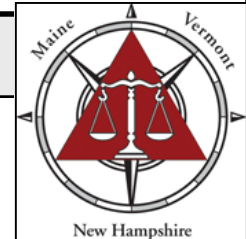


Tri-State Defense Lawyers Association

Vermont · New Hampshire · Maine



Blair Jones, ME President

Newsletter

Summer 2009

Pitching In or Holding Back

Sun has been spotted in the Northeast on several consecutive days in July, surely a sign that summer has arrived and a welcome relief from the long siege of unrelenting rain we have had. As I say to all my friends who live in other parts of the world, you just can't beat Maine summers; both weeks are really amazing! With the summer comes another excellent issue of TDLA's newsletter, thanks, once again, to the hard work and dedication of Beth Stouder, as well as the new editorial staff! Thanks to all of you for your excellent work and putting together this fine newsletter.

Looking ahead, we have planned an excellent annual meeting this year. We have some excellent and informative programs lined up for the meeting, and hope you will all be able to attend.

We are very excited about the new changes to the newsletter that will involve rotating the editorship through members of each state and involving assistant editors for each state. It has proven to be successful for this issue, and we hope it will continue to work for the future. We encourage you all to contribute to the newsletter. The success of the newsletter depends upon all of us. Remember, many hands make light work, so the more of us that can pitch in, the easier it will be. Please consider contributing an article and/or serving as an editor for the newsletter. If you would like to discuss this, please feel free to give me a call.

I look forward to seeing you all at the annual meeting in the fall! Have a great summer!

Blair A. Jones

Friedman, Gaythwaite, Wolf & Leavitt

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MAKE PLANS TO ATTEND

REGISTRATION FORMS HAVE BEEN MAILED

**Tri State Defense Lawyers Association
3rd Annual Meeting
Hilton Garden Inn
Portsmouth, NH**

September 11 & 12, 2009

Friday, September 11, 2009

6:00 p.m. Reception
7:00 p.m. Dinner
7:45 p.m. Welcome and Introductions
Christopher Poulin, TDLA Chairman
Getman, Stacey, Schulthess & Steere, P.A., Bedford N
8:30 p.m. TBA

Saturday, September 12, 2009

8:00 - 8:15 a.m. Opening Remarks
Christopher Poulin, TDLA Chairman
Getman, Stacey, Schulthess & Steere, P.A., Bedford NH
8:15 - 10:15a.m. CLE: Telling Stories: Making Your Client's Case from the Answer to Closing Argument
Thomas J. Hurney, Jr., *Jackson Kelly PLLC*, Charleston, WV
10:15 - 10:30 a.m. Break
10:30 - 11:45 a.m. CLE: Client Confidentiality, Candor to the Court and Related Risk Management
Peter G. Beeson, *Devine Millimet & Branch, P.A.*, Manchester, NH
Mitchell M. Simon, *Devine Millimet & Branch, P.A.*, Manchester, NH
11:50 - 12:05 p.m. Business Meeting

A block of rooms has been reserved at the Hilton Garden Inn under the name of TDLA at the rate of \$209+ taxes. Reservations can be made by calling the Hilton at 603-431-1499. Their website is:
<http://hiltongardeninn.com> • 603-431-1499

Member: \$165 Non-Member Attorney: \$230 Spouse/Guest: \$ 55

2008-2009 TDLA Officers

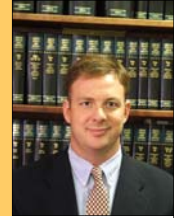
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Blair Jones, Maine President	
Patricia Orr, Vermont President	DRI Officers
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Matthew S. Borick , VT Young Lawyer Rep	Greg Weimer, DRI VT State Representative

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This newsletter is a publication produced by the TDLA for the use of attorneys in Maine, New Hampshire and Vermont. Articles should not be re-printed without the permission of the authors. The TDLA welcomes submissions, announcements and recommendations for its next Newsletter.

Tri State Defense Lawyers Association ■ 304-344-1611 ■ www.tristatedefenselawyers.org
Peggy L. Schultz, Executive Director



WRONGFUL DEATH A Comparison of the Statutes in Maine, New Hampshire and Vermont

By Elizabeth G. Stouder (ME), Christopher Poulin (NH)
and Richard Hennessey (VT)

The statutes in all three states provide for survival of a cause of action in the event of death. In Maine and Vermont, the action must be brought within two years. 12 V.S.A. §1492(a); 18-A M.R.S.A. §2-804(b) (except for medical malpractice actions). Under Vermont law, the two-year period runs from the date of death and not from the date an administrator is appointed. 12 V.S.A. §§464, 557; 14 V.S.A. §§1451-1453; *Mier v. Boyer*, 154 Vt. 12, 196 A.2d 501 (1963). In New Hampshire, if a right of action existed in favor of the decedent at the time of death, it may be brought by the administrator within one year after the original administration grant or before the expiration of the statute of limitations, whichever is later. RSA 556:7; *Atwood v. Bursch* 107 N.H. 189 (1966).

The Maine and Vermont statutes begin with almost identical language. Compare 18-A M.R.S.A. §2-804(a) & (b) with 14 V.S.A. §1491. The New Hampshire statute uses very different language. RSA 556:12. The Maine and New Hampshire statutes each list several elements of damages which are recoverable including pre-death damages or conscious pain and suffering, pecuniary losses, the reasonable value of medical, funeral and burial expenses and loss of comfort, society and companionship. By contrast, the Vermont statute mentions only pecuniary injuries, without enumerating any particular categories of damages. It is Vermont case authority which discusses specific types of damages.

Another difference between the statutes is the statutory limits on damages. Vermont does not cap any damages. The New Hampshire statute has two statutory caps. The Maine statute has caps on most of the damages listed. By way of contrast, the statutory cap for loss of comfort, society and companionship is \$150,000 in New Hampshire and \$400,000 in Maine.

In order to compare the statutes and highlight the differences of each state, we will analyze the damages recoverable under each statute, using the following fact pattern:

Hypothetical

Jake Goodfellow, age 50, was in a tragic accident. He and his wife Sophie were stopped in traffic as the wrecker ball of the Big Bad Crane Co. flew toward their car, causing them to gasp in anticipation of impending death. Jake did not die immediately but lay in a hospital for two months before he died, clearly experiencing conscious pain and suffering. When he died, Jake left the lovely Sophie, age 45, and their two minor children. Jake had been a hard worker with a steady job at which he earned \$60,000 a year.

MAINE WRONGFUL DEATH STATUTE 18-A M.R.S.A §2-804

Under 18-A M.R.S.A §2-804(b), the action against Big Bad Crane Company would be brought by the personal representative of the estate but the action would be for the benefit of the beneficiaries of the estate, Sophie and her two minor children. They would be entitled the following damages:

1) Pecuniary Losses: 18-A M.R.S.A. §2-804(b)
Sophie and the children would be entitled to recover an unlimited amount for any pecuniary losses that they could prove they suffered because of Jake's death. Under the statute, "the jury may give such damages as it determines a fair and just compensation with reference to the pecuniary injuries resulting from the death to the persons for whose benefit the action is brought." Significantly, the measure of damages is the loss to the beneficiaries, not the decedent. The damage recoverable is not simply the amount Jake would have earned over his lifetime. Jake's earnings would serve as the beginning of the calculation, but the fact finder would have to determine the amount of his earnings that would have gone to the benefit of Sophie and his children.

Thus, the jury would be given the present value of Jake's anticipated lifetime earnings (e.g., 15 years @ \$60,000). Plaintiff and Defendant could argue that Jake would have worked a longer or shorter period. Jake's own personal consumption would be deducted from that amount. The defendant could also argue that any other amounts which would not have been available to Sophie and the children should be deducted as well.

Under Maine's statute, like Vermont's and New Hampshire's, pecuniary losses are unlimited. The plaintiff must offer evidence that permits the factfinder to determine any pecuniary losses with reasonable certainty: they must not be based on speculation. See, e.g., *Carter v. Williams*, 792 A.2d 1093, 2002 ME 50.

Although not specifically mentioned in the statute, Sophie and Jake's children can also make a claim for the pecuniary loss of

Wrongful Death Column-contd.

Losses. *Feighery v. York Hospital*, 38 F.Supp 2d 142 (D. Me. 1999). In *Feighery* the Maine federal court held that “relational claims”, such as claims of loss of parental advice, counsel and guidance have been found by the courts to be pecuniary and not included in the loss of comfort, society and companionship. Under that decision, claims made by children for the death of a parent were considered pecuniary and were not subject to the cap for loss of comfort, society and companionship. The Maine Law Court has not indicated whether it will adopt the federal court’s conclusion.

2) Medical and Funeral Expenses: 18-A M.R.S.A. §2-804(b)

Jake’s estate would also be entitled to recover for the reasonable expenses of medical, surgical and hospital care and treatment, as well as for reasonable funeral expenses. There is no statutory cap on those expenses.

3) Loss of Comfort, Society and Companionship: 18-A M.R.S.A. §2-804(b)

Sophie and the children are also entitled to recover for the loss of Jake’s comfort, society and companionship. The amount they can recover under the statute is capped at \$400,000 (in effect since 1999). The statute specifically provides that included under this cap are any claims for emotional distress arising out of the same facts. Sophie and the children would not have a right to make any independent claims for emotional distress. *Carter, supra*, 792 A.2d at 1099. Non-beneficiaries, however, whose claims are not governed by the wrongful death statute, may have a right to make independent claims for emotional distress. In the *Carter* case, the decedent’s sister was held entitled to make a bystander claim for emotional distress because she was not a beneficiary under the death statute. *Id.*

4) Punitive Damages: 1 8-A M.R.S.A. §2-804(b)

The statute also provides for recovery of up to \$75,000 for punitive damages. Note that the Maine legislature has recently enacted an amendment that will increase the limit to \$250,000 effective September 2009.

The wrongful death statute does not contain its own definition of punitive damages. Under Maine law, Plaintiffs have a difficult burden to prove punitive damages. In order to recover any punitive damages, the Goodfellows would have to be able to show that Big Bad Crane Co. acted with malice, which is defined as either deliberate ill will toward Jake Goodfellow or conduct so outrageous that that such ill will could be implied. *Tuttle v. Raymond*, 494 A.2d 1353 (1985). Gross, wanton or reckless conduct is not sufficient to support a claim for punitive damages. In addition, the Goodfellows would have to prove malice by clear and convincing evidence, a higher standard than the normal preponderance of the evidence. *Id.*

5) Conscious Pain and Suffering: 18-A M.R.S.A. §2-804(c)

Jake’s family can make a claim for conscious pain & suffering under 18-A M.R.S.A. §2-804(c), by bringing a separate count in the same lawsuit. There is no statutory cap in this section, but it contains curious language stating that this is “subject to the same limitation as to the amount recoverable for such death and exclusively for the beneficiaries in the manner set forth in subsection (b), separately found, but in such cases there shall be only one recovery for the same injury.”

**VERMONT WRONGFUL DEATH STATUTES
14 V.S.A. §§1491-92, 1451-53**

Vermont courts have stated that recovery under Vermont’s wrongful death statutes is remedial in nature and must therefore be liberally construed. *Vaillencourt v. Medical Center Hospital of Vermont, Inc.*, 139 Vt. 138, 141, 425 A.2d 92, 94 (1980). Vermont’s wrongful death statute allows the court or jury to “give such damages as are just, with reference to the pecuniary injuries resulting from such death, the wife and next of kin or husband and next of kin, as the case may be.” *Dubaniewicz v. Houman*, 180 Vt. 367, 370, 910 A.2d 897, 899 (2006) (citing 14 V.S.A. §1492(b)). In addition, recovery may be had for the damages suffered by the decedent prior to death. 14 V.S.A. §§1451-1453. No common-law right of action for wrongful death exists in Vermont. See *Quesnel v. Town of Middlebury*, 167 Vt. 252, 256, 706 A.2d 436, 438 (1997).

Actions based on Vermont’s wrongful death statutes must be brought in the name of the personal representative of such deceased person. *Espinoza v. Eli Lilly & Co.*, 116 F.Supp.2d 546, 549 (D.Vt., 2000) (quoting 14 V.S.A. §1492(a)). A beneficiary of the estate does not have standing to bring suit under the statute. See *Leo v. Hillman*, 164 Vt. 94, 665 A.2d 572 (1996). Interestingly, but not surprisingly, the Vermont Supreme Court has recently declined to extend recovery under the Wrongful Death Act to include the loss of a pet as a statutory next of kin. See *Goodby v. Vetpharm, Inc.*, 2009 VT 52, 2009 WL 1262406 (2009).

Under our hypothetical, Sophie and her children would be entitled to the following damages under Vermont’s statutes:

1) Pre-Death Damages: 14 V.S.A. §§1451-1453

Under Vermont’s Survival statutes, Jake’s estate would be entitled to recover for his conscious pain and suffering prior to his death. *Whitchurch v. Perry*, 137 Vt. 464, 408 A.2d 627 (1979).

Wrongful Death Column-contd.

- 2) Pecuniary Damages: 14 V.S.A. §1492(b)
Jake's family would be entitled to recover for their pecuniary injuries resulting from his death. This would include Jake's \$60,000.00 salary at time of death and the projection of what he would have earned if he had lived. Age, opportunities for advancement and life expectancy can be considered in determining this loss. *Walker v. Firestone Tire & Rubber Co.*, 412 F.2d 60 (1969); *Woodcock's Adm'r v. Hallock*, 98 Vt. 284, 127 A. 380 (1925).
Similar to the Maine statute, the amount recovered would be for the benefit of Sophie and the children, as next of kin. Under Vermont's statute, next of kin must exist for there to be a recovery of pecuniary losses. The chain of distribution and heirs is discussed extensively in 14 V.S.A. §1492(c). If next of kin cannot be ascertained, computation of damages is impossible. The term "next of kin", in Vermont's wrongful death statute, properly denotes those persons most nearly related to the decedent by blood. *Whitchurch*, 137 Vt. at 472, 408 A.2d at 632. If Jake and Sophie's children were adopted, that might affect their ability to recover. The Court in *Whitchurch* held that equitable adoption would not confer next of kin status on adoptive parents prior to the time the adoption became final, so as to entitle them to maintain a claim for the child's wrongful death. *Id.*
Pecuniary damages also include the unique value of a decedent's life. The Court in *Woodcock's Adm'r v. Hallock*, 98 Vt. 284, 127 A. 380 (1925) noted "damages in these cases are peculiarly for the jury. In the very nature of things, they are much more a matter of judgment than computation. No two lives are of the same value to their families and kinsmen..." As such, juries should consider "[t]he age, health and habits of industry of the decedent; his skill, thrift, and capacity for business; his earnings, property, and probable duration of life; his habits, generosity, and disposition toward those for whose benefit suit is brought." *Id.*
- 3) Other pecuniary losses:
The term "pecuniary injuries" in the Vermont wrongful death statutes does not limit recovery to purely economic losses, nor is there a specific list of damages recoverable in wrongful death actions. Vermont courts have interpreted pecuniary damages to include compensation for lost intellectual, moral and physical training, or the loss of care, nurture and protection. *Mobbs*, 150 Vt. at 316, 553 A.2d at 1095-1096; *Lazelle v. Town of Newfane*, 70 Vt. 440, 445, 41 A. 511, 512 (1898). Obviously, such "damages, in their very nature, [are] not ... susceptible of exact computation." *Johnson v. Hoisington*, 134 Vt. 544, 547, 367 A.2d 680, 682 (1976). On the other hand, pecuniary damages cannot be presumed, and must be established by special proof. *Mobbs v. Central Vermont Ry.*, 150 Vt. 311, 316, 553 A.2d 1092, 1095-1096 (1988).
Other types of damages that are recoverable under Vermont's case law are:
- A) Funeral and Burial Expenses:
Sophie can recover funeral and burial expenses as pecuniary injuries since they are a direct result of the wrongful death, and, as a matter of justice, should be considered an item of damages suffered by the person liable to pay them. *Dubaniewicz*, 180 Vt. at 375, 910 A.2d at 903. However, Sophie would not be able to recover other out-of-pocket expenses, such as debts arising from settlement of the estate, such as payment of insurance and property taxes-lack a direct causal connection to the tort and thus are not compensable. Those losses are the direct result of the decedent's financial situation at the time of his death, and not of the tort. *Id.*; see also *Quesnel*, 167 Vt. at 256, 706 A.2d at 438 (under wrongful death statute, "damages are based on the loss suffered by the spouse and the next of kin").
- B) Loss of Familial Relations:
Value of loss of husband's care and protection, minor children's loss of father's intellectual and moral training, and destruction of parent-child relationship to include damages for grief, mental anguish and suffering are recoverable under Vermont law. *Dubaniewicz v. Houman*, 180 Vt. 367, 910 A.2d 897 (2006); *Clymer v. Webster*, 156 Vt. 614, 596 A.2d 905 (1991); *Hartnett v. Union Mut. Fire Ins. Co.*, 153 Vt. 152, 569 A.2d 486 (1989); *Mobbs v. Central Vermont Ry.*, 150 Vt. 311, 553 A.2d 1092 (1988); *Woodcock's Adm'r v. Hallock*, 98 Vt. 284, 127 A. 380 (1925).
The loss of the comfort and companionship of an adult child is a real, direct and personal loss that can be measured in pecunia terms. *Clymer*, 156 Vt. at 629, 596 A.2d at 914. In determining whether and what amount of damages are appropriate for loss-of-companionship, the court or jury should consider the physical, emotional, and psychological relationship between the parents and the child. Accordingly, the factfinder should examine the living arrangements of the parties, the harmony of family relations, and the commonality of interests and activities. *Id. at 630, 596 A.2d at 914.*
Wrongful death actions involving child victims also permit recovery for the "destruction of the parent-child relationship" which includes damages for grief, mental anguish, and suffering. *Hartnett*, 153 Vt. at 156, 569 A.2d at 488 (1989) (quoting 14 V.S.A. §1492(b)). Expert testimony is not required to establish parental grief and mental anguish. *Id.* Such damages are measured by what is fair and just based on the facts and circumstances of a particular case. *Id.*
- C) Loss of companionship damages may apply to adult relatives of decedent. *Clymer v. Webster*, 156 Vt. 614, 596 A.2d 905 (1991); *Mobbs v. Central Vermont Ry.*, 150 Vt. 311, 553 A.2d 1092 (1988).

Wrongful Death Column-contd.

D) Damages for emotional distress:

Damages for emotional distress may be recoverable in a wrongful death action. See *Thayer v. Hardt*, 155 Vt. 448, 586 A.2d 1122 (1990). In *Thayer*, plaintiff filed a wrongful death action which included a claim for intentional infliction of emotional distress. *Id.* Plaintiff's emotional distress claim was to recover for a tort committed directly against her, and was not precluded by the wrongful death statute. *Id.* at 456-457, 586 A.2d at 1127. There is no requirement of physical impact or that plaintiff be within a zone of danger from physical impact to bring a claim for intentional or reckless infliction of emotional distress. *Id.* at 455, 586 A.2d at 1126. By contrast, claims of the surviving plaintiffs for negligent infliction of emotional distress are available only if the plaintiffs were within the "zone of danger." *Leo v. Hillman*, 164 Vt. 94, 101, 665 A.2d 572, 577 (1996).

E) Punitive damages:

Punitive damages are recoverable under Vermont's wrongful death act. *Monahan v. GMAC Mortg. Corp.*, 179 Vt. 167, 893 A.2d 298 (2005); *Brueckner v. Norwich University*, 169 Vt. 118, 730 A.2d 1086 (1999); *Clymer v. Webster*, 156 Vt. 614, 596 A.2d 905 (1991). Sophie's burden in establishing them, however, would be significant. She would have to prove that Big Bad Crane's unlawful or wrongful acts evinced personal ill will or showed a reckless or wanton disregard of another's rights. *Clymer*, 156 Vt. at 631, 596 A.2d at 915.

**NEW HAMPSHIRE WRONGFUL DEATH STATUTES
RSA 556:12-13**

New Hampshire has never recognized a common law cause of action for wrongful death. *Wyatt v. Williams*, 43 NH 102, 103 (1861). The right to recover for wrongful death is a creature of statute and exists only to the extent and in the manner provided by the legislature." *Trovato v. Deveau*, 143 NH 523, 525 citing *Hebert v. Hebert*, 120 NH 369 (1980). Accordingly, any recovery is based on the statute.

The damages recoverable for wrongful death in New Hampshire are found in RSA 556:12, which sets forth several items which "may be considered as elements of damage". Only the loss of comfort, society and companionship has a statutory cap (\$150,000). New Hampshire has a second statute, however, that limits recovery to \$50,000 in any case in which the decedent has not left a widow, widower, child, father, mother or a dependent. See RSA 556:13.

Under the New Hampshire statutes, a jury would be entitled to consider the following elements of damages in their award to Sophie and her children:

1) Mental and physical pain:

RSA 556:12 (I)

Jake's estate would be entitled to recover for any mental and physical pain suffered by deceased in consequence of the injury as a "pre-death" measure of damage. See *Trovato v. Deveau*, 143 NH 523, 528 (1999) citing *Lozier v. Brown Company*, 121 NH 67, 69-70. See also *New Hampshire Civil Jury Instructions, Chapter 16.1 4D Issue 9 (2002)*. Jake's estate can also recover for his mental anguish in anticipation of his impending accident. *Thibeault v. Campbell*, 156 NH 698 (1993).

2) Reasonable expenses to the estate:

RSA 556:12(I)

Jake's medical and hospital expenses, funeral and burial expenses are recoverable. *New Hampshire Civil Jury Instructions Chapter 16.1 4D Issue 9 (2002)*.

3.) Probable duration of life:

RSA 556:12(I)

Sophie and the children are entitled to be compensated for the loss of Jake's life. This item of recovery allows a jury to consider an amount of money, based upon the evidence which recognizes the deceased's inability by virtue of his short life to carry on and enjoy life in a way that the decedent would have had if he had lived. *New Hampshire Civil Jury Instructions Chapter 16.6 4D Issue 9 (2002) citing Marcotte v. Timberlane/Hampstead School District*, 143 NH 331, 340 (1999).

4) Capacity to earn money:

RSA 556:12(I)

The factfinder can consider Jake's capacity to earn money during his probable working life and the loss to Sophie and his children caused by the loss of his earning power. A jury may consider (1) the amount that Jake was capable of earning for the balance of his probable working life (2) from that amount a jury would deduct Jake's necessary personal expenses, i.e., his own living expenses for balance of his lifetime. This figure should not include anything that Jake may have spent for his family, just for his own personal necessary living expenses.

When considering the decedent's capacity to earn money, a jury can consider (1) the decedent's probable working life expectancy but for the injury (2) the proper rate of interest by which the adjusted gross figure should be discounted (this may be offset by the amount of inflation over the period of decedent's expected lifetime). *New Hampshire Civil Jury Instructions Chapter 16.4 4D Issue 9 (2001)* and *Pitman v. Merriman*, 80 NH 295 (1922).

Since Jake was a high wage earner at \$60,000, this amount would be forecast into the future to cover his probable working life then discounted by the amount of inflation. Jake's own personal necessary living expenses (that he would have incurred during his probable working life) would also be discounted.

Wrongful Death Column-contd.

5. Other Elements Allowed by Law:

RSA 556:12(I)

The statute also provides for recovery of “other elements allowed by law in the same manner as if the deceased had survived”. This category of damage refers to elements that are recoverable in actions where death is not a factor. However, the New Hampshire Supreme Court has declined to determine the nature and scope of the hedonic element, if it exists, as encompassed by the phrase “other elements provided by law.” *Bennett v. Lembo*, 145 NH 276, 340 (2000) citing *Marcotte v. Timberlane/Hampstead School District*, 143 NH 331, 340 (1999). It is clear that the wrongful death statute specifically permits recovery for loss of life as a separate element of damage, as set forth above.

This element of damages, arguably, would include a negligence cause of action for negligent infliction of emotional distress. In order to recover damages for emotional distress pursuant to a negligence cause of action, the plaintiff must prove through expert testimony that physical injury or physical symptoms resulted from the defendant’s conduct. *Petition of Bayview Crematory*, 155 N.H. 781 (2007)(next of kin must show physical symptoms of emotional distress). *Thorpe v. State*, 133 N.H. 299(1990) (expert testimony is required to prove physical symptoms suffered from alleged negligent infliction of emotional distress). The resulting emotional harm “cannot be insignificant” *Corso v. Merrill* 119 N.H. 647, 642-53(1979). In addition, a claim for negligent infliction of emotional distress to bystanders must satisfy three prongs: (1) causal negligence of the defendant; (2) foreseeability; and (3) serious mental and emotional harm accompanied by objective physical symptoms. *Id.*

6. Loss of Comfort, Society and Companionship:

RSA 556:12(II)

As the surviving spouse, Sophie would be entitled to recover damages not to exceed \$150,000 for the loss of Jake’s comfort, society and companionship. The right to “society” includes love, companionship, comfort, affection, solace or moral support. *New Hampshire Civil Jury Instructions Chapter 9.10 4D, Issue 9 (2005)*.

Any damages recoverable under this section are subject to diminution for comparative fault as provided by RSA 507:7-d (New Hampshire’s Comparative Negligence Statute). Accordingly, in addition to the fault of the deceased, if the statutory beneficiary caused or contributed to cause the injury that beneficiary may not be able to recover. *New Hampshire Civil Jury Instructions Chapter 16.5 4D Issue 8 (2001)*. It seems unlikely that Jake is guilty of comparative fault in his accident with the Big Bad Crane wrecking ball.

7. Loss of Familial Relationship:

RSA 556:12 (III)

Jake’s children are entitled to receive damages for loss of familial relationship in an amount not to exceed \$50,000 per individual child. Note that the statute provides the same \$50,000 recovery for each parent in the event of the death of a minor child. The right of recovery under this section of the statute is also subjected to diminution under New Hampshire’s Comparative Negligence Statute, RSA 507:7-d.

8. Limitation of Recovery:

RSA 556:13

This statute would not apply to the Goodfellows, since Jake left both a widow and children. This statute provides that damages for wrongful death are capped at \$50,000 in any case in which the plaintiff’s decedent has not left either a widow, widower, child, father, mother, or any relative dependent on the decedent. In the trial of such an action the jury is not informed of the limitation imposed by this section and if the jury awards damages in excess of such limitation, the court shall reduce the amount of damages awarded to conform to such limitation.

RSA 556:13 specifies amounts recoverable by two classes of relatives (1) those specifically listed in the statute [widow, widower, child, father, mother or dependent relative] whose financial dependency does not have to be proven to recover in excess of \$50,000 and (2) those relatives not specifically listed whose financial dependency must be proven to recover in excess of \$50,000.

Vermont Wrongful Death Statutes

14 V.S.A. § 1491

When the death of a person is caused by the wrongful act, neglect or default of a person or corporation, and the act, neglect or default is such as would have entitled the party injured to maintain an action and recover damages in respect thereof, if death had not ensued, the person or corporation liable to such action shall be liable to an action for damages, notwithstanding the death of the person injured and although the death is caused under such circumstances as amount in law to a felony.

14 V.S.A. § 1492

Such action shall be brought in the name of the personal representative of such deceased person and commenced within two years from the discovery of the death of the person, but if the person against whom such action accrues is out of the state, the action may be commenced within two years after such person comes into the state.

(a) After such cause of action accrues and before such two years have run, if the person against whom it accrues is absent from and resides out of the state and has no known property within the state which can by common process of law be attached, the time of his or her absence shall not be taken as part of the time limited for the commencement of the action. If the death of the decedent occurred under circumstances such that probable cause is found to charge a person with homicide, the action shall be commenced within seven years after the discovery of the death of the decedent or not more than two years after the judgment in that criminal action has become final, whichever occurs later.

(b) The court or jury before whom the issue is tried may give such damages as are just, with reference to the pecuniary injuries resulting from such death, to the wife and next of kin or husband and next of kin, as the case may be. In the case where the decedent is a minor child, the term pecuniary injuries shall also include the loss of love and companionship of the child and for destruction of the parent-child relationship in such amount as under all the circumstances of the case, may be just.

(c) The amount recovered shall be for the benefit of such wife and next of kin or husband and next of kin, as the case may be and shall be distributed by such personal representative as hereinafter provided. Such distribution, whether of the proceeds of a settlement or of an action, shall be in proportion to the pecuniary injuries suffered, the proportions to be determined upon notice to all interested persons in such manner as the superior court, or in the event such court is not in session a superior judge, shall deem proper and after a hearing at such time as such court or judge may direct, upon application made by such personal representative or by the wife, husband or any next of kin. The distribution of the proceeds of a settlement or action shall be subject to the following provisions, viz:

(1) In case the decedent shall have left a spouse surviving, but no children, the damages recovered shall be for the sole benefit of such spouse;

(2) In case the decedent leaves neither spouse nor children, but leaves a mother and leaves a father who has abandoned the decedent or has left the maintenance and support of the decedent to the mother, the damages or recovery shall be for the sole benefit of such mother;

(3) In case the decedent leaves neither spouse nor children, but leaves a father and leaves a mother who has abandoned the decedent, the damages or recovery shall be for the sole benefit of such father;

(4) No share of such damages or recovery shall be allowed in the estate of a child to a parent who has neglected or refused to provide for such child during infancy or who has abandoned said child whether or not such child dies during infancy, unless the parental duties have been subsequently and continuously resumed until the death of the child;

(5) No share of such damages or recovery shall be allowed in the estate of a spouse to his or her surviving spouse who has abandoned the decedent or in the estate of a wife to a husband who has persistently neglected to support his wife prior to her death;

(6) The superior court or superior judge, as the case may be, shall have jurisdiction to determine the questions of abandonment and failure to support under subdivisions (2), (3), (4) and (5) of this section and the probate court having jurisdiction of the decedent's estate shall decree the net amount recovered pursuant to the final judgment order of the superior court or superior judge.

(d) A party may appeal from the findings and decision rendered pursuant to subsection (c) of this section as in causes tried by a court.

(e) Notwithstanding subsection (a) of this section, if the death of the decedent was caused by an intentional act constituting murder, the action may be commenced within seven years after the discovery of the death of the decedent.

New Hampshire Wrongful Death Statute

556:12 Damages for Wrongful Deaths, Elements.

I. If the administrator of the deceased party is plaintiff, and the death of such party was caused by the injury complained of in the action, the mental and physical pain suffered by the deceased in consequence of the injury, the reasonable expenses occasioned to the estate by the jury, the probable duration of life but for the injury, and the capacity to earn money during the deceased party's probable working life, may be considered as elements of damage in connection with other elements allowed by law, in the same manner as if the deceased had survived.

II. In addition, the trier of fact may award damages to a surviving spouse of the decedent for the loss of the comfort, society, and companionship of the deceased; however, where fault on the part of the decedent or the surviving spouse is found to have caused, in whole or in part, the loss complained of, damages recoverable shall be subject to diminution to the extent and in the manner provided for in RSA 507:7-d. In no event shall damages awarded under this paragraph exceed \$150,000.

III. In addition, where the decedent is a parent of a minor child or children, the trier of fact may award damages to such child or children for the loss of familial relationship, whether caused intentionally or by negligent interference; where the decedent is a minor child with a surviving parent or parents, the trier of fact may award damages to such parent or parents for the loss of familial relationship, whether caused intentionally or by negligent interference. However, where fault on the part of the decedent or the claimant is found to have caused, in whole or in part, the loss complained of, damages recoverable shall be subject to diminution to the extent and in the manner provided for in RSA 507:7-d. For purposes of this paragraph, loss of familial relationship shall include the loss of the comfort, society, affection, guidance, and companionship of the deceased. In no event shall damages awarded under this paragraph exceed \$50,000 per individual claimant.

RSA 556:13 "Limitation of Recovery" states:

The damages recoverable in such an action shall not exceed fifty thousand dollars (\$50,000) except in cases where the plaintiff's decedent has left either a widow, widower, child, father, mother, or any relative dependent on the plaintiff's decedent in which event there shall be no limitation. In the trial of such an action the jury shall not be informed of the limitation, if any, imposed by this section and if the jury awards damages in excess of such limitation, the court shall reduce the amount of damages awarded to conform to such limitation.

Maine Wrongful Death Statute

18-A M.R.S.A. §2-804

- (a) Whenever the death of a person shall be caused by a wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then the person or the corporation that would have been liable if death had not ensued shall be liable for damages as provided in this section, notwithstanding the death of the person injured and although the death shall have been caused under such circumstances as shall amount to a felony.
- (b) Every such action must be brought by and in the name of the personal representative of the deceased person, and the amount recovered in every such action, except as otherwise provided, is for the exclusive benefit of the surviving spouse if no minor children, and of the children if no surviving spouse, and one-half for the exclusive benefit of the surviving spouse and one-half for the exclusive benefit of the minor children to be divided equally among them if there are both surviving spouse and minor children, and to the deceased's heirs to be distributed as provided in section 2-106 if there is neither surviving spouse nor minor children. The jury may give such damages as it determines a fair and just compensation with reference to the pecuniary injuries resulting from the death to the persons for whose benefit the action is brought and in addition shall give such damages as will compensate the estate of the deceased person for reasonable expenses of medical, surgical and hospital care and treatment and for reasonable funeral expenses, and in addition may give damages not exceeding \$500,000 for the loss of comfort, society and companionship of the deceased, including any damages for emotional distress arising from the same facts as those constituting the underlying claim, to the persons for whose benefit the action is brought, and in addition may give punitive damages not exceeding \$75,000, provided that the action is commenced within 2 years after the decedent's death. If a claim under this section is settled without an action having been commenced, the amount paid in settlement must be distributed as provided in this subsection. No settlement on behalf of minor children is valid unless approved by the court, as provided in Title 14, section 1605.
- (c) Whenever death ensues following a period of conscious suffering, as a result of personal injuries due to the wrongful act, neglect or default of any person, the person who caused the personal injuries resulting in such conscious suffering and death shall, in addition to the action at common law and damages recoverable therein, be liable in damages in a separate count in the same action for such death, brought, commenced and determined and subject to the same limitation as to the amount recoverable for such death and exclusively for the beneficiaries in the manner set forth in subsection (b), separately found, but in such cases there shall be only one recovery for the same injury.
- (d) Any action under this section brought against a governmental entity under Title 14, sections 8101 to 8118, shall be limited as provided in those sections.



U.S. SUPREME COURT DECIDES TWO VERMONT CASES: Products Liability and Criminal Procedure

By Walter E. Judge, Jr.

The U.S. Supreme Court Decides That A Vermont Jury Verdict, Finding That A Drug's Warning Was Inadequate, Is Not Pre-Empted By The FDA's Prior Approval Of The Warning At Issue

Wyeth v. Levine, ___ U.S. ___, 173 L. Ed.2d 51 (2009) (March 4, 2009)

On March 4, 2009, the United States Supreme Court, affirming a decision of the Vermont Supreme Court, held that federal law does not pre-empt the plaintiff's claim that a drug's label did not adequately warn her medical care providers of the potential dangers of a particular method of administration of the drug, even though the label had been reviewed and approved by the federal Food and Drug Administration (FDA). As a result, a multi-million dollar verdict that was awarded to the plaintiff, which was affirmed by the Vermont Supreme Court, will stand. The case had been followed closely by the pharmaceutical industry, the plaintiffs' bar, and others.

Background:

Wyeth's anti-nausea drug Phenergan was injected inadvertently into an artery in Levine's arm using an "IV push" administration method. This injection severely damaged the artery, caused gangrene, and led to the amputation of Levine's hand and forearm. The drug's label, which had been approved by the FDA, warned of the dangers of inadvertent arterial administration. Levine asserted claims against the health center and the physician's assistant who had injected the drug into her artery, and, after settling those claims, sued Wyeth for negligence and failure-to-warn, asserting that Wyeth's warning of the known dangers of injecting Phenergan intravenously was inadequate. Wyeth argued that its warning label was approved by the FDA and that federal law preempted Levine's claim, contending that "any state common law duty to provide a stronger warning about the dangers of administering Phenergan by IV push conflicts with the FDA's approval of the drug's label." At issue was whether Wyeth had the right, and the duty, to independently strengthen the warning on the label, without waiting for FDA approval of a new label, under a provision of the FDA regulations (the "CBE" regulation), based on its knowledge that this type of injury had occurred to other people before Levine. The jury found for Levine and awarded approximately \$7 million. The trial court denied Wyeth's post-trial motion. Wyeth appealed. The Vermont Supreme Court affirmed in an opinion holding that FDA approval of a drug's label does not preempt state failure-to-warn claims. The Court joined several other courts in so holding. The Court found that federal labeling requirements are a "floor," not a "ceiling," for regulation. Wyeth appealed to the United States Supreme Court.

Product Liability and Criminal Procedure Column-Contd.

The Supreme Court Decision

A 5-4 majority of the U.S. Supreme Court affirmed the Vermont Supreme Court decision, holding that FDA drug labeling regulations – and specifically, the approval and mandating of the particular label at issue for Phenergan – did not pre-empt state common-law negligence suits for inadequate warnings.

Wyeth argued legal “impossibility” – that it could not have changed the label on Phenergan without violating federal law that mandated use of the FDA-approved label. It also argued that Levine’s state tort action presented an obstacle to accomplishment of Congressional purposes under the FDA (i.e., implied pre-emption). Wyeth also pointed out that the physician assistant’s act of injecting the drug into Levine’s artery despite the label’s warning against such administration was an intervening efficient cause. But the majority, led by Justice Stevens, decided the case not on causation, but only on the narrow issue of whether federal law pre-empted the state law action, and held that it did not.

First, the Court found that it would not have been impossible for Wyeth to strengthen the warning on its label because of the FDA’s “changes being effected” (CBE) regulation. According to the Court, the CBE regulation would have allowed Wyeth to unilaterally strengthen its warning at the same time it applied to the FDA for approval of the revised label. The Court was not persuaded by Wyeth’s point that the FDA was well aware of the prior incidents of injuries to patients caused by arterial injection when it mandated the use of the label in question.

Second, the Court rejected Wyeth’s implied pre-emption argument. Unfortunately for Wyeth, the federal Food, Drug, and Cosmetic Act, which has been amended from time to time, contains no explicit statement of federal pre-emption for labeling. The Supreme Court therefore resorted to an examination of its past precedents on *implied* pre-emption, and found that implied pre-emption did not apply to drug labeling. The Court found that Congress and the FDA had long been aware that state tort suits had historically been brought against prescription drug manufacturers, and had not acted to put a stop to this. The Court further found that allowing state tort suits based on inadequate warnings to proceed would not frustrate the federal purpose of having an expert agency (the FDA) consider and approve drug labels that strike a balance between competing objectives (making a helpful drug available for use with appropriate warnings vs. keeping it off the market because of some dangers). The Court acknowledged that there are some cases where implied pre-emption is appropriate (such as Geier v. American Honda Motor Co., 529 U.S. 861 (2000)) based on the particular federal regulation at issue, but determined that this is not such a case, based on the legislative and regulatory history of the FDA.

Justices Breyer and Thomas concurred, but for completely opposite reasons. Justice Alito dissented, joined by Chief Justice Roberts and Justice Scalia.

Breyer’s very brief concurrence was to emphasize his agreement with the majority that sometimes a federal regulation can have pre-emptive effect against state tort actions, but that this was not such a case.

Thomas’ concurrence and Alito’s dissent, each of which is as long as the majority opinion, make for very interesting reading and raise the question of who is the real conservative?

Thomas concurred in the judgment but sharply rebuked the majority in a lengthy opinion that examined the history of the Court’s implied pre-emption jurisprudence and criticized the Court for continuing to adhere to that doctrine as untenable. Thomas would find no federal pre-emption unless Congress included an explicit statement of pre-emption in the law in question. Thus, Thomas would affirm Levine’s state tort judgment as a matter of strict federalism.

Alito, on the other hand, would have reversed the state tort judgment as an impermissible encroachment into an area regulated by federal law. He argued that the FDA – not a Vermont jury – has the legal responsibility for determining the adequacy of a drug warning. He also pointed out what he believed is the obvious truth that a “stronger” warning on Phenergan’s label about the dangers of arterial administration would not have helped Levine, as this is not a drug that is self-administered by the patient but is administered by a doctor or a clinician – and the physician’s assistant who injected the drug into Levine’s arm disregarded at least six separate warnings on the label. He faulted the majority for departing from its long line of federal pre-emption cases in this particular case. He argued that the states cannot compel a drug manufacturer to adopt a warning that a federal agency does not require, and pointed out that the FDA was well aware of the risks of inadvertent arterial administration of Phenergan but nevertheless determined that the benefits of intravenous administration outweighed the potential but rare dangers of accidental injection into an artery. He noted that Levine herself had benefitted from the “IV-push” method of administration in the past, and that her doctors, who testified at trial, admitted that the IV-push method was an effective way of relieving Levine’s migraine symptoms. Finally, he pointed out that juries, deciding a case affecting only a single individual, are ill-equipped to make the kind of long-term judgments the FDA makes about a drug’s labeling.

So who’s the conservative – the justice who would have let the plaintiff’s verdict stand because he adheres to a strict state’s rights ideology and doesn’t believe in any implied pre-emption, or the justice who would have vacated the jury award as not supported by a true causation analysis and as an impermissible encroachment on federal authority?

Product Liability and Criminal Procedure Column-Contd.

It seems very likely that this decision will spur calls for legislative action to adopt an explicit pre-emption provision for FDA drug labeling approvals. However, how such a proposal would fare under the current presidential administration and Congressional makeup is entirely unclear.

The U.S. Supreme Court, Reversing The Vermont Supreme Court, Decides That A Criminal Defendant Whose Trial Was Not Reached For Three Years Was Not Denied His Constitutional Right To A Speedy Trial; The Court Held That The Delay, Which Was Caused In Part By The Succession of Six (6) Public Defenders As Appointed Counsel For The Defendant), Was Attributable To The Defendant And Not To The State Of Vermont, As The Vermont v. Brillon, ___ U.S. ___, 2009 U.S. LEXIS 1780 (March 9, 2009)

Michael Brillon was charged with domestic assault in July, 2001. He was prosecuted as an habitual offender and was jailed for nearly three (3) years before his case went to trial. While he awaited trial, he went through six (6) public defenders. After some initial delays relating to the timing of his bail hearing and defense counsel's readiness to try the case, the defendant "fired" his first public defender and the trial court then granted that attorney's motion to withdraw. The court appointed a second public defender but a few days later that attorney reported a conflict of interest and the court appointed a new (third) public defender. Three months later, the defendant filed a pro se motion seeking a new attorney because of his current (third) attorney's alleged failure to communicate. During a hearing on this motion, the attorney moved to withdraw because, during a break in the hearing, the defendant threatened counsel's life. That day the court appointed yet another (fourth) attorney to represent defendant. That attorney requested a continuance to do discovery and prepare for trial. Later, the defendant filed a motion to dismiss this attorney, claiming that the attorney had not responded to numerous attempts to contact him and had not prepared for trial.

The attorney then moved to withdraw and the court granted the motion. After some further delay, a new attorney (fifth) was assigned to represent the defendant. A few months later, the attorney filed a motion to withdraw. After some further delay, the Defender General's office assigned a sixth attorney to represent the defendant.

The sixth attorney asked for continuances of the trial date to familiarize herself with the file. She ultimately filed a motion for dismissal based on the delay, but the trial court denied the motion.

The case finally went to trial in June 2004. The defendant was convicted by the jury and sentenced to twelve to twenty years in prison. After his conviction, he appealed to the Vermont Supreme Court, claiming that the three-year delay in his case reaching trial deprived him of his constitutional right to a speedy trial.

The Vermont Supreme Court vacated the conviction, holding that the delay violated the defendant's constitutional rights. The Court found that the length of the delay was significant – significant enough to trigger review of the other constitutional "speedy trial" factors under U.S. Supreme Court precedent: 1) the reason for the delay, 2) the defendant's apparent eagerness to have his day in court during the period of the delay, and 3) prejudice to the defendant. On the "reason for the delay" factor the Vermont Supreme Court found that at least two years of the three-year delay were the State's fault, despite the prosecution's contention that most of the delay was caused by the defendant's practice of finding fault with, and then dismissing, his attorneys. The Court determined that public defenders are part of the State, and that the delay was caused by the assigned counsels' inability or unwillingness to move the case forward. Therefore, the State, not the defendant, was responsible for the delay. On the "eagerness" factor, the Court found that throughout the period of delay, the defendant had expressed his readiness and eagerness to have a trial, but was hampered by assigned counsel who apparently were not ready to try the case quickly. Finally, on the "prejudice" factor, the Court found that the extreme delay between arrest and trial caused prejudice because there was some evidence that the memory of potential defense witnesses had faded.

The dissent argued that the record showed that the defendant himself, while pretending to want a trial, contrived to delay his case from going to trial by coming up with excuses to repeatedly seek new counsel.

The state's attorney appealed the Vermont Supreme Court's decision to the U.S. Supreme Court, which reversed. By and large, the U.S. Supreme Court (USSC) did not find fault with the Vermont Supreme Court's (VSC) reasoning in analyzing the lengthy delay. However, the VSC's opinion was based largely on USSC precedent, and the USSC held that the VSC had misconstrued that precedent. The USSC held that its cases hold that the attorney is the defendant's agent, and therefore any delay caused by defense counsel is charged against the defendant. This is true regardless of whether counsel is privately retained by the defendant or publicly assigned. A public defender, according to the USSC, is not a state actor. Therefore, his or her actions cannot be charged against the state.

Accordingly, the VSC's vacatur of the conviction was reversed. The USSC's rebuke of the VSC is considered significant because the USSC decision was authored by Justice Ginsburg, generally considered a liberal.



Message From the Regional DRI Director.... Brooks Magratten, *Pierce Atwood, LLP*, Providence, RI

Please mark your calendars for two important events on the horizon. The first is the TDLA Annual Meeting, September 11 & 12, 2009 in Portsmouth, New Hampshire. The TDLA is still in a formative stage and will rise or fall depending on the participation of a wide base of committed members. Yes, we are in a recession, and funds may be scarce for discretionary spending. But the recession has also opened up new marketing opportunities to those firms who invest in bar organizations such as the TDLA and DRI. The TDLA Annual Meeting is an excellent CLE and networking opportunity and well worth your time and travel.

The same should be said of the DRI annual meeting, this year in Chicago, October 7-11, 2009. If you have been to a DRI annual meeting, then you know what an incredible experience it is in terms of education, professional development and just plain fun. If you have not attended the Annual Meeting before, it too is well worth your time and travel. There simply is no way to deepen your involvement in the DRI organization without attending its Annual Meeting.



Developments in Legal Malpractice Law By Brian McDonough

MAINE SUPREME COURT

Lambert v. Hunt, 2008 Me. Unpub. LEXIS 166 (9/30/08)

In a two paragraph ruling, the Maine Supreme Court upheld the granting of summary judgment in plaintiff's legal malpractice action against defendant, holding that 1) plaintiff's fraudulent concealment claim did not toll the statute of limitations because plaintiff stipulated that defendant had not withheld any material facts from him; and 2) Maine's discovery rule regarding attorneys, 14 M.R.S. § 753-B(1), did not apply.

NEW HAMPSHIRE SUPREME COURT

Sicotte v. Lubin & Meyer P.C., 157 N.H. 670, 959 A.2d 236 (9/1/08)

Parents of a brain-injured child engaged defendant to bring a medical malpractice action. The signed fee agreement stated that defendant would be paid a 40 % contingency fee. Appearing next to the figure was the handwritten notation "in any event subject to court approval if necessary." The action settled for \$2,250,000. At a hearing on a petition to approve the settlement, defendant sought a 1/3 contingency fee which was approved by the court. Two years later, the guardian of the child's estate moved, in the malpractice action, for the return of attorney fees, alleging that defendant failed to inform the parents that the court ordinarily would not allow attorney fees in excess of 25 % of a minor settlement except upon good cause shown [N.H. Super. Ct. R. 111(E)(2)]; and failed to give the parents the option of paying an hourly rate for defendant's services (RSA 508:4-e, I). The trial court denied the motion as the estate did not move to reconsider the prior court approval when it was issued. The estate brought a legal malpractice action against defendant, which moved to dismiss because plaintiff's expert disclosure was inadequate to prove causation. The court granted the motion, and plaintiff appealed, arguing that causation was obvious and implied because defendant violated the rule. While the expert's report mentioned a lost opportunity to hire other counsel, it said nothing of the probability that other counsel would have obtained similarly favorable results at a lower cost. The N.H. Supreme Court affirmed, ruling that determination of (1) what fee the trial court would likely have awarded in the face of opposition by the parents; and (2) what results another attorney would likely have obtained and how much it would likely have cost on an hourly basis, are so distinctly related to the legal profession as to be beyond the ken of the average layperson, and expert testimony was required.

NEW HAMPSHIRE SUPREME COURT

Hilaro v. Reardon, 158 N.H. 56, 960 A.2d 337 (11/7/08)

Plaintiff was indicted on criminal charges and entered into a plea agreement which provided that if he met certain conditions, the State would petition for suspension of a portion of his sentence. Unknown to him and without authority, his attorney filed a motion to withdraw the plea, stating he was innocent of the charges and requested a new trial. The court denied the motion. Plaintiff then filed a motion to suspend a portion of his sentence, pursuant to the plea agreement. The State objected and the court agreed, holding that by attempting to withdraw his plea, plaintiff breached the terms of the agreement. He sued his attorney for filing the motion to withdraw, and defendant moved to dismiss because, *inter alia*, plaintiff had not proven his "actual innocence." Plaintiff did not object to the motion, the court dismissed his action for this reason, and plaintiff appealed. The Supreme Court applied the plain error rule, holding, *inter alia*, that the trial court dismissed the action with no regard for the merits of the claims, this affected the outcome of the proceedings, and there was reversible error. Plaintiff also argued that the "actual innocence"

Developments in Legal Malpractice Law-Contd.

rule should be overturned or limited to cases where the claimant is alleging malpractice leading to a wrongful conviction. The court refused to overturn the rule, but held that it did not apply, because, *inter alia*, plaintiff does not challenge his conviction or claim that, but for his attorney's negligence, he would have obtained a different result. He simply argued that once he agreed to a sentence and entered into an agreement for the attachment of certain conditions that would permit him to petition for suspension of part of that sentence, it was the negligence of his attorney that upset the agreement.

NEW HAMPSHIRE SUPREME COURT
Pike v. Mullikin, 158 N.H. 267, 965 A.2d 987 (1/14/09)

Prior to their wedding, plaintiff and his wife executed an antenuptial agreement prepared by defendants, plaintiff's attorneys. The wife filed for divorce and contested the agreement. Plaintiff's divorce attorney raised concerns about the agreement's enforceability. Plaintiff and his wife, without divorce counsel, negotiated a permanent stipulation regarding the agreement which stated that they certified they were satisfied that it was a fair and equitable resolution of the divorce. The stipulation was incorporated into the divorce decree. Plaintiff brought a malpractice action against defendants, alleging they were negligent in drafting, preparing and executing the antenuptial agreement. Defendants moved for summary judgment, claiming, *inter alia*, that (1) judicial estoppel barred plaintiff from bringing his action because it was based upon a claim that the antenuptial agreement was legally flawed, a position inconsistent with the stipulation he agreed to in his divorce; (2) fairness and public policy favoring divorce settlements precluded plaintiff from bringing an action; and (3) since plaintiff failed to litigate the validity of the antenuptial agreement in the divorce action, he cannot prove causation. The trial court granted defendants' motion, and plaintiff appealed. Plaintiff argued that because he had concerns over the validity of the antenuptial agreement, he settled with his wife to mitigate potential losses that would likely have occurred if the antenuptial agreement were struck down. The court concluded that, under these circumstances, it was not unreasonable for plaintiff to agree that the stipulation was fair and equitable; and that this position was not clearly inconsistent with his malpractice position that defendants breached a duty in drafting and executing the agreement. Therefore, collateral estoppel did not apply. The court also rejected the argument that public policy favored settlements, ruling that plaintiff did not seek to undermine final resolution of his divorce, but only to put himself in the place in which he expected he would be if the terms of the antenuptial agreement had been enforced by the court. Finally, the court held that plaintiff's decision to settle with his wife rather than litigate the validity of the agreement should not, by itself, bar plaintiff from the opportunity to do so.

U.S. DISTRICT COURT (NEW HAMPSHIRE)
White v. Sisti, 2009 U.S. Dist. LEXIS 58078 (6/23/09)

Plaintiff brought a malpractice action against her criminal defense attorney for ineffective assistance of counsel. Defendant moved for judgment on the pleadings, which the court granted because plaintiff could not maintain her action against defendant as she has failed to obtain post-conviction relief. As long as a valid criminal conviction is in place, a legal malpractice cause of action based on a defense counsel's ineffective assistance resulting in that conviction cannot be brought.

U.S. DISTRICT COURT (NEW HAMPSHIRE)
Adam v. Hensley, 2008 DNH 104 (5/16/08)

A New Hampshire plaintiff sued his Massachusetts attorney regarding his legal representation of plaintiff in Hawaii litigation. The defendant moved to dismiss, claiming lack of federal court jurisdiction and venue. Whenever plaintiff met with defendant away from Hawaii, it always occurred in Massachusetts and not in New Hampshire. Plaintiff cited two letters from defendant to plaintiff as specific instances of contact between defendant and New Hampshire; and that defendant had been admitted to the New Hampshire bar *pro hac vice* in one unrelated matter in 1995. None of these contacts related to plaintiff's claim that defendant committed malpractice. The malpractice, if any, occurred in Hawaii, and possibly Massachusetts. Defendant's conduct in New Hampshire did not reflect a voluntary decision to do business in the state, but simply that defendant had to communicate with a client who lived in New Hampshire. The Court did not exercise jurisdiction in the case. Regarding venue, the underlying action was litigated in Hawaii, during which the alleged legal malpractice occurred. Thus, venue in New Hampshire was not properly grounded on 28 U.S.C. § 1391(a)(1-3), which would call for venue in the District of Hawaii or the District of Massachusetts.

VERMONT SUPREME COURT
Deptula v. Kane, 964 A.2d 1184, 2008 Vt. Unpub. LEXIS 268 (11/1/08)

A homeowners' association brought an action against plaintiff and other property owners to collect unpaid assessments. The owners retained defendant to represent them. There was a verdict for the association, and plaintiff filed a malpractice action against defendant. Defendant moved for summary judgment, which was granted by the trial court because plaintiff failed to provide expert evidence, which was required to establish plaintiff's claims. Plaintiff appealed, and the Vermont Supreme Court affirmed, denying plaintiff's breach of contract claim because it was a restatement of his negligence claim; and that expert evidence was necessary because no lay person could evaluate the legal merits of plaintiff's claims or determine whether defendant violated objective standards of professional competence.



Recent Developments In Maine Tort And Insurance Law

By Alicia F. Curtis, *Lambert Coffin Haenn*

NOTICE BY PUBLICATION

The Maine Supreme Judicial Court holds that service by publication, although compliant with the Maine Rules of Civil Procedure, did not afford a defendant due process of law.

Gaeth v. Deacon, 2009 ME 9; 964 A.2d 621. The plaintiff Gaeth and defendant Deacon were both students at Colby College when Deacon allegedly hit Gaeth in the face with his fist while intoxicated. Approximately a year and half later, Gaeth's attorney sent Deacon a letter addressed to him in Cambridge, Massachusetts, to which Deacon responded. Gaeth then filed a complaint in Lincoln County, Maine, his county of residence, as provided for in 14 MRSA § 501. Gaeth was unsuccessful in serving process on Deacon, however, because the main door to Deacon's putative apartment building in Cambridge was always locked, and internet searches on a public records database and a telephone number database turned up no information. Maine Superior Court, Lincoln County, granted a motion for service by publication for three successive weeks in the Lincoln County News, which complied with M.R.Civ.P. 4(g)'s requirement of publication in the county where the action is pending.

In vacating a default judgment against Deacon, the Law Court held that although both the venue and the service by publication were technically correct under 14 MRSA § 501 and M.R.Civ.P. 4(g), the service failed to provide Deacon the due process required by the United States and Maine Constitution, because it was not reasonably calculated to give actual notice. The Court noted that service by publication must be a last resort, because it is less likely to meet the requirements of due process in today's society than at the time the practice first developed, when newspapers were the only means of printed mass communication. The Court found Gaeth's efforts to locate Deacon inadequate, noting there was no showing that Gaeth used information available to Colby College to attempt to locate Deacon's relatives. It noted that in other jurisdictions, service by publication was inadequate when the plaintiff failed to search publicly available databases, tax records, voting rolls, criminal history records, credit records, telephone directories, or divorce or death records.

Furthermore, even if service by publication were warranted, publication in the Lincoln County News was constitutionally inadequate when Deacon's only known connection to Maine was Colby College in Kennebec County, and Gaeth knew that Deacon most probably lived in another state. In *dicta*, the Court indicated that if the action had been brought in Kennebec County with publication in a Kennebec County newspaper, service by publication might have been adequate.

ENFORCEABILITY OF A SETTLEMENT AGREEMENT

The Maine Supreme Judicial Court upheld summary judgment enforcing a settlement agreement when the detailed terms of the agreement had been read into the record by counsel after a judicial settlement conference, and each party had affirmed the agreement on the record.

Muther v. Broad Cove Shore Association, 2009 ME 37, 2009 Me. LEXIS 36. After a judicial settlement conference in a case regarding the scope of an easement, counsel notified the court they had reached a settlement agreement. Counsel for plaintiffs then read the detailed terms of the agreement into the record, with opposing counsel making corrections, clarifications, and additions as necessary. Each party then affirmed on the record that the recital was a fair and accurate representation of that agreement. Defendants subsequently refused to sign a draft of the stipulated judgment based on the agreement. Plaintiffs then filed a motion for summary judgment for breach of the settlement agreement. Justice Crowley of the Maine Superior Court entered judgment enforcing the agreement, despite the defendants' argument that it was only an "agreement to agree."

In upholding the Superior Court's decision, the Law Court held the transcript of the settlement agreement established the existence of an enforceable agreement as a matter of law. Because the complete agreement was reflected in the lower court's record, there were no issues of material fact regarding the existence of a binding agreement.

At the Maine State Bar Association's Bench Bar Conference in Augusta, Maine on April 23, 2009, Justice Crowley recommended not only reading the terms of a settlement agreement into the record after a judicial settlement conference, but also including a merger and integration clause as a term of that agreement in order to make it enforceable at a motion for summary judgment stage.

SUBJECT MATTER JURISDICTION

The Maine Supreme Judicial Court held that a plaintiff who had not yet participated in a mandatory medical malpractice screening panel prior to filing a complaint in Superior Court could cure the resulting lack of subject matter jurisdiction by filing a supplemental pleading stating the panel had been held after the initial complaint was filed.

Hill v. Kwan, 2009 ME 4, 962 A.2d 963. Plaintiff filed a notice of claim under the Maine Health Security Act alleging defendant Dr. Kwan was negligent in performing an interventional neuroradiology procedure. After two years of discovery and a delay in the panel hearing due to difficulty finding a radiologist and attorney to serve on the panel, the plaintiff filed a complaint in Superior Court. The complaint was in violation of the Maine Health Security Act, because she had not yet participated in a screening panel hearing nor had the parties waived panel hearing. Before a Superior Court hearing on the defendants' motion to dismiss for lack of subject matter jurisdiction, a screening panel was convened and made findings. The plaintiff then filed an amended complaint reflecting that a screening panel hearing had been held.

The Law Court overturned the Superior Court's dismissal for lack of subject matter jurisdiction, holding that the plaintiff's amended complaint was actually a supplemental pleading under M.R.Civ.P. 15(d), and could be used to cure the defect in subject matter jurisdiction. The Law Court clarified that the rule in federal jurisprudence, fixing determination of subject matter jurisdiction at the time the complaint is filed, does not apply in this setting. The federal courts apply that rule to curtail forum shopping and other strategic behavior in cases of diversity jurisdiction. Here, rather than choosing between two different fora the plaintiff in a medical malpractice suit is constrained by statute to submit first to an agency of the court without independent judicial authority, and then to the court. Because there is little risk of strategic behavior or manipulation by a plaintiff in this situation, the plaintiff could cure her jurisdictional defect with a supplemental pleading alleging a fact that occurred after the initial complaint.

UNDERINSURED MOTOR VEHICLE COVERAGE

The Maine Superior Court held an underinsured motorist coverage clause requiring exhaustion of the underinsured motorist's policy limits was unenforceable as against public policy to deny coverage to a policy holder who had settled for less than the underinsured motorist's policy limit but had offered her insurer credit for the full policy limit as an offset to her claim.

Hammond v. Vermont Mutual Insurance Co., CV-07-408 (Me. Super. Ct. Yor. Cty., Feb. 9, 2009)(Brennan, J.). The policy holder was rear ended by a vehicle driven by a motorist with a \$50,000 policy limit, and she allegedly suffered more than \$50,000 in damages. Her underinsured motorist policy contained a clause requiring that she exhaust the motorist's policy limits through judgment or settlement before filing a claim for underinsured motorist coverage (the exhaustion clause). She settled with the motorist for \$45,000. Her insurer had advised her she must settle for the full policy limit of \$50,000, although she had offered to give the insurer credit for the full policy limit as an offset against her claim. The policy holder then filed a motion for summary judgment on the issue of whether the insurer could rely on the exhaustion clause to bar her claim for underinsured motorist coverage.

The Maine Law Court has yet to decide this issue, and courts in other jurisdictions are split on the issue. The Superior Court found the clause unenforceable to bar the policy holder's claim for coverage, because 24-A MRSA § 2902(1) provides that underinsured motorist coverage allows an injured party the same recovery she would have received had the underinsured motorist been insured to the same extent as the injured party. Although insurers do have a substantial and legitimate interest that the policy holder settle with the underinsured motorist for the maximum possible amount before looking to her own underinsured coverage, this concern was obviated by the policy holder's offer to give the insurer credit for the full amount of the underinsured motorist's policy limit as an offset to her claim. Justice Brennan's holding that the exhaustion clause is unenforceable as against public policy to bar the policy holder's claim in this case is in accord with a decision by Justice Delahanty of the Maine Superior Court against Vermont Mutual on the same issue. *Richter v. Vermont Mutual Ins. Co.*, CUMSC-CV-07-181 (Me. Super. Ct., Cum. Cty., Feb. 6, 2008).

SUMMARY JUDGMENT PRACTICE

In two unpublished decisions the Maine Superior Court, Aroostook County, denied two motions for summary judgment filed by a defendant and a third-party defendant in the same case without reaching the merits of the motions, on the grounds that defendant's statement of material facts contained sixty-nine paragraphs and third-party defendant's contained ninety paragraphs.

Jackson v. Bouchard, CV-07-80 (Me. Super. Ct., Aro. Cty., Mar. 26, 2009)(Cuddy, J.). The Court held the statements of material fact attached to the motion, submitted in a multi-party case involving the sale of commercial property, did not comply with the spirit or letter of M.R.Civ.P. 56(h)(1)'s requirement that the statement of material facts be short and concise. In denying the motions for summary judgment, the Court relied on *dicta* in a Law Court case warning that parties who submit an unnecessarily long, convoluted or repetitive statement of material fact run the risk that the motion will be denied on that basis. Defense counsel should be aware that a motion for summary judgment may be denied based solely on the number of paragraphs in the statement of material facts, although the Rules of Civil Procedure set no express limit and the Superior Court does not consistently deny motions with this many paragraphs in the statement of material facts.

No Impasses Before Noon – Understanding Early Mediation Dynamics

By Devon Coughlan and Patrick Coughlan



Conflict Solutions

“That offer is insulting.” “They can’t be serious.” “We are obviously wasting our time.” These statements, or ones like them, are offered by counsel or parties early in the mediation process in many insured claims cases. In fact, dismay by counsel, parties and adjusters in the opening position of the other side at mediation is so common, the term “insult offer” has almost lost its meaning. While posturing is to be expected, the reality is that parties need not and should not get worked up over the first offer, or even first 5 offers, from the opposition. Understanding the early mediation process, its purpose, and why it is almost always unavoidable, will help you keep your client in the room, and improve your chances of obtaining an acceptable settlement.

Consider the following hypothetical: In a medical malpractice case, there is one physician defendant and one corporate defendant. There is a total of 2 million in coverage. The facts heavily favor the Plaintiff regarding the violation of the standard of care, but causation relating to alleged brain injuries and damages are heavily contested. At mediation, Plaintiff’s counsel makes an initial demand of 7.5 Million. The adjuster is about ready to zip up his or her bag. “7.5 Million? Are they out of their minds? They are almost 6 million above the coverage limits!”

The adjuster counters with an offer of \$25,000. The Plaintiff’s counsel offers up his own thoughts on the “absurdity” of the Defendant’s position in a case with “clear liability.” He tells the mediator it is hardly worth even making a counter-offer, as the Defense is so far out in left field.

The parties are now 7.475 million apart. How does the gap get bridged, while keeping everyone engaged in the process? The better the parties understand what the other is really up to, and why, the more efficiently and successfully the early mediation process will move.

Defense counsel must understand: Plaintiff’s counsel is posturing in an effort to maximize his client’s recovery and impress the client. Plaintiff’s counsel knows the Defense is not paying above policy limits. The goal of Plaintiff’s counsel in starting with such a high demand is to move the ultimate settlement number higher. Plaintiff’s counsel will rely on the mediator, to a greater or lesser degree, to justify to the client reducing the demand toward policy limits over a series of moves.

This “dance” may be tedious or frustrating to the Defense, but there is really no way around it. Showing patience, and keeping the process moving, is the best and only viable course of action.

Plaintiff’s counsel needs to understand: The Defense will almost never (absent truly egregious facts and a collectable defendant) pay above policy limits. Likewise, absent really bad facts, the Defense will not pay policy limits. The Defense has what the Plaintiff wants; namely money. There is no profit in walking away from mediation before seeing the process through. The adjuster is not going to reveal what authority he or she has, or even how the carrier ultimately values the case, early in the process.

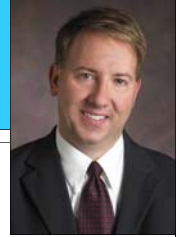
Ultimately, both sides need to relax and do their best to move the process through the sometimes frustrating but unavoidable early stages, without unnecessarily digging in their heels. As long as the Plaintiff’s demand is above policy limits, it has no real value. So the Plaintiff should not get overly stressed about the moves needed to get to policy limits. By dropping from 4 million to 3 million the Plaintiff gives up nothing, as such an offer will never be accepted.

Likewise, the Defense must know that a Plaintiff will never accept nominal value on the facts presented. In fact, it is safe to say that any offer under \$500,000 has zero chance of being accepted. Therefore, assuming the carrier has correctly valued the case, offers below the \$500,000 threshold need not be accompanied by a lot of grinding of teeth.

Once the Plaintiff gets within policy limits, and the Defense is within the low-end verdict range (and the parties have the benefit of lunch in their stomachs) the real settlement discussions can start. Hopefully, a settlement gets done. However, if the parties can’t keep their eye on the ball through a morning of “insult offers”, they will never know what might have been possible.

New Hampshire Law Update

By Chris Poulin, *Getman, Stacey, Schulthess and Steere*



AREA OF INTEREST:

Common law duties that are owed by land owners to members of the public.

The defense of primary implied assumption of risk as it applies to participants, sponsors and organizers of recreational athletic events.

LEGAL SIGNIFICANCE:

Participants, sponsors and organizers of recreational athletic events may only be liable if their conduct unreasonably increases the risks inherent in the recreational athletic event or if they unreasonably create risks outside the range of ordinary activity involved in the sport.

CASE CAPTION:

Kirsten Werne v. Executive Women's Golf Association, Executive Women's Golf Association of Southern New Hampshire, Alpine Ridge Golf, LLC and Deb Armfield

Issued: February 19, 2009

FACTUAL SUMMARY:

On September 5, 2003, Kirsten Werne was struck by an errant golf ball while participating in an evening "glow golf" event at the Alpine Ridge Golf Club in Hollis, NH. The "glow golf" event was sponsored by the Executive Women's Golf Association of

Southern New Hampshire represented by Christopher J. Poulin of Getman, Stacey, Schulthess & Steere. Other defendants included Alpine Ridge LLC (landowner of the golf course), Executive Women's Golf Association (national chapter of the women's golf league) and Deb Armfield (the golfer responsible for striking the ball that hit the plaintiff).

Glow golf involved golfing at night while using glowing golf balls and other glowing devices. The participants were illuminated with glow necklaces and glow jewelry. The golf course was illuminated with glow sticks on each side of the tees and tiki torches placed near the greens. The event began once darkness fell. In the course of the evening the plaintiff, Kirsten Werne played in a group of four women including the co-defendant Deb Armfield. In the course of their round, Armfield made an errant shot which hit Werne in the head causing her to suffer a concussion and brain damage.

Werne brought a civil action in the Hillsborough County Superior Court Southern District alleging negligence against all four defendants. Each defendant filed a special plea of brief statement arguing, among other things, that it did not owe Werne a duty and that Werne's claims were barred by her assumption of the risk and her own comparative fault. The defendants also filed motions for summary judgment relying in large part on the case of Allen v. Dover Co-Recreational Softball League, 148 N.H. 407, 418 (2002). The defendants argued that they could only be found liable for reckless or intentional injurious conduct outside the range of ordinary activity involved in the sport and for creating or allowing unreasonable risks beyond those risks inherent within the sport of glow golf." Id. The trial court granted the defendants' motions for summary judgment concluding that Werne failed to allege facts showing that the conduct of any defendant unreasonably increased the inherent risks of the game, and ruled that they had not breached the applicable duty of care owed to her under the Allen standard.

Werne appealed the trial court's decision to the New Hampshire Supreme Court. Werne first argued that the trial court failed to apply the common law duties that are owed by landowners to members of the public. Werne contended that Alpine Ridge could not assert the defense of primary applied assumption of the risks because the assumption of the risk doctrine is not applicable to tort claims against owners and occupiers of land. The Supreme Court rejected this argument. While the Supreme Court noted that owners and occupiers of land owe plaintiffs a duty of reasonable care under all the circumstances in the maintenance and operation of their property, see, e.g., Simpson v. Wal-Mart Stores, 144 N.H. 571, 574 (1999), it also noted that courts have recognized that participating in a sport "gives rise to commonly appreciated risks which are inherent in and arise out of the nature of the sport and generally and flow from such participation."- as the court previously held in Allen. Allen 148 N.H. at 417.

In Allen, the plaintiff was struck by an errantly thrown softball while running to first base. A landowner and the softball field owner were one of the six defendants in this case. The Supreme Court held that the duty owed by the owner of the softball field was to "create only the risks that are normal or ordinary to the sport or that would be created by a reasonable person of ordinary prudence under the circumstances." Id. at 422 (quotations omitted). Thus, in negligence terms, a land owner operating a sports facility "who creates only the risks that are normal or ordinary to the sport at issue acts as a reasonable person of ordinary

NH Law Update Column-Contd.

prudence under the circumstances.” *Id.* at 418 (quotation omitted). The Supreme Court noted that Allen did not represent a departure from the land owner’s general duty to exercise reasonable care under the circumstances but that Allen simply addressed the duty with regard to the circumstance common to land owners operating a sports facility. Accordingly, by applying Allen to the facts of the Werne case, the Supreme Court found that the trial court correctly identified the common law duties land owners owe to members of the public.

Second, Werne argued that the assumption of risk doctrine was not applicable to tort claims against owners and occupiers of land. The Supreme Court also rejected this argument. In Allen, the Supreme Court noted that the doctrine of primary implied assumption of the risk applied when a plaintiff voluntarily and reasonably entered into some relation with a defendant who the plaintiff reasonably knows involves certain obvious risks such that a defendant has no duty to protect the plaintiff against injuries that may be caused by those risks. *Id.* at 414. In Allen, the Supreme Court held that that being struck in the head by an errantly thrown softball was part of the risk inherent in the game and that the defendants, including the owner of the field, were not liable because they had not unreasonably increased that risk or unreasonably created or countenanced risks outside the range of ordinary activity involved in the sport. *Id.* at 417-18, 420-23. Accordingly, the Supreme Court held that the defendants in the Werne case could use the primary implied assumption of the risk as a defense against liability.

Third, Werne argued that the trial court should have barred all four defendants from asserting the defense of primary implied assumption of the risk because they pled that Werne was comparatively at fault in their special pleas and brief statements. Werne attempted to argue that because the defendants initially pled that the plaintiff was comparatively at fault, they admit that they owed her a duty and therefore must be barred from arguing that no duty was owed. The Supreme Court correctly noted that Superior Court Rule 28 required all defendants to file a special plea and brief statement. The rule did not provide that a defendant was bound by those defenses. Accordingly, the Supreme Court found that the defendants were not limited to asserting comparative fault to the exclusion of other defenses.

Fourth, Werne argued that glow golf is not a distinct sport from golf, and that the trial court erred in basing its decision on whether the defendants’ conduct unreasonably increased the inherent risks of the sport of glow golf as opposed to the sport of golf generally. The Supreme Court also rejected this argument. The Supreme Court considered the following factors in determining the appropriate standard of care to be applied to participants, sponsors and organizers of recreational athletics, (1) the nature of the sport involved; (2) the type of contest, i.e., amateur, high school, little league, pick-up, etc.; (3) the ages, physical characteristics and skills of the participants; (4) the type of equipment involved; and (5) the rules, customs and practices of the sport, including the types of contact, and the level of violence generally accepted. (citing Allen, 148 N.H. 418). In the Werne case, Executive Women’s Golf Association of Southern New Hampshire provided a sign-up sheet which stated, “Come play a round in the dark! Yes the dark!” The Supreme Court found that although the rules of glow golf appeared to be essentially the same as those of golf, glow golf had its own equipment, distinct from that of golf, and it was separately marketed at trade shows and in industry magazines. Accordingly, the Supreme Court found no error in the trial court’s characterization of the sport as glow golf as opposed to golf.

Lastly, Werne argued that the trial court erred in granting the defendants’ motions for summary judgment because the defendants’ conduct unreasonably increased the risks inherent in the game. Werne argued that Alpine Ridge breached a duty to provide a safe premises due to inadequate lighting. Werne argued that the lack of light prevented Deb Armfield from being able to see where she was hitting the ball and that the Executive Women’s Golf Association and the Executive Women’s Golf Association of Southern New Hampshire failed to monitor, screen or instruct players in the safe play of golf.

However, the Supreme Court considered all of these factors and held that Allen provided the governing standard in this case. The defendants would only be held liable if their conduct unreasonably increased the risks inherent in the game of glow golf or if they unreasonably created risks outside the range of ordinary activity involved in the sport. The Court found that Werne failed to demonstrate that any of the defendants’ conduct unreasonably increased the inherent risk that Werne could be struck by a ball playing glow golf. As such, the Supreme Court upheld and affirmed the trial court’s granting of the defendants’ motions for summary judgment.

HOLDING:

The Executive Women’s Golf Association of Southern New Hampshire, as well as all of the defendants, did not participate in conduct that unreasonably increased the inherent risk that Werne could be struck by an errant ball while playing glow golf. As such, none of the defendants could be held liable.

Please feel free to contact Christopher Poulin at (603) 634-4300 extension 799 with any questions about this case.

****Note: The material contained herein has been abridged from laws, court decisions, and administrative ruling and does not constitute legal advice or legal opinions on specific facts. Readers should consult legal counsel to determine how laws apply to specific situations. This work may be reproduced provided this entire notice is enclosed.**

New Hampshire Law Update

By Naomi Mooney, *Getman, Stacey, Schulthess and Steer*

AREA OF INTEREST:

Consumer Protection Act, Standard of Proof/No Right to Jury Trial

CASE CAPTION:

Hair Excitement, Inc. v. L'Oreal U.S.A., Inc.

Docket Number: 2007-920

Decided: February 19, 2009

LEGAL SIGNIFICANCE:

Clarification of rascality standard for a consumer protection claim; reiteration of rule that there is no right to a jury trial in a Consumer Protection Act claim.

FACTUAL SUMMARY:

Hair Excitement is a New Hampshire corporation which owns and operates a number of hair salons in New Hampshire, Maine and Massachusetts. L'Oreal manufactures and distributes hair care products, including Matrix and Redken brand products. Hair Excitement brought suit against L'Oreal alleging that it had violated RSA chapter 358-A. It contended that L'Oreal willfully and knowingly misrepresented the identity of its agent and also misrepresented the agent's intent with the purpose to deceive and induce it to sell the products to third parties in violation of its purchase contracts and chain account agreement, resulting in its termination as an approved franchise. L'Oreal brought a counterclaim alleging that Hair Excitement violated RSA chapter 358-A because its distribution of Redken products outside of the salon-only sales to consumers harmed Redken's business reputation with both salon owners and consumers, created a mistaken impression that L'Oreal permits or endorses the sale of Redken products outside of a professional salon setting, and was likely to cause confusion concerning the quality of Redken products.

HOLDING:

The court reiterated its previous holding that there is no right to a trial by jury for Consumer Protection Act claims.

The court explained in all controversies concerning property, and in all suits between two or more persons except those in which another practice is and has been customary, and except those in which the value in controversy does not exceed \$1,500 and no title to real estate is involved, the parties have a right to a trial by jury. This method of procedure shall be held sacred, unless, in cases arising on the high seas and in cases relating to mariners' wages, the legislature shall think it necessary to alter it.

The court explained the right to a jury trial under the New Hampshire Constitution "is not without limitation; it extends only to those cases for which the jury trial right existed when the constitution was adopted in 1784." [State v. Morrill, 123 N.H. 707, 712, 465 A.2d 882 \(1983\)](#); see [Hallahan v. Riley, 94 N.H. 338, 339, 53 A.2d 431 \(1947\)](#) (constitutional guaranty of trial by jury in civil matters determined generally by historical test of its use at common law). [Part I, Article 20](#) "did not create or establish a right [to a jury trial] not previously existing. It was a recognition of an existing right, guaranteeing it as it then stood and was practiced, guarding it against repeal, infringement, or undue trammel by legislative action, but not extending it so as to include what had not before been within its benefits." [Davis v. Dyer, 62 N.H. 231, 235 \(1882\)](#). "The right does not extend ... to special, statutory or summary proceedings unknown to the common law." [In re Sandra H., 150 N.H. 634, 636, 846 A.2d 513 \(2004\)](#).

The court stated to resolve whether a party has a right to trial by jury in a particular action, we generally look to both the nature of the case and the relief sought, and ascertain whether the customary practice included a trial by jury before 1784." [Franklin Lodge of Elks v. Marcoux, 149 N.H. 581, 591, 825 A.2d 480 \(2003\)](#) (quotation and citation omitted). "When a plaintiff seeks relief for breach of codified rights, we further consider the comprehensive nature of the statutory framework to determine whether the jury trial right extends to the action." *Id.*

The court stated that the legislature enacted RSA chapter 358-A in 1970 to "ensure an equitable relationship between consumers and persons engaged in business." [Hughes v. DiSalvo, 143 N.H. 576, 578, 729 A.2d 422 \(1999\)](#). RSA chapter 358-A is "a comprehensive statute designed to regulate business practices for consumer protection by making it unlawful for persons engaged in trade or commerce to use various methods of unfair competition and deceptive business practices." [Chase v. Dorais, 122 N.H. 600, 601, 448 A.2d 390 \(1982\)](#). Thus, RSA chapter 358-A creates new statutory rights which did not exist in New Hampshire common law in 1784 when this state adopted its constitution. Because of this, the constitution does not confer the right to a jury trial for a claim under RSA chapter 358-A. See [Morrill, 123 N.H. at 713, 465 A.2d 882](#).

Moreover, nothing in the language of RSA chapter 358-A specifically provides for a right to a jury trial. The statute states that: Any person injured by another's use of any method, act or practice declared unlawful under this chapter may bring an action for damages and for such equitable relief, including an injunction, as *the court* deems necessary and proper. If *the court* finds for the plaintiff, recovery shall be in the amount of actual damages or \$1,000, whichever is greater. If *the court* finds that the use of the method of competition or the act or practice was a willful or knowing violation of this chapter, *it* shall award as much as 3 times, but not less than 2 times, such amount. In addition, a prevailing plaintiff shall be awarded the costs of the suit and reasonable attorney's fees, as determined by *the court* Injunctive relief shall be available to private individuals under this chapter without bond, subject to the discretion of *the court*.

The court further clarified the rascality standard under the Consumer Protection Act finding that the trial court did not commit an unsustainable exercise of discretion by ruling that hair product manufacturer did not engage in unfair and deceptive acts under the Consumer Protection Act by retaining an investigator to determine whether hair salon company was violating anti-diversion provisions in the parties' chain account agreement. Anti-diversion provisions were included by the manufacturer to protect its brand name, trade name, and other intellectual property rights for its salon-only products. Such contractual terms were common, The court noted, in the industry and the manufacturer publicized the fact that it policed salons and distributors that engaged in diversion, and hair salon company was aware of the practices of diversion, the gray market, and efforts by the industry to police and curtail it. [RSA 358-A:2](#).

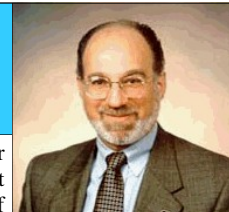
In sum, the court stated that selfish bargaining and business dealings will not be enough to justify a claim for damages under the Consumer Protection Act.

The court stated that L'Oreal's conduct was not immoral, unethical, oppressive, or unscrupulous, did not offend public policy as established by law or by other established concepts of unfairness, was not the type proscribed by the Consumer Protection Act, and did not attain a level of rascality that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce. L'Oreal was instead, in the context of a rough and tumble business, exercising its rights under the Hair Excitement agreements. Hair Excitement has fallen far short of its burden of proving that L'Oreal engaged in an unfair or deceptive act or practice in violation of the Consumer Protection Act.

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What is a Discount Rate?

By Mark Filler



How many times have you heard someone tell you that a business is worth “four or five times earnings,” or something like “two times annual sales” is the value of a company? Perhaps you have not heard those exact multiples but you might have heard something like that. Implicit in those types of statements are all kinds of assumptions. In this article we want to tell you about one of the most important assumptions.

Implicit in the idea of multiples that are used to estimate the value of a business is a “discount rate.” An income multiple assumes some level of future income that is to be discounted back to present value using a rate that reflects the risk associated with attaining that income. A discount rate reflects the risk associated with the amount and timing of the expected income stream.

In economic terms, a present value discount rate is an "opportunity cost." That is, the expected rate of return (or yield) that an investor would have to give up by investing in the subject investment instead of in available alternative investments that are comparable in terms of risk and other investment characteristics.

The rational investor does not buy a business or another investment simply because of what it has accomplished in the past or even what it consists of at present.

Although these may be important considerations in determining what the business or other property is likely to do in the future, it is the anticipated future performance of a business that gives it economic value. Because of the natural tendency to dwell on the past and/or present status of a business or investment, the business owner needs to be especially careful to remain aware of the fact that value is neither a reflection of the past, nor even of the present. The value of a business and the risk factors involved to arrive at that value are based on expected future activity.

The International Glossary of Business Valuation Terms defines a discount rate as follows: “A rate of return (cost of capital) used to convert a monetary sum, payable or receivable in the future, into present value.” Cost of capital is defined as: “The expected rate of return (discount rate) that the market requires in order to attract funds to a particular investment.” Said another way, the discount rate represents the total expected return an investor would require on the monies invested in the particular investment given the level of risk associated with the ownership interest. A competent business appraiser is an effective resource to help you determine this rate, and all the other important elements of an accurate value conclusion.