NORMAN, HANSON & DETROY, LLC

newsletter

Current developments in Maine law

Fall 2012

Vol. 25, No. 3

Whistleblowers in the Medical Profession

BY CHRISTOPHER C. TAINTOR

Hospitals and other healthcare institutions have an overarching public duty to provide high-quality care. That duty is enforced by a variety of state and federal agencies, and by non-governmental organizations, which issue voluminous rules and regulations. Sometimes the duties they impose come into conflict, putting providers in nearly impossible binds. These conflicting demands are well illustrated by a growing body of state and federal case law decided under Maine's Whistleblower Protection Act (WPA).

The Maine Whistleblower Protection Act prohibits employers from firing or otherwise discriminating against any employee who (1) reports what he has "reasonable cause to believe" is a violation of law; (2) reports what he has "reasonable cause to believe" is an unhealthy or unsafe working condition; (3) refuses to carry out a directive to engage in an illegal or unsafe activity; or (4) "consistent with state and federal privacy laws, reports to the employer, to the patient involved or to the appropriate licensing, regulating or credentialing authority, orally or in writing, what the employee has reasonable cause to believe is an act or omission that constitutes a deviation from the applicable standard of care for a patient by an employer charged with the care of that patient." 26 M.R.S.A. §833. The Act "embodies a statutory public policy against discharge in retaliation for reporting illegal acts, a right to the discharged employee, and a remedial scheme to vindicate that right." *Bard v. Bath Iron Works Corp.*, 590 A.2d 152, 156 (Me. 1991).

The Maine Act is similar to whistleblower protection laws in many other states, although the provision that directly speaks to health care providers' reports of "deviations from the applicable standard of care," which was only added in 2003, is relatively novel. Few other states have singled out health care providers as the Maine WPA does. Indeed, the Maine WPA has been characterized as "perhaps the broadest and least restrictive whistleblower statute [in the country] designed to protect health care employees from retaliation in the employment context, for direct patient advocacy." 14 Quinnipiac Health L.J. 203, 209 (2011).

In recent years, doctors, nurses, and other health care professionals have increasingly invoked the Maine WPA to remedy workplace discipline that they regard as retaliatory and unfair. Among those who have sued under the Act are:

- A surgeon who claimed that she was constructively discharged – that is, that her employer made her life so miserable that she was essentially forced to quit – after she complained about the competence of another physician, *Thayer v. Eastern Maine Medical Center*, 740 F.Supp.2d 191 (D. Me. 2010);
- A mental health crisis worker who claimed that she was constructively discharged after she raised concerns about the legality of the employer's billing practices, *Gammon v. Crisis and Counseling Centers, Inc.*, 762 F.Supp.2d 165 (D. Me. 2011);
- A counselor at the Maine State Prison who was fired after he complained to his employer about its confidentiality policies, *Halkett v. Correctional Medical Services, Inc.*, 763 F.Supp.2d 205 (D. Me. 2011); and
- A nurse who was fired after she

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divulged confidential medical information about a co-worker, and accused the same co-worker of sabotaging her ability to provide good patient care, *Stewart-Dore v. Webber Hospital Ass'n*, 2011 ME 26, 13 A.3d 773.

Protection of genuine whistleblowers serves an important function. Employers shouldn't be able to muzzle employees with threats of discipline if they engage in conduct that serves vital public interests – reporting illegal or dangerous behavior. More than other statutes that protect distinct classes of employees, however, whistleblower laws are susceptible to abuse. Membership in any other "protected class" – by virtue of gender, race, national origin, or disability – results from natural, immutable characteristics. Litigants can disagree about whether a particular employment decision was motivated by the employee's membership in the protected class, but membership in the class is seldom in dispute. Whistleblowers are different. An employee who knows that he is at risk of discipline can "join" a protected class just by lodging a complaint. In fact, an employee who wants to be protected by the law is tactically better off waiting to complain until he expects to be disciplined, since the proximity in time of the discipline to the report actually supports an inference of retaliation, strengthening his case. Significantly, moreover, the complaint doesn't have to be about a practice that is actually illegal or dangerous; it is enough for the employee to allege that he had "reasonable cause to believe" the practice was illegal or dangerous. And, in the most difficult cases, employers may be forced to draw fine distinctions between conduct that warrants discipline because it is "disruptive" and that which merits protection because it is "whistleblowing."

The *Thayer* and *Stewart-Dore* cases, summarized above, illustrate many of these concerns. Both involve allegations of "disruptive" behavior. The Joint Commission for the Accreditation of Healthcare Organizations defines disruptive behavior as "anything a clinician does that interferes with the orderly conduct of hospital business, from patient care to committee work," including demeaning, disrespectful, or intimidating conduct that "undermines the patient's confidence in the hospital or another member of the healthcare team." The Joint Commission has adopted standards requiring hospitals to develop and implement "zero tolerance" policies toward intimidating and disruptive behaviors, and to incorporate those policies into medical staff bylaws and employment agreements as well as administrative policies.

The plaintiff in the *Thayer* case was a physician employed by Eastern Maine Medical Center (EMMC), who complained that Dr. Tabbah, another doctor on the staff, practiced below the standard of care. Dr. Thayer had what the Court described as an "acrimonious professional relationship" with Dr. Tabbah, and "negative and confrontational relationships" with other members of EMMC's medical staff. The chief of service initiated a corrective action process pursuant to the hospital's Medical Staff Bylaws, culminating in a directive that Dr. Thayer engage in anger management counseling and a warning that she would be subject to further disciplinary action if she continued to behave disruptively. Dr. Thayer, who had taken a leave of absence, eventually decided not to return, and later asserted that she had been forced to quit. Dr. Thayer won her case at trial. Although the jury awarded her no damages, her partial success -- the jury's finding that she had been retaliated against because she was a "whistleblower" -- allowed the court to award her tens of thousands of dollars in attorneys' fees and expenses.

Mary Stewart-Dore was a nurse at Southern Maine Medical Center (SMMC) who reported to her supervisor the fact that another nurse had a staph infection. She had learned about the infection in her capacity as the co-worker's caregiver, and claimed that she thought it raised concerns about patient safety. After this incident the relationship between the two nurses became stormy, with a series of incidents that culminated in Stewart-Dore filing a formal complaint with the hospital's security manager, alleging that her co-worker's antagonism compromised patient safety. In her meeting with the security manager Stewart-Dore repeated the earlier disclosure of her co-worker's medical condition. When this disclosure came to light, Stewart-Dore was fired for breaching her patient's confidentiality. A hospital policy required termination in cases of "intentional access, review, and/or disclosure of [protected health information] for purposes other than the care of the patient . . . for personal gain or with malicious intent." She sued, arguing "that she engaged in protected activity through her initial complaints regarding the other nurse's staph infection and through repeated complaints to her supervisors about the other nurse failing to relay patient information and other conditions that endangered patient safety." Although SMMC won summary judgment in the trial court, the Law Court vacated that judgment and allowed the case to proceed to trial.

The *Thayer* and *Stewart-Dore* cases illustrate the dilemma health care institutions face under the WPA. In both cases, the employees who sued

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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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were active participants in creating workplace conflict and disruption, and there was powerful evidence that one had violated a hospital policy for which termination was required. Under the Joint Commission's "zero tolerance" directive, their employers were required to take serious action to restore calm to the workplace. Nonetheless, in both cases those employers were exposed not only to the routine costs of litigation and risks of a damage award, but also to liability for the plaintiffs' attorneys fees and costs. If one person's disruption is another's whistleblowing, and if only juries can decide which is which, how can health care institutions manage the risk of liability under the WPA? And, conversely, how can health care professionals with legitimate concerns about dangerous or illegal institutional practices speak without fear of retaliation?

Where the complaining party is a physician, the employer can invoke the protection afforded by the Health Care Quality Improvement Act (HCQIA), which immunizes institutions and their agents against claims based on "professional review actions" taken:

(1) in the reasonable belief that the action was in the furtherance of quality health care,
(2) after a reasonable effort to obtain the facts of the matter,
(3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and
(4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

42 U.S.C. § 11112(a)(1)-(4). HCQIA immunity is a powerful defense – even if the plaintiff can demonstrate some subjective retaliatory animus, he still bears the burden of proving that the peer review investigation or the resulting discipline was objectively unreasonable – and it has been raised with success in cases elsewhere.

However, in cases involving nurses like Stewart-Dore, or non-physician clinicians like Halkett and Gammon, HCQIA does not apply. In those cases, as is true in most employment disputes, the best advice for employer and employee alike is to address concerns as they arise, and then memorialize their meetings and conversations for reference in the future. An employer dissatisfied with an employee's performance can't afford to wait until those problems have reached crisis level before making them known; savvy employees, anticipating discipline, may well know enough to register their own concerns about health, safety, or compliance irregularities, preemptively gaining a measure of statutory job protection they otherwise would not enjoy. On the other hand, a health care professional who has legitimate concerns about health, safety, or compliance should speak up early, and monitor his employer's response to those concerns; a complaint or report that comes after he has been given notice of substandard performance will likely be seen as manufactured and disingenuous. In any case, as the trend toward transparency in the health care profession continues, claims of retaliation by self-proclaimed whistleblowers are likely to increase in both number and significance, requiring heightened attention and management. □

2012 Fall Forum and Client Reception

November 16, 2012 • Portland • Regency Hotel • 20 Milk Street

The Fall Forum 2 – 4 pm • Client Reception 4 – 7 pm

The 16th annual Norman, Hanson & DeTroy, LLC, Fall Forum for our clients will be held in Portland on Friday, November 16, 2012, at the Portland Regency Hotel.

The Forum will be followed by our annual client reception at the hotel, and we cordially invite all interested clients to join us. Please mark your calendars, and look for your invitation and topic announcements in the mail.

We hope to see you there!

Mild Traumatic Brain Injury 2.0

By Jonathan W. Brogan, Esq.

JONATHAN W. BROGAN, ESQ.

Recently, when trying an automobile accident case that involved a claim of mild traumatic brain injury, I became aware of how different an ordinary jury's understanding of concussion and mild traumatic brain injury had become.

Having tried mild traumatic brain injuries for over 20 years, and having dealt with numerous juries on the issues of mild traumatic brain injury over those years, it was surprising to see how different picking a jury had become.

Jurors, when questioned about concussion or mild traumatic brain injury, were much more aware of the diagnosis of concussion and, especially, post-concussive syndrome. Many jurors now are parents of children who are involved in contact sports. Contact sports, even at the elementary school level, now include education on concussion and brain injury. That education includes many warnings on the dangers of multiple concussions and contact sports, especially football and hockey.

Local school districts are finding it harder and harder to fill out team rosters in high impact contact sports because of parental concerns over brain injury. Parents are no longer willing to risk their children's future in sports where concussions can be routine and recurring.

Against this backdrop, people coming into court alleging that automobile accidents or other traumatic events led to concussion and potential post-concussion injuries are now viewed differently. It was not more than 10 years ago that people viewed "having their bell rung" as a normal part of life. Almost everyone had personally, or knew someone, who had struck their head and become unconscious. Almost all of those people recovered fully. Mild traumatic brain injury is now viewed as "an epidemic" in the United States with 8 million people suffering head injuries each year and 4 to 5 hundred thousand hospitalized. Eighty (80) percent of those hospitalized now meet the criteria for a mild traumatic brain injury (MTBI).

So then how do doctors define mild traumatic brain injury? As the jurors learned in my most recent trial, it was dependent on which doctor you spoke to. Doctors who applied rigorous scientific and medical tests criteria had much different definitions of traumatic brain injury than family physicians who simply defined mild traumatic brain injury as someone who complains that they had confusion following a traumatic event. Traumatic brain injury may occur with or without evidence of external trauma following violent contact forces or rapid acceleration/deceleration movements of the head. The usual causes include accidents involving motor vehicles, bicycles, pedestrians, construction and sports. However, there must be definitive signs of head trauma for a traumatic brain injury to be diagnosed. These signs include confusion, loss of consciousness, amnesia and focal neurologic deficits. Traumatic brain injury is classified at the time of the injury by certain measures including the duration of loss of consciousness, duration of post-traumatic amnesia and the Glasgow Coma Scale (GCS) score. Doctors classify brain injury as mild, moderate or severe. The American Congress of Rehabilitation Medicine, in 1993, defined mild traumatic brain injury as head trauma with the loss of consciousness lasting less than 30 minutes, a GCS of 13 or more, and post-traumatic amnesia lasting less than 24 hours.

As confusing as all of this sounds, plaintiffs tend to bring witnesses who will have even less rigorous standards for diagnosis. Typically if a person reports they are in an accident, had some confusion following the accident despite no evidence of focal trauma or any trauma but complain of headaches, confusion and/or other "fuzzy" neurologic symptoms, their medical provider will diagnose concussion. If that person returns with the same symptoms, then they will be diagnosed with "post concussion syndrome".

It is important to remember that the severity of a concussion is roughly proportional to the magnitude of applied traumatic force. A concussion is manifested by loss of consciousness lasting less than 30 minutes or a period of confusion lasting less than an hour but not more than 24 hours. Most times the plaintiffs we deal with have much less severe symptoms than these. However, their post-injury course is more severe, more disabling, and more enduring. Concussion can occur without a preceding loss of consciousness, but its hallmarks are confusion and amnesia. Plaintiffs who can report every detail of an accident but still complain of confusion and lingering issues tend to be found most often in litigated matters.

Despite all of the information that people are now receiving regarding sports injuries and concussions, that information is not well articulated. Repeated concussions that occur over a short period, as may occur during contact sports, can result in "second impact syndrome". This term describes a concussion that occurs while an individual

is still symptomatic from an earlier one. The cumulative effect of repeated concussions, and second impact syndrome, has resulted in a development of parameters regarding assessment and management of concussions in sports. Professional athletes have been diagnosed with chronic traumatic encephalopathy (CTE). That unfortunate disease is very rare and typically occurs in people who have had numerous concussions. It is very rare in an uncomplicated car accident.

However, when going to trial on a mild traumatic brain injury, now, all of these issues and the attendant publicity have to be considered. Plaintiffs' attorneys want to equate people involved in low speed or even higher speed accidents with airbag deployment to professional athletes who suffer numerous, and multiple, significant concussions. They want jurors, and treating physicians, to lump anyone complaining of post-concussive symptoms into the same group as professional athletes. They want people to believe that those complaining of post-concussive symptoms are in fact suffering from post-concussion syndrome. Research shows that people symptomatic following an MTBI generally recover over a 3 months period. Those who have an MTBI with a brief loss of consciousness, a GCS score of 15 in the ER, and post-traumatic amnesia lasting less than an hour will usually recover in 6 to 12 weeks. Athletes and younger people may recover in a few days. Longer recoveries may be expected in older patients and in persons with pre-existing medical conditions, including psychiatric disorders, alcohol or drug dependency, or a previous head trauma. After 6 to 9 months, even symptomatic patients will continue to recover. By one year, 85 to 90 percent of patients will be fully recovered.

Persistent post-concussive syndrome, or those people who continue to report disabling symptoms more than a year after an accident, may result from brain injury or may be related to partially or entirely to chronic pain, anxiety or depression. Depression is known to disrupt cognitive function, including concentration, attention, memory and executive function. Conversion "pseudodementia" is sometimes used to describe the cognitive impairment seen in persistently symptomatic patients with depression. Chronic pain can also cause similar symptoms. A reduced capacity to perform complex cognitive tasks may be attributable to pain or associated fatigue, sleep deprivation, depression, anxiety, poor motivation or even the effect of medicine used to treat pain. It is important in any mild traumatic brain injury case to try to sort out that which is actually related to the alleged brain injury and that which is related to pre-existing or post-accident conditions.

Plaintiffs who have an MTBI with neuropsychological impairment and functional disability that are disproportionate to objective injury, especially in the presence of symptoms that are inconsistent with known effects of neurological lesions, are typically involved in litigation. There is little or no scientific evidence that these persistent post-concussive syndromes are related to the original alleged neurologic injury. In analyzing the data in cases like this, especially from neuropsychologists, one must determine if measures of symptom validity and motivational bias have been measured. Also, both pre-accident and post-accident conditions need to be measured in those people reporting chronic disability in which there are significant discrepancies between their subjective complaints and objective findings. Neuropsychologists can test symptom validity, malingering, or non-organic disorders in plaintiffs who continue to complain of problems much greater than their objective injury.

The medicine involved in trying a mild traumatic brain injury is detail involved and crucial. A neurologist who understands the literature of MTBI, and can explain it coherently to a jury, is a must. Proper cross examination of plaintiffs' experts who rely not on actual science but on subjective complaints is essential. Finally, the most important aspect of any claim to remember is the credibility of the plaintiff him or herself. If the jury believes the plaintiff, then all the experts may be for naught. Experts can explain what is and isn't happening in a person's brain and can explain that a person's belief that they are disabled is not based in any rational medical evidence. However, if the jury believes that the accident caused disability, and the disability is ongoing, then expert testimony may not prevent a large verdict. Therefore, it is crucially important that all information concerning the plaintiff's pre-accident emotional, mental and physical state must be discovered. A plaintiff's work history, school history, and medical history remains vitally important. Pre-existing psychiatric or psychological problems and treatment, as well as pre-existing use of significant use of drugs or alcohol, is crucial. The overall picture of the plaintiff's pre-accident condition and post-accident condition remains of vital importance. The stakes in any mild traumatic brain injury case that goes to a jury are always high. The costs associated with litigating those issues remains high. However, it is important to remember in this new reality that juries now come to court with much more information regarding brain injuries that may lead them to believe that a plaintiff's complaints are valid unless they are presented with evidence that shows that their preconceptions are incorrect. □

NHD Attorneys Listed as New England "Super Lawyers"

We are proud to announce that the 2012 edition of *New England Super Lawyers* and the 2012 *New England Rising Stars*, has recognized a number of our attorneys for inclusion in the publication. They are as follows:

2012 New England Super Lawyers

Peter J. DeTroy
Professional Liability: Defense

Kevin M. Gillis
Workers' Compensation

David L. Herzer, Jr.
Personal Injury Defense: General

Stephen Hessert
Workers' Compensation

John H. King, Jr.
Workers' Compensation

Theodore H. Kirchner
Personal Liability: Defense

Mark G. Lavoie
Personal Injury Defense
Medical Malpractice

Thomas S. Marjerison
Personal Injury
Defense: Counsel

James D. Poliquin
Insurance Coverage

New England Rising Stars 2012

Joshua D. Hadiaris
Personal Injury Plaintiff: General

Lance E. Walker
Insurance Coverage

NHD Attorneys Listed in "Best Lawyers"

Norman, Hanson & DeTroy is proud to announce that eighteen of its attorneys have been named to the 2012 edition of *The Best Lawyers in America*, the oldest and most respected peer review publication in the legal provision. First published in 1983, *Best Lawyers* is based on an exhaustive annual peer-review survey comprising nearly 4 million confidential evaluations by some of the top attorneys in the country. The *Best Lawyers* lists appear regularly in *Corporate Counsel* Magazine, and is published with collaboration with *U. S. News & World Report*.

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Jonathan W. Brogan
Medical Malpractice Law – Defendants
Personal Injury Litigation – Defendants

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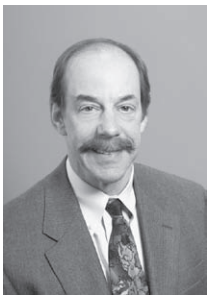
Bet-the-Company Litigation
Commercial Litigation
Criminal Defense: Non-White Colar
Criminal Defense: White-Collar Mediation
Personal Injury Litigation – Defendants
Personal Injury Litigation – Plaintiffs

Paul F. Driscoll
Litigation – Real Estate
Real Estate Law

Mark E. Dunlap
Personal Injury Litigation – Defendants
Commercial Litigation – Insurance Law



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David L. Herzer. Jr.
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Professional Malpractice Law – Defendants

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Thomas S. Marjerison
Personal Injury Litigation – Defendants

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Ethics and Professional Responsibility Law
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Professional Malpractice Law

James D. Poliquin
Appellate Practice
Commercial Litigation
Insurance Law
Personal Injury Litigation – Defendants

Roderick R. Rovzar
Corporate Law
Real Estate Law

John R. Veilleux
Insurance Law
Personal Injury Litigation – Defendants

Lance Walker
Insurance Law

New Associate: Devin W. Deane

We are pleased to announce that Devin Deane joined the firm as an associate attorney in September, 2012. Devin is a native of Troutville, Virginia and a graduate of Lord Botetourt High School. He studied economics at Virginia Tech and was the recipient of the Henry Webb & Christine Maddox '33 Memorial Scholarship given to a promising Southwest Virginian. Devin played flanker for Virginia Tech's men's rugby team and graduated magna cum laude in 2009, receiving a B.S. in Economics.

While studying at the University of Maine School of Law, Devin interned at the Federal Defender's Office for the District of Maine and was the inaugural fellow of the Charles Harvey, Jr. Trial Immersion Fellowship. As part of the fellowship, he worked in the litigation divisions of several of Maine's leading trial firms including Norman, Hanson & DeTroy, Pierce Atwood, and Berman & Simmons. Devin was a key member of the school's moot court team where he won prize brief honors and competed in the Mardi Gras Sports Law Invitational at Tulane University Law School. In his third year, Devin represented clients in criminal and family law matters as a student attorney at the Cumberland Legal Aid Clinic. He also volunteered at Pine Tree Legal and taught a "Know

DEVIN W. DEANE

Your Rights" workshop for high school students as a volunteer instructor for the Maine Civil Liberties Union. Devin served as class speaker at the University of Maine School of Law graduation in 2012 where he graduated cum laude and received the Faculty Significant Achievement and Pro Bono Publico Awards for his work in the classroom and community.

Workers' Compensation – Law Court Decisions

By Stephen W. Moriarty

Stacking of permanent impairment

***Buckley v. S. D. Warren Company*, 2012 ME 112 (September 25, 2012)**

The combining or "stacking" permanent impairment arising from multiple compensable injuries has been responsible for many a brain cramp. In 2010 William Buckley was successful in an appeal before the Law Court (*Buckley v. S. D. Warren Company,* 2010 ME 53, 997 A.2d 747) in a case in which the presiding hearing officer refused to stack the levels of impairment resulting from four injuries. The Court vacated the decision and remanded to the Board for further proceedings. The claim arose from the following facts.

In an initial 2005 decision the Board awarded benefits for 100% partial incapacity for two left shoulder injuries occurring in 1996 and/or an October 2001 injury to both shoulders. S. D. Warren then filed a petition to establish the occurrence of a March 2000 right shoulder injury coupled with a Petition for Apportionment and a Petition to Determine the Extent of Permanent Impairment. In a 2008 Decree the second hearing officer found that the employee had sustained a right shoulder injury in 2000 which was causally related to over-compensation from favoring the left arm as the result of the previous injuries. Although the hearing officer found various levels of PI, he declined to stack them, which resulted in the employee's successful appeal and the remand order mentioned above.

In his subsequent decision the hearing officer assessed 14% PI to both of the 1996 injuries, plus an additional 7% PI resulting from the 2000 right shoulder injury. No PI was found to result from the 2001 bilateral shoulder injury. The employee appealed once again and argued that the PI related to the two 1996 injuries ought to be stacked onto the 7% assessment causally related to the 2000 injury.

After reviewing the statutory history of §213(1-A)(A) the majority adopted the hearing officer's conclusion that causation flows forward and not backward. (The Court originally issued its decision on August 7, but later issued a revised decision on September 25 addressing some minor and clerical issues but without changing the result.) In other words, because the 2000 injury was causally related to the earlier 1996 injuries PI was attributable as well to the earlier injuries and it was appropriate to stack the 2000 PI onto the impairment assessed for the 1996 injuries. As the Court stated, "permanent impairment from a subsequent injury that was *caused by* a prior injury could be stacked onto impairment from the prior injury" (emphasis original). However, because the 1996 injuries were not caused by the 2000 injury, and were not aggravated or worsened in any fashion by that injury, the Court refused to stack the PI related to the 1996 injuries onto that from the 2000 injury. Therefore, the PI rating for the 2000 injury was left undisturbed at the 7% figure found by the hearing officer.

STEPHEN W. MORIARTY

The Court also upheld the finding that no PI resulted from the final bilateral shoulder injury of 2001.

Two dissenting justices found that the hearing officer did not carry out the remand order by virtue of his refusal to combine the PI percentages from the 1996 injuries with that from the 2000 injury. The dissenters concluded that 14% PI should have been found with respect to that injury, and would have remanded the matter for a further determination consistent with the first appeal.

Stacking obviously remains a complex and somewhat cumbersome feature of the law, and this latest decision does not add much clarity to the situation. Stacking issues are uniquely dependent upon the facts of each case.

Interest on 14-day rule violations

***Estate of Michael Joyce v. Commercial Welding Company*, 2012 ME 62**

This decision dealt with two issues of significance to the operation of the

Workers' Compensation system. Mr. Joyce had been exposed to asbestos during a lengthy career and ultimately became incapacitated due to lung cancer on October 1, 2007. Prior to his death approximately one year later he filed a Petition for Award pursuant to the Occupational Disease Law but the claim was not controverted. Ultimately, more than one year following Mr. Joyce's death the employer cured the violation by paying accrued benefits to the estate as of the date of payment but did not pay interest on the overdue amount.

The hearing officer initially ruled that the fourteen-day rule applies to any claims brought pursuant to the Occupational Disease Law. He then ruled that the employer had not cured the rule violation because it had not paid interest, and therefore ordered payment of interest from the date of incapacity to the present and ongoing, plus ongoing disability benefits to the estate until the rule violation was fully cured.

On appeal the Court reviewed the purpose of the fourteen-day rule and disagreed that interest was payable on benefits owed due to a rule violation. The Court reasoned that a payment for a rule violation was not comparable to that for an award of compensation because it was payable whether or not the claimant had experienced any incapacity resulting from an injury, and that it was owed regardless of the merits of the underlying claim. Accordingly, the Court ruled that no interest was payable pursuant to §205(6) of the Act, and that the rule violation had been fully cured by the employer.

The second issue addressed by the Court involved a claim for death benefits pursuant to §215 filed by the employee's widow. The petition was filed following the death and was timely controverted. The hearing officer granted the petition and awarded 500 weeks of benefits at a total incapacity rate. However, the hearing officer ruled that the payments made by the employer to correct the fourteen-day rule violation could not be applied against the employer's separate obligation to the widow, and no credit or offset was allowed.

On this issue the Court upheld the hearing officer and ruled that a claim for dependent's death benefits pursuant to §215 was a legally distinct and separate claim; therefore because there had been no fourteen-day rule violation with respect to the claim for dependent's benefits, the benefits owed to the widow were payable in full without consideration of the sum paid to cure the fourteen-day rule violation for the deceased employee's own claim. □

Recent Decisions From The Law Court

By David P. Very

DAVID P. VERY

Inference of defect in product liability actions

In Estate of *Stanley Pinkham v. Cargill,* Inc. 2012 ME 85 (July 3, 2012), the Law Court issued a significant decision as to what evidence is necessary in order to prove that a product was defective. The case involved an allegation that a turkey product was defective in that it contained bone fragments resulting in an esophageal perforation of the Plaintiff. The question presented to the Court was in cases without proof of a specific defect should the Court allow for an inference that a product may be defective in certain circumstances.

Under the "inference of defect" theory, it may be inferred that the harm sustained by the Plaintiff was caused by a product defect existing at the time of sale or distribution, without proof of a specific defect, when the incident that harmed the Plaintiff was of a kind that ordinarily occurs as a result of product defect and was not, in the particular case, solely the result of causes other than the product defect existing at the time of sale or distribution. The Law Court adopted this theory. As a result, the Law Court indicated that the Plaintiff would be allowed the inference that the harm sustained was caused by a product defect. The Court further held that the injury sustained was of a kind that ordinarily occurs as a result of a product defect and was not solely the result of causes other than the defect. As a result, the Court vacated the summary judgment granted in favor of the manufacturer below. The adoption of this standard will clearly make it easier in certain cases for a plaintiff to survive a summary judgment motion and obtain a verdict in cases where there is no direct evidence of defect.

In the same case, the Law Court also adopted the "reasonable expectation test" with respect to foreign objects found in food products. The reasonable expectation test provides that the producer will be liable for injuries that are caused by any substance, including natural ingredients, which the consumer would not reasonably have expected to find in the product. The Court then went on to hold that whether a consumer would reasonably expect to find a particular item in a food product is normally a question of fact that is left to a jury. Thus, this holding will make it

more difficult to obtain summary judgment in a defective food product case.

Dog bite actions

In *Morgan v. Marquis*, 2012 ME 106 (August 9, 2012), the Law Court addressed several issues that arise in dog bite cases.

The Defendants adopted a dog that was part pit bull. The Defendants received no information that the dog was in any way dangerous, and the dog was not aggressive toward anyone during their ownership. The Plaintiff, a family friend, proposed that she trade animal care services with the Defendants so that they could each attend their son's respective military basic training graduations. The Plaintiff was an experienced dog owner and pet-sitter. The Plaintiff, in advance of the graduation, came to the Defendants' house to meet the dog and learn his routine. Over the course of approximately an hour, the Plaintiff walked the dog, interacted with him, controlled him with voice commands, and followed him into the house. The dog responded well on the leash to the Plaintiff and no unfriendly behavior was observed. The Defendants did not tell the Plaintiff that the dog was part pit bull.

On the day of the incident, the Defendants departed at around 5:00 p.m., and the Plaintiff arrived at around 7:00 p.m. and entered the dark kitchen. She turned on the light, spoke to the dog, and reached down to pet him. The dog lurched out, bit her in the face, and then retreated. The Plaintiff sued the Defendants alleging statutory liability, common law strict liability, and negligence. The Court granted the Defendants' motion for summary judgment and the Plaintiff appealed.

With respect to common law strict liability, the Court noted that the Plaintiff must demonstrate that the possessor of the animal knew or has reason to know of the animal's dangerous propensities. The Court agreed that there was insufficient evidence that the Defendants knew or should have known that the dog could be dangerous. The Court also rejected the argument that pit bulls are per se abnormally dangerous. The Court noted that the fact that the dog had been kept chained to a porch at his previous home, had been removed because a mailman apparently became concerned about the dog's welfare, liked to climb fences, was focused on cats, was sometimes chained to the Defendants' barn, and was treated by the Defendants with caution around new people were insufficient as a matter of law to establish that the Defendants knew that the dog was likely to bite the Plaintiff or someone else.

With respect to common law negligence, the Plaintiff once again argued the characteristics of pit bulls in general, and of the dog in particular, including the fact that the Defendants did not tell her that the dog was part pit bull. The Court held that although the assertions were not sufficient to survive summary judgment with respect to strict liability, the question of breach of duty on an ordinary negligence claim, where Plaintiff may argue that the Defendants should have known about the dog's potential to bite, was for the fact finder. Thus, this holding once again will make it difficult to obtain summary judgment in a dog bite case.

Lastly, the Court addressed the statutory liability claim. The Defendants argued that because the Plaintiff was the dog's "keeper" at the time she was bitten, and because the statute only allows recovery by injured third parties, not the dog's owner or keeper, a statutory liability claim was not available to the Plaintiff. Although the Law Court agreed that a keeper of a dog may not bring a statutory liability claim, a person's status as a dog's keeper is normally a question of fact left to the jury. A keeper is someone who has possession or control of a dog. The Court theorized that, "A jury could determine that the Plaintiff had possession or control of the dog once she entered the house to care for him, or not until she entered the house, or not until she turned on the light, located the dog, and reached to pet him, or not until she did those things and then something more, or the jury could find that the Plaintiff never had possession or control of the dog." Again, this holding will make it difficult to obtain summary judgment even in situations where the victim is the alleged keeper of the dog. □

KUDOS

At the annual Comp Summit Seminar **KEVIN GILLIS** participated in a plenary session titled "Think Tank" involving a number of representatives of the major parties involved in workers' compensation issues. **STEVE MORIARTY** presented a 20-year perspective on entitlement to specific loss benefits and the conclusive presumption of 800 weeks of total incapacity for catastrophic injuries.

JONATHAN BROGAN won his lucky 13th club championship at the Purpoodock Golf Club in Cape Elizabeth.

STEVE HESSERT was recently elected as President of the Board of Directors of the Portland Conservatory of Music. The Conservatory is a non-profit community music school, with professional and community divisions, for students of all ages and level of ability, meeting Maine's need for quality musical education.

RUSSELL PIERCE has been elected to serve on the Board of Directors of the Natural Resources Council of Maine. NRCM was founded in 1959, and is the State's largest and most effective environmental advocacy organization, currently with over 12,000 members and activists. NRCM is also the Maine State affiliate of the National Wildlife Federation.

Last summer **STEVE HESSERT** spoke at a National Business Institute Seminar on the topics of Medical Issues in Workers' Compensation Cases and Ethics.

In late September **STEVE HESSERT** and **DORIS RYGALSKI** spoke at an American Law Firm Association workers' compensation program in Boston. Steve spoke on Electronic Discovery and Metadata issues in compensation litigation. Doris addressed recent Medicare developments.

JONATHAN BROGAN spoke at the annual convention of the Maine Municipal Association on "How to Head Off Employment Claims". □

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Fall 2012 issue