



Developments in Maine Tort Law continued

### About the Firm

Berman & Simmons trial lawyers are aggressive, results-oriented advocates who have obtained many of the largest personal injury jury verdicts ever awarded in Maine courts. Each year we take dozens of cases to trial, and settle hundreds more. Our trial lawyers have the experience, resources and commitment to get the best possible result.

■ **Premises Liability:** *Benham v. Morton & Furbish Agency*, 2007 ME 83, 929A.2d 471  
This is an important case because it distinguished between a landlord-tenant relationship and a license for purposes of premises liability for injuries sustained in a rental cottage. The Law Court concluded that the cottage rented by the plaintiff was "more akin to a place for travelers, lodgers, and transient guests, and did not convey a 'possessory interest in the land to another for a period of time'" and that the duty of care was therefore stricter than in a standard tenancy.

■ **Landowner Liability for Conduct of Contractor:** *Maravell v. R.J. Grondin & Sons*, 2007 ME 1, 914 A.2d 709 – The Law Court held that a property owner and general contractor may be vicariously liable for the acts of a blasting subcontractor. The Law Court applied the Restatement (Second) of Torts § 413 in concluding that the general contractor had a duty to third parties who were damaged by the conduct of the subcontractor under certain circumstances. The Law Court also concluded that the property owner had a duty to third parties for certain activities of a subcontractor under Restatement § 414(A).

### Medical Malpractice

■ **Pre-litigation Screening Panels:** *Smith v. Hawthorne*, 2007 ME 72, 924 A.2d 1051  
This continues the Law Court's analysis of the pre-litigation screening panel statute for medical malpractice cases. By a 4-2 vote, with four separate opinions, the Law Court held that where the panel findings are split between causation and negligence, the medical provider has the choice whether the findings will be admitted. Justices Alexander and Silver dissented, arguing that the Majority's holding is inconsistent with the Law Court's previous decision in the first appeal in this case.

### Uninsured Motorist Coverage

■ **Definition of "Bodily Injury":** *Ryder v. USAA General Indemnity Co.*, 2007 ME 146, 938 A.2d 4 – In this wrongful death case, the Law Court held that the term "bodily injury," as used in an underinsured motorist insurance policy, applied to a bystander claim for emotional distress from witnessing a loved one's death as long as the plaintiff could establish that the emotional distress was a diagnosable sickness or disease. The policy defined "bodily injury" as "bodily harm, sickness, disease or death." The Law Court found that the term was ambiguous and construed the term in favor of coverage.

The Law Court concluded that there could be coverage for bystander recovery under the policy language but departed from its previous jurisprudence on recovery for emotional distress by concluding that the plaintiffs could collect only if they could show that the mental distress was both severe and constituted a diagnosable sickness or disease under the DSM-IV.

### Courts

■ **Final Judgment Rule:** *Geary v. The Stanley Medical Research Institute*, 2008 ME 9, 939 A.2d 86 – This case involved the defendants' taking of bodily organs without the permission of the next of kin. The Superior Court denied the defendants' motions for summary judgment. On appeal, the Law Court concluded that there was no final judgment, rejecting defendants' argument that the good faith exception to the Uniform Anatomical Gift Act was a defense similar to that of qualified immunity for purposes of 42 USC § 1984 or the immunity granted to governmental actors under the Maine Tort Claims Act. The Court distinguished these defenses from the good faith exception under UAGA, reasoning that they embodied specific legislative intent to protect governmental employees, which could not and should not be extended to these private parties. Moreover, the good faith exception in the UAGA was a defense to the civil action and did not provide immunity.

### In This Issue:

- Automobile Defect Litigation | 1
- A Closer Look | 1
- Recent Developments In Maine Tort And Trial Law | 1
  - Negligence
  - Medical Malpractice
- Noteworthy | 2
- In Other News | 3

### Introducing IN BRIEF

For nearly a hundred years, Berman & Simmons has enjoyed strong personal and professional bonds with attorneys across the State who share a common vision of fighting for Maine people.

Berman & Simmons is pleased to inaugurate our redesigned newsletter *In Brief*. *In Brief* provides concise information to help Maine lawyers and others keep up-to-date with trends and developments in Maine tort and trial law, including medical malpractice, products liability, vehicular accidents, insurance, and civil rights. *In Brief* will contain articles exploring cutting-edge legal issues and trial techniques, as well as summaries and commentary on recent court decisions.

We will circulate *In Brief* by both regular mail and email. Let us know which of these formats you prefer by returning the enclosed card to us.

The first edition of *In Brief* coincides with the launch of our redesigned internet website. Please visit our new web site [bermansimmons.com](http://bermansimmons.com). The website contains articles covering a wide variety of trial-law topics. As always, we welcome any comments or suggestions you may have.

## Automobile Defect Litigation

Are You Missing Tort Remedies in One Car Crashes?

By John E. Sedgewick, Esq.



Black ice, moose in the road, and driver error are often accepted as adequate and final explanations for terrible injuries suffered in one car accidents. This is unfortunate and unnecessary, because passengers, including the drivers, in these events may be entitled to tort damages. Lawyers who have the chance to consult with victims of single vehicle events should consider three approaches to defect analysis which can lead to successful product liability claims. The three things to look for are defects which cause accidents, defects which cause injuries, and defects which cause "enhanced injuries."

continued on page 2

## A Closer Look

By Paul F. Macri, Esq.



In *MacDowall v. MMG Ins. Co.*, 2007 ME 56, 920 A.2d 1044 and *Patrons Oxford Ins. Co. v. Harris*, 2006 ME 72, 905 A.2d 819, the Law Court enforced the Maine Reach and Apply statute, 24-A M.R.S.A. § 2904, by refusing to allow insurers to litigate policy defenses in reach and apply actions. The Law Court thereby enforced the underlying intent that the statute provide a straightforward way for plaintiffs to reach insurance proceeds where insurers either deny coverage or defend under a reservation of rights.

In both cases, the insurer lost control of its case, in *MacDowall*, because it failed to keep track of a potential claim about which it had been informed by plaintiff's attorney, and in *Harris*, because the insurer was defending under a reservation of rights so the insured decided to protect his personal assets by confessing to judgment and assigning his action against the insurer to the plaintiff.

continued on page 2

## Recent Developments In Maine Tort And Trial Law

By Paul F. Macri, Esq.

### Negligence

■ **Duty to Keep Roads Free of Snow:** *Alexander v. Mitchell*, 2007 ME 108, 930 A.2d 1016  
The Law Court declined to extend the duty of keeping roads free from snow to those who contract with a town to plow, salt, and sand its roads. In determining whether a duty existed, the Law Court considered conditions in Maine during the winter and reviewed its previous case law on snowy and icy conditions. The Law Court distinguished *Budzko v. One City Center Associates, Limited Partnership*, 2001 ME 37, 767 A.2d 310, as involving a narrower duty of a landowner to keep its premises safe for those on its premises, rather than an open-ended duty to the public for the safety of roads.

continued on page 4

## Noteworthy



**Honors** Berman & Simmons was recognized by Chambers USA, the foremost publisher of law firm ratings, as “the best plaintiff’s firm in the state.” Special recognition was given to **Jack Simmons**, **Bill Robitzek**, **Jay Sweet**, **Steven Silin** and **Jodi Nofsinger**. Our lawyers have also again been included in every litigation category in the 2007-2008 edition of *The Best Lawyers in America*: **Jack Simmons** was listed under Personal Injury, Business Litigation, Medical Malpractice and Criminal Defense; **John Sedgewick** for Products Liability; **Bill Robitzek** for Business Litigation and Personal Injury; **Jay Sweet** for Personal Injury and Medical Malpractice; **Steven Silin** for Personal Injury and Medical Malpractice; and **Paul Macri** for Appellate Litigation. **Steven Silin** and **Jay Sweet** were also selected for inclusion in the inaugural publication of *New England Super Lawyers* magazine. *Super Lawyers* is an annual listing of “outstanding lawyers who have attained a high degree of peer recognition and professional achievement.”

**Medical Malpractice Verdict** Our track record of success in medical malpractice cases was extended recently by **Jay Sweet** and **Craig Bramley** when they obtained a jury verdict of \$7,960,605 in the Androscoggin Superior Court for a mother and child for medical care, lost earnings and loss of enjoyment of life against Central Maine Medical Center and Irene M. Meyers, CNM. The child suffered hypoxic ischemic encephalopathy as a result of the mismanagement of the last two hours of the mother’s labor.

**Taser Case Verdict** **Ben Gideon** enhanced his reputation as a leading civil rights lawyer by winning a high profile and hard fought case. Ben’s client, who was shot with a Taser gun by a South Portland police officer, won a \$111,000 jury verdict in U.S. District Court in Portland. The Court also awarded the plaintiff attorney fees and costs.

## Automobile Defect Litigation continued

### Defects Which Cause Crashes

Some trips in automobiles would be perfectly uneventful but for a defect which actually triggers a crash. Defects in this category include air bags which deploy spontaneously, “false park” conditions which allow sudden and unexpected movement of an idling vehicle, and stability and handling defects which make fifteen passenger vans and SUVs subject to rollover. Others include sudden acceleration or engine stalling problems associated with computer controlled engines, and tire detreading or exploding incidents. One recent development in this area is aged tires. Manufacturers have recently begun disclosing a problem which, arguably, they have known for years. That is, tires more than six years old can be unsafe due to chemical changes in the rubber. While an old spare tire may look like new, it may be unsafe.

### Defects Which Cause Injuries

Not every automobile crash should cause an injury. Some defects cause injuries where ordinarily you would expect none at all. Examples in this category include air bags which deploy too early or too late in the sequence of crash events, those that deploy at crash speeds below the accepted threshold (8 to 14 miles per hour), and those designed without internal tethers to prevent them from getting too close to the driver. Fuel tanks and fuel lines which are punctured or which drain during a crash may result in a “fuel fed fire” causing burn injuries which are otherwise totally avoidable. In rear end collisions, some front seatbacks collapse backwards, striking children or other rear seat passengers.

Some defects cause injuries even without a crash. For example, radiator fans known as “flex fans,” designed and sold thirty years ago to enhance gas mileage, are known to fly apart, killing and maiming innocent by-standers. There have been at least two incidents of this type in Maine in recent years.

### Enhanced Injuries

The term “enhanced injuries” refers to cases in which a crash occurs which is severe enough to cause some injury, but where some form of product failure makes the injury worse. Examples include roof crush cases where weak vehicle components allow the roof to crush in during a rollover event, causing a catastrophic spinal injury to one person while everyone else in the car suffers only bumps and bruises. Poor fitting seat belts and child seats can cause severe spinal or internal injuries to small passengers. “Inertial unbuckling” is a form of seat belt failure which occurs when crash forces cause a seat belt to unlatch when a passenger needs it most, during a crash. In these cases, once the plaintiff establishes that product failure made the injury worse, the burden shifts to the defense to prove what part of the damages would have occurred anyway, in spite of the defect.

While it can be expensive to fully investigate these cases, severely injured clients deserve a careful analysis of the evidence. The fact that only one vehicle is involved should not be seen as a barrier to tort recovery, even where the injured person is the driver.

## A Closer Look continued

In both cases, the plaintiffs invoked the reach and apply statute under which an injured person who has gotten a judgment against a tortfeasor has the right to sue the insurer directly to “reach and apply” the available insurance coverage provided that, “when the right of action accrued, the judgment debtor was insured against such liability and if before the recovery of the judgment the insurer had had notice of such accident, injury or damage.” Under the statute, once a judgment has been obtained against its insured, the insurer can invoke only the six listed defenses: that the vehicle was being operated illegally or by one under age, that it was being used in a race or for towing a trailer, that liability has been

assumed by the insurer, that there is workers’ compensation liability, or that there has been fraud or collusion by the insured. Limiting the insurer’s defenses makes a reach and apply claim straightforward and relatively easy to prosecute, and the Court wants it to stay that way.

In both *MacDowall* and *Harris*, the insurer unsuccessfully attempted to avoid liability under the reach and apply statute by raising defenses not set out in the statute. In *MacDowall*, the insured had been defaulted in the tort case because he had ignored the summons and complaint that were served on him. The insurer was aware before suit was filed that there was a claim against the insured but failed to monitor that claim and as a result was unable to get the default set aside, although it did take part in the hearing on damages. The judgment against the insured was affirmed on appeal, and the plaintiff then sued MMG under the reach and apply statute. MMG argued that it had not been able to address the merits of the case in the underlying action because of the default and tried to raise them in the reach and apply action, but that argument was rejected by the trial court.

The Law Court affirmed, agreeing that the insurer had been afforded due process because it had had notice of the action at a meaningful time in the proceedings under the controlling case, *Michaud v. Mut. Fire, Marine & Inland Ins. Co.*, 505 A.2d 786 (Me.1986):

*MMG had the opportunity to remove the default. It was unsuccessful. MMG also had the opportunity to contest damages. Those opportunities are sufficiently meaningful to satisfy due process.*

*MacDowall*, 2007 ME 56, ¶ 14, 920 A.2d at 1047.

The Court reached a similar result in *Harris* where Patrons-Oxford defended its insured under a reservation of rights, asserting that there was no coverage because the driver was not a permittee.

Patrons unsuccessfully attempted to intervene in the tort action to assert that defense and then filed a declaratory judgment action in which the insured counterclaimed under the reach and apply statute. Ultimately, the insured settled by stipulating to judgment and agreeing not to contest damages in return for the plaintiff’s promise not to execute against his personal assets and only to pursue the insurance proceeds under the reach and apply statute.

Patrons lost on the coverage defense, and the entire case was appealed where the Court confronted for the first time what it called “the tensions that exist between an insurer that reserves the right to deny coverage under the policy and the impact of that decision on the insured.” 2006 ME 72, ¶ 13, 905 A.2d at 825.

On appeal, the insurer argued that it had not had an adequate opportunity to contest its coverage and therefore should not be bound by the settlement. The Court rejected this argument concluding that by defending under a reservation, the insurer lost the ability to control Harris’s defense: “Patrons cannot now assert that it was denied the opportunity in the personal injury action to litigate Harris’s liability to Luce because it was an opportunity Patrons possessed and relinquished when it proceeded under the reservation of rights.” *Id.*, ¶ 16, 905 A.2d at 826. Furthermore, “[a]lthough Patrons may have lost the opportunity to control the tort litigation when it decided to proceed under the reservation of rights, it was not left without the ability to contest its liability under the policy. Patrons had, and in fact availed itself of, the opportunity to litigate coverage by undertaking this declaratory judgment action at an appropriate point relative to *Luce v. Harris*.” *Id.*, ¶ 17, 905 A.2d at 826, citing *Michaud*.

As these cases make clear, the Law Court continues to be unwilling to let the reach and apply law become a forum in which insurers can litigate coverage defenses, and rightly so. The statute provides plaintiffs with an easy way to collect against insurers who raise invalid coverage defenses or otherwise drop the ball for their insured while at the same time protecting the insured’s personal assets. It needs to be protected by the Court as a forum for these purposes.



## In Other News

- **Jim O’Connell**, our newest lawyer, recently won his first Maine jury trial in Cumberland Superior Court. He won a judgment of twice the pre-trial offer in a left-turn automobile accident case involving emotional distress damages.
- **Michael Bigos** recently tried and won an uninsured motorist case in Androscoggin Superior Court against North East Insurance involving soft-tissue spinal injuries. Michael was also recently invited to serve on the Board of Governors of the MTLA. He joins Steven Silin (past president), Daniel Kagan, and Jodi Nofsinger on the Board.

*As these cases make clear, the Law Court continues to be unwilling to let the reach and apply law become a forum in which insurers can litigate coverage defenses, and rightly so.*