INBRIEF

Current Developments in Maine Law

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Caging the Reptile

By Jonathan W. Brogan, Esq.

Recently the plaintiff's bar has become enamored of a theory invented by Attorney Don Keenan and Jury Consultant David Ball in their book *Reptile: The Manual of the Plaintiff's Revolution*. That strategy, called "reptile" theory, has swept through the plaintiff's bar and become a key topic at seminars for plaintiff's lawyers.

"Reptile" theory is a pseudoscientific strategy attempting to capitalize on the need of the reptilian portion of the human brain to avoid "survival dangers". As Keenan and Ball wrote, "When the reptile sees the survival danger, even a small one, she protects her genes by impelling the jury to protect [itself] and the community." The scientific basis for the reptile theory is slim at best. Numerous scientists have debunked the claim that the human brain can be manipulated so easily as to be influenced by "safety rule plus danger equal reptile". However, as with many trial strategies, perception is reality and plaintiff's lawyers are using the reptile theory, allegedly with great success, in courtrooms all over the United States.

Many of you have probably seen or heard the reptile theory during deposition, opening or throughout a trial. The goal of the theory is simple. A plaintiff's lawyer, through witness examination and closing argument, tries to influence a juror's need to minimize survival dangers for herself and her loved ones. The "reptile" must be convinced that the defendant acted negligently but also that such conduct threatens the juror's community and the jurors, through their verdict, punish the conduct thereby protecting themselves and the community.

Essentially the theory states that engaging the reptilian part of a juror's brain allows a plaintiff to get a winning verdict even when logic or emotion might cause the jurors to

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find against the plaintiff, and to increase the size of the verdict, by asking jurors to think beyond the risk or harm suffered by the individual plaintiff to the safety of their community as a whole.

The method used to invoke the "reptile" is not revolutionary but is, somewhat, evolutionary. The plaintiff's lawyers invoke or establish broad "safety rules" which the defendant violated and which would have prevented the harm suffered by the plaintiff if they had not. Keenan and Ball offer six characteristics that each safety rule must possess in order to trigger a juror's reptile brain:

- The rule must prevent danger;
- the rule must protect people in a wide variety of situations, not just the plaintiff;
- the rule must be in clear English;
- the rule must explicitly state what a person must or must not do;
- the rule must be practical and simple for someone in defendant's position to have followed; and
- the rule must be one that a defendant will either agree with or seem careless or incredible if they do not agree.

So how does it work in the real world? The plaintiff's lawyer wants to start with the broadest "umbrella rule". Using doctors as an example, many lawyers start with the Hippocratic Oath: "First, do no harm". A reptile practitioner could use a similar oath or promise for a car maker, a pharmacy owner or any other person or group that interacts with the public when their safety might be involved.

Next, once the umbrella rule is established, plaintiff's attorney will slowly bring it down to the more specific alleged safety issue in the subject case. From the umbrella of the Hippocratic Oath, a "reptile" lawyer might ask a neurologist about a choice between two treatment alternatives, claiming he is negligent unless he elects the safest choice. The reptile advocate states that if a doctor picks any alternative that is not the absolute safest, he is needlessly endangering the public. The point is to drill down to a safety rule that might apply to the case that is being tried. Once they tie the "big" rule to the "small" rule then the "reptile" safety imperative is enabled.

Again, these ideas are not particularly revolutionary. Many plaintiffs' lawyers have tried, over the years, to invoke the "conscience of the community" or the "golden rule" to convince jurors to do what the law and the facts do not allow. One must always remember the jurors are there to find facts. They are then given the law by the court and asked to apply the law, as given by the court, to the facts they have found. That law will not include reptile theory, will never talk about the conscience of the community and does not allow the jurors to stand in the shoes of the plaintiff. In Maine, a safety statute (or in some cases a rule) may be evidence of negligence but it is not negligence per se. The reptile theory does not deal with a legal standard of care but a "safety rule" that may be part of the law, or not part of the law, but is surely not meant to allow the jurors to do what they swore, under oath, to do. They swore to follow the law as given to them by the Judge and the court.

So how does one defend against the "reptile" in the courtroom? Continuing with the medical analogy, though this analogy can be used in personal injury and products cases as well, one must refute the reptile at the beginning. The "umbrella rule", which is the foundation of the safety analysis, must be disengaged. The real rules of medical treatment are not black and white. The Hippocratic Oath, though easy to cite, is not always applicable. If it were, many cancer treatments, surgeries and other treatments would be prohibited as they cure disease by inflicting other harm. Allowing the "reptile lawyer" to direct a juror's attention to a general standard of "safety", and not to the particular plaintiff's treatment by a particular physician, allows the "reptile" to flourish.

Using the six rules cited above, defending against the "reptile" theory is important and straightforward. First, "the safety rule must prevent danger" is easy to confront. Jurors may want to believe that physicians, property owners, or manufacturers can guarantee safety. However, no such guarantee exists and the jurors will be instructed that the defendant is NOT a guarantor of safety. There are myriad factors that affect safety, many lifesaving medical treatments have side effects that necessarily are not safe. Preventing one problem may present another. Jurors must be reminded that the world is not black and white but has many problems, and "drilling" down to simplistic safety rules is unrealistic.

The second rule that "safety must protect people in a wide variety of situations" is also simplistic. Most safety situations are not broadly interchangeable and there are no hard and fast rules that apply to each and every person. That is especially true in medical situations where a doctor has the job of treating that patient not some broad group of people not involved in the case. Wanting "the safety rule to be in clear English" is fine, but simplicity is not the nature of real life. It is important to remind jurors that realistic complexity, based on individual situations, is crucial for everyone and everything. The "reptile" lawyer wants to establish rules that explicitly state what a person "must, or must not," do. This sort of linear decision making is not realistic. Obviously no one wants to hear a witness talk about probabilities or possibilities but putting together and explaining all of the factors in making a decision rules out the "but for" thinking upon which "reptile" theory thrives.

The fifth tenet is that the safety rule "must be practical and easy . . . to have been followed". In retrospect, many things are easy. In a medical situation, tests could have been ordered or a patient transferred and everyone would be protected but it is never whether it would have been better to do something, in retrospect, it is whether appropriate care was delivered based on what was known at the time. Many things can be seen retrospectively once the pressure of the moment in a situation has been relieved. But, did the defendant act appropriately given the situation presented to him?

Finally, "reptile's" best friend is that their safety rule "was so easy to follow that the defendant who does not follow it has to be unthinking, careless and/or dishonest in disagreeing." A jury, however, needs to be educated as to what actually happened, warts and all. Reality is difficult. Bad things happen to good people and situational decisions sometimes look careless. Educating a jury on what actually happened, in real time, and that it was done by careful, thoughtful members of their community will cage the reptile

Estate Planning for the Family Camp

By: Kathryn M. Longley-Leahy, Esq.

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As memories of warm summer picnics and lake or seaside gatherings at the family camp are replaced by seasonal hiking, fishing, or other outdoor activities within the colorful brilliance of Maine's foliage season, all in anticipation of winter adventures of skiing, skating and ice-fishing at the winter cabin, generations of New Englanders have come to cherish the wonderful family memories created throughout the year at the "family camp." Regardless of its monetary value, the family camp is often the asset that is closest to the heart and soul of a family, the one asset that continues to bring generations of families together well after the original owners have passed away and the one asset that is very often at the emotional core of an estate plan. As young families grow, move away, and continue to return to the family camp with their own friends, children, and extended families, the love for, and draw to, the source of those cherished childhood memories seldom wanes, regardless of the direction of one's life's adventures or the geographic location where a family member ultimately resides. Advising clients interested in preserving the family camp for the use and enjoyment of future generations includes not only the need to understand the family's unique dynamics, but also, the ability to incorporate the dynamics within the client's financial, estate, gift, tax, trust, elder care and even business planning considerations. When considered together, such factors become instrumental in the creation of an appropriate plan for the ongoing use of the family camp in a manner that both satisfies the client's desire to be fair, flexible, and accommodating to the next generation of owners while simultaneously providing a management framework that fosters family enjoyment, unity, and, most importantly, harmony, for generations to come.

Any estate plan for protecting and preserving the family camp is multi-faceted, and decades of estate planning experience has shown that no two families have the same planning needs and objectives. Depending on each client's health, financial security and unique planning considerations, not the least of which includes the management of unique family dynamics, an owner's desire to retain the right to enjoy and/or control of the property, exposure to federal and/or state estate and income taxes, and liabilities accruing as a result of creditor claims, divorce, etc., the transfer of the family camp property to, or for the benefit of, succeeding generations must be carefully planned. Whether the transfer of ownership occurs during an owner's lifetime in the form of an outright gift, sale or transfer of some or all of the family camp's ownership interest to a trust, partnership or other entity, or included as a bequest in the owner's Last Will and Testament to the next generation, outright or trust, consideration should be given including a mechanism for the transfer – be it via gift, bequest or testamentary bequest – in the form of established, but flexible guidelines as to how the property is to be used, by whom, how costs are to be allocated, and how future ownership transfers are to be restricted to prevent the ownership interests falling into the hands of creditors or other non-family friendly owners.

Volumes could be written on the various approaches to preserving the family camp as there are many considerations that an estate planning attorney must process in advising the owner of a family camp to take into account a multitude of "what if" scenarios. Are there potential state and/or federal estate taxes at issue? Does the current owner

"ANY ESTATE PLAN FOR PROTECTING AND PRESERVING THE FAMILY CAMP IS MULTI-FACETED, AND DECADES OF ESTATE PLANNING EXPERIENCE HAS SHOWN THAT NO TWO FAMILIES HAVE THE SAME PLANNING NEEDS AND OBJECTIVES."

expect to continue to use and enjoy the camp property after the transfer? Does the next generation have the resources to purchase an interest in the property, or to pay its costs? What if either the current owner, or a future owner, becomes bankrupt, divorced or subject to creditors' liens, or needs public or private financial assistance to cover the costs of nursing home care? What if a family member or their friends misuse the property, or worse, have a serious accident for which the property owners (or more likely, the one owner with the most money) become liable? The list goes on, yet client concerns remain the same: "How can a plan be developed that is fair, flexible, and accommodating to the next generation while simultaneously providing a management framework that fosters family enjoyment, unity, and, most importantly, harmony?"

Plans for ownership succession of the family camp can range from outright gifts of some or all of the family camp property to the next generation, to the creation of a so-called 'dynasty trust' drafted to hold and manage the family camp for generations to come, with many planning variations in between. For clients seeking an alternative to an outright gift of the family camp to the next generation or the transfer of the gift into either a short-term or long-term trust, the use of an entity such as a properly drafted limited liability company can provide a viable planning option to not only minimize the financial liability of future owners and restrict future transfers of ownership interests in the property, but could also allow the elder generation's continued participation in the management and operation of the property, setting the stage for a harmonious transition for the continued generation of wonderful family memories.

With over 2,500 lakes and ponds nestled among Maine's woods and mountains, and thousands of family camps scattered on those lakes, shores and mountains… the need for proper planning for an orderly transfer of the family camp to the next generation is a critical aspect of a family member's estate plan as there are few assets more likely to foster ongoing family gatherings while facilitating the on-going creation of generations of family memories than the beloved family camp. Norman, Hanson & DeTroy has the required planning expertise in estate, gift, trust and tax planning to assist clients in this important planning process.

The Estate Planning group at Norman, Hanson and DeTroy, LLC has decades of experience in advising clients in the preparation of estate plans designed to meet each client's unique situation, and welcomes the opportunity to discuss planning options specifically designed to achieve each individual's unique needs and objectives.

Workers' Compensation– Appellate Division Decisions

By: Stephen W. Moriarty, Esq.

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Stacking of Psychological Impairment.

Back in 2008, the Law Court held for the first time that permanent impairment may be assessed for the psychological consequences of a physical injury, even though the *4th Edition of the AMA Guides* does not set forth specific percentages for emotional impairment. See, *Harvey v. H.C. Price Co.*, 2008 ME 161, 957 A.2d 960. In that same year the Court held that PI may be assessed as a consequence of a gradual mental stress injury pursuant to Section 201(3). *Smart v. Dept. of Public Safety*, 2008 ME 172, 959 A.2d 756. While the "stacking" or combining of permanent impairment from separate physical injuries has been codified in Section 213 (1-A), until recently there had been no appellate opinion on the legality of stacking physical and psychological impairment.

In *Waters v. S. D. Warren Co.*, App. Div. No. 14-26, the employee had sustained several physical injuries in 1998 and 1999 when the prevailing PI threshold was 11.8%. The extent of physical permanent impairment had been assessed by a Section 312 examiner at 11%. However, the claimant had a pre-existing psychological condition which was aggravated by his physical injuries, and a different Section 312 examiner assessed a 7% level of permanent impairment due to the psychological consequences of the injury. Because the employee had been awarded ongoing benefits for partial incapacity, he argued that the two assessments should be stacked, thereby placing the overall level of impairment above the threshold and entitling him to unlimited benefits for partial. The presiding hearing officer ruled that the two

separate assessments could not be stacked, and the employee appealed.

Section 213(1-A) (A) addresses stacking as follows:

> For purposes of this section "permanent impairment" includes only the impairment resulting from:
>
> A. The work injury at issue in the determination and any pre-existing physical condition or injury that is aggravated or accelerated by the work injury at issue in the determination. (Emphasis added).

The primary rule of statutory construction is that the language of a statute should be given its plain and ordinary meaning. In a 2-1 ruling, the Division affirmed the decision of the hearing officer and held that the statute expressly allowed only the stacking of permanent impairment resulting from an injury together with any impairment resulting from an aggravation of a pre-existing physical condition. As the Division held:

> … looking only at the plain language of the statute, we conclude that the Legislature did not intend to include permanent impairment from pre-existing psychological conditions in the calculation of permanent impairment. . .

Accordingly, the majority found no error in the exclusion of impairment resulting from an aggravation of a pre-existing psychological condition.

One member of the panel dissented from the majority on an unrelated issue.

In summary, without legislative change, permanent impairment resulting from an occupational aggravation of a pre-existing psychological condition may not be combined with impairment caused by a physical injury.

Determination of Entitlement to Partial.

It has long been recognized that hearing officers are invested with substantial discretion in determining the nature and extent of incapacity flowing from an injury. A hearing officer need not reach the "right" decision (assuming that contending parties could ever agree what the "right" decision might be), but need only reach a decision which is adequately supported by the evidence.

In *Morneault v. Katahdin Paper Co.*, App. Div. 14-21, the presiding hearing officer granted the employee's petition for review and awarded ongoing benefits for fixed partial in an amount equivalent to approximately one-third of the pre-injury average weekly wage. The employee disagreed, and argued on appeal that there was insufficient evidence establishing the extent of work capacity found.

In rejecting the employee's appeal, the unanimous panel observed that hearing officers "are not required to follow any mathematical formula when evaluating an employee's earning capacity", but must consider a variety of factors to determine an injured worker's ability to earn. In this case the employee had been found to have sedentary to light-duty work capacity but had not performed a work search or otherwise tested the labor market. He still held a commercial driver's license and the hearing officer concluded that he could earn slightly higher than minimum wage on a full-time basis. The Division found that there was sufficient competent evidence to support the findings and the hearing officer's decision was affirmed.

Independent Contractor Status.

Notwithstanding a long history of decisional law coupled with statutory changes, issues regarding employment status and potential entitlement to benefits frequently arise within the system. In *Workers' Compensation Board Abuse Investigation Unit v. Price*, App. Div. No. 14-20, the AIU imposed a penalty against an individual doing business as Blind Faith Tattoos for failing to secure coverage for his employees. The respondent was a tattoo artist who rented a building in Bangor as a studio, and within the same building he rented space to other tattoo artists and a body piercer. The AIU hearing officer considered the statutory

"IN SUMMARY, WITHOUT LEGISLATIVE CHANGE, PERMANENT IMPAIRMENT RESULTING FROM AN OCCUPATIONAL AGGRAVATION OF A PRE-EXISTING PSYCHOLOGICAL CONDITION MAY NOT BE COMBINED WITH IMPAIRMENT CAUSED BY A PHYSICAL INJURY."

criteria for an independent contractor as set forth in Section 102(13) and concluded that the fellow occupants of the building were employees and imposed a penalty.

The Appellate Division vacated the decision on appeal and denied the AIU's complaint for penalties. In reaching this decision, the Division held that in some situations an individual may not necessarily be either an employee or an independent contractor, and may in fact be neither one. In this case, the Division concluded that the alleged employees were simply lessees of the respondents, and that the only relationship between them was that of landlord/tenant. Therefore, in the absence of any other indicator of an employment relationship, apart from the rental agreements, the Division found that there was no obligation to secure the payment of workers' compensation benefits.

By contrast, in *Workers' Compensation Board Investigation Unit v. Morrissette*, App. Div. No. 14-18, a penalty had been assessed against a taxicab company for failing to secure compensation coverage for its drivers. In this case, each of the drivers had signed a lease which expressly stated that they were independent contractors, but a penalty was imposed against the business owner.

The Division affirmed the decision, and followed the well-established rule that efforts to define a relationship through methods such as tax withholding practices are not legally determinative. As the Division held:

> However, employment status is not governed by how the parties choose to characterize their relationship in advance. How the parties frame their relationship in terms of written agreements or tax forms is secondary to whether the relationship in fact resembles that of employer-employee rather than employer-independent contractor.

The Division noted that the cab drivers did not supply their own vehicles or pay for repairs and maintenance. Similarly, the drivers were supplied with cellphones and a GPS system by the employer and were not permitted to hire assistants. Furthermore, the cab company was in the regular business of providing taxi transportation to its customers. The hearing officer concluded that there was ample evidence of a traditional employment relationship triggering the duty to secure the payment of compensation, and the Division agreed.

Lent Employee Doctrine.

According to the "Lent Employee Doctrine," an employee of one employer (usually referred to as the "general" employer) may be loaned to another employer (usually referred to as the "special" employer) for the performance of a particular project or work assignment. In the event of an injury sustained while working for the "special" employer, the injured worker is deemed to be the employee of that employer.

In *Malpass v. P. James Gibbons Construction*, App. No. 14-19, a complex relationship existed between several parties and individuals in the construction business, and the claimant was injured when helping to lift a wall with a framing crew after having been asked to assist. The injured worker's petition for award was denied and the Division affirmed.

The Division held that before the "Lent Employee Doctrine" may be applied, there must be an existing and established relationship with the "general" employer before an employee may be transferred or lent to a "special" employer. In this case there was no evidence of a contract of hire between the claimant and the "general" employer and that therefore he could not have been lent to the "special" employer.

In this same decision the Division relied upon *Harlow v. Agway, Inc.*, 327 A.2d 856 (Me. 1974) and held that an injury sustained by an individual acting gratuitously or as a pure volunteer is not compensable.

Dual Purpose Doctrine.

In workers' compensation practice, the "Dual Purpose Doctrine" holds that if a trip serves both a business and personal purpose, an injury sustained while making the trip is compensable if it would have been made in any event notwithstanding the personal purpose. *Cox v. Coastal Products Company, Inc.*, 2001 ME 100, 774 A.2d 347.

In *Johnson v. Sure Winner Foods*, App. Div. 14-15, the employee appealed from the denial of a Petition for Award for an injury sustained in circumstances implicating the dual purpose doctrine. The facts showed that after having completed a delivery route and having parked his employer's vehicle, the claimant drove his own vehicle to the home of a co-worker. The primary purpose of the visit was social, but the employee also picked up a hand-held scanner which had been issued by the employer, and planned to use it on the following day while making deliveries. However, the use of the scanner was not required and the employer had no knowledge of the employee's intent to use it.

The hearing officer found that the scanner would only have produced a small benefit to the employer, and that the employer had no knowledge of the trip to pick it up on the evening in question. After two hours of socializing at the home of his friend, the employee was injured in a traffic accident while driving to his residence. The Petition for Award was denied.

On appeal, the Division deferred to the hearing officer's conclusion and agreed that the business purpose of the trip was not significant enough to invoke the Dual Purpose Doctrine. The Division found that the hearing officer's decision was neither arbitrary nor without rational foundation.

Adrian Kendall Receives Knight's Cross of the Order of Merit of the Federal Republic of Germany from German President.

On October 20, 2014, at the law offices of Norman Hanson & DeTroy in Portland, Maine, NHD member and German Honorary Consul Adrian Kendall was awarded The Knight's Cross of the Order of Merit of the Federal Republic of Germany on behalf of the German Federal President, Joachim Gauck. Consul General Rolf Schütte had what he himself termed "the distinct pleasure of decorating Adrian Kendall with this prestigious honor" at a ceremony in the presence of Kendall's colleagues, clients and relatives.

Kendall has served as Germany 's Honorary Consul to the States of New Hampshire and Maine since 2007. However, his cooperation with the German Consulate in Boston began back in 2000, when he was first appointed as the Consulate's "Vertrauensanwalt" (trusted legal counsel), a position he still holds. In this capacity, Kendall not only provided legal advice to the German Government and German citizens, but assumed a much wider role in helping the Consulate General in Boston maintain and expand Germany's business, academic and cultural relations with the State of Maine. Over the years, he has become increasingly – and most successfully – involved in the important work of keeping the German-American ties strong through public diplomacy.

In the business and legal realms, he has engaged at all levels of state government, working closely with the Maine International Trade Center, assisting Maine businesses in understanding German markets and business culture, briefed and accompanied the governors of Maine and New Hampshire on trade missions to Germany, and fostered opportunities in the renewable energies and technology sectors. Most recently, he briefed companies and trade representatives from Maine, New Hampshire, Vermont, and Connecticut preparing to visit MEDICA, the world's largest medical industry trade fair that is held annually in Düsseldorf, Germany.

In matters of culture and education, he is a frequent speaker at universities, colleges, and high schools to inform young New Englanders about the importance and value of the German language, as well as of the German model of vocational training and available research and study programs. In 2013, he was recognized by the national American Association of Teachers of German organization with the "Friend of German Award" for his "outstanding support for and promotion of German and the study of German at the local, regional and national level."

His cultural outreach has also taken him outside of the classroom. In 2008 in a private ceremony on Walker's Point, Kendall presented former President George H.W. Bush with a book bearing an inscription of thanks from the German Ambassador, commemorating the 20th Anniversary of the Fall of the Berlin Wall. In 2003, he learned from a newspaper article that the citizens of Houlton, Maine wanted to organize a reunion of former German prisoners of war who had been held at the Houlton POW camp during WWII. Kendall contacted German government archives and the German Red Cross to locate former POW's and then helped the town to invite them to the reunion event. The extremely successful

COUNSUL GENERAL ROLF SCHÜTTE AND GERMAN HONORARY COUNSUL ADRIAN KENDALL

"I'M HONORED TO REPRESENT GERMANY HERE IN MAINE, AND JUST AS PROUD TO REPRESENT MAINE TO GERMANY"

- ADRIAN P. KENDALL

and memorable reunion took place with a typical warm Aroostook County welcome and was recorded in a documentary with the tongue in cheek title "Don't Fence Me In." The documentary was aired on Maine Public Broadcasting and copies are kept at both the United States Library of Congress and Germany's national museum of contemporary history, the *Haus der Geschichte*.

Recognizing Germany's special historical responsibility, Kendall has continuously worked with the Maine Holocaust and Human Rights Center, Jewish community leaders and local schools to ensure that the lessons of the Holocaust are never forgotten. In December, 2014, an exhibition of the experience of Jewish lawyers under the Nazi regime will be hosted at the Maine Jewish Museum with the title "Lawyers without Rights". Kendall worked with the German Federal Bar and the American Bar Associations to bring the exhibition to Maine.

In his congratulatory remarks, Consul General Schütte pointed out that Adrian Kendall has become "what the Portland Press Herald once called 'Germany's go-to guy in Maine.'" With his expertise in the German business, law, and cultural worlds, Kendall has certainly demonstrated excellence in and dedication to the "very valuable volunteer work that he does."

Kendall remarked: "Receiving this award is a great personal honor, but one that I share with the many colleagues, clients, family and friends who have supported me along the way and who have made our successes possible. It has allowed me to not just represent Germany to Maine and New Hampshire, but to also serve the citizens of those two great states. This award is a reflection of their contributions and dedication. I want to especially thank my family, which has always been a source of tremendous strength for me. I look forward to years of future service."

The Order of Merit of the Federal Republic of Germany was instituted in 1951 by Federal President Theodor Heuss. It is the only honor that may be awarded in all fields of endeavor and is the highest tribute the Federal Republic of Germany can pay to individuals for services to the nation. The Order of Merit may be awarded to Germans as well as foreigners for achievements in the political, economic, social or intellectual realm and for all kinds of outstanding services to the nation in the field of social, charitable or philanthropic work. No pecuniary reward is attached.

Recent Decisions From The Law Court

By: Matthew T. Mehalic, Esq.

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No Tolling Of Statute Of Limitations Where Defendant Amendable To Service

In *Christine S. Angell v. Renald C. Hallee*, 2014 ME 72 (May 29, 2014), the Law Court addressed whether the statute of limitations was tolled during the time the defendant resided in Massachusetts. The Court held that the limitations period was not tolled. Russell B. Pierce of Norman, Hanson & DeTroy successfully represented the defendant in the matter.

The case arose from alleged sexual assaults that took place in the 1970s by the defendant while he was a priest. The claims derived from intentional torts, and therefore, the applicable limitations period was two years. The plaintiff filed suit approximately thirty years after her eighteenth birthday. The limitations period was tolled until the plaintiff reached her eighteenth birthday. There is a current statute that now provides that there is no time limitation on actions based on sexual acts toward minors, but that statue did not take effect until 2000. Therefore, it was inapplicable to resolution of the issues in the matter.

The Court looked at whether the law authorized service on the defendant as an out-of-state defendant pursuant to 14 M.R.S.A. § 704-A (Maine's long-arm statute) and whether the plaintiff through reasonable effort was able to find and serve the defendant by any means other than publication. The Court answered both questions in the affirmative.

Section 704-A authorized service on the defendant while he lived in Massachusetts. The section permits service of process on an individual residing in another state if the complaint arose from the individual's commission of a tortious act in Maine.

In regards to the second question, the Court held that the plaintiff despite making no effort to find the defendant could have

obtained information about the defendant's whereabouts through reasonable effort. The defendant was living an open life in Massachusetts and there were sources available within the state of Maine that knew defendant's whereabouts in Massachusetts. The Court held that reasonable effort would have included filing suit against the Diocese and obtaining discovery in that lawsuit on the whereabouts of the defendant for purposes of service of process directly on the defendant.

The importance of this decision is that even if a claimant does not know the whereabouts of a defendant, reasonable effort must be made to locate and effectuate service of process on that individual. That reasonable effort may include filing suit against someone who ultimately may not be liable in order to obtain discoverable information on the whereabouts of the tortfeasor.

Redacted Letter Admissible In Medical Malpractice Jury Trial Despite Contentions of Author

In *Wendell Strout, Jr. v. Central Maine Medical Center*, 2014 ME 77 (June 10, 2014), CMMC appealed a judgment on a jury verdict in favor of Strout in a medical malpractice lawsuit. The issue on appeal was whether it was improper for the Superior Court to allow into evidence a redacted version of a letter from CMMC to Strout that read, in its entirety: "That being said, he realizes now that prior to sharing his clinical impressions with you, he needed to wait for the results of the biopsy to confirm what the cancer was." The portions of the letter that were redacted included statements of apology and "writing off" portions of Strout's medical bills.

CMMC argued (1) that the redacted letter should not have been admitted by the trial court under 24 M.R.S. § 2907(2), (2) that the statement was part of an offer to compromise, and (3) that the statement's probative value was substantially outweighed by the danger of unfair prejudice under M.R.Evid. 403. The Law Court affirmed the judgment, rejecting CMMC's contentions on appeal.

Title 24 M.R.S. § 2907(2) is referred to as the sympathy or apology statute. It prevents from admission at trial statements made by a healthcare provider expressing sympathy, apology or condolences to an alleged victim or a relative of an alleged victim. However, the statute distinguishes between statements of apology and statements admitting fault or liability. The latter are admissible at trial. The Law Court held that the redacted letter's admission was proper because although contained in a statement of apology, the statement was an admission of fault. The Court concluded that statements of fault are admissible, even when coupled with other statements that may be inadmissible.

M.R.Evid. 408(a) excludes from evidence offering to compromise a claim in order to prove liability. CMMC argued that because the letter included a statement offering to write-off some of the medical bills incurred by Strout that the entire letter should have been excluded from evidence. The Law Court rejected this argument holding, at the time the letter was sent to Strout by CMMC, no dispute or claim existed. Rather, Strout had complained to CMMC about his treatment. Strout did not file his notice of claim against CMMC until after the letter was received. Therefore, the Court concluded that the statements contained in the letter were not made as part of a settlement negotiation or mediation.

Finally, the Court rejected the argument that M.R.Evid. 403 should have prevented the admission of the redacted statement. CMMC argued that the statement in isolation was out of context and resulted in unfair prejudice and was misleading. However, because there was only a transcript of a pretrial conference in chambers and not the trial itself, the Court was unable to assess the extent to which the letter may have been used improperly to influence the jury, if at all. Therefore, the last contention by CMMC was also rejected.

Differing Opinions On Whether A Settlement Agreement Has Been Reached

In *Estate of Harold Forest Snow*, 2014 ME 105 (Aug. 14, 2014), the Law Court looked at whether a binding settlement agreement existed between parties, and if so, how to enforce the settlement agreement. The case arose from the death of an individual who left behind four daughters. During the decedent's lifetime he had transferred real property to one of his daughters. The real estate gifted during the decedent's lifetime was supposed to be counted

"THE IMPORTANCE OF THIS DECISION IS THAT EVEN IF A CLAIMANT DOES NOT KNOW THE WHEREABOUTS OF A DEFENDANT, REASONABLE EFFORT MUST BE MADE TO LOCATE AND EFFECTUATE SERVICE OF PROCESS ON THAT INDIVIDUAL."

as part of the one daughter's allocation of the estate assets. Another of the decedent's daughters was named personal representative of the estate. It was this daughter that filed suit seeking the return to the estate of the real property gifted.

Immediately prior to a deposition of the daughter who received the gifted real property, the attorneys reached a settlement agreement. The daughter was not deposed. Instead, the attorneys proceeded to put the terms of the settlement on the record. A professional court reporter transcribed the terms of the settlement. After several weeks of exchanging proposed settlement agreement language, a motion to enforce the settlement was filed. The Probate Court granted the motion to enforce finding that the record contained unequivocal stipulation by the parties' attorneys that the matter was settled and the material terms of the agreement were clearly defined in the transcript. The decision on the motion to enforce was appealed.

The Law Court affirmed the Probate Court's decision. It found that the record contained ample evidence that the parties intended to enter into an enforceable settlement agreement to be subsequently memorialized in writing, that the parties did in fact assent to the terms set forth on the record before the court reporter, and that the terms placed on the record reflected all of the material terms of the contract. The mere existence of some evidence that the parties' recitation of the terms of the settlement was merely an outline, and that certain details of the agreement remained to be negotiated did not render the Probate Court's decision clearly erroneous.

The appellant also sought reversal on the grounds that the Probate Court erred or abused its discretion in granting the motion to enforce the settlement agreement without holding a trial or an evidentiary hearing, or converting the motion to one for summary judgment. The Court rejected the appellant's contentions holding that it had previously endorsed filing motions to enforce without the need for a summary judgment record and that whether to have a hearing was discretionary, pursuant to M.R.Civ.P. 7(b) and M.R.Prob.P. 7(b). Because the record submitted to the Probate Court contained no ambiguity of the settlement language, no evidentiary hearing was required. Therefore, the Order enforcing the settlement was affirmed.

New Associate: Benjamin Donahue

BENJAMIN N. DONAHUE

We are pleased to announce that Benjamin Donahue joined the firm as an associate in September 2014. Ben is a native of Vermont and a graduate of the Stratton Mountain School. Beginning at a young age, he skied competitively and in high school he was honored twice as an All-American athlete. After high school, Ben followed his passion for skiing west to the University of Colorado, Boulder, where he studied economics.

Ben attended the University of Maine School of Law and graduated magna cum laude. During law school, he served as the executive editor of the Maine Law Review and worked as a judicial intern for Judge Kermit Lipez of the United States Court of Appeals for the First Circuit and Justice Andrew Horton of the Maine Business and Consumer Court. As a student attorney, he represented juvenile clients in criminal matters. And at graduation, Ben was recognized with the Edward T. Gignoux Appellate Advocacy Award for his success at one of the country's preeminent moot court competitions.

Depending on the season, Ben spends his free time either skiing or sailing. He lives in South Portland with his wife, Daphne.

NHD Attorneys Listed In "Best Lawyers"

Norman, Hanson & DeTroy is proud to announce that seventeen of its attorneys have been named to the 2015 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*.

Robert W. Bower, Jr.

Labor Law – Management

Workers' Compensation Law – Employers

Jonathan W. Brogan

Medical Malpractice Law – Defendants

Personal Injury Litigation – Defendants

Peter J. DeTroy

Arbitration

Bet-the-Company Litigation

Commercial Litigation

Criminal Defense: Non-White-Collar

Criminal Defense: White-Collar Mediation

Personal Injury Litigation – Defendants

Personal Injury Litigation – Plaintiffs

Paul F. Driscoll

Litigation Real Estate

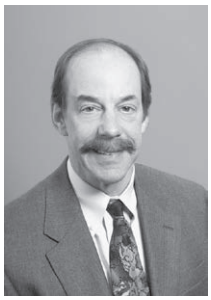
Real Estate Law

Mark E. Dunlap

Commercial Litigation

Insurance Law

Personal Injury Litigation - Defendants



John W. Geismar

Tax Law

Kevin M. Gillis

Workers' Compensation Law – Employers

David L. Herzer

Insurance Law

Personal Injury Litigation – Defendants

Professional Malpractice Law – Defendants

NHD Attorneys Listed In "Best Lawyers" *(continued)*

Stephen Hessert
Workers' Compensation Law – Employers

John H. King, Jr.
Workers' Compensation Law – Employers

Mark G. Lavoie
Medical Malpractice Law – Defendants
Personal Injury Litigation – Defendants

Thomas S. Marjerison
Personal Injury Litigation – Defendants

Stephen W. Moriarty
Workers' Compensation Law – Employers

Russell B. Pierce
Appellate Practice
Commercial Litigation
Ethics and Professional Responsibility Law
Product Liability Litigation – Defendants
Professional Malpractice Law – Defendants

James D. Poliquin
Appellate Practice
Bet-the-Company Litigation
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

Norman, Hanson & DeTroy Attorneys Contribute to an Essential Legal Resource

David L. Herzer, Jr., Jennifer A.W. Rush, Matthew T. Mehalic, and **Darya I. Haag** co-authored, together with other contributing writers, *A Practical Guide to Discovery and Depositions in Maine*, a comprehensive legal resource consisting of twenty-one chapters on the primary aspects of Maine discovery and depositions, including the pertinent court rules, case law, and statutory authority, published by MCLE|NewEngland®. Jennifer Rush and Darya Haag co-authored Chapter 6, "Protecting Confidential and Privileged Information Before and During Discovery." David Herzer authored Chapter 12, "Expert Depositions: Medical Care Providers, Accountants, and Economists." Matthew Mehalic authored Chapter 15, "Physical and Mental Examinations of Persons under Rule 35 of Maine Rules of Civil Procedure." Extensive judicial commentary by Justice Andrew M. Horton of the Maine Superior Court throughout the chapters, make this publication an invaluable practical resource for civil litigators.

Kudos

NORMAN, HANSON & DeTROY once again served as a sponsor of Maine's largest and most popular road race, the Beach to Beacon 10 kilometer race held in early August. Participants from the firm included **J. D. HADIARIS, STEVE MORIARTY** and **TED KIRCHNER.**

BOB BOWER was appointed by the Governor and confirmed by the Maine State Senate to become a member of the Maine Labor Relations Board. Bob already serves on the Maine Board of Civil Service Appeals and the Board of Arbitration and Conciliation.

At the annual Comp Summit seminar in August, **STEVE MORIARTY** was the primary speaker in the introductory session designed to assist "newcomer" employer and insurer representatives to become familiar with compensation practice and procedure. **BOB BOWER** presented a segment addressing the effective drafting of settlement documents. Finally, **KEVIN GILLIS** participated in the 2014 Comp Summit Think Tank, a panel presentation moderated by the Executive Director of the Board.

MATT MEHALIC was elected as Maine's Vice President of the Tri-State Defense Lawyers' Association (TDLA) at the annual meeting held in Portsmouth, New Hampshire in September. TDLA is an organization of employees from Maine, New Hampshire, and Vermont which focuses on the issues faced by defense attorneys, insurance industry representatives, and business risk managers in preventing, preparing for, and engaging in litigation.

Chris McCauley, Tammy Moody, and Tracey Gould of the Maine Municipal Association joined Steve Moriarty in the finish area of the Beach to Beacon.

RUSS PIERCE addressed the Maine Court Reporter's Association in September on a new state statute defining ethical standards for court reporters.

JON BROGAN spoke at a conference of the Litigation Counsel of America in Napa, California on the topic of "Advancing the Art of Trial Advocacy". The LCA is a peer-selected, invitation only attorney honor society consisting of fewer than one half of 1% of all attorneys.

STEVE MORIARTY has been appointed to the Legislative Policy Committee of the Maine Municipal Association, a position that he held several years ago.

DAVE HERZER, **JOHN VEILLEUX** and **EMILY BLOCH** have received the coveted AV rating from Martindale-Hubbell Peer Review Rating, the highest peer review distinction for attorneys. **DAVE, JOHN**, and **EMILY** join 15 other NH&D attorneys who have achieved this recognition.

ADRIAN KENDALL was the featured legal topic presenter at this year's **Maine Credit Union League 76th Annual Meeting & Convention**, held at the Holiday Inn by the Bay in Portland. His presentation, ***"Credit Union Promotions: Gaming Laws and Other Con-***

siderations," was designed to help Credit Union management teams design effective sweepstakes and other promotions to grow membership and product sales, while managing legal compliance, reputation risk and other concerns that arise in a highly regulated environment.

Norman, Hanson & DeTroy is proud to have supported Attorney **JENNIFER A.W. RUSH** in her first triathlon, Tri for a Cure, which she and a friend completed together in order to honor all of their loved ones and friends who have been affected by cancer. She supported dozens of individuals, many of whom are part of the NHD family, by writing their names on the front of her NHD athletic shirt she wore during the bike and run portions of the triathlon. **JEN** feels privileged to be a part of this emotional and inspiring event and to be able to participate with so many cancer survivors. NHD matched the funds that Jen raised and together, they made a significant contribution to the important work performed by the Maine Cancer Foundation. Below are two links if you are interested in learning more about Tri for a Cure and Maine Cancer foundation: http://triforacure.org/ and http://mainecancer.org/

ADRIAN KENDALL was quoted in the latest edition of Maine's premier business newspaper, Mainebiz. Identified as one of the few lawyers in Maine practicing in international transactional law, **ADRIAN** highlighted how easy it is for Maine's businesses to venture into overseas markets for their goods and services, especially using the data and marketplace available on the internet. As **ADRIAN** noted, "it's getting easier for Maine companies to identify companies and markets, to get market data and to coordinate with international partners.

"I feel privileged to be a part of this emotional and inspirational event and to be able to participate with so many cancer survivors."
- Jennifer A.W. Rush

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