NORMAN, HANSON & DETROY, LLC

newsletter

Current developments in Maine law

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Law Court expands defense of waiver of subrogation

BY: DAVID P. VERY

The Law Court recently became the first high court in the country to rule that a waiver of subrogation clause in the contract of a general contractor bars a product liability subrogation action against a manufacturer or supplier of a product used in the project. The Court further held that public policy favors enforcement of waivers of subrogation even in the face of claims of gross negligence or willful and wanton conduct.

Five years ago, in *Acadia Insurance Company v. Buck Construction Company,* 2000 ME 154, 756 A.2d 515, the Law Court construed an insurance procurement clause in a construction contract as an intention of the parties to shift the risk of loss, to include losses caused by the negligence of the contractor, to an insurer. The insurance procurement clause was thus deemed a waiver of subrogation provision barring any subrogation action against the alleged negligent contractor. In so holding, the Law Court stated, "Waivers of subrogation are encouraged by the law and serve important social goals: encouraging parties to anticipate risks and to procure insurance covering those risks, thereby avoiding future litigation, and facilitating and preserving economic relations and activity."

In the recent case, ***Reliance National Indemnity, et al. v. Knowles Industrial Services Corp., et al.***, 2005 ME 29, 868 A.2d 220, a catastrophic fire completely destroyed the First Parish Congregational Church as a result of a Knowles' employee bringing a cigarette or open flame within ten feet of a section of the church to which large quantities of a paint stripper had been applied earlier that day. Knowles was using a paint stripper manufactured by Nutec Industrial Chemical, Inc. to remove 200 years of paint from the church. The church submitted claims for its losses, exceeding $16 million, to its insurers and the insurers brought suit against Knowles for negligence and against Nutec, asserting theories of strict liability, negligence, breach of warranty, and claims under the Federal Hazardous Substances Act.

DAVID P. VERY

The contract between Knowles and the church contained a provision that stated, "The owner and contractor waive all rights against each other, separate contractors, and all other subcontractors for damages caused by fire or other perils to the extent covered by builder's risk or any other property insurance . . ."

The Law Court first addressed the issue of whether Nutec, as a manufacturer of a product, could be fairly characterized as a "subcontractor" or "separate contractor" as a matter of law. The Court held that with respect to waivers of subrogation, product manufacturers or suppliers, in addition to those who furnish labor, fall within the definitions of "subcontractor" or "separate contractors." The Court found that the fact that other sections of the contract distinguished between "suppliers" and "subcontractors" had little bearing because the waiver of subrogation clause had a broader purpose than those sections.

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The Court also noted that holding that waivers of subrogation do not apply to product suppliers and manufacturers would render their protection illusory. The Court stated that if insurers could bring claims against product suppliers or manufacturers, then the suppliers or manufacturers should be expected, in turn, to bring contribution claims against the general contractor, thereby making an end run around the waiver clause. The Court therefore concluded that the terms "separate contractors" and "subcontractors" was unambiguous as a matter of law and, by its very terms, included product suppliers and manufacturers.

The insurers further argued that even if the waiver of subrogation clause was applicable to product manufacturers and suppliers, waivers cannot serve to protect parties from breach of warranty or strict liability claims. The Court specifically held that waivers of subrogation clauses are to be liberally construed, and that a waiver of subrogation clause will serve to waive an insurer's right to all claims, including warranty and strict liability claims.

With respect to Knowles, the insurers argued that the waiver of subrogation clause was unenforceable because of Knowles' willful and wanton misconduct. The Law Court acknowledged that gross negligence or willful and wanton misconduct generally renders exculpatory provisions void. The rule exists for exculpatory clauses to ensure that a party injured by another's gross negligence will be able to recover its losses. Of interest, the Law Court stated that in cases involving waivers of subrogation, however, there is no risk that an injured party will be left uncompensated, and it is irrelevant to the injured party whether it is compensated by the grossly negligent party or an insurer.

The Court noted that were it to hold that parties cannot bar subrogated claims for gross negligence or willful or wanton misconduct, those benefits would evaporate, as the parties would have the incentive to litigate the question of whether a heightened standard of negligence applies. As a result, the Law Court concluded that public policy favors enforcement of waivers of subrogation even in the face of claims of gross negligence or willful and wanton misconduct.

This decision, coupled with the earlier Acadia decision, makes it clear that the Law Court does not consider an insurance company, as a subrogee, to be "an injured party." As a result, to avoid litigation, the Court has stated that waiver of subrogation and insurance procurement clauses should be broadly and liberally construed to bar any action by the subrogee insurance carrier. Given that, in prosecuting or defending a subrogation action, the first order of business is to determine if there is a contract shifting the risk of loss to an insurer or limiting or waiving the rights of the subrogee insurer.

Norman, Hanson & DeTroy, LLC's **David Very** and **Lance Walker** represented Nutec in this suit. ☐

The Best Lawyers in America

JIM POLIQUIN

JONATHAN BROGAN

Jim Poliquin and **Jonathan Brogan** have been selected to be included in the 2005-2006 edition of The Best Lawyers in America. Because Best Lawyers is based on an exhaustive peer-review survey in which leading lawyers throughout the country cast votes on the legal abilities of other lawyers in their specialties, and because lawyers are not required to pay a fee to be listed, inclusion in Best Lawyers is considered a singular honor. Other lawyers in the firm with inclusion are **Peter DeTroy**, Best Lawyers in America since 1991 and **Steve Hessert,** Best Lawyers in America since 1995. ☐

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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U.S. Supreme Court issues three important employment law decisions

BY: ANNE M. CARNEY

ANNE M. CARNEY

The employment law decisions issued by the United States Supreme Court during its 2004 term address a variety of topics. The Supreme Court recognized new causes of action in two cases, potentially expanding employer liability. In a third, the Supreme Court affirmed the right of an employer to discharge an employee based upon off-duty misconduct.

Title IX of the Education Amendments of 1972, prohibits sex discrimination by educational institutions that receive public funds: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). The statute does not expressly create a private right of action on the part of a student who is subject to discrimination. In contrast, Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, which prohibits sex discrimination in employment, specifically allows for lost pay, compensatory and punitive damages. In spite of this difference between the statutes, the Supreme Court has held that Title IX creates an "implied" private claim. *Cannon v. University of Chicago,* 441 U.S. 677, 690-693 (1979). Furthermore, Title IX does not expressly create a retaliation claim, while Title VII specifically prohibits retaliation. 42 U.S.C. § 2000e-3(a).

Plaintiff Roderick Jackson is an employee of the Birmingham Alabama School District. In addition to his teaching duties, he worked as a girls' basketball coach. In 1999, he discovered that the girls' basketball team received less funding, poorer athletic equipment and facilities than the boys' team. After coaching for a year with inadequate funding, equipment and facilities, Jackson began to complain about the unequal treatment of the girls' basketball team. The school failed to respond to his complaints or to remedy the situation. Instead, he began to receive negative evaluations and ultimately was removed as the girls' coach, although he continues to teach.

Jackson filed suit alleging that Title IX protected him from retaliation for protesting discrimination against the girls' basketball team. The Federal District Court, and subsequently the Court of Appeals for the 11th Circuit, held that Jackson could not go forward on his claim because Title IX did not expressly create a retaliation claim.

In ***Jackson v. Birmingham Board of Education,*** 544 U.S. ___ (2005), 125 S. Ct. 1497, 2005 U.S. LEXIS 2928, the U.S. Supreme Court held that Title IX creates a private right of action for retaliation. The Court relied upon broad language used by the statute to prohibit discrimination, holding that "[r]etaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination encompassed by Title IX's [implied] private cause of action." The Court supported this interpretation with a discussion of policy considerations. If recipients of Federal funds were permitted to retaliate against anyone who complained of sex discrimination, individuals who observed discrimination would be reluctant to report it, and the underlying discrimination would be perpetuated. Furthermore, in the school setting, "teachers and coaches such as Jackson are often in the best position to vindicate the rights of their students because they are better able to identify discrimination and bring it to the attention of administrators."

The United States Supreme Court considered whether the Age Discrimination in Employment Act (ADEA) authorizes recovery in disparate-impact cases in ***Smith v. City of Jackson, Mississippi***, 544 U.S.___ (2005), 125 S. Ct. 1536, 2005 U.S. LEXIS 2931. A disparate-impact case asserts that an apparently neutral policy has a disproportionately adverse impact on members of a protected class and serves no job-related function. For example, in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Supreme Court found that requiring a high school diploma as a condition of employment had the effect of excluding African Americans at a substantially higher rate than white applicants, and did not correlate with job capability. Id. at 432.

The ADEA prohibits an employer from "limit[ing], segregate[ing], or classify[ing] his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age" except "where the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623.

The City of Jackson implemented an across-the-board pay increase for law

enforcement employees. The City's goal was to make the pay more competitive with comparable positions in the market. Because the pay of more junior officers, however, was less competitive than the pay of more senior officers, officers under the age of 40 received a higher raise, measured in percentage of salary, than employees over 40. When measured in dollar amount, those over 40 received higher raises.

The Supreme Court held that the disparate-impact theory of recovery is available to ADEA litigants to the same extent it is available in race, gender, and other discrimination cases. The facts before the Court did not support a disparate-impact claim, however, because the City's plan to grant a larger percentage increase to lower level employees for the purpose of bringing salaries in line with law enforcement officials in surrounding communities was based on a "reasonable factor other than age."

Smith v. City of Jackson, Mississippi may have significant effect on age discrimination litigation in Maine. Disparate-impact claims often require an employer to develop costly expert testimony in the form of statistical analysis.

Based on an odd set of facts, ***City of San Diego, California v. John Roe,*** 543 U.S. ___ (2004), 125 S. Ct. 521, 2004 U.S. LEXIS 8165, reaffirms the right of employers to discipline employees based upon misconduct. In a per curiam decision, the Supreme Court held that the First Amendment right to freedom of expression does not extend to a public employee's videotaped parody of a police officer performing indecent acts while in the course of his official duties.

A supervisor inadvertently discovered that a subordinate San Diego officer made, starred in, and sold on E-bay a pornographic video showing him stripping off a police uniform and engaging in sexual conduct. Initially the San Diego Police Department ordered the officer to cease making, advertising and selling the video and similar merchandise. He was terminated when he failed to comply with the order.

The officer filed suit alleging that the termination violated his First Amendment right to freedom of expression. San Diego achieved summary judgment in the District Court, but the Court of Appeals reversed, finding that his video was entitled to First Amendment protection.

The Supreme Court reiterated that a government employee does not relinquish his First Amendment right to freedom of expression simply because he becomes a government employee. Not every expression is protected, however, and in some circumstances, the government employer may restrain its employees' speech. Greater First Amendment protection is accorded to an employee's speech on matters of public concern that typically interest the public at large and relay facts or opinions that are of value and concern to the public.

The Supreme Court forcefully rejected the former officer's claim that his video was protected by the First Amendment. The Court observed that the expression did not offer any opinion or information to the public about any aspect of the San Diego Police Department. Instead, the former officer exploited the image of the San Diego Police Department for personal financial gain. The San Diego Police Department did not violate the First Amendment right to freedom of expression when it terminated the officer for conduct unbecoming of an officer, immoral conduct, and disobedience of the order to cease the conduct. □

Briefs/Kudos

Louise and **Steve Hessert's** two sons, John and Joe, are recognized for their achievements. In March, John successfully finished his first Iditarod, a long distance sled dog race from Anchorage to Nome, Alaska, covering a distance of approximately 1,150 miles. Joe recently graduated from Connecticut College with a major in English and a minor in Theater. He will matriculate at the Writer's Workshop, University of Iowa, in the fall, in a program leading to a Masters of Fine Arts in Creative Writing.

Lucy and **Bill LaCasse's** daughter, Kaitlin, is a 2005 graduate of Colgate University with a double major in Political Science and Spanish. She is on her way to Texas to teach at the high school level in the Rio Grande Valley for two years for Teach America. Kaitlin received honors for her grades in the Core Curriculum.

Jim and **Patte O'Donnell's** daughter, Caitlyn M. O'Donnell, graduated on May 7, 2005 from Roanoke College in Salem, VA. She graduated cum laude, with honors in her major, Spanish, and honorable mention as one of the three top Spanish major students in the graduating class. Caitlin is looking to relocate to the San Diego, California area where she hopes to find a job translating or interpreting Spanish.

We have some new hires at NH&D. We are pleased that **Kendra McKinnon** has joined us. She is a Workers' Compensation case manager. **Theresa A. Jewell**, known to us as "Terry," started working this past winter with the Litigation group. In addition to being a

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Significant bankruptcy decision for credit unions

BY: RODERICK R. ROVZAR

Congratulations to **Dan Cummings** for his successful representation of Bowdoinham Federal Credit Union in a significant piece of litigation brought by Peter Fessenden, the standing Chapter 13 Trustee for the State of Maine, in a case of interest to credit unions across the country.

DAN CUMMINGS

This case flows on the heels of a First Circuit case of national significance in which Dan successfully represented Katahdin Federal Credit Union on an appeal from a case in which the Credit Union was challenged in the Bankruptcy Court for its failure to reaffirm a secured debt. In *Jamo v. Katahdin Federal Credit Union*, 253 B. R. 115 (Bankr. D. Me. 2000), LEXIS 574, the Bankruptcy Court took the position that the Credit Union's policy of requiring all debts to be reaffirmed, including unsecured debts, and thus not permitting borrower debtors to pick and choose amongst secured and unsecured loans, violated provisions in the Bankruptcy Code. The First Circuit in *Jamo v. Katahdin Federal Credit Union, 283 F.3d 392 (1st Cir. 2002)*, persuaded by Dan's advocacy, overturned the Bankruptcy Court and ruled that creditors may require borrowers to reaffirm all debts and not enjoy the luxury of picking and choosing.

In the case of ***Jasper & Fessenden v. Bowdoinham Federal Credit Union***, 2005 Bankr. LEXIS 921, (decided May 24, 2005), the Trustee urged that the Credit Union's policy that authorized its Board to revoke membership privileges of any member who caused the Credit Union a loss was a violation of §525(a) of the Code and constituted "an unpermitted exercise of control of estate property, namely the Jaspers' interest in the rights and privileges of Credit Union membership."

In this case of first impression, Dan took over representation of the Credit Union in the Bankruptcy Court from another firm and successfully rebuffed the Trustee's arguments that Credit Union membership privileges were analogous to a "license" or "permission to use its services and benefits" and thus covered by the anti-discrimination provisions of §525(a) of the Code.

In a carefully reasoned decision, Judge Haines ruled that the Credit Union's policy was non-discriminatory and did not frustrate the fresh start policies of the Bankruptcy Code. Ironically, Judge Haines cited the Jamo case (in which his decision was overturned by the First Circuit) and opined:

> "It is beyond cavil that check cashing privileges, ATM transactions, online banking, minimum account balances, and the like are widely available. BFCU's revocation of those privileges hardly impairs the Jaspers' fresh start. There may be something to Fessenden's point that, absence a ruling in their favor, the Jaspers will pay slightly more for banking services, but it should come as no surprise that bankruptcy can bring on some adverse consequences."

ROD ROVZAR

The Plaintiffs also sought damages and restoration of membership benefits citing several violations of the automatic stay imposed by §362(a) of the Bankruptcy Code. The Trustee asserted that membership benefits terminated by the Credit Union were contractual and thus constituted property of the debtors estate; and by terminating those rights, the Credit Union exercised control over "estate property." Dan pointed out that there was no evidence of any contractual relationship between the Credit Union and the Jaspers as to the privileges the Credit Union revoked. Judge Haines agreed with Dan's analysis and concluded that the Credit Union's "termination of the Jasper's membership benefits did not violate the stay."

This is the second significant credit union related bankruptcy case in which Dan Cummings has played a lead role in litigation that has nationwide impact on the credit union industry and credit union rights in bankruptcy.

Congratulations to Dan! □

"Personal Improvement" injuries – when are they compensable?

STEPHEN W. MORIARTY

People in a broad variety of occupations frequently participate in programs or events designed to maintain or improve their skills and proficiency. Such activities may cover the range from in-house training sessions to attendance at seminars or conventions at remote locations. Depending upon one's occupation, maintaining job readiness may also involve ongoing physical conditioning or training. Unavoidably, injuries will occur while in the pursuit of professional enhancement, and inevitably the question of compensability will arise.

The circumstances surrounding such injuries will vary enormously, and therefore the determination of compensability will be highly fact-intensive. Nevertheless, several standards or criteria have emerged through litigation which bring some predictability to the process. The leading treatise on workers' compensation law has concisely framed the issue as follows:

> When employees, by undertaking educational or training programs, enhance their proficiency in the work, they do in a sense benefit the employer. On the other hand, self-improvement is primarily the employee's own concern. 2 *Lex Larson and Arthur K. Larson, Workers' Compensation Law*, §27.03[1][a](2004).

As the treatise explains, compensability generally turns upon factors such as the location of the injury (i.e., whether the injury occurs on employer premises), the timing of the injury (i.e., whether the injury occurs during regular work hours), and evidence of a direct or tangible benefit to the employer. If one or more of these "special elements" can be established, the injury will usually be recognized as compensable.

The picture becomes less clear, however, when an injury occurs off premises or when the benefit of the training to an employer is less direct. As Larson has explained:

> As to attendance at conventions, institutes, seminars, and trade expositions, compensability similarly turns on whether the claimant's contract of employment contemplated attendance as an incident of the work. It is not enough that the employer would benefit indirectly through the employee's increased knowledge and experience. *Larson*, supra, §27.03[1][c].

Thus, when an employee is actually required to attend a program or participate in a conference, any injury sustained while so participating would be compensable. The same result would follow if an employee had been strongly urged or encouraged to attend. The scope of compensability would also extend to injuries sustained while traveling to or from an event, since travel required by employment is a recognized exception to the "going and coming" rule in Maine. *Abshire v. City of Rockland*, 388 A.2d 512 (Me. 1978).

The result will generally be different, however, if an employer did not require or urge attendance at a program, but merely was aware of the program or acquiesced. Similarly, what *Larson* has termed "a vague and general benefit" (as opposed to a more direct or specific benefit) resulting to an employer may not be enough to sustain compensability.

Several cases from other jurisdictions illustrate these principles. In *Loggins v. Wetumka General Hospital*, 587 P.2nd 455 (Ok. 1978), the employee was a licensed practical nurse and sustained a personal injury while attending an emergency medical training course offered at a local community college. Although the employee learned of the course through her supervisor, she was not instructed or urged to attend. She did so on her own volition and at her own time and expense. The training provided would not have been a basis for promotion or an increase in the pay rate. The claim for compensation was denied on the grounds that the injury was not an incident of employment and the benefit to the employer was too indirect.

Similarly, in Camburn v. Northwest School District, 592 N.W.2nd 46 (Mich. 1999), benefits were denied to a teacher who was injured while driving to attend a seminar. While the school principal had encouraged teachers generally to take advantage of educational programs, the employee was not required or encouraged to attend the particular program in question. Benefits were denied on the basis of an indirect benefit to the employer and on the lack of an obligation to attend.

Some occupations, such as law enforcement, have physical fitness requirements and periodic fitness tests. A number of courts have held that an employee is personally responsible for compliance with job qualifications, and that injuries sustained while meeting expected standards are not compensable. A different result may follow, however, if physical training is performed on premises and under the supervision or direction of the employer.

Of course, there have been many cases in other jurisdictions in which benefits have been awarded for personal improvement injuries, but as mentioned, the outcome has been driven by the unique facts of a particular case. Generally speaking, injuries sustained on premises or under circumstances where attendance is required are compensable. However, where participation or attendance is not an incident of employment, direct or tangible employer benefit coupled with employer encouragement or urging is required to trigger compensability. □

Two recent Law Court decisions

BY: DAVID P. VERY

Law Court holds owner of an ATV may be liable for failing to supervise its use by minors.

In ***Bonin v. Crepeau***, 2005 ME 59, 873 A.2d 346 (May 19, 2005), the Law Court held that an owner of an all terrain vehicle (ATV) may be held liable for failing to supervise its use by minors.

On October 19, 2001, three days before his 12th birthday, Adam Marchand accompanied Roger Crepeau, Crepeau's girlfriend, and the girlfriend's son, Damian, to a camp in Jackman. At some point after arriving, Adam and Damian went outside and Damian started riding Roger Crepeau's ATV. Crepeau watched Damian ride around for five minutes before leaving the boys and going indoors. Subsequently, Damian drove Adam around and later Adam started driving the ATV on his own. He had no experience riding dirt bikes or ATV's. He had no idea how to operate the ATV, and no one instructed him on its operation. Eventually, while riding on his own, Adam crashed the ATV and injured himself. Both Adam and Damian had been riding unsupervised for at least forty minutes.

Adam's mother filed a complaint contending that Crepeau was negligent in supervising her son. The Superior Court granted Crepeau's motion for summary judgment on the grounds that Crepeau could not be liable for Adam's injuries because he did not supply Adam with the vehicle and Adam was aware of the danger associated with ATV use.

On appeal, the plaintiff contended that Crepeau owed her son a duty pursuant to the *Restatement* (Second) *of Torts* § 388 regarding the supplying of dangerous machinery to a minor. In order to be held liable, a person must supply the machinery and have reason to believe that the user would not realize its dangerous condition.

With respect to the issue of whether Crepeau supplied the ATV, the Law Court held that the standard is whether the owner "should have expected" the user to use the machinery. In this case, the Court held that Crepeau watched Damian ride the ATV for five minutes and then went inside leaving both of the boys unsupervised for at least forty minutes with the ATV. Given Adam's age and the fact that Crepeau did not forbid Adam from riding the ATV, the Law Court held that a fact finder could conclude that Crepeau should have expected Adam to ride the ATV. As a result, the Court found that for purposes of summary judgment, Crepeau did supply the ATV to Adam.

The Court then addressed the issue of whether Crepeau had reason to believe that Adam would realize the ATV's dangerous condition. The Court noted that although the danger of operating an ATV may be obvious to an adult, and even though Adam may have understood that he could crash the ATV, the Court could not state that Crepeau would have reason to know that Adam fully appreciated the risk involved. The Court stated that Adam was only 11 years old. As a result, for purposes of summary judgment, the Law Court held a fact finder could find that Crepeau would have reason to believe that Adam did not appreciate the ATV's dangerousness.

Therefore, the Law Court vacated the grant of summary judgment to the defendant and remanded the case to the Superior Court for trial.

Law Court adopts tort of negligent supervision in cases involving a "special relationship"

In ***Fortin v. The Roman Catholic Bishop of Portland***, ***et al***, 2005 ME 57, 871 A.2d 1208 (May 3, 2005), the Law Court, for the first time, recognized the tort of negligent supervision, but only in cases involving a "special relationship."

Michael Fortin filed a complaint against the Roman Catholic Bishop of Portland (the "Diocese") alleging that Raymond Melville, a priest, began to sexually abuse him when he was 13 and the abuse continued until he was 20 years old. The incidents allegedly occurred while Fortin was a student at St. Mary's School and as an altar boy at St. Mary's Parish. The complaint alleged that the Diocese was aware that Melville had a propensity to sexually exploit and abuse young boys, failed to report Melville to law enforcement officials, and concealed from parishioners and the public Melville's propensities.

Based on the Law Court's previous decision in *Swanson v. Roman Catholic Bishop of Portland*, 1997 ME 63, 692 A.2d 441, the Superior Court granted the defendant's motion to dismiss the complaint against the Diocese since all the plaintiff's claims against the Church depended on application of secular agency principles rejected in Swanson. Fortin appealed.

The Law Court acknowledged that it had not yet adopted or rejected a cause of action for negligent supervision by an employer for the intentional acts of its employee outside the common, regular activities of a business or organization. The Court held, however, that if a plaintiff asserts the existence of facts that, if proven, establish a special

relationship with a defendant, an action may be maintained against the defendant for negligent supervision liability. The Court specifically held that it would not address whether negligent supervision liability may be imposed in other circumstances.

The Law Court stated that an established and close connection between a child and an organization, whether religious, academic, or otherwise, is a reasonable basis, informed by both common sense and common experience, to impose a duty on the organization to prevent harm to the child. In this case, throughout the seven-year period that Fortin was abused by Melville, he was both a parochial school student and an altar boy. The Court found that one could reasonably infer that Fortin's involvement required that he be physically present at St. Mary's more often than a general member and that he have substantially greater day-to-day contact with members of the clergy and faculty than would a general member. The Court stated that a child who is both a student and an altar boy is subject to the supervision, control, and authority of the Diocese on a daily basis. At its very core, this is a relationship marked by the great disparity of position and influence between the parties that is a hallmark of a fiduciary or "special" relationship.

In addition, the Court specifically noted that the Diocese's duty does not exist simply because of Fortin's status as a student and altar boy, but because of the added assertion that the Diocese knew or should have known of the risk of harm posed by the priest who abused Fortin. Thus, in order to impose a duty on an employer, the employer must have a special relationship with the plaintiff and must know, or should know, of the risk of harm posed by its employee to the plaintiff.

The Law Court also rejected the Diocese's argument that the imposition of a fiduciary-based duty of care would violate the free exercise clause of the Constitution because it would necessarily encroach upon the Diocese's authority to decide such things in accordance with their own theological premises and governance traditions. The Law Court stated that theological beliefs only become relevant to the First Amendment analysis if the Diocese demonstrates that its ability to practice specific beliefs will be interfered with in some real and substantial way. The Law Court held that the Diocese failed to identify a specific religious doctrine or practice that would be burdened if Fortin's claim was not dismissed. The Diocese did not assert that it actually holds to ecclesiastical doctrines concerning sin, penance, forgiveness and redemption that would have prevented or restricted the bishop from intervening after learning that Melville might be sexually abusing boys, or from otherwise reporting this information to the police or the members of the parish. Because the Court stated that it could not infer from the Diocese's general assertions that there is, in fact, an actual doctrine or practice that would be substantially burdened by the resolution of Fortin's claim, such a claim did not violate the free exercise clause of the First Amendment of the Constitution.

The Law Court concluded that under the facts alleged in the present case, the risk of harm posed by a priest to a child with whom the Diocese has a fiduciary relationship is "reasonably to be perceived within the range of apprehension" and creates a duty on the part of the Diocese to act. Further, Fortin's claim that the Diocese learned of Melville's propensity to sexually exploit and abuse young boys, but failed to report Melville to law enforcement officials and then concealed the information from parishioners and the public, stated a claim upon which relief could be granted. As a result, the Law Court vacated the dismissal of the plaintiff's complaint and remanded the case for further proceedings.

In a vigorous dissent, Justices Alexander and Clifford argued that by adopting the tort of negligent supervision, the Court imposed on the Roman Catholic Church, and all other employers, a duty to not forgive, to not allow for redemption, and to give no second chances when flaws or improprieties are found in an employee's conduct, even if that conduct occurs outside the regular course of the employer's or organization's business activities. The dissent warned that with this ruling, the Court invites lawsuits against businesses, schools, camps, churches, and youth sports organizations for real or perceived improprieties by their members or employees that occur outside of the course and scope of the organization's responsibilities.

As a result, Justice Alexander indicated that when a business is aware that an employee may have, in the past, engaged in some impropriety, that business may be liable if the employee is allowed to continue to come in contact with the public and again engages in some similar impropriety. The result may be termination or refusal to hire individuals with less than perfect records and relations with the public. The dissent reiterated that the message this sends to businesses, churches, and other organizations is one of zero tolerance, no forgiveness, no redemption, and no second chances. □

Workers' compensation- Board and Law Court updates

By: Stephen W. Moriarty

PI and Benefit Extension

Effective July 1, 2005, the maximum compensation rate has been raised to $542.40. Previously, the max rate stood at $523.20.

Acting upon the most recent actuarial analysis, the Board has initiated the rule-making process regarding the permanent impairment threshold and extension of benefits for partial incapacity. The Board's draft rule will revise the PI threshold upward slightly from the current 13.2% to 13.4%. In addition, the draft rule will not extend the period of entitlement to benefits for partial incapacity for either 2004 or 2005. Accordingly, if the rule is adopted, the present current durational limit of 364 weeks will remain in place. The draft rule will be scheduled for public hearing and comment before the Board takes final action.

Compensability of Injury

Notwithstanding the apparent simplicity of the requirement that an injury must both arise out of and occur in the course of employment to be compensable, a recent decision of the Law Court illustrates the difficulty of applying the formula in unusual factual circumstances.

In ***Standring v. Town of Skowhegan***, 2005 ME 51, 870 A.2d 128, the claimant was employed by the Town of Skowhegan as a reserve police officer where he worked for hourly pay on an "on call" basis. When a vacancy arose he applied for the position of full-time patrol officer, and as part of the application process he participated in a required physical agility test. He suffered a heart attack while taking part in the test, and filed a claim for workers' compensation benefits. The presiding Hearing Officer denied the claim on the grounds that the injury did not arise out of and occur in the course of employment. Specifically, the Hearing Officer found that the Employee was not paid for the time spent in taking the physical agility test, and was not required to take the test in order to maintain his current position as a reserve officer. Furthermore, he was free to stop the test at any time, and was not guaranteed a position as a full-time officer even if he passed the test. The claimant appealed to the Law Court.

If the claimant had not been employed by the town at the time of the injury, there could have been no possibility of a successful outcome. The Court recognized that a non-employee cannot bring a claim for workers' compensation benefits for an injury sustained in the course of the job application or screening process, as benefits under the Act are available only to those who are already employees. However, because Mr. Standring was a current employee of the town (even though in a different capacity), the Court found that the Hearing Officer did not give sufficient weight to his existing status as an employee and should have applied the broad criteria set forth in *Comeau v. Maine Coastal Services*, 449 A.2d 362 (Me. 1982) to determine whether the injury arose out of and occurred in the course of employment. In *Comeau*, the Court set forth a list of eight non-exclusive factors for analyzing the compensability of an injury, which are as follows:

1. Whether at the time of the injury the employee was promoting an interest of the employer, or the activity of the employee directly or indirectly benefited the employer;
2. Whether the activities of the employee work to the benefit or accommodate the needs of the employer;

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3. Whether the activities were within the terms, conditions, or customs of the employment, or were acquiesced in or permitted by the employer;
4. Whether the activity of the employee serves both a business and personal purpose, or represents an insubstantial deviation from the employment;
5. Whether the hazard or causative condition can be viewed as employer or employee created;
6. Whether the actions of the employee were unreasonably reckless or created excessive risks or perils;
7. Whether the activities of the employee incidental to the employment were prohibited by the employer either expressly or implicitly;
8. Whether the injury occurred on the premises of the employer.

In applying these criteria to the facts, the Court clearly suggested that the injury was compensable.

The Court found that the claimant's desire to seek full-time status promoted the interests of the town and that participation in the application process was permitted by the town. Even though the

claimant was not paid while taking the agility test, the Court found that the test was an insubstantial deviation from regular employment activities. Furthermore, the Court noted that the test itself was not an employee-created hazard, and that the injury occurred during the course of the test "in the manner in which it was intended to be performed." The Court also noted that the injury took place at a location selected by the employer in which to administer the test.

However, the Court stopped short of substituting its judgment for that of the Hearing Officer, and held only that the *Comeau* criteria "may" support a finding that the injury was compensable. Accordingly, the Court vacated the decision and remanded the matter to the Hearing Officer with instructions to consider Mr. Standring's existing employment relationship and to apply the *Comeau* criteria. Two justices, while agreeing with the majority decision to remand the matter, held that more tightly-drawn standards tied specifically to the job application process should have been used to determine compensability, as opposed to the broader and more generic *Comeau* factors.

14-Day Rule

Section 152 of the Workers' Compensation Act gives the Board broad rule-making authority to "adopt rules to accomplish the purposes of this Act." Over the years the Board has approved an extensive set of rules, and the process is essentially ongoing in nature. Among the more important provisions is Chapter 1, §1, which establishes the so-called 14-day rule. Briefly, the rule requires the filing of a Notice of Controversy within 14 days of knowledge of a claim for incapacity, and in the event a NOC is late, employers must pay total benefits from the onset of incapacity to the date of the filing of the NOC. Payment of benefits in such situations may stop only when a NOC has been filed and accrued benefits have been paid.

Section 205 of the Act requires prompt and direct payment of compensation, and further provides that disability benefits are due within 14 days of notice of injury. Significantly, however, the statute itself does not require an employer to file a NOC within that period of time to preclude automatic liability for payment. In fact, §205 makes no mention of a NOC whatsoever. The

Casual Rentals of Living Quarters subject to 7% Sales Tax; Registration Required

New Tax on Rentals

Effective as of July 1, 2005, any person who owns a house, cottage, condominium unit, vacation home, camp or any other place kept, used, maintained, advertised or held out to the public as a place where living quarters are offered for rent must register with Maine Revenue Services and collect and remit sales tax on such rentals at the rate of 7% beginning July 1, 2005. If total rentals are for fewer than 15 days each calendar year, then there is no need to either register or collect tax.

Prior to this change in law, these rentals were considered "casual sales" and not taxed if the person only rented one property without the assistance of a management company or realtor.

Exemptions

There is some good news as exemptions do apply. In addition to the above stated exemption for properties that are rented for fewer than 15 days per calendar year, examples of rentals not subject to tax include the following situations:

Rental to any sales tax exempt organization (e.g., governmental agencies or holders of a Maine permanent exemption certificate).

Continuous rental to a person for more than 28 days when it is the person's primary residence.

Continuous rental to a person for more than 28 days when the person is residing away from that person's primary residence due to employment or education.

Rental by an employer to an employee, where the employer controls the premises and the arrangement is solely for the convenience of the employer.

Rental by camps that are entitled to a property tax exemption as literary, scientific or benevolent and charitable institutions, or children's camps determined to be schools under 36 MRSA §1760(6-A).

Rental at an institution licensed by the State of Maine for hospitalization or nursing care.

Rentals to students necessitated by attendance at primary or secondary school or college.

Important Transition Note

All rentals on or after July 1, 2005 will be subject to the 7% tax. All rentals are considered sold when occupancy is made. As a result, deposits received are not sales. Even if a deposit was received before July 1, 2005 for a rental occurring on or after July 1, 2005, the rental is subject to tax even if the entire rental charge was paid prior to July 1, 2005.

For more information regarding tax on rentals of living quarters or to obtain a copy of newly revised Sales Tax Instructional Bulletin #32, contact Adrian Kendall at 207.774.7000 or email: akendall@nhdlaw.com □

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rule, therefore, imposes financial obligations and consequences upon an employer which are not otherwise found in the statute. The validity of the rule and of the Board's exercise of its rule-making powers was challenged in two cases which were consolidated on appeal before the Law Court. In ***Bridgeman v. S. D. Warren Company***, 2005 ME 38, 872 A.2d 961, a majority of the Court held that the rule was not in conflict with the statute.

In the past, the Court has generally deferred to the Board in the exercise of its rule-making powers, but has not been reluctant to intervene when a rule has been found to be inconsistent with the statute. For example, in *Beaulieu v. Maine Medical Center*, 675 A.2d 110 (Me. 1995), the Court invalidated a rule which limited the fringe benefit provisions of §102(4)(H) only to those injuries occurring on or after 1/1/93. In *Roe v. Yarmouth Lumber, Inc.*, 2001 ME 159, 785 A.2d 334, the Court struck down a rule which provided that the offer of reinstatement provisions of §214 do not apply when benefits are being paid without prejudice. More recently, in *Lydon v. Sprinkler Services*, 2004 ME 16, 841 A.2d 793, the Court rejected a rule which enabled physicians who had performed §207 exams in the recent past to be appointed as §312 examiners.

Given the background of these earlier decisions, the Court's willingness to affirm the 14-day rule was somewhat surprising. The Court found no conflict between the rule and the language of §205, despite the fact that the statute imposes a maximum penalty of $1,500 for the late payment of benefits. The majority held that by adopting the rule, "the Board reasonably sought to encourage the timely filing of a Notice of Controversy to facilitate the administrative process and to ensure 'the speedy, efficient, just and inexpensive disposition of all proceedings under this act' and 'the prompt delivery of benefits legally due,'" citing §151-A and §152(2). The majority therefore found that the Board had not exceeded its authority in promulgating Chapter 1, §1 of the WCB Rules. The Court also held that, in the event of a 14-day violation, benefits must be paid retroactively to the date of incapacity, and not to the date of the filing of a petition.

Two dissenting justices observed that the former "early pay" system, with its harsh consequences for failure to pay or controvert promptly, had been completely repealed with the enactment of the Workers' Compensation Act of 1992. The dissenters examined the plain language of §205 and found that the statute "does not mandate that an employer controvert a claim within 14 days" and "also does not compel the conclusion that an employer who files an untimely notice of controversy must pay benefits that have accrued up to that time." The dissenters concluded that "the Board rule makes a significant substantive change in the law that contravenes the legislative intent," and that in so doing the Board had exceeded its lawful rule-making authority.

With the rule having withstood judicial challenge, there is little incentive on the part of the Board to modify its terms. It remains to be seen whether efforts will be initiated in the next legislative session to reverse the impact of the decision through statutory change. □

paralegal, Terry is also a registered nurse. You may have noticed the renovations here at the firm. Well, the reception area is back on the 5th floor and our new afternoon receptionist is **Anne Dishman**. Welcome, also, to our newest legal secretary in the Litigation group, **Laura Myrand**.

Emily Bloch's updated article on Foreign-Object Exception to the Statute of Limitations is the front page article in *Medical Malpractice Law & Strategy* published by Law Journal Newsletters. It can be found in Vol. 22, Number 7, the May 2005 issue. Emily wrote the brief and delivered the oral argument before the Law Court in this case of first impression. This article was first reported in the NH&D Newsletter in the Fall 2003 edition. Because of its significance, this decision has been reported in national publications.

Steve Moriarty spoke at a seminar in late March sponsored by Lorman Education Services in Portland, titled "Basic Workers' Compensation in Maine."

Anne Jordan was a member of the panel, "The State of Animal Welfare Law in Maine" at the Maine State Bar Association's Summer Meeting Program on June 24th. Also presenting was Marilyn Goodreau of the Maine State Society for the Prevention of Cruelty to Animals, Kennebec County District Attorney Evert Fowle, from District Court, the Honorable John V. Romei, and Norma Worley, Director of the Animal Welfare Program for the State of Maine.

Jonathan Brogan, Tom Marjerison, Aaron Baltes, John Veilleux, and **Jennifer Rush** presented a seminar on May 13, 2005 in Falmouth at the Portland Country Club on the topic, Advanced Auto Liability. Several topics were addressed including accident reconstruction and a black box case study. □

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