

About the Firm

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

Recent Adoption of the Maine Rules of Professional Conduct

Author: Susan A. Faunce, Esq.



The Maine Task Force on Ethics, created by the Maine Supreme Judicial Court, has for the past four years been assessing the possibility of adopting the Maine's version of the ABA Model Rules of Professional Conduct. Maine was among the few states that did not base its Code of Professional Responsibility upon the ABA Model Rules.

The Maine Supreme Judicial Court has adopted Maine's version of the Model Rules as the Maine Rules of Professional Conduct which are in effect as of August 1, 2009. Maine Bar Rule 2-A (Aspirational Goals for Lawyer Professionalism), Maine Bar Rule 3 (Code of Professional Responsibility), Maine Bar Rule 8 (Contingent Fees) have been abrogated and are replaced with the Maine Rules of Professional Conduct.

Rule 1.5 Contingent Fees

Rule 1.5 is consistent with Maine Bar Rule 8, requiring the fee agreement to be in writing, provided to the client, and prohibiting contingent fees in matters involving criminal proceedings and domestic relations.

In terms of fee sharing between lawyers of different firms, 1.5(e) requires full disclosure to the client. The client must consent to both the employment of the other lawyer and to the terms of the fee division. The disclosure must be confirmed in writing. The total fee of the lawyers employed must be reasonable. Comment [7]* adds that pursuant to Rule 1.1, a lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter.

Rule 1.8 Conflict of Interest Current Clients

Rule 1.8(g) specifically addresses settlements and prohibits a lawyer who represents two or more clients from participating in an aggregate settlement of the claims, and in criminal cases aggregate plea agreements, unless the each client gives informed consent in writing signed by the client. A lawyer must disclose the nature of all the claims or pleas involved and the participation of each person in the settlement.

Comment [13] emphasizes that under Rule 1.7, the risk of representing multiple clients must first be discussed with the client prior to representation and each affected client must provide informed consent confirmed in writing. Additionally, under Rule 1.2(a) the client ultimately determines whether or not to settle a case. Rule 1.8(g) further requires the attorney to inform each client about the material terms of settlement including what other clients will receive if the settlement is accepted.

Rule 1.15(f) Termination and Safekeeping of Client Property

1.15(f) requires a lawyer to either return to the client or retain and safeguard information and data to which the client is entitled upon termination of representation. For information that has intrinsic value in the particular version, such as an original signed document, a lawyer must retain and safeguard until such time as they are out of date or no longer of consequence. For all other information, a lawyer must either return the information to the client or safeguard the information for eight years. A lawyer can enter into a voluntary written agreement with the client for different time period.

Comment [7] explains that an eight year timeframe was selected because it is two years beyond the general six year statute of limitations for professional negligence. In a case in which the statute of limitations for beginning a professional negligence action is longer than six years, it is recommended that the lawyer retain client information until 2 years following the expiration of the statute. Client confidentiality must be maintained in retaining or disposing of client files.

Rule 4.4(b) Inadvertent Disclosure

Essentially, the new rule codifies the Law Court's holding in *Corey v. Norman, Hanson & Detroy*, 742 A.2d 933 (Me. 1999). The rule requires the attorney who received the inadvertent disclosure to immediately stop reading the information as soon as the lawyer has reason to believe the materials were inadvertently disclosed and contain confidential information. The lawyer must also notify the sender of the documents in writing and shall promptly return, destroy, or sequester the confidential information. A lawyer is not permitted to use or disclose the information until the claim has been fully resolved. Rule 4.4(b) applies to e-mail and other electronic modes of transmission.

Comment [4] explains that if the metadata in word processing documents contain confidential information that is inadvertently disclosed, the metadata is also subject to the rule. ■

*The comments are available for review, but have not been adopted by the Maine Supreme Judicial Court.



In This Issue:

- Shifting the Burden: Fairness for Injured Persons | 1
- Before Embarking on the Rollercoaster of Amusement Park Litigation, Know What the Ride Has in Store | 1
- Recent Adoption of the Maine Rules of Professional Conduct | 4

Legislative Changes

In September 2009, several bills became law that will have a positive impact on the ability of injured persons to obtain justice. Berman & Simmons attorneys **Michael Bigos**, who co-chaired MTLA's Legislative Committee, and **Ben Gideon** who also served on the committee, were instrumental in working to pass these important legislative changes:

- 24-A M.R.S. 2910-A: Precludes subrogation of medical payments coverage for the first \$20,000 of recovery
- 24-A M.R.S. 2164-E Mandates disclosure of insurance policy limits to an injured party
- 18-A M.R.S. 2-804: Raises punitive damages limit and expands available pecuniary loss recovery in wrongful death cases
- 18-A M.R.S. 3-108: Extends Statute of Limitations for actions against estate of a decedent from 3 to 6 years
- 28-A M.R.S. 2509: Raises the cap on liquor liability damages from \$250,000 to \$350,000
- 29-A M.R.S. 2056(2): Expands the automobile - bicycle "3 foot rule" to cover pedestrians in car-pedestrian collisions

IN BRIEF

Berman & Simmons Trial Attorneys' Newsletter

Fall 2009

Shifting the Burden: Fairness for Injured Persons

Author: Steven D. Silin, Esq.



As plaintiffs' lawyers, we must recognize and work to overcome the fundamental injustice of situations in which the defendant's own actions would otherwise serve to insulate him from liability due to a lack of proof. Courts are increasingly open to adopting ameliorative doctrines designed to avoid such a result. A thorough knowledge of these doctrines is critical to successfully representing a plaintiff in such cases and, perhaps more importantly, to anticipating those situations in which the basic principles underlying those rules may call for their novel application.

Historical Underpinnings

Most of us are familiar with *Summers v. Tice*, 33 Cal.2d 80, 199 P.2d 1 (1948). The Court held that two members of a hunting party who had negligently fired their guns in plaintiff's direction could be held jointly liable for the resulting injury despite plaintiff's inability to prove which of them had fired the shot that struck him. The court ruled that the innocent plaintiff should not be denied a remedy, and that the negligent defendants should bear the burden of uncertainty created by their own actions.

Other courts, including in Maine, have since followed the lead of *Tice* and recognized the injustice of imposing this strict burden of proof on plaintiffs in cases involving multiple tortfeasors independently causing an indivisible injury. In *Paine v. Spottiswoode*, 612 A.2d 235, 240 (Me. 1992), the Court held that where no apportionment is possible, each defendant is liable for the entire injury.

Continued on page 2

Before Embarking on the Rollercoaster of Amusement Park Litigation, Know What the Ride Has in Store

Author: Daniel G. Kagan, Esq.



Introduction

Every year, hundreds of people across the Country and the State of Maine are injured by dangerous amusement park rides. The injuries can be catastrophic, and the stakes for the injured person and family are high.

Maine's Amusement Park Statute

The starting point to understanding the obligations of amusement ride "operators" and "riders" is in 8 M.R.S.A. § 801 et seq. Titled the Rider Safety Act (RSA), this section codifies guidelines that apply to both owners and riders. While covering

both operators and riders, the RSA's primary focus is on the conduct of the rider. These standards are very important for the lawyer to understand, in order to anticipate and overcome liability defenses.

Beyond the general statement that a rider must "refrain from acting in any manner that may cause or contribute to injuring the rider or others," the statute provides that a rider is prohibited from:

- exceeding the limits of the rider's ability
- interfering with safe operation of the amusement ride
- not engaging any safety devices that are provided
- disconnecting or disabling a safety device except at the express instruction of the ride operator
- using the controls of the amusement ride designed solely to be operated by the ride operator
- extending arms or legs beyond the carrier or seating area except at the express direction of the ride operator

Continued on page 3

Noteworthy



- **Berman & Simmons** earned top ranking in the area of General Commercial Litigation by Chambers & Partners USA, a leading guide to America's law firms and attorneys. According to Chambers, **Berman & Simmons** "houses many high-quality attorneys who are well known throughout the Northeast." **Jack Simmons**, ranked as a Senior Statesman, was described as "clearly among the state's very best trial lawyers regularly securing large payouts for his clients." **William Robitzek**, ranked in band 1, achieved status as "one of the great litigators of the state." **Steven Silin**, ranked in band 1, was commended for being "extremely well versed-in fact, probably one of the most knowledgeable in civil litigation." **Julian Sweet**, ranked in band 1, "won the largest verdict in Maine history for a medical malpractice plaintiff." **Jodi Nofsinger**, ranked in band 2, "background in biology has proven useful as she has used her specialist knowledge of heart disease, cellular biology and genetics in various matters."
- Attorneys **Julian Sweet** and **Craig Bramley** have continued their success in the area of medical malpractice. In May, they won a plaintiff's verdict in the case of *Merle L. Connors v. Patricia S. Greatorex, M.D.* in the York County Superior Court. That case involved permanent brain damage resulting from attempted sinus surgery.
- Attorneys **Sweet** and **Bramley** have also obtained settlements in medical malpractice cases involving:
 - Bowel perforation,
 - Negligence in the course of sinus surgery,
 - Paraplegia caused by the negligence of primary care and emergency room physicians,
 - Negligence in the installation and management of a gastrostomy tube.

Shifting the Burden: Fairness for Injured Persons *continued*

The rule of *Paine* was then extended in *Lovely v. Allstate*, 658 A.2d 1091 (Me. 1995) to the situation where a single defendant's negligence combines with a preexisting condition to produce an indivisible harm.

Loss of A Chance

One argument still open for development by thoughtful plaintiffs' lawyers arises in medical malpractice cases where the defendants' negligent conduct in failing to diagnose or treat plaintiff's preexisting condition, frequently cancer, has deprived the plaintiff of a less than fifty percent chance of survival or cure. In these cases, defendants have argued that the plaintiff cannot meet her burden of proof on causation by a preponderance. In response, several courts have developed some form of a relaxed causation or a "loss of a chance" rule. Under the former, plaintiff need only produce "[e]vidence demonstrating within a reasonable degree of medical probability that negligent treatment increased the risk of harm posed by a preexistent condition." *Scafidi v. Seiler*, 119 N.J. 93, 108, 574 A.2d 398 (1990). Under the latter approach, plaintiff will recover the value of the lost chance of a more favorable outcome, even if it is less than fifty percent. *Matsuyama v. Birnbaum*, 452 Mass. 1, 890 N.E. 2d 819 (2008). The basis for both rules is that the defendant's negligence has effectively made it impossible to know whether the plaintiff would have achieved a more favorable outcome in the absence of negligence.

Maine's Law Court, while acknowledging the loss of a chance rule, has not yet adopted either it or the relaxed causation rule. *Phillips v. Eastern Maine Medical Center* 565 A.2d 306, 308 (Me. 1989). However, the Court's application of the basic principles of fairness in the cases discussed above suggests that it will do so if presented with an appropriate opportunity.

Failure to Test

Another area in which the relaxed causation rule has been applied is in cases where the defendant's negligent failure to order a diagnostic test that might have demonstrated the harm makes it difficult or impossible for plaintiff to prove causation.

Recurring Dangerous Conditions

Similar fairness concerns have been applied in contexts other than burden shifting to allow plaintiffs to overcome unreasonable burdens of proof on the elements of a cause of action. *Dumont v. Shaw's Supermarkets, Inc.*, 664 A.2d 846 (Me. 1995) is a premises liability case in which the trial court, following the traditional liability rule, required that plaintiff show that the defendant had notice of a foreign substance on the floor. On appeal, the Law Court reversed, holding that the jury should have been instructed that where plaintiff can prove that the defendant created a foreseeably recurring dangerous condition, the defendant will be liable for failing to take reasonable steps to guard against resulting injuries even in the absence of proof of notice of a specific instance of danger. This development of the liability rules is consistent with the familiar rule of *res ipsa loquitur*, which permits an inference of defendant's negligence if the event causing injury would likely not have occurred in the absence of such negligence.

Apportionment of Emotional Distress

It is important for plaintiffs' lawyers to be alert to the opportunities to use the principles inherent in these rules to circumvent obstacles to proof, whether through burden shifting or drawing of inferences. *Ward v. Washburn Forest Products, Cumberland County CD-03-48* (jury verdict, March 9, 2003) is another example where we achieved a recovery by shifting the traditional burden of proof. In that case, we were able to apply the principles inherent in *Lovely* in the novel context of a case involving an accident in which plaintiff's husband was killed when the car he was driving was struck by a logging truck that had come over the centerline. Plaintiff, a passenger, suffered some relatively minor physical injuries as well as the horror of witnessing her husband's death. After the settlement of the wrongful death case, which necessarily included her claim for loss of consortium, Mrs. Ward went to trial on her separate injury case. Although she was entitled to damages for the emotional distress attendant to her physical injuries, any damages allocable to her witnessing her husband's death were, under 18-A M.R.S.A. §2-804(b), subsumed in the wrongful death case. Although the jury was instructed that it could award damages only for the emotional distress arising from plaintiff's own injuries and not from the witnessing of the death of her husband, and although the defendant argued that much of her emotional distress arose from seeing her husband's death, the jury awarded \$750,000. It was the important principle recognized in *Lovely*, imposing the apportionment burden on the defendant, that made the difference in the case.

Of course, our job is always to maximize compensation for our clients by creatively pushing for developments in jurisprudence in appropriate cases. We must be alert to the opportunities to use fairness principles to argue for changes in the law, particularly where a tortfeasor would otherwise be unfairly insulated from liability. By doing so, we will help injured people gain access to justice by expanding the opportunity for recovery and fair compensation. ■

Before Embarking on the Rollercoaster of Amusement Park Litigation, Know What the Ride Has in Store *continued*

- throwing, dropping or expelling an object from or toward an amusement ride except as permitted by a ride operator.
- getting on or off an amusement ride except at the designated time and area, if any, at the direction of the ride operator or in an emergency, and
- not reasonably controlling the speed or direction of the rider's person or an amusement ride that requires the rider to control or direct the rider's person or a device.

In addition, the statute provides that a rider "may not get on or attempt to get on an amusement ride unless the rider or the rider's parent or guardian reasonably determines that, at a minimum, the rider":

- Has sufficient knowledge to use, get on or off the amusement ride safety without instruction, or has requested and received before getting on the ride sufficient information to get on, use and get off safely.
- Has located, reviewed and understood any signs in the vicinity of the ride and has satisfied any posted height, medical or other restrictions.
- Knows the range and limits of the rider's ability and knows the requirements of the amusement ride will not exceed those limits.
- Is not under the influence of alcohol or any drug that affects the rider's ability to safely use the amusement ride or obey the posted rules or oral instructions.
- Is authorized by the amusement owner or the amusement owner's authorized servant, agent or employee to get on the amusement ride.

Bringing the Amusement Park Case

While the RSA imposes specific standards of conduct upon the rider (and, as discussed below, upon the operator), it does not bar or restrict the rights of injured persons to pursue civil claims. By its own terms, the statute provides that it is not intended to preclude a "civil action available under any other law." § 805. In Maine, this would include claims based upon (among other things) negligence, workers compensation and strict product liability. The statute does not create any per se standards for determining negligence or comparative fault in amusement cases. Rather, just like the "rules of the road" in motor vehicle cases, compliance or non-compliance with the RSA is at most "some evidence" of negligence. It remains for a jury to decide the issues of negligence and comparative fault.

In considering whether to bring a case against an amusement ride owner or operator, it is important to remember that the statute also imposes requirements on the part of the amusement owner. The owner must post signs that are conspicuous and communicate the statutory rules pertaining to rider responsibility and conduct. If an owner fails to follow the statute and does not post the required signs, instructions and warnings, he should not be permitted to take advantage of any failure on the part of the rider to follow those same rules. Accordingly, it is essential to obtain documentation of the signage, instructions and warnings posted by the amusement owner. Did the injured rider actually see the signs? If not, why not? Were the signs too small or otherwise inconspicuous?

Also, look to see whether the amusement owner acted in a manner consistent with the rules and posted signs. Did the amusement owner tacitly approve of improper rider conduct by allowing prohibited conduct and failing to deter misconduct? For instance, although the statute precludes extending arms or legs outside a roller coaster, it is common knowledge that many riders do just that with the tacit consent of the operator. A ride operator cannot permit conduct deemed unsafe by statute and then use that same statute to defend against an injury claim that arose from the conduct it permitted.

Additional Practical Considerations for Succeeding in the Amusement Park Case

When you first see a potential client in an amusement park case, you may be already behind. By statute, an injured amusement park rider "shall report the injury in writing to the park owner." 8 M.R.S.A. § 803(1). While the statute says failure to report in writing does not affect the rider's right to a civil remedy, this requirement may enable the park owner and its insurer to conduct an immediate investigation.

Go to the scene and see the ride in operation. See what happens during the ride's normal use. Investigate the type of ride and see if others have been injured similarly. Familiarity with the ride and how it works is critical to both understanding the liability case and in preparing your client to communicate her story.

With some research, you can find standards for operation of particular rides. Few operators build their rides. Rather, they purchase them, from manufacturers who define the proper operation, maintenance and use of the attraction. These standards from manufacturers can be a potent weapon in defining what went wrong, why it went wrong, and how the operator caused it to go wrong by violating the manufacturer's standards. ■

In Other News



- **Benjamin R. Gideon** – recently won a bench trial in Cumberland Superior Court on behalf of a young woman who suffered a hip injury as a result of a rear-end collision. Prior to trial, the defense moved in limine to exclude plaintiff's medical expert on the grounds that the necessity for the hip surgery recommended by plaintiff's doctor could not be verified without diagnostic arthroscopy, which the plaintiff could not afford because she lacked medical insurance. The plaintiff presented a claim for \$10,000 in past medical bills and approximately \$40,000 in expected future medical expenses related to the surgery. At trial, the defendants contested liability, damages and medical causation. The pretrial offer was \$45,000 and pretrial demand \$90,000. The court denied defendants' motion in limine, and, after trial, awarded plaintiff \$150,000 plus interest and costs.
- **Jodi L. Nofsinger's** rating with Martindale Hubbell was recently elevated to an AV rating.
- **Bill Robitzek** and **Jim O'Connell**, representing the Estate of a woman killed by a drunk driver in a car wreck, filed suit against the negligent driver and the bar where he was drinking prior to the crash. Their disputed motion for approval of attachment and trustee process was recently granted, resulting in an order of attachment and trustee process in the amount of \$1,000,000 against the assets of the defendant driver.