

Maine Statutes of Limitation

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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.

MaineCare Pitfalls – Personal Injury Attorneys Beware!

Author: Michael T. Bigos, Esq.



When a personal injury client's medical bills are or may be paid by MaineCare, counsel must keep in mind the dual and sometimes conflicting goals of protecting the client's eligibility for MaineCare insurance and maximizing the client's cash recovery from the case. Succeeding in this endeavor will invariably require careful attention to a unique set of issues and problems, beginning at the very first meeting with the client. Here is an outline of practice pointers which serves as a starting point for dealing with these cases:

- 1. Keep A Detailed Worksheet Reflecting Payment Of Medical Bills.** In some cases, medical bills are paid by a combination of med pay coverage, MaineCare, health insurance, and the client (out of pocket). Handling the case properly requires knowing the total amount of the bills, who has paid what, and the amount of any outstanding balance. Only with these facts, updated in a handy form and at your fingertips, will you be able to negotiate the best reduction of reimbursement claims. This level of preparation is needed to shift payment responsibility to the entity most likely to provide relief to the client, to argue whether certain services are truly accident-related, and to maximize the net recovery to the client.
- 2. Anticipate Proof Problems At Trial.** If the case is tried, the defense may attempt to argue that only the amount paid by MaineCare should be admissible at trial on the issue of the value of accident-related medical treatment (because that amount is likely to be less than the face amount of the bills). Avoid that debate by stipulating to an appropriate value for accident-related treatment, and guard against last-minute motions in limine by designating expert and lay witnesses to testify regarding the reasonableness of bills.
- 3. Prepare To Shift The Burden.** If a stipulation is not possible or likely, use requests for admission, document requests and interrogatories to force the defendant to disclose its available evidence on the reasonable value of medical services other than collateral MaineCare payments.
- 4. Do Not Accede To Defense Arguments.** Defense lawyers routinely argue that MaineCare payments, by definition, equal the reasonable value of medical services, or that MaineCare makes "adjustments" to those medical bills that it deems to be unreasonably high. Those arguments are incorrect and baseless. By its own terms, MaineCare regulations make clear that MaineCare payments do not establish the reasonable value of medical services. See 10-144 CMR 101-1.08-1 and 101-1.02-2(A).
- 5. Respond To Motions In Limine With Confidence.** If you have followed the steps outlined above, you will be ready to respond on the admissibility of MaineCare payments as evidence of the fairness and reasonableness of medical bills. Frame the issue in terms of the collateral source rule: there should be no windfall to the defendant. Cite the Superior Court cases that have ruled in favor of the Plaintiff on this issue. Don't let last-minute motions in limine derail good trial preparation.
- 6. Jury Instructions.** The comment to Alexander, Maine Jury Instruction # 7-108 (4th ed. 2005) explains, "Medical expense damages may be recovered for charges paid by a collateral source or charges actually incurred but later written off or otherwise not collected." In a case involving write offs, you may want to bring this instruction to the attention of the trial judge to ensure that defense counsel does not make reference to write offs during closing argument.
- 7. Ask The Jury To Apportion All Damages.** The verdict form should apportion medical bills, lost wages, earning capacity, pain and suffering, and future pain and suffering. *Provencher v. Faucher*, 2006 ME 59, n. 3, 898 A.2d 404, 407 (allowing damages itemization). If the jury makes a specific finding about medical bills and the defense makes a successful appeal related to MaineCare and the medical bills, only that part of your verdict will be affected by the appeal.
- 8. MaineCare And Settlement Negotiations.** If you are at a point where the case may be settled, you will need to negotiate a repayment of amounts paid by MaineCare. *Arkansas v. Ahlborn* provides little guidance, and cannot be relied upon to guide counsel to the likely outcome of litigation over what should be repaid. A hearing pursuant to 22 M.R.S.A. §14(2-F) is possible if agreement cannot be reached, but rather than litigating with the State, it is better to employ strategies designed to negotiate a fair, sensible reimbursement payment. The State of Maine will consider factors including that there is limited third-party insurance coverage available, medical causation is problematic, liability is questionable, and compromise may help the client reach the goal of independence, as proper bases for reducing repayments.
- 9. Maintaining Eligibility.** Eligibility guidelines for food stamps and MaineCare are strict. Ensuring that settlement funds do not disrupt the client's ability to remain qualified for means-tested benefits is a critical component of settlement. You will need to discuss this openly with the client, government officials (at the right time), and possibly with qualified trust attorneys to arrange settlements that meet client goals. ■



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Health Plans and Reimbursement

In personal injury cases where an employer-sponsored health plan has paid some of the medical expenses, it is important to study the plan language before agreeing to reimbursement.

Here are some of the issues and opportunities:

Even with an ERISA self-funded plan you may have leverage with which to negotiate. Some plans provide for recovery only against tortfeasors or their liability insurers, leaving your client's recovery under her own uninsured motorist policy untouched.

Other self-funded ERISA plans contain "duplicate payments" language limiting reimbursement to circumstances where the client has been fully compensated for his injury.

If your client is a Maine municipal employee, remember that the Maine Municipal Employees Health Trust is a "governmental plan" which is exempt from ERISA and provides for reimbursement on a "fair and equitable" basis.

Read more at bermansimmons.com or contact Robert Furbish, Esq. at 1-800-244-3576.

I N B R I E F

Berman & Simmons Trial Attorneys Newsletter

Summer 2009

Understanding Air Bag Cases

Author: John E. Sedgewick, Esq.



Airbags are an important part of the safety equipment in modern cars, but when they don't work correctly serious injuries can result. Maine lawyers who speak to clients injured in automobiles should have a basic knowledge of airbag claims because there are some cases in which pursuing a product liability remedy may be the only way to fully and properly protect the client.

How Airbags Work

Every airbag system includes crash sensors, a control module, and an airbag module. The sensors respond to sudden changes in a vehicle's speed or direction by sending electrical signals to the control module. The control module, a small computer, receives those signals and, when appropriate, activates an explosive device in the airbag module, which deploys the bags at over 200 mph. The elapsed time from the onset of a crash to full airbag deployment is less than one-tenth of a second.

The earliest airbag systems had a single airbag mounted in the steering wheel. They were designed to protect the driver in a front-end crash. The theory was that if the sensor could identify a crash event from a sudden change in velocity, and if the control module could send a deployment signal, and if the airbag could be inflated fast enough, then the driver would strike the soft airbag and not something harder and more dangerous. This theory has proven viable, and many injuries have been mitigated or avoided. Airbag systems are now standard safety equipment, and protect the driver and other passengers as well.

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Evaluating The Nursing Home Case: Accidents, Falls And Elopement

Author: Benjamin R. Gideon, Esq.



More so than any other segment of the population, older adults who reside in nursing homes or other institutional care facilities often are at risk of suffering "accidental" injuries. The term "accident" is defined by the federal regulations as "any expected or unintentional incident, which may result in injury or illness to a resident." With respect to accident prevention, the federal regulations provide "the facility must ensure that the resident environment remains as free of accident hazards as possible; and each resident receives adequate supervision and assistance devices to prevent accidents."

The challenge in evaluating a nursing home case involving accidental injury or death involving a fall or other type of accident is to distinguish between those accidents that result from substandard care, negligence or neglect on the part of the facility and its staff, and those that could not have been anticipated or avoided.

The Stakes Are High

Before discussing the standard of care, it is important to have some appreciation for what is at stake. For an older adult in a care facility, a single fall and orthopedic injury is, more often than not, an event from which no recovery is possible. Even if the resident does not suffer immediate death, he or she may well face irreversible decline in cognition, chronic pain and lose what is left of his or her independence. An older adult who was in the facility for rehabilitation may lose the chance to improve and go home. With respect to "elopement" (wandering out of the facility), recent articles indicate that 70% of such incidents result in death.

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Noteworthy



- **Daniel G. Kagan's** term as President of the Maine Trial Lawyer's Association began on April 10th at the 2009 MTLA Spring Seminar and Annual Meeting, held at the Hilton Garden Inn in Freeport. In speaking to the 120 seminar attendees, Dan outlined his plans for the coming year, which include working closely with legislative leadership and the judiciary to preserve and expand access to civil justice in Maine.
- **Jodi L. Nofsinger** has been appointed by the Maine Supreme Judicial Court as a member of its Advisory Committee on the Rules of Civil Procedure.
- **Steven D. Silin** has been named "Maine's Personal Injury Litigator of the Year" for 2009 by Best Lawyers in America. This first of its kind award, based on extensive peer-review surveys, recognizes Steve for his "exceptional abilities, professionalism and integrity."
- **Berman & Simmons** continues to receive praise as "one of the best plaintiff's firms in the state" and received a **highly recommended** ranking by Benchmark Litigation, the definitive guide to America's leading litigation firms and attorneys in its 2009 edition.
- Also recognized by *Benchmark* as "Local Litigation Stars" were **William D. Robitzek**, **Steven D. Silin**, and **Julian L. Sweet** for their success in handling personal injury, medical malpractice, and product liability cases. "Future star" status went to **James E. O'Connell, III** who predominately handles cases involving accidents, professional malpractice, business torts and faulty products.

Understanding Air Bag Cases continued

Problems With Airbags

Two common problems with airbag performance are unwanted deployment and failure to deploy. Lawyers who represent people injured in car crash cases should consider whether a product liability claim related to airbag malfunction might be a source of recovery to an injured client where there is otherwise no insurance coverage or insufficient coverage.

Unwanted Deployment

Unwanted airbag deployment is bad because it can not only cause injuries, but can also cause crashes. This is an important distinction. Airbags were intended to work in response to collision events. In unwanted deployment cases, there is either no collision preceding deployment or the forces involved in the collision are so low that there should be no deployment. If an unwanted deployment occurs at high speed, it can disable the driver and cause a crash, hurting people both inside and outside of the car. These events can appear to be unexplained crashes, as occupants will rarely be certain about what happened.

An unwanted deployment occurred in Maine recently. While driving at low speed in a parking lot, the driver's airbag in a GM sedan deployed spontaneously. The driver was struck in the face and arm by the deploying bag, suffering fractures of the face and wrist. The bag deployed as a result of an electrical short circuit in the control module, which was located on the floor of the car. Water from wet boots, leaky window seals and other sources soaked the carpeting and eventually leaked through the seals of the control module, corroding and corrupting the electrical circuits. Similar cars were recalled in Canada for exactly this problem, but no recall and no warning was issued in the U.S. The long history of other similar incidents known to the manufacturer made this incident completely avoidable. In another incident several years ago, the driver of a Mitsubishi was exiting her driveway and did no more than blow the horn to say goodbye to family members when her airbag deployed and caused serious arm injuries. Fortunately, these unwanted deployments occurred at low speed.

An example of unwanted deployment causing a crash involved the driver of a Volvo who was knocked unconscious when his airbag deployed spontaneously at normal road speed. He lost control and crashed head-on into oncoming traffic. Incidents like this are sometimes wrongly attributed to driver error because they happen so fast.

Failure To Deploy

Non-deployment can be the proximate cause of injuries and death. These cases are called "enhanced injury" cases because only that part of the injury which could have been prevented by proper deployment, presumably an enhanced injury, is compensable. Any injury that would have resulted from the collision if the airbag had deployed correctly cannot be proximately caused by non-deployment. Clients with brain injuries or serious neck injuries from front-end collisions in cars in which the airbags failed to deploy may benefit from a product liability analysis of their case.

Non-deployment occurs when poor sensor design results in electrical discontinuity between a sensor and the control module. That happened recently to a Maine "snowbird" driving south for the winter. During a head-on collision caused by the other driver, the wire connecting the crash sensor to the control module was severed, so the driver's airbag did not deploy. This should have been a survivable crash, but the driver died of head injuries and internal bleeding. The product liability settlement in the case was many times greater than the available auto liability coverage.

In January of 2009, Nissan recalled thousands of trucks sold in snow-belt states, including Maine, because the airbag sensors were not properly protected from road salt corrosion. Rather than expose customers to sensor malfunction leading to non-deployment, Nissan recalled the trucks.

Conclusion

Whether they buy a car for commuting to work, taking children to school, or family ski trips, people have come to rely on airbags as standard safety equipment. Vehicle manufacturers have the capacity to design and make airbag systems that work reliably and consistently, and lawyers have the duty and opportunity to hold them accountable when they fail to do so.

For more articles on product liability cases by Attorney Sedgewick, please go to www.bermansimmons.com. ■

Evaluating The Nursing Home Case: Accidents, Falls And Elopement continued

The Standard Of Care

Before it can assert that an accident was "unavoidable," a facility must show that it took reasonable steps to identify the risk and to implement an appropriate plan to mitigate it. As the risks change or interventions fail, the facility must adjust its approach to meet the resident's changing needs. It must try new interventions if current approaches prove ineffectual.

Identify Risks

It is elementary that a facility and its staff cannot take reasonable steps to prevent an accident if it fails to identify the risk in the first place. For this reason, accident prevention begins with timely and comprehensive resident assessment. Many factors contribute to accident risks: cognitive deficiencies, confusion, agitation, dementia, unsteady gait, anxiety, depression, malnutrition, prescription medications, pain, toileting needs and environmental factors such as the layout, organization, lighting and security of the physical premises. Properly assessing the resident for risk of falls or elopement involves a deliberative, multi-disciplinary process which must consider of all significant risk factors. The independent, subjective decision of an individual staff member is no substitute for this inclusive approach.

Implement A Plan

The facility must devise reasonable interventions to reduce or eliminate accident risks. For instance, if a resident is unsteady on her feet and lacks the cognitive functioning to remember to use her call button, an alarm might be required to alert staff if the resident attempts to self-ambulate. For residents who wander and suffer from dementia, reasonable steps must be taken to prevent elopement. Such steps might include transferring the resident to a locked unit.

Medication Risks

Accidents are often related to the use of medication. Older adults are highly susceptible to adverse side effects of medications. Unfortunately, some facilities use medications excessively in order to restrain or subdue a resident who is anxious or noncompliant. Even if such medications are medically indicated, the facility fails in its duty of care unless it closely monitors the resident for side effects and plans accordingly.

Adequacy Of Staff

In investigating a case involving an accident, it is important to look at the timing of the incident and the staff levels in the facility at that time. The standard requires that the nursing home provide "adequate" staffing to meet the needs of the residents. If a resident requires close supervision, but there is insufficient staff to provide that level of care, the facility has violated this "adequacy" standard. Another timing-related issue is whether the accident occurred within the first 72 hours after admission. Newly-admitted residents are at heightened risk of accidents because they may have anxiety and difficulty adjusting to the new setting.

Look For Patterns

The facility often takes the position that it could not have anticipated the accident. In order to counter this defense, look to see whether there were prior similar accidents involving this or other similarly-situated residents. If the resident suffered prior falls at the facility, any claim by the facility that it lacked notice of the resident's fall risk will lack credibility. If there is such a pattern, look to see whether the facility developed new interventions.

Conclusion

One of the fundamental responsibilities of any nursing home is to keep the residents safe and secure and to take reasonable steps to prevent accidental injury or death. Not only is this good practice and common sense, but it is mandated by Federal and State law. Although not all accidents are avoidable, many are.

For more articles on Nursing Home cases by Attorney Gideon, please visit our website at www.bermansimmons.com. ■

In Other News



- **Michael T. Bigos** recently presented a seminar on "Proving the Reasonable Value of Medical Expenses at Trial" at the Maine Trial Lawyers Association CLE entitled "Issues for a New Year."
- **James O'Connell** recently obtained Orders of Attachment and Trustee Process in two separate cases for clients who were severely burned in fires, one of whom died as a result of his injuries. The Orders were used to successfully attach at least eight parcels of real estate and secure funds in a combined amount of \$750,000 held by Trustees both in and outside of Maine.
- **William D. Robitzek** will be teaching a course at the law school this Summer in "Problems in Cross Examination." Bill was an adjunct professor at the law school in 2008 teaching a course in "Advance Problems in Pretrial Civil Litigation."
- **Steven D. Silin** and **William D. Robitzek** were co-editors with Justice Donald G. Alexander and Laurie A. Gibson, Esq. for the MSBA Practice Series, "The Maine Rules of Civil Procedure with Advisory Committee Notes and Practice Commentary." This is the first comprehensive publication of the rules with all historical commentary and advisory notes in decades. This important volume is available from the Maine State Bar Association.
- **Benjamin R. Gideon**, who has served on the adjunct faculty of the Maine Law School since 2006, will be returning to teach a course during the Fall semester.