



## Amidst Change, Keys to Success Remain the Same

*Travis M. Brennan, Esq.*

There's no "going back" to the way things were in December 2019. The global pandemic has forever changed the way we practice law—whether it's something as simple as incorporating Zoom depositions into your practice, or something more complex, like adapting to better succeed in pre-litigation resolution. Fortunately, though, some things remain constant. As the courts prepare to return to in-person trials, I have reflected upon jury trial experiences in the year before trials were shut down. And, despite all that has changed, many of the lessons learned then remain just as relevant to my practice today.

My last full year of practice prior to COVID was a busy one. My staff and I helped clients collect six civil jury verdicts for personal and medical malpractice injuries across five counties—from York to Aroostook counties. In three cases, we recovered six-figure verdicts that far exceeded any pre-trial offers from the

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## Staying Practiced When Practice is Stayed: The Power of Reflection in Preparing to Return to the Courtroom

*Jodi L. Nofsinger, Esq.*

As a litigator, I do my best work by making myself informed, anticipating obstacles to desired outcomes, and engineering a plan to overcome them. Be it procedural, evidentiary, or one of client management, I have long believed there is rarely an issue that cannot be "lawyered around" with thoughtful practice. Then the pandemic struck, and the courts closed. No amount of creative advocacy or command of expert examinations could remedy the unforeseen challenges 2020 brought us.

So, like the rest of the civil bar, I've waited—but not idly. While many Americans adjusted to quarantine—distracting themselves baking homemade sourdough bread or binging the latest Netflix series—trial attorneys had to live with the uncomfortable reality that our clients' cases—real people's life-changing legal matters—would live in an uncertain, liminal space indefinitely. One of the ways I coped was to reflect more deeply on past cases, and lessons therein learned. Robbie Nason's case immediately came to mind.

### The Case

In 2013, Robbie injured his wrist while working as a craftsman at Old Town® Canoe. Unable to return to work without repair, he sought treatment

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**MAINE STATUTES  
OF LIMITATIONS**

Download a copy of our *2021 Maine Statutes of Limitations* document at:  
[bermansimmons.com/attorney-referrals](http://bermansimmons.com/attorney-referrals)

## Firm News

### Miriam Johnson Involved in Historic Settlement with Maine Department of Corrections

Under an agreement with the State, the Maine Department of Corrections has agreed to treat all inmates in its custody who have chronic Hepatitis C, rather than just those who could show proof that their disease had progressed to the point of permanent liver damage. Attorney Miriam Johnson was part of the team that led the negotiations to this settlement.

### Berman & Simmons Lawyers Honored in 2022 Best Lawyers® Lists

Berman & Simmons is pleased to announce those named to The Best Lawyers in America list: Steven Silin, Craig Bramley, Daniel Kagan, Jodi Nofsinger, Michael Bigos, Susan Faunce, James O'Connell, and Travis Brennan. *The Best Lawyers: Ones to Watch* list recognizes Dov Sacks, Timothy M. Kenlan, Elizabeth Kayatta, and Christopher Boots. Daniel Kagan was also named 2022 *Best Lawyers® Lawyer of the Year* in the Augusta-ME area.

### Dan Kagan Presents at Brain Injury Association of America (BIAA) Conference

Attorney Dan Kagan and Dr. Jeffrey Barkin recently presented at the BIAA "Defining Moments in Brain Injury" conference on October 13. Their presentation, entitled "*Brain Injury: Predictably Unpredictable. Variability in Brain Injury Recovery*," identified key factors that can prolong, and even inhibit, brain injury recovery, and what support team members—family, medical, legal—can do to minimize their impact.

### Travis Brennan Featured in "Beyond the Law" Series

Attorney Travis Brennan was recently interviewed for the "Beyond the Law" series in the summer issue of the MSBA's Maine Bar Journal. The article showcases Travis' additional work as a volunteer firefighter for the Town of Hebron, ME, and what attracted him to this challenging endeavor.

### Berman & Simmons Completes Trauma-Informed Training

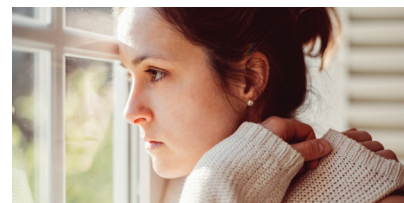
To better help support our clients of sexual abuse, members of our Sex Abuse Survivors Practice Group have completed trauma-informed training presented by HAVEN Violence Prevention and Support Services of New Hampshire. This education involved familiarization with the nature of trauma responses and ways in which legal professionals may work with survivors in a trauma-informed capacity.

## LEGAL LANDSCAPES

# Our Practice, In Motion

### Empowering Survivors, Holding Sex Abusers of Children Accountable

The State of Maine recently lifted the statute of limitations for those born before August 11, 1970, who were sexually abused as children, allowing them to pursue civil claims against their abusers. This change in the law reflects the latest trauma-informed and policy-based approaches of government in the wake of widespread abuse perpetrated within organizations like the Catholic Church and Boy Scouts of America. The Berman & Simmons Sexual Abuse Survivors Practice Group represents survivors of sexual abuse and sexual assault in a broad range of cases.



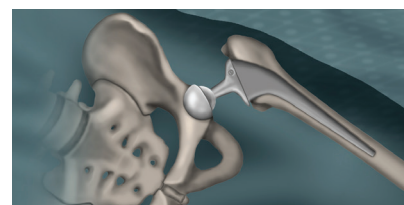
### Maximizing Jones Act Recovery for Maine's Injured Maritime Workers

Unlike land-based workers, injured maritime workers can sue their employers for negligence. Maritime injury claims are complex federal claims brought under the Jones Act of 1920. Berman & Simmons has the expertise, experience, and skills to manage these cases and maximize financial recoveries for maritime workers.



### Protecting Consumers Against Dangerous Drugs & Defective Medical Devices

Despite knowing about the dangers of drugs and medical devices, manufacturers continue to sell them without providing adequate warning to doctors or patients. If your client was harmed by a defective medical device or dangerous drug, we are here to help. Berman & Simmons is currently handling the following mass tort cases:



- C-PAP and Sleep Apnea Machines
- Zantac
- Hernia Mesh
- Talcum Powder
- 3M Combat Arms Earplugs
- Valsartan
- Metal-on-metal Hip Implants

## REFLECTION

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at Eastern Maine Medical Center (EMMC) where he underwent fracture reduction and fixation surgery that involved placement of a screw. Unfortunately for Robbie, his surgeon left the screwhead protruding above the bone surface where it irritated and damaged adjacent cartilage. Robbie could tell there was something wrong, but his concerns were rebuffed. Eventually he sought a second orthopedic opinion which revealed the medical error. Several surgeries later, Robbie was still left with diminished function and substantial pain.

My partner Susan Faunce and I prosecuted Robbie's malpractice claim through a Prelitigation Screening Panel and then in Superior Court. At trial, with the surgeon still refusing to take responsibility, we asked the jury to assess damages of \$1 million. The jury returned a verdict of \$2 million.

What was it about Robbie's claim that had compelled a result beyond our expectations? What did the jury see in the courtroom that might explain their verdict? And more importantly—can it be replicated when the courts re-open for civil litigation? The more I thought about what we had done well, the more I realized that the good outcome was also a product, in part, of the doctor's untenable defense. Here are several observations that underscore the importance of identifying, building upon, and allowing a poorly constructed defense to fail:

### **Defendants' Inconsistencies and Lack of Experience**

At trial, the surgeon's testimony was plagued by shifting versions of the facts. We made sure the jury didn't miss this. For example, though he conceded in discovery that proper surgical technique requires seating the screwhead below the bone surface so as not to irritate adjacent cartilage, at trial he said that this was not necessary—likely to match the testimony of the expert he had called.

Discovery brought out how little experience and training this surgeon had in this kind of procedure. Meanwhile, we also showed that, when it became clear Robbie needed this surgery, EMMC had several other surgeons with training and experience in this particular procedure but nonetheless wrongly allowed this ill-prepared surgeon to proceed.

### **We Factored in a Jury's Tendency to Defer**

In medical malpractice cases, defendants typically, and often arrogantly, argue that medicine requires real-time judgment calls, even intraoperatively, and that it is inappropriate to "second-guess" their trained, seasoned judgment. Thus, in putting together your case, it is not enough to have the facts on your side—you have to factor in jurors' inclinations to defer to the caregiver. Here, however, we were able to guide the jurors to see that not only was there an operating room error but also a refusal by the hospital to acknowledge the mistake. In sum, the defense alienated the jury and capitalized upon this miscalculation.

### **Appeal**

Post-verdict, the defendants moved for a new trial. In the alternative, they sought a reduction of the verdict on the basis that it was excessive on the facts. Defendants' appeal was defeated.

## Legislative Updates

For more than 100 years, Berman & Simmons has represented seriously injured plaintiffs in the Maine court system. As part of our century-old commitment to civil justice, we have a proud tradition of advocacy before the Maine Legislature on behalf of the rights of injured Mainers. We are honored to have played a key role in helping to pass many important laws that, in turn, have helped ensure access to justice for all Maine people.

### ► **LD 589: An Act to Provide Access to Justice for Victims of Childhood Sexual Abuse**

On June 21, 2021, Governor Janet Mills signed into law a bill which lifted the statute of limitations on all claims arising out of sexual acts towards minors. This law, which retroactively lifts already-expired limitations on sex abuse claims occurring prior to 1987, takes effect on October 18, 2021. Attorney Michael Bigos, who specializes in litigation related to child sex abuse, testified before a legislative committee in support of this change in the law.

### ► **LD 737: An Act to Increase the Value of Property Exempt from Attachment and Execution**

Beginning on October 18, 2021, the limits for certain amounts of property exempt from attachment and execution will increase. For example, the exemption of aggregate interest for a debtor's residence increases from \$95,000 to \$160,000 if the debtor has minor dependents. See 14 M.R.S. § 4422 for complete changes.

### ► **LD 841: An Act to Amend the Laws Governing Damages Awarded for Wrongful Death**

In 2019, the Maine Legislature passed a law increasing the statutory cap collected for non-economic damages in wrongful death claims by 50 percent, from \$500K to \$750K.

### ► **LD 492: An Act to Extend from Six Months to One Year the Notice Period Required under the Maine Tort Claims Act**

This 2019 bill doubles the notice period for Maine Tort Claims Act claims from six months to one year.



## Notable Law Court Cases in 2020 & 2021

Alicia F. Curtis, Esq.

### The Law Court Clarifies Who May Recover in a Bystander Emotional Distress Claim

Existing Law Court precedent allows emotional distress damages to a mother who sees her young son hit by a car as he crosses the street in front of her, but bars recovery if she learns about his injury in a telephone call and then rushes to the hospital to see him. The distinction hinges on whether the mother “contemporaneously perceives” the injury-producing event. In *Coward v. Gagne & Son Concrete Blocks, Inc.* (September 2020), the Law Court addressed this contemporaneous perception requirement in bystander emotional distress claims, issuing an opinion helpful to plaintiffs both for its clarity and its potential to expand who may recover.

In this case, Thomas Coward *heard* his minor son’s screams when one ton of concrete rebar was accidentally dropped on him, but Coward did not immediately realize what had happened or that it was his son who was injured. He arrived on the scene seconds later to see his severely injured son die.

The Law Court’s decision clarified that “contemporaneous perception” can involve any of the five senses, including Coward hearing his son’s screams. A close family member like Coward may recover when he is present on the scene, hears the victim injured, and then in the “immediate aftermath” sees the victim’s injuries and understands what has happened. Rather than adopting a bright-line rule limiting the amount of time that could pass between hearing a “crash” or “bang” and then seeing the injured relative, the Law Court chose to create a more flexible rule. A close relative may recover if the sound or other sensation

caused them to investigate and see the injury. This focus on the close relative’s experience and involvement in the scene provides a more flexible approach that could help bystander relatives recover in a broader range of cases.

### The Law Court Expands Access to *Voir Dire* When Race Is an Issue

In a criminal case whose holding applies equally to civil cases, the Law Court provided important guidance on the availability of *voir dire* when race is an issue. (*State v. Fleming*, October 2020). Previously, a trial lawyer wishing to conduct *voir dire* to discern potential jurors’ bias against her client must first lay a foundation showing widespread societal bias against persons like her client. Fleming modifies the *voir dire* process: whenever a trial includes racial issues there is a presumption of widespread societal bias and trial courts are required to thoroughly probe the issue of racial bias in *voir dire*.

This decision acknowledges that simply asking whether a potential juror can be fair and impartial is not enough to uncover racial bias. Fleming calls upon lawyers, judges, and legal professionals to “heighten their awareness and understanding of implicit bias, its role in our civil and criminal justice system, and in particular, the problems that it creates with regard to juries.”

### The Law Court Holds Claim Preclusion Does Not Bar a Second Claim Based on Continuing Conduct

In *20 Thames Street LLC v. Ocean State Job Lot of Maine 2017 LLC* (June 2021), the Law Court considered the application of claim preclusion (*res judicata*) in the unique context of a motion to dismiss brought in a forcible

entry and detainer (FED) claim. Justice Connors’s concurrence in this case includes reasoning potentially helpful to plaintiffs in all types of civil actions involving continuing negligence.

Landlord 20 Thames attempted to evict its tenant Ocean State in 2018, serving a termination letter and then filing an FED complaint. 20 Thames asserted that Ocean State had violated its lease by leaving trailers parked at its loading dock longer than allowed by the lease. The trial court ultimately ruled for the tenant, but its decision did not address the trailer parking conduct. When 20 Thames attempted to evict Ocean State again in 2019 for its trailer parking practices, Ocean State moved to dismiss that complaint on claims preclusion (*res judicata*) grounds. At issue—Was the fact that the trailers were left at the loading dock for days on end something that was, or could have been, litigated in the first FED action? The Law Court held that dismissal was inappropriate because 20 Thames could be alleging new or different conduct (such as trailers left for longer periods of time or in different places), and the trial court’s record was ambiguous about whether and how much the trailer parking conduct was litigated in the first claim.

The majority’s holding suggests that continuing conduct can only form the basis for a new claim after a first claim has failed, when there is something new or different about the conduct leading up to the second claim. Justice Connors’s concurrence asserted that actions after a failed first claim need not be new or different; if the continuing conduct since the first claim is enough to support the second claim by itself, *res judicata* will not apply. Plaintiffs in civil cases involving continuing negligence could benefit from this decision.



## CHANGE

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insurance companies. Notably, an Aroostook County jury returned a \$1.2 million verdict to compensate our client for serious injuries stemming from medical malpractice. Here are three examples of lessons learned from 2019 that have helped me navigate a shifting landscape in 2020 and beyond.

### **Harness the Power of Core Truths**

A core truth is a foundational principle in your case that is authentic and integral. Every case has one or more core truths that relate to the issues of liability and damages. Tapping these core truths empowers your client's case by breaking down façades and appealing to good-sense factfinders. Identify core truths by interviewing and spending time with your client. Do not just take notes but learn their past—the injuries they experienced, their recovery, their struggles, and their passions. Core truths can even transform potential weaknesses the defense might try to emphasize into strengths. By learning these core truths early on you will be in the best position to shape the narrative and positively impact the course of discovery.

### **Apply New Approaches to Jury Selection**

Jury selection may be the single most important part of a trial. And even though 2020 and much of 2021 has been without in-person trials, the “threat” of a well-populated jury still looms large over the defense bar. Attorneys know that all it takes is one or two jurors with underlying biases or prejudices to undo all your hard work at trial. Fortunately, civil procedure in Maine is evolving in a way that promotes more intelligent and informed jury selection. In three of my trials in 2019, on our motion, the Court permitted a new approach by Maine standards and allowed jury selection assisted by attorney-directed voir dire. Attorney-directed voir dire provides an opportunity to explore attitudes, experiences, and beliefs that jurors may hold that would disqualify them from sitting on a jury. By way of example, in three of my cases, this process led to the removal of certain jurors who were hostile to the idea of awarding money damages for pain and suffering, as well as those who had strong biases about personal injury/premises liability cases. Be effective during this case-shaping procedural process by developing a clear plan that outlines the topics you intend to cover, and the estimated time needed as you conduct voir dire.

### **Be Wary of Stipulations**

In several of my 2019 cases and continuing into the pandemic, defendants sought to stipulate to liability on the eve of trial or mediation. Defendants often claim the best and most noble of intentions from: “we take responsibility” to “we don’t need to waste time.” My experience has taught me that these claims often belie an ulterior motive: defendants use stipulations to divorce the actions that caused the injury from damages. Once liability is stipulated by the parties, savvy defendants argue that the negligent actions that caused your client’s injuries are irrelevant. They are not. Do not allow defendants to use stipulation as a shield to neutralize powerful facts in your case and/or to preclude your presentation of a cohesive story about the incident that caused the injuries bringing you to court. Remember that a stipulation requires agreement by both parties. Before agreeing to it always weigh the risk and benefits first.

Travis M. Brennan, *Three Lessons Learned from Recent Jury Trials*, 35:2 ME. BAR J. 62 (2020).

## More Firm News



### **Welcome Charles P. Hehmeyer**

Berman & Simmons is delighted to announce that Charles “Chuck” Hehmeyer has joined our law firm. Chuck is an experienced trial lawyer who specializes in medical negligence and commercial vehicle accident claims. He comes to us from Raynes Lawn Hehmeyer—a leading personal injury law firm in Philadelphia, where Chuck developed the only practice in the nation that regularly represents children who suffer from metabolic disease and other rare genetic disorders. He has gained national recognition as the country’s leading legal expert in these matters and has won numerous seven- and eight-figure verdicts for his clients.

A veteran attorney with nearly 30 years’ experience trying claims across 24 states, Chuck adds to our team’s wealth of knowledge and expertise. We are confident that he will be an asset not only to our firm and our clients, but to the broader legal community as well. Although Chuck is “from away,” he is humble and genuine, qualities he attributes to his working-class roots growing up on a dirt road in Ohio. Those who have the privilege of working with Chuck will quickly discover that he embodies the work ethic, collegiality, and integrity that is characteristic of the Maine legal community.

Welcome aboard, Chuck.

## New Attorneys

### Welcome: Sarah Hall and Joseph Gousse

*Berman & Simmons is pleased to welcome attorneys Sarah K. Hall and Joseph G.E. Gousse to the firm's research and writing team.*

During her 22-year legal career in Maine, Sarah has represented plaintiffs in personal injury and medical malpractice cases, and has assisted litigators in an employment practice. For over a decade of her career, she led her own practice with a focus on research and writing. Sarah earned her law degree from University of Maine School of Law, *cum laude*.



Joe has dedicated his practice to representing injured Mainers as a lead research and writing attorney. Prior to his admission to the bar, he served as Legislative Researcher for the Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission and taught both Legal Research & Writing and Business Law in the Maine Community College System for several years. Joe is a graduate of the University of Maine School of Law, *cum laude*.



## Resources

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## Experience

Winning cases for the people of Maine for over 100 years.

## Results

Achieving industry-leading results with over **\$1.25 billion** recovered for our clients.

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129 Lisbon Street  
Lewiston ME 04240



## Experience matters.


In a serious personal injury case, experience can make the difference between winning and losing. No one can match our depth of talent, expertise, and financial strength to deliver the results your client deserves. Together, we'll win.

Experience. Resources. Results.

Steven D. Silin, Esq.  
Daniel G. Kagan, Esq.  
Craig A. Bramley, Esq.  
Jodi L. Nofsinger, Esq.  
Michael T. Bigos, Esq.  
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