



A Victory in Maine Superior Court Affirms the Jury's Role to Decide the Scope of a Defendant's Duty

Alicia F. Curtis

Defendant Seeks to Limit its Liability as a Matter of Law

Does the duty of a tour bus operator to provide its passengers a reasonably safe discharge include a duty to drop passengers off at a location where they have a safe path to the front door of their destination? Or, is the duty limited to dropping passengers off in a nearby parking lot, without considering their path to the destination?

VIP Tour and Charter Bus Company filed a motion for summary judgment asking the Maine Superior Court to decide this very issue, as a matter of law, in a lawsuit brought by passenger June Rickett. Ms. Rickett was seriously injured when she tripped and fell in an unlit staircase walking between a parking lot where a VIP tour bus had dropped off her tour group, and the restaurant designated as the first stop on their tour.

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Change to Maine's Wrongful Death Law Expands Measure of Damages

Sarah K. Hall

In 2009, the Maine Legislature eliminated ten words from the state's wrongful death statute. Although this bit of lawmaking was marked by little fanfare, it profoundly reshaped the scope of damages available to grieving beneficiaries of such claims in Maine. Prior to the 2009 amendment, Maine's wrongful death statute provided, in pertinent part:

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 ...

18-A. M.R.S.A. § 2-804 (b) [*repealed and replaced* by 18-A M.R.S. §2-807 (2010)]

When—with the passage of the 2009 amendment—the “to the persons for whose benefit the action is brought” clause was omitted, what might have appeared to have been a small change portended major developments to Maine tort law.

It would just take some time—more than ten years, to be precise—for those changes to be woven into our jurisprudence.

Pre-2009: A Loss-to-Survivors Approach

Under the original language contained in the pre-amendment statute—referred to as a “loss-to-survivors” approach—a wrongful death beneficiary could recover only those pecuniary losses they could prove to have individually suffered as a result of the decedent's death. As a result, if the decedent in a wrongful death action died without a minor child or a spouse,

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OF LIMITATIONS**

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Firm News

Attorney Susan Faunce Interviewed in MaineBiz

Susan Faunce was recently featured in *MaineBiz* "On the Record" with a Q&A about her life experiences and inspirations that contributed to her becoming a fierce and successful advocate for her clients. She also discussed how she'll use her position as the new president of the Maine Trial Lawyers Association to support the courts in getting through the backlog of civil cases.

Sexual Abuse Survivors Practice Group Files Complaints Against Roman Catholic Bishop of Portland

The Berman & Simmons Sexual Abuse Survivors Practice Group—including attorneys Michael Bigos, Elizabeth Kayatta, Tim Kenlan and Joe Gousse—is representing three survivors of childhood sexual abuse by four different Catholic clergy and one lay educator/confirmation officer. Berman & Simmons recently filed the civil complaints against the Roman Catholic Bishop of Portland seeking damages. These are believed to be the first civil suits to be filed since the Maine State Legislature lifted the statute of limitations for such claims one year ago.

Attorney Travis Brennan's Article Featured in Maine Bar Journal

Travis Brennan takes a close look at the decision in *Estate of Carol A. Kennelly v. Mid Coast Hospital*. In his article, Travis highlights the ways in which the Law Court's decision is inconsistent with state and federal law and describes the broad implications this decision will have for many different types of criminal and civil cases.

Attorney Michael Bigos Appointed to Professional Ethics Commission

Michael Bigos has been appointed to the Maine Board of Overseers of the Bar, Professional Ethics Commission, which renders formal and informal written advisory opinions involving the interpretation and application of the Maine Rules of Professional Conduct.

Attorneys James O'Connell and Alicia Curtis Take On Amazon

Jim O'Connell and Alicia Curtis are representing the Fisher family of Woolwich, ME, in a multi-count negligence suit against Amazon and three of its trucking subcontractors for the wrongful death of 41-year-old Joe Fisher. Fisher was struck and killed by an Amazon delivery driver.

LEGAL LANDSCAPES

Our Practice, In Motion

Representing Survivors of Sex Abuse by Religious Clergy

The crisis of sex abuse within religious institutions transcends any one faith or denomination. Over the past several decades, however, much attention has focused on the history of sexual misconduct and coverups in the Catholic Church. Until Governor Janet Mills

signed the law to lift the statute of limitations on childhood sex abuse claims, survivors had no legal path to hold the Church and clergy accountable or to seek justice. Now that is easier to do for all those who suffered sex abuse in Maine as a child.

The Berman & Simmons Sex Abuse Survivors Practice Group represents survivors of childhood and adult sex abuse in a broad range of cases, including those abused by clergy. This group has made investments in trauma-informed hiring, training, and audits with local sexual assault response nonprofits, and now has an extensive network of expert witnesses, mental health counselors, assault response advocates, and leading abuse survivor lawyers around the country with whom it consults on claims.



Helping to Right the Wrong When There Is a Serious Medical Error

The medical malpractice lawyers at Berman & Simmons have obtained several of the largest medical malpractice jury verdicts and settlements in Maine; a record built on experience, expertise, and determined advocacy. We

have access to the world's leading and most highly credentialed medical experts whose analysis and testimony are often pivotal in maximizing compensation for clients.



Holding Those Responsible Accountable in Catastrophic Personal Injury Cases

The personal injury lawyers at Berman & Simmons have established an unmatched track record of success, while obtaining life-changing compensation for clients. We work closely with top medical experts, investigators, accident reconstruction specialists, and other consultants whose expertise can be the key to proving negligence and demonstrating the extent of catastrophic injuries and losses.



CHANGES *continued from Page 1*

the scope of pecuniary damages would typically be much less than if the same person left behind surviving immediate family under identical circumstances. As a practical matter, this meant that a tortfeasor's financial exposure in a pre-2009 wrongful death action hinged, in large part, on the decedent's family circumstances.

Post-2009: A Loss-to-Estate Approach

The 2009 amendment removing the “*persons for whose benefit*” clause relieved beneficiaries of their obligation to prove the extent of loss to specific immediate family of the decedent.

The new language read, in pertinent part:

The jury may give damages as it determines a fair and just compensation with reference to the pecuniary injuries resulting from the death.

18-A M.R.S. §2-807 (2010) [*repealed and replaced by 18-C M.R.S.A. §2-807(2) (2019)*].

This 2009 shift in language—what amounted to a “loss-to-estate” approach—opened the door for *full recovery* of pecuniary damages to the estate of the decedent, including future lost earnings. Under the loss-to-estate approach, the damages are based not upon vagaries of proof as to losses of the individual beneficiaries, but upon the likely future earnings of the decedent. Rooks, Jr., RECOVERY FOR WRONGFUL DEATH §§ 12:52-12:56 (2021).

A significant development in creating a more equitable environment for wrongful death claims, the 2009 revision enabled parents in Maine to recover for the future lost earning capacity of a deceased child for the first time. Faced with expanded availability of damages, some in the defense bar continue to discount the revision and insist pecuniary damages still require proof of loss by specific beneficiaries. Unfortunately, this can have the effect of stifling meaningful settlement discussion and, more concerning, may convince some practitioners to abandon otherwise-viable damage claims in mistaken reliance upon cases decided under the former statute.

Berman & Simmons Successfully Argues Loss of Earnings to Estate of Peter Smith

Despite the passage of more than ten years, there have been surprisingly few decisions on point, and the Law Court has not yet considered the language. Recently, Berman & Simmons attorneys Jodi L. Nofsinger and Sarah K. Hall successfully argued that the 2009 revision of Maine's wrongful death law substantively changed the scope of available damages and eliminated the need to prove loss to specific individuals.

Despite defendants' claim that the statutory language was ambiguous and such damages exceeded the compensatory purpose of tort damages, Superior Court Justice John O'Neil, Jr., denied defendants' Motion for Partial Summary Judgment. In the most authoritative statement on the 2009 revisions to the Maine wrongful death statute to date, Justice O'Neil unequivocally held:

The statute allows a wrongful death plaintiff—a personal representative or special administrator—to seek pecuniary damages resulting from the death, for the benefit of the estate and its beneficiaries. This includes the loss of the deceased's future earnings, regardless of whether the estate's beneficiaries suffered any actual loss.

Angela and Richard Smith, as Personal Representatives of the Estate of Peter Smith v. John Henson, MD, Mercy Hospital and Eastern Maine Health Care Systems, CUM-CV-21-151, Order on Defendant's Motion for Partial Summary Judgment, May 23, 2022 (J. O'Neil Jr.).

This decision paves the way for the Smith family to hold defendants accountable for damages resulting from the untimely loss of their son, Peter. Peter Smith passed away from complications of Lyme disease, that went undiagnosed and untreated despite multiple medical appointments. At only twenty-five, Peter had his whole life ahead of him. A recent graduate of Temple University, Peter had joined a Big Four accounting firm and was working towards his CPA license. Everyone who knew him speaks of his charismatic personality and his strong work ethic. The eldest of six, Peter was a natural leader and supportive sibling and friend. There is little doubt that he had a bright future ahead of him. Under the old statute, recovery of damages by his parents would have been limited absent specific proof that Pete would have provided for them financially throughout his life. Under the revised language, Berman & Simmons attorneys were successfully able to argue that the defendants are accountable to Peter's estate for the same measure of damages, regardless of his marital or parental status.

Building on Earlier Victories

The *Smith* Court's decision builds on and reinforces an earlier Berman & Simmons win on a similar issue in the U.S. District Court for the District of Maine, in which U.S. District Judge George Singal permitted recovery of pecuniary damages by the plaintiff stemming from the death of his son, without requiring proof that the child would have supported the father had he survived. *Fitzpatrick v. Cohen*, 777 F. Supp. 2d 193, 194-5 (D. Me. 2011).

That the latest victory on this issue comes more than a decade after Judge Singal's holding in *Fitzpatrick* evidences the defense bar's resistance to the change. More importantly, however, it demonstrates the depth of Berman & Simmons' ongoing commitment to redefining and protecting the contours of plaintiff-friendly personal injury law through effective research and advocacy. Results such as those achieved in *Smith* lay the framework for better outcomes for our current clients and pave the way for others in the future.

¹The wrongful death statute was amended again in 2019, and this revision retained the 2009 language allowing the decedent's heirs to recover for “pecuniary injuries resulting from the death” without limitation as to the beneficiaries. 18-C M.R.S.A. § 2-807(2) (2020).

After reviewing briefs from all the parties—including plaintiff June Rickett’s attorneys Jim O’Connell and Alicia Curtis—the Court denied VIP’s motion. More than a procedural victory in the case, the order limits a defendant’s ability to avoid liability on summary judgment by asking a court to define the scope of a defendant’s duty so narrowly it excludes the defendant’s actions and omissions. As Justice O’Neil noted in his May 13, 2022, decision: parties “seeking to avoid liability often attempt to gerrymander themselves out of a duty by narrowly defining the duty owed so that it does not encompass them.”

Scope of Defendant’s Duty is Defined by Jury, Case by Case

Justice O’Neil’s decision rebuffed that strategy, which effectively asks a court to decide, as a matter of law, whether a defendant breached the duty of care. Instead, he emphasized the flexible and general nature of a duty of care, which depends on the factual circumstances.

The decision makes Vacationland safer for travelers and tour group participants by establishing that a travel agent or tour group operator does owe travelers a duty to act reasonably in performing their duties.

A court may decide, as a matter of law, whether a defendant owes a duty of care to a particular plaintiff. But having established that VIP, as a common carrier, owed a duty of care to Ms. Rickett, its passenger, the Court refused “to contour VIP’s duty to fit the specific factual circumstances before it.” Attorneys O’Connell and Curtis’s brief helped guide the Court to this important decision, which affirms the jury’s central role in deciding fact-bound issues such as the scope of a defendant’s duty and whether that duty was breached.

Vacationland Safer for Travelers

In a related decision on VIP’s cross-claim for contribution against the organizer of Ms. Rickett’s tour, Justice O’Neil issued an order clarifying the duty of care owed by a travel agent or tour group organizer to travelers. The

tour group organizer filed a motion for summary judgment asserting she owed no duty to Ms. Rickett. Justice O’Neil noted the lack of any case law imposing a distinct duty of care on travel agents or trip coordinators. He went on to conclude the tour group organizer owed a general tort duty of care to Ms. Rickett—a duty “of reasonable conduct in the light of the apparent risk.” Because the facts in VIP’s summary judgment record failed to establish a *prima facie* case that the trip organizer breached that duty of care, Justice O’Neil granted the trip organizer’s motion for summary judgment, ending VIP’s cross-claim. The decision makes Vacationland safer for travelers and tour group participants by establishing that a travel agent or tour group operator does owe travelers a duty to act reasonably in performing their duties.

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Addressing the Real Issues Young Attorneys Face

Berman & Simmons is excited to announce *Practice Builder*—an upcoming digital media publication focused on bringing to light the real issues and common challenges young attorneys face in their first decade of practice. This series aims to provide guidance, advice and empirical insights from veteran practitioners.

Supporting Maine’s Next Generation of Lawyers

From explaining how referrals work to networking tips to managing the complexities of your first “big case,” the *Practice Builder* series will aim to bridge the gap between the potential young lawyers possess and the repeatable best outcomes they hope to achieve. Tapping into one of the Maine bar’s most diverse and experienced professional attorney networks, Berman & Simmons is proud to offer this content as means of educating and supporting the next generation of Maine lawyers.

Robert Furbish: Berman & Simmons' Research and Writing Specialist

Attorney Robert H. Furbish has been at the helm of Berman & Simmons' research and writing team for 17 years. Since joining the firm in 2005, Bob has been integral in successfully representing thousands of Maine plaintiffs with complex legal issues. Recently, Bob announced that he would be retiring in 2022. In tribute to his decades of service to our clients and role in developing our research and writing resources, Berman & Simmons celebrates Bob Furbish as our 'spotlight' attorney in this issue.

For more than 100 years, Berman & Simmons has maintained a reputation as Maine's leading personal injury firm. From winning historic verdicts that help our clients reclaim control of their lives to legal victories that shape the landscape of Maine tort law, our success is founded upon a legacy of mastering both the law and advocacy.

Bred of a commitment to winning results, strategically applying Maine law in creative ways is part of the DNA of our work. And, at the heart of this, are Berman & Simmons' team of legal research and writing experts.

A Foundation of Legal Knowledge

Berman & Simmons recognizes that being Maine's premier personal injury firm requires more than extraordinary litigators: it demands a talented team of intellectually curious attorneys to develop strategies and produce written arguments that maximize success at trial. As a firm, we understand that our clients are best served when their cases are built upon a foundation of legal knowledge and creativity. And, when it comes to Berman & Simmons' team of research and writing specialists, there is no question that Bob Furbish is the bedrock upon which that foundation rests.

Bob has been the "secret ingredient" in countless Berman & Simmons successes for nearly two decades and will begin his next chapter in . Working behind the scenes as part of a multi-faceted

task force, Bob is most gratified when analyzing complex legal issues and probing the contours of the law around complicated questions of tort, insurance coverage, and protection of his clients' recovery by negotiating liens and reimbursement claims. Bob has served as the "backroom" intellect behind many a brilliant trial strategy deployed by Berman & Simmons in these areas and others. He has also served as an editor of Maine Tort Law, which has been a valuable resource for the Maine bench and bar for over three decades.

Creative Approaches and Solutions

Bob's role as a research and writing specialist is to find solid, and sometimes novel, theories of liability and creative sources for insurance coverage. As a recent example, Bob determined that an employer could be held liable for a catastrophic motor vehicle accident, even though its employee was driving his own non-work vehicle well outside of normal working hours. Bob helped develop a compelling argument supporting vicarious liability that allowed Berman & Simmons to take on a case that many experienced attorneys would have rejected. As a direct result of Bob's work, the employer's insurance carrier had little choice but to come to the table and negotiate—setting the stage for a favorable resolution that dramatically improved the quality of life for the profoundly injured clients.

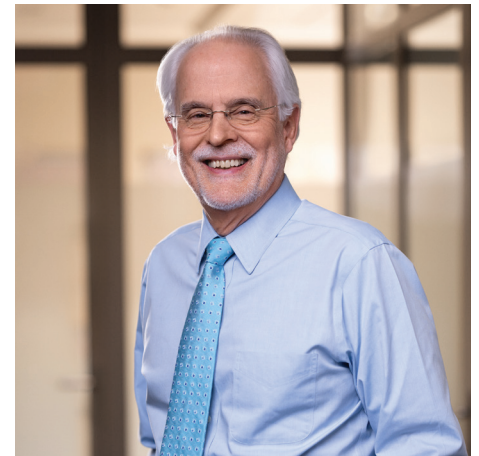
When asked recently about the keys to his success, Bob explained that you

cannot take a case at face value. "You've got to dig deeper. And a little deeper. Then even deeper still, motivated by the instinct that there is something here. There has to be," he reflected. "And you twist and turn and scrape until you can find it because there are people who are depending on us." Bob's is a role that very few other lawyers could envision doing. It's out of the "spotlight" and often quiet, deliberate work. But for the trial attorneys and clients Bob serves, it's an invaluable asset.

Part of the Team

Always modest, Bob shared a simple hope when asked about how he sees his role: "I always want the client to know that Berman & Simmons' reputation as the top personal injury law firm is based on real results. I am glad to be part of the team that has earned us that reputation."

We're all certainly glad that Bob is on the team.



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—ROBERT FURBISH

Kudos from our Colleagues

“As the referring attorney it is nice to know that my case is being aggressively and competently pursued. Thank you for your great work.”

—POWERS, JODOIN, MARGOLIS & MANTELL

“I couldn't have referred a better attorney to take on my client's case. The knowledge, detail and human touch put into this case shows a passion and commitment that far exceeds other practitioners. The video was the best!”

—CENTRAL MAINE SOLO PRACTITIONER

“It is the kind of customer service most solo practitioners will give clients in their hometown but nothing that any client of mine ever got from anybody else at a large firm.”

—MCINTOSH LAW

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