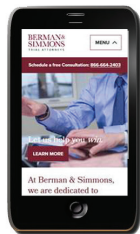


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## Dangerous Drugs and Medical Device Cases

To view the dangerous drug and medical device cases we are handling, go to [bermansimmons.com/masstart](http://bermansimmons.com/masstart).



## \$2.75 Million Settlement with United States Government on Behalf of Patient Paralyzed by Spinal Epidural Abscess ■ Benjamin R. Gideon, Esq.

Recently we represented a 38-year-old Marine Corps Veteran who suffered permanent paralysis after visiting the Togus VA Hospital in Augusta (Togus) in 2011. When we first spoke to this client, we learned that he had already consulted with several lawyers who told him there was nothing they could do to help him. We agreed to take the case, and filed suit against the U.S. government. After two years of litigation, we obtained a settlement for our client of \$2.75 million, one of the largest such settlements obtained in Maine history. This article describes our client's situation and the case brought.

### Timely Treatment Is Critical for Spinal Cord Injuries

A spinal epidural abscess (SEA) is a rare, but well-known, medical condition that involves an abscess (usually bacterial) getting into the epidural space around the spinal cord. Left untreated, the abscess can grow and injure the spinal cord, through either direct pressure or damage to nearby blood vessels.

The most important factor in recovering from SEA is the timeliness of the treatment. Without decisive medical treatment, SEA leads to paralysis or death.

*Continued on page 2*



## Proving Negligence In the Face of a Defendant's Compliance with Government Regulations or Industry Standards ■ Alicia F. Curtis, Esq.

Defendants in product liability and other complex personal injury cases often point to their compliance with government regulations or industry standards as a key to their defense. Under Maine law, breach of a law, regulation, or formal standard is evidence of negligence to be considered with other evidence in the case.

The defendant may argue that sauce for the goose is sauce for the gander, and compliance with these same regulations or standards proves lack of negligence. Jury research shows that jurors place significant weight on such evidence. In other words, "how can ABC Company be liable for millions of dollars when it did everything the government told it to do?" Implicit in this defense argument is the message that laws, regulations, and formal standards are drafted after months or years of research and testing by a consensus of experts wiser, more knowledgeable, and more experienced than the jury or even the plaintiff's experts.

A successful plaintiff's case gives jurors both the information and motivation necessary to deliver a verdict holding defendants accountable for their choices to put profit over safety. This article addresses legal arguments helpful for attacking their "compliance" defense.

### Irrelevant Standards

One strategy is to move in limine to block admission of any evidence about the law, regulation, or standard, and the defendant's compliance with it, on grounds of

*Continued on page 4.*

## Firm News

### ■ Settlement in July 4 Parade Death

The widow of a man who died in a 2013 Independence Day parade accident involving an antique firetruck settled her wrongful death lawsuit against the city of Bangor, Maine and the parade's sponsor for an undisclosed amount. Attorney Daniel Kagan represented the family.

### ■ Settlements in Fire Deaths

The families of two men who died following a 2014 apartment fire in Biddeford, Maine, have reached settlements in their civil lawsuits against the landlord. Attorney Michael Bigos represented the families. Following the settlement, the Journal Tribune published a guest commentary by Bigos, in which he urges municipalities and landlords to work together to improve building safety for all renters in Maine.

### ■ \$1.8 Million Medical Malpractice Verdict

A jury in northern Maine has awarded \$1.8 million to a Millinocket man who nearly died from a heart infection in 2011, eight months after a Bangor hospital failed to share blood test results with his family doctor. Attorney Benjamin Gideon represented the family.

### ■ \$465,000 "Good Samaritan" Verdict

Attorney Daniel Kagan won a groundbreaking case in Kennebec County, involving the little-known "rescue doctrine," a legal principle designed to protect good Samaritans.

### ■ Dangerous Drugs and Medical Devices

Berman & Simmons has recently expanded into a new area of law. The firm is now accepting clients who have been harmed by dangerous drugs or medical devices. Led by Attorney Susan Faunce, these are some of the most complex cases in the legal system, often involving plaintiffs from many states taking on powerful corporations.

### ■ Chambers USA

Berman & Simmons earned the highest possible ranking in the Litigation: Mainly Plaintiff practice area in the annual Chambers USA directory, and was the only Maine firm to be ranked in that practice area. Additionally, Chambers USA selected four lawyers for recognition as outstanding lawyers for plaintiffs: Steven Silin, Julian Sweet, Jodi Nofsinger, and Benjamin Gideon.

*\$2.75 Million Settlement, continued from page 1.*

## Delay in Treatment Leads to Permanent, Irreversible Spinal Cord Injury

Our client went to Togus seven times in ten days in March and April 2011, complaining of severe intra-scapular back pain, loss of appetite, and inability to sleep. Initially, doctors assumed a musculoskeletal issue and prescribed medications for inflammation and pain. Eventually, they considered other possibilities, such as pulmonary embolism and pericarditis, but our client continued to worsen. No one at Togus ordered any advanced imaging of the spine, which would have identified or ruled out infection. Even after our client lost feeling in his feet and legs to the point where he could no longer stand up, Togus delayed the MRI.

The MRI revealed a large infection enveloping the patient's spinal column in the area where he had first reported pain. Our client was rushed to another hospital for emergency neurosurgery, but it was too late. The infection had damaged blood vessels servicing the spinal cord, resulting in thrombosis and permanent, irreversible spinal cord injury. The neurosurgeon told our client he would never walk again.

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***Claims against the U.S. are brought under the Federal Tort Claims Act (FTCA). The FTCA incorporates Maine substantive law of medical negligence, but there are a number of important procedural differences.***

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## Client Faces Difficult Rehabilitation as a Paraplegic

After his spinal cord injury, our client undertook rehabilitation at a VA facility in Massachusetts. He learned to use a wheelchair. The spinal cord injury left our client without functioning bowels or bladder, so he had to learn how to use a catheter and to perform an excruciating bowel protocol that takes several hours each morning.

Once back at home, our client faced the stark reality of having to live the rest of his life as a paraplegic. Before this incident, he was a social worker who cared for people with disabilities, but now he is the one in need of almost around-the-clock care. His wife was forced to give up her career to stay home and care for her husband and their young son. With a meager disability benefit, the family could barely pay the mortgage, and could not afford the basic necessities of a handicap-accessible vehicle or rehabilitation therapy.

## Litigating FTCA Cases Requires Expertise and Specialization

In February 2014, we filed suit on behalf of our client against the U.S., alleging negligence in the medical care provided at Togus. Claims against the U.S. are brought under the Federal Tort Claims Act (FTCA). The FTCA incorporates Maine substantive law of medical negligence, but there are a number of important procedural differences.

- No Pre-Litigation Screening Panel – Cases proceed directly to the U.S. district court.

*Continued on page 3.*

*\$2.75 Million Settlement, continued from page 2.*

- **Two Years to File Claim** – Claims are subject to the FTCA notice requirements, must be filed within two years of the incident, and must specify a dollar amount.
- **No Right to a Jury** – Cases are tried before a U.S. district court judge (or magistrate, if the parties agree).
- **Special Rules Governing Costs and Fees** – Limitations are in place for recoverable costs and attorney fees.
- **Evidentiary Issues** – In federal court, there is an argument that the heightened Daubert standard for admissibility of expert testimony will apply, rather than the more relaxed standard applied in state court. This requires preparing experts differently.

At Berman & Simmons, we have developed specialized expertise in litigating and trying FTCA cases. We have settled many of these cases and taken a number of them to trial, including a 2007 trial in which we obtained a judgment of over \$1 million in a motor vehicle case against a federal Border Patrol officer, as well as the case of our client with the spinal epidural abscess, in which we obtained a judgment of \$2.75 million.

### **\$2.75 Million Settlement Promises to Change Our Client's Life**

There are many important ways this settlement will benefit our client and his family.

- **Medical Trust** – Allows our client to pay for the rehabilitation therapy and home care services he needs.
- **Lifetime Annuity Payment** – Ensures the family will be able to meet the cost of basic needs for the rest of their lives.
- **Cash Payout** – Enables the family to pay off the mortgage, renovate their home to make it accessible, purchase a handicap-accessible vehicle, and provide for their young son.
- **Peace of Mind** – Allows this family basic financial independence and security, free of constant anxiety about paying their bills. ■



## **Attorney Taylor Asen joins Berman & Simmons**

Attorney Taylor Asen, a Maine native who spent the past two years in New York City representing plaintiffs in class action and mass tort cases, has joined the Berman & Simmons law firm. Asen will represent plaintiffs in personal injury cases and complex civil litigation matters.

Asen was a top scholar at George Washington University, and graduated from Yale Law School in 2012. He served as a law clerk for the Honorable J. Paul Oetken of the Southern District of New York and for the Honorable Julio M. Fuentes of the United States Court of Appeals for the Third Circuit. Asen is licensed to practice law in New York, and will take the bar exam in July to obtain licensure in Maine.

Asen, who officially joined the firm on June 13, works in the Lewiston office. ■

## **Firm News**

### ■ **WGME TV I-Team Interviews**

- Attorney Daniel Kagan was interviewed for a segment about odometer tampering and the Volkswagen emissions-cheating scandal.
- Attorney Susan Faunce was interviewed for a segment about professional malpractice and dentists in Maine who have a history of safety and ethics violations.

### ■ **Maine State Bar Association (MSBA) Presentations**

- Attorneys James O'Connell and Alicia Curtis, along with lawyers Jerrol Crouter, Peter Del Bianco, and Michael Martin, presented "Family BBQ Gone Awry: Investigating, Litigating, and Mediating an Interesting Product Liability Case."
- Attorneys Craig Bramley and Travis Brennan presented "Emerging Issues in Professional Negligence Litigation."
- Attorneys James O'Connell and Robert Furbish presented "Lien on Me: The Case Ain't Over Till It's Over," as part of a series of talks hosted by the John Waldo Ballou Inn of Court.

### ■ **Maine Trial Lawyers Association (MTLA) Training**

Attorneys Benjamin Gideon and Jodi Nofsinger served on the faculty of the MTLA College of Trial Advocacy, and intensive trial practice training program for 48 Maine lawyers interested in becoming more skillful in trial advocacy.

### ■ **Youth Summits**

Attorney Jodi Nofsinger spoke at the New England Youth Identity Summit, an event designed to spark meaningful conversations about identity, diversity, and community. Nofsinger also presented "Know Your Rights" at a recent King Fellows Youth Summit, an organization with the mission to advance racial equity and social justice.

### ■ **Berman & Simmons donates \$2,000 to Tree Street Youth**

Berman & Simmons has donated \$2,000 to support Tree Street Youth Center's 50 Day, \$50K challenge. The firm's donation brings the organization one step closer to reaching its renovation goal of \$1.3 million.

**See more firm news at:**  
[bermansimmons.com/news](http://bermansimmons.com/news).

## About the Firm

Berman & Simmons, P.A., is a firm of 16 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.

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

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*Proving Negligence, continued from page 1.*

irrelevance. For instance, the standard may not address the particular reason a product failed and caused injury. American National Standards Institute (ANSI) standards for fiberglass ladders focus on the strength and durability of the flat section of ladder rails—not the strength of rail corners. However, the strength of rail corners is crucial to ladder performance and poses numerous technical challenges during the manufacturing process. Proof that a ladder user was injured by failure of a rail corner may be grounds to exclude evidence the manufacturer met ANSI standards for rail strength.<sup>1</sup>

## Outdated or Obsolete Standards and Lack of Scientific Basis

Compliance with a regulation or standard is irrelevant when there is no scientific basis for the standard, or it is so outdated it fails to take into account newer materials, newer measuring and testing methods, or newer uses of the product. For example, Federal Motor Vehicle Safety Standard (FMVSS) 207, which governs the amount of load an automobile seatback should be able to withstand without deformation of the frame, is not based on any scientific evidence that meeting its foot-pound load requirement protects occupant safety. The industry has abandoned this standard, and most auto manufacturers now test modern seats to at least double the FMVSS 207 requirements. To the extent a defendant's expert relies on compliance with obsolete or unfounded standards such as FMVSS 207, a Daubert challenge to this testimony should focus on exposing the lack of science to support such standards.

## Actual Knowledge of Risk

Even when a defendant's compliance with law, regulation, or standards is admissible, countervailing evidence can help the jury put this into context. For instance, when a defendant company has met DOT regulations governing its driveway, jurors believe the company can reasonably assume the driveway poses no danger to its customers. Based on jury research, it seems that jurors rely on the notice function of a law, regulation, or standard. In other words, if a defendant has complied with the standard, it has no notice of any danger. But if the company has learned of several collisions caused by customers exiting the driveway located at a blind corner, this changes the analysis.

## Promises, Promises, Promises

The promises that a defendant makes in its advertising, warranties, statements, and submissions to government regulators and elsewhere can be powerful evidence—evidence the defendant is aware of the risks associated with its product or business and holds itself to a higher standard than that imposed by law or regulation. Extensive discovery of a defendant's communications in these areas can be worth the time and effort involved.

Ultimately, when a defendant has met applicable laws, regulations, or industry standards, and this evidence is admissible, success depends on educating the fact finder about the tort standard for negligence as well as its purpose. A defendant can be negligent without doing something "illegal." As Justice Learned Hand held in the T.J. Hooper case read by many law school students, a defendant's failure to equip its tugboat with two-way radios can be negligent, even though no other tugboat at the time had adopted this technology.

Proper jury instructions are important, with an emphasis on the *Dongo v. Banks* rule that safety statutes, regulations, and standards must be considered in the context of other evidence, such as the defendant's actual knowledge of safety risks, its promises and representations about safety, and the limited relevance or validity of the standards in question. ■

<sup>1</sup> I would like to acknowledge and thank retired Berman & Simmons Attorney John Sedgwick for sharing his extensive knowledge on this and other subjects in product liability litigation.