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### Law Articles

For our recent law articles, go to [bermansimmons.com/law-articles](http://bermansimmons.com/law-articles).

Maine Statutes of Limitations (2017)		
Cause	Time Allowed	Action Required
<b>Personal Injury</b>		
• Personal Injury	2 years	18 M.R.S. § 751
• Wrongful death	2 years from date of death	18 M.R.S. § 751
• Wrongful death	2 years from date of death	18 M.R.S. § 751
• Wrongful death	2 years from date of death	18 M.R.S. § 751
<b>Contract</b>		
• Contract	6 years	18 M.R.S. § 752
• Contract	6 years	18 M.R.S. § 752
<b>Real Estate</b>		
• Real Estate	6 years	18 M.R.S. § 753
• Real Estate	6 years	18 M.R.S. § 753
<b>Maritime</b>		
• Maritime	2 years from date of death	18 M.R.S. § 754
• Maritime	2 years from date of death	18 M.R.S. § 754
<b>Other</b>		
• Other	2 years	18 M.R.S. § 755
• Other	2 years	18 M.R.S. § 755
<b>Statute of Repose</b>		
• Statute of Repose	2 years	18 M.R.S. § 756
• Statute of Repose	2 years	18 M.R.S. § 756
<b>Statute of Limitations</b>		
• Statute of Limitations	2 years	18 M.R.S. § 757
• Statute of Limitations	2 years	18 M.R.S. § 757
<b>Statute of Limitations</b>		
• Statute of Limitations	2 years	18 M.R.S. § 758
• Statute of Limitations	2 years	18 M.R.S. § 758
<b>Statute of Limitations</b>		
• Statute of Limitations	2 years	18 M.R.S. § 759
• Statute of Limitations	2 years	18 M.R.S. § 759

### Maine Statutes of Limitations

To download a copy of our Maine Statutes of Limitations document, go to [bermansimmons.com/attorney-referrals](http://bermansimmons.com/attorney-referrals).



## Justice Achieved and Fire Safety Improved

■ Michael Bigos, Esq.

In the middle of a September night, a fire ripped through an apartment building at 35 Main Street in downtown Biddeford, Maine. Michael Moore, 23, and his best friend and roommate James Ford, 21, were trapped in their attic apartment unit. By the time they were carried out of the building by firefighters, the men were unconscious and had suffered severe smoke inhalation. Moore died the next day at Maine Medical Center in Portland. Ford died nearly one month later. The men had been friends since grade school.

The investigation ultimately led to the arrest of 18-year-old Dylan Collins, who set the blaze because he was angry with his girlfriend, who lived in the building. She and her family escaped from the fire.

Needless to say, the tragedy had a profound impact on those who loved Michael and James, as well as the firefighters and medical personnel who tried to save them. What made the grief even harder to bear was the fact that these deaths were absolutely preventable. According to the Maine State Fire Marshal's Office, there were 27 National Fire Protection Association code violations at 35 Main Street that "significantly contributed" to their deaths. If the building had been up to code, and the men could have accessed a safe way out, they almost certainly would have lived.

*Continued on page 2*



## Maximizing Jones Act Recovery for Maine's Injured Maritime Workers

■ Dov Sacks, Esq.

As Mainers, we are fortunate to live in the state with the third-longest coastline in the continental U.S., trailing only Florida and California. This offers many the opportunity to work at sea in fishing, maritime construction, shipping, oil, and many other industries.

However, as anyone who has spent time at sea knows, these maritime positions can pose serious risks—often to life and limb—which are uncommon in most land-based positions. Fortunately, several federal and state laws recognize the dangerous nature of these jobs, and they provide maritime workers with special protections.

No law is more important in this regard than the Jones Act of 1920, which gives injured maritime workers a powerful legal right that is usually denied to land-based workers: the right to sue their employer for injuries caused by the employer's unsafe conduct.

### The Power of the Jones Act

In the U.S., the Workers' Compensation Program, overseen by the Department of Labor, prevents virtually all land-based employees from suing their employer, even when their injuries were caused by horrible work conditions or employer carelessness.

*Continued on page 3*

## Firm News

### ■ Rockland Man Awarded \$2M in Medical Negligence Case

A jury in Bangor awarded \$2 million to Robbie Nason, 49, in a medical malpractice case against Eastern Maine Medical Center and a hand surgeon whose negligence resulted in permanent damage, complications, and multiple follow-up surgeries for Nason, who originally had broken his wrist. Attorneys **Jodi Nofsinger** and **Susan Faunce** represented Nason.

### ■ Double Fatality Wrongful Death Case Settled

The families of Paul Fowles and Christine Torres-York, both from midcoast Maine, have settled wrongful death claims against R & E Logistics, a Tennessee-based trucking company. The claim arose from a 2016 multi-vehicle trucking accident. Attorney **Steven Silin** represented the families. The terms of the settlement are confidential.

### ■ Westbrook Woman Awarded \$338K for Defective Wheelchair Lift Accident

A judge ordered a Florida businessman to pay Marion Murphy, 83, \$338,000 for serious injuries caused by a defective wheelchair lift he sold her on eBay. Attorney **Daniel Kagan** represented Murphy.

### ■ Rockland Hit-and-Run Victim Awarded \$200K

A jury awarded \$200,000 to Adam Feener, 22, whose hand was seriously injured during a hit-and-run incident. Attorney **Michael Bigos** represented Feener in the trial against Concord Insurance Group, The Main Street America Group, and Progressive Insurance Company.

### ■ Cassidy Charette Wrongful Death Lawsuit Settled

The family of Cassidy Charette, the central Maine teenager killed in a haunted hayride crash in October 2014, has settled its wrongful lawsuit against Harvest Hill Farm, the farm's former owner, hayride driver, and mechanic. Attorney **Jodi Nofsinger** represented the Charette family. The terms of the settlement are confidential.

### ■ Attorney Robert Furbish Co-Author of Maine Tort Law

Attorney **Robert Furbish** is co-author of the 2018 edition of Maine Tort Law, the definitive reference guide for civil litigators statewide. Attorney **Alicia Curtis** also played a key role in the 2018 edition, making critical research, writing, and editing contributions.

*Justice Achieved, continued from page 1*

Berman & Simmons was retained by the families of Michael and James to pursue wrongful death claims against the building's landlord, Nielsen Clark. As the attorney for the families, my goal was two-fold: first, to achieve a remedy that would provide justice and full compensation for the Moore and Ford families; and second, to help prevent similar tragedies from happening in the future by shining a light on the broader problem of unsafe housing conditions. Prevention was an important goal for both families. They did not want their loved ones to have died in vain.

### Overcoming Blame

For a first step toward our goals, we would need to overcome blame. The defense sought to blame the victims: Why didn't they try to escape through a window? Why didn't they crawl through a passageway that led to another exit? Maybe they had disabled the smoke alarms?

The defense also wanted to focus on the arsonist. How could Nielsen Clark be blamed for the deaths, they argued, when it was Dylan Collins who started the fire?

We needed to show that the landlord should be held responsible in civil court, just as Dylan Collins would ultimately be held responsible in criminal court. It was our position that the actions of both parties contributed to the deaths of Michael and James. The actions of one could not legally nullify the actions of the other.

We shifted the focus of the case to the blatant code violations at 35 Main Street.

According to the State Fire Marshal's Office, there were more than 20 safety violations at the building, including the lack of a second fire exit and the lack of working smoke alarms, as required under the National Fire Protection Association life safety code.

The investigative reports of the Fire Marshal's Office and the Maine Attorney General's Office were crucial pieces of evidence as we built our case that Nielsen Clark had acted negligently. On top of those reports, we also sought and obtained expert testimony about the cause and origin of the fire, and the impact the code violations had on Michael and James' chances at survival.

A former investigator with the State Fire Marshal's Office provided his expert opinion: "If the apartment was equipped with a second means of egress, as was required, it is almost certain that Michael and James would have escaped the building without injury or with minimal injury."

### Recreating the Circumstances

Michael and James were searching frantically for a way to escape their apartment as flames climbed up the only stairway, but the two men were trapped.

The terror they experienced consciously, before they were overcome by smoke and heat, was key to demonstrating the suffering they endured prior to their deaths. In many cases like this one, however, there are no witnesses to help recreate the moments of the tragedy. Fortunately, we had a witness.

Chandra Osthoff of Essex, Iowa, had been communicating with Michael and James via Skype in the early morning hours when the fire started. Once James learned of

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***Finally, civil justice and criminal justice. One without the other would have been another tragedy for the families.***

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*Jone Act, continued from page 1*

By contrast, the Jones Act expressly permits that “[a] seaman injured in the course of employment may elect to bring a civil action at law, with the right of trial by jury, against the employer.” (46 U.S.C. § 30104)

Additionally, when workers prevail in such lawsuits, the Jones Act entitles them to broad categories of damages—including lost future earnings, past and future medical expenses, past and future pain and suffering, and permanent impairment damages—unavailable to most land-based employees.

The injured maritime employee’s ability to sue his or her employer under the Jones Act is a rare and coveted jewel within the American legal system. At Berman & Simmons we have developed expertise in this area of the law and are absolutely committed to making the most of it for our clients.

### **Proving Negligence for Unsafe Conduct**

Although the Jones Act makes broad recovery possible, injured maritime workers are not entitled to any compensation unless their attorney first succeeds in proving that the injuries were caused by employer negligence or unreasonable conduct.

At Berman & Simmons, we work to prove negligence and hold maritime employers accountable for a broad range of unsafe conduct, such as:

- The careless actions of a co-worker, whether deckhand or captain
- Inadequate training of the crew
- Faulty or defective nautical equipment
- Substandard safety devices or procedures
- Unseaworthiness of the vessel

We also know what it takes to recover full damages for our clients even when factors other than an employer’s negligence (such as unpredictably rough weather) played the primary role in causing our clients’ injuries. Our expertise in the application of the Jones Act enables us to obtain financial recoveries that are often far greater than would be possible for a land-based worker who had suffered the same injuries.

### **Expanding Jones Act Coverage**

We pride ourselves in our ability to secure Jones Act protections for as many injured Mainers as possible. In order to qualify for Jones Act protection, a worker must be (1) a “seaman”; (2) “in the service of a vessel or group of vessels”; and (3) working within an “employer-employee relationship.”

These legal criteria are far more complex than they sound: Is a worker who spends only a fraction of his work hours at sea a “seaman”? What about the worker who is almost always at sea, but is injured on land? Are non-self-propelling structures such as barges, dredges, or oil rigs considered “vessels”? Is the worker who is paid “off the books” considered an employee?

Aggressive and intelligent lawyering is often the only difference between a court ruling that an injured worker is a “seaman” who can sue his or her employer, and a court ruling that the worker is “land-based” and has no right to sue. Our attorneys are able to secure “seaman” status for workers who may not even see themselves as maritime workers.

### **Attention to Detail**

Jones Act cases are complex legal matters involving numerous challenges that can sink a case before less experienced attorneys can even recognize them.



*Our expertise in the application of the Jones Act enables us to hold employers accountable and maximize financial recoveries for maritime workers.*

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For example, employers will often “helpfully” and quickly usher their injured maritime employees into the Workers’ Compensation Program because, under Maine law, an award of workers’ compensation benefits can permanently strip a maritime worker of the right to sue an employer under the Jones Act.

Federal law allows three years from the date of injury to file a Jones Act lawsuit. However, much faster action is often necessary to preserve critical evidence and eyewitness testimony, in order to achieve maximum recovery.

If your client has been injured while working at sea, don’t let them entrust their financial security to their employer, who has every reason to keep them in the dark. Contact us for a comprehensive assessment of potential Jones Act claims. ■

## Applying Jones Act to El Faro case

On October 1, 2015, in one of the worst maritime disasters in American history, the U.S.-flagged cargo ship SS El Faro sank—and its entire crew of 33 perished—near the Bahamas. The ship’s captain had refused to heed repeated weather warnings of fast-approaching Hurricane Joaquin.

Attorneys Benjamin Gideon and Dov Sacks represented two Maine families whose loved ones were lost at sea in this tragedy. In the intensive litigation against the shipping company that had employed the deceased crew, the Jones Act enabled them to successfully secure recovery on behalf of these devastated Maine families.

## Attorney Elizabeth Kayatta Joins Firm



Attorney Elizabeth Kayatta, a Maine native who has spent the past five years in Boston representing plaintiffs in medical malpractice cases and other civil disputes, has joined Berman & Simmons. She will represent plaintiffs in medical malpractice, personal injury, wrongful death, and other civil litigation matters.

Kayatta grew up in Cape Elizabeth. She attended Princeton University and graduated magna cum laude from Boston College Law School. Kayatta officially joined the firm December 1, working at its main office in Lewiston. ■

## Firm News

### ■ Suit Against Vehicle Manufacturer

In 2017 attorney **Daniel Kagan** filed suit against a major car and truck manufacturer for product liability. The suit alleged that our client’s catastrophic injuries sustained in an automobile crash resulted from a product defect addressed inadequately by the manufacturer’s NHTSA-obligated recall. Through discovery, Kagan developed evidence that the manufacturer was aware that its recall procedure would not correct the defect but chose to go forward anyway because it lacked enough parts to fix all affected vehicles. Following pre-trial mediation the parties settled the dispute on terms that were “satisfactory to all parties.”

### ■ Attorney Alicia Curtis Named Pro Bono Attorney of the Year

ILAP selected Berman & Simmons as the Pro Bono Firm of the Year for 2017. In addition, attorney **Alicia Curtis** was named as the Pro Bono Attorney of the Year. ILAP, Maine’s only statewide provider of free and low-cost legal assistance to immigrants and refugees, annually recognizes a law firm and attorney who stand out as exceptional in their commitment and dedication to their Pro Bono Asylum Project.

### ■ Attorney Michael Bigos Named MTLA President

Attorney **Michael Bigos** was recently named President of the Maine Trial Lawyers Association. As an accomplished trial attorney and former legislative staffer, Michael is excited to promote the cause of civil justice in capitols and courtrooms during his term. “2018 is an important election year for pro-civil justice candidates in Maine and the U.S.,” says Michael. He will also prioritize civility in legal practice, and the highest quality legal education to meet the mission of the organization.

### ■ U.S. News–Best Lawyers®

The following attorneys have been selected for the Best Lawyers in America® 2018 directory: **Steven Silin**, **Julian Sweet**, **Daniel Kagan**, **Jodi Nofsinger**, **Benjamin Gideon**, and **Jack Simmons** (of counsel). Maine Attorneys **Gideon** and **Nofsinger** were named “Lawyer of the Year.”

### ■ Super Lawyers®

New England Super Lawyers has selected **Steven Silin**, **Julian Sweet**, **Daniel Kagan**, **Jodi Nofsinger**, and **Benjamin Gideon** for its 2018 Directory. **Miriam Johnson**, **Timothy Kenlan**, **Travis Brennan**, **Dov Sacks**, and **Taylor Asen** were selected as “Rising Stars.”

the flames, he stopped the Skype call and called Chandra back from his cell phone. Chandra spoke with James, who was in a state of panic, until the line went dead about a minute later.

As we put our case together, I developed a rapport and a level of trust with Chandra. When I prepared her for deposition, I emphasized the importance of justice—not only for Michael and James, but for all tenants who are put at risk because of substandard housing conditions. At deposition, she conducted herself beautifully, providing a real time account of what the men had gone through.

### **The Tipping Point—Mediation**

About nine months after we filed the wrongful death lawsuits, the cases were transferred from York County Superior Court to U.S. District Court in Portland. We had taken nearly 20 depositions and felt we had the advantage.

This belief was bolstered when the defense team requested a mediation, which is not required in federal court.

Friends and relatives of Michael and James, including their sisters, attended the mediation. I created a Powerpoint presentation in an effort to capture the essence of the dispute and convince the defense they would not want to proceed to a trial. Slides included understandable photos and graphics, 911-call audio, and dramatic video deposition clips from police, co-workers, and family.

Soon after the mediation, to the great relief of the families, we were able to reach settlements in both cases. The terms of the final settlements are confidential.

Within a year, Dylan Collins was sentenced to 50 years in prison after pleading guilty to arson and murder. Finally, civil justice and criminal justice. One without the other would have been another tragedy for the families.

### **Addressing the Needs of the Clients and Society at Large**

In this civil case, we were proud to achieve our two primary goals: compensation for the families of the victims, and bringing safety-code compliance, as well as the need for better enforcement, into the public spotlight.

Tenants, particularly low-income renters, deserve safe housing and landlords who comply with fire and building codes, plus adequate oversight by towns and cities.

Since the cases were resolved, the City of Biddeford has hired an extra inspector to ramp up inspections of apartment buildings, with a goal of getting to more than 600 buildings. In addition, Biddeford continues to crack down on landlords who are out of compliance. ■



*WMTW photo: Scene from Biddeford apartment fire. In this civil case, we achieved our two primary goals of providing compensation for the families of the victims and bringing safety code compliance into the public spotlight.*

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## **Legislative Updates**

### **LD 852: An Act to Make Changes to the Maine Liquor Liability**

Berman & Simmons has been representing seriously injured victims of wrongdoing in Maine's courts for more than 100 years. As part of our longstanding commitment to civil justice, we have fought to protect the rights of injured victims in our legislative bodies as well. We are proud to have played a key role in passing many important laws that, in turn, have helped ensure access to justice for all Mainers.

Most recently, in 2017, the Maine Trial Lawyers Association proposed a much-needed amendment (LD 852) to the Maine Liquor Liability Act. Berman & Simmons attorneys Steven Silin, Robert Furbish, and Michael Bigos were instrumental in conceiving, drafting, and helping to successfully shepherd this law through to passage. Specifically, LD 852 extended the “good cause” exception to the 180-day deadline for injured victims of an intoxicated driver to file a Notice of Claim when they are unable to obtain investigative records from a law enforcement agency that could potentially help identify the liable server of alcohol within the presumptive filing deadlines. ■

### About the Firm

Berman & Simmons, P.A., is a firm of 17 attorneys with offices in Portland, Lewiston, and Bangor, Maine. The firm has represented the people of Maine in a wide range of plaintiffs' cases for over 100 years and has obtained some of the largest personal injury verdicts ever awarded in Maine courts. Berman & Simmons has been listed under all litigation headings in Best Lawyers since its first publication and has been cited in Chambers USA as "the best plaintiffs' personal injury and medical malpractice firm in Maine."

### Refer Your Clients with Confidence\*

We have a long history of working with Maine lawyers as referral counsel to help obtain fair compensation for their injured clients. If you have a complex personal injury, medical malpractice, or dangerous drug or medical device case in which our experience, expertise, and resources could make a difference, let us provide the support you need. Your client's success is our shared goal.

**To refer a case,  
please call us at  
800-244-3576**

\* We share fees consistent with the Maine Rules of Professional Conduct adopted by the Maine Supreme Judicial Court.



## Notable Law Court Cases in 2017

■ Alicia F. Curtis, Esq.

### A Defendant's Offer to Stipulate Should Not Disrupt the Narrative Force of Plaintiff's Evidence at Trial

A tort defendant whose negligence was obvious or shocking will sometimes offer to stipulate to liability before trial, leaving the jury to consider the issue of damages in isolation. The Law Court's recent decision in *State v. Michaud* addresses the extent to which such an offer prevents a plaintiff from adducing evidence about how a car crash occurred, or why using the wrong motor in a wheelchair lift caused it to come crashing down, for instance (2017 ME 170). The criminal defendant in *Michaud* crossed the yellow line and hit another driver head-on, while attempting to pass several cars ahead of her. Before trial, she offered to stipulate that the driver and passenger in the car she hit had suffered "serious" injuries. The prosecutor nevertheless put on evidence of the victims' exact injuries.

In reasoning that applies equally in civil cases, the Law Court explained the relevance of the exact injuries, even if the stipulation is accepted. The *results* of the crash—the exact injuries that occurred—were proof of the nature of the crash and how it occurred.

The *Michaud* court went further, acknowledging that evidence has value beyond its relevance. Quoting the Supreme Court case *Old Chief v. United States*, it explained: "People who hear a story interrupted by gaps of abstraction may be puzzled at the missing chapters" and an assurance that missing logical links exist, is "never more than second best." Plaintiffs should insist on their right to tell a complete story. Under *Michaud*, a tort defendant's stipulation to liability should not prevent the plaintiff from putting on evidence of negligence that is relevant and necessary to her case.

### The Law Court's Recent Decision in *Plante v. Long* Illustrates the Danger of a "Piecemeal" Approach to Evidence In Summary Judgment Decisions

Trial judges deciding a pretrial motion may be tempted to view the evidence in a "piecemeal rather than cumulative fashion," without the complete narrative provided by a trial, warned the dissent in *Plante v. Long* (2017 ME 189). Quoting a law review article by Arthur R. Miller, Justice Jabar noted the danger of judges being tempted to draw inferences against the nonmoving party, or discount the nonmoving party's evidence, when deciding a motion for summary judgment without the "safeguards and environment" of a trial.

The majority in *Plante v. Long* held that two brothers, a fire chief and assistant fire chief for a town in Maine, had failed to make a *prima facie* case that the defendant, an outspoken critic of the fire department and its leadership, had spoken with "actual malice" in sending emails about the brothers. At issue was whether the defendant had been reporting verifiable, black-and-white facts, or stating his opinion about ambiguous events.

The majority in *Plante v. Long* arguably succumbed to the temptation Arthur R. Miller warned of, weighing competing versions of the facts and drawing inferences against the brothers in ruling against them. *Plante v. Long* is an important reminder that in a time when summary judgment is playing an increasingly important role, a plaintiff must build a strong evidentiary foundation for each element of a claim before discovery closes. ■