

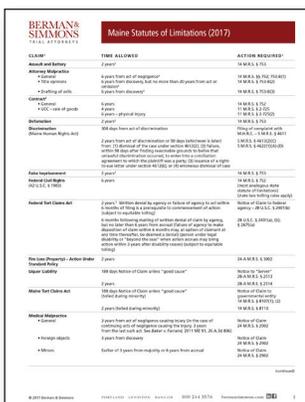
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Law Articles

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2017 Maine Statutes of Limitations

To download a copy of our updated Maine Statutes of Limitations document, go to bermansimmons.com/attorney-referrals.



Negligence on Blueberry Field Leads to \$729,000 Verdict

■ Travis M. Brennan, Esq.

On October 2016, after a five-day bench trial, the Penobscot Superior Court awarded our client Michael Lund approximately \$729,000 for serious and permanent injuries he experienced as a result of the Defendant’s negligence. The Court’s decision and award are the culmination of over four-and-a-half years of time and resources. This article reflects on some of the fundamental issues that we had to navigate to prevail in this case.

Blueberry Burns in Machias

In March 2012, Defendant M.A. Whitney & Son conducted several blueberry burns in the Machias area. Blueberry burns are used routinely to prune blueberry plants. During a blueberry burn, a tractor pulls a burning machine across the field, while the machine shoots flames onto the plants. A crew assists with the burn, monitoring the fire to keep it contained.

On the morning of March 22, 2012, M.A. Whitney was shorthanded for one of their burns, and hired Michael Lund to assist for the day. Michael, age 33, had no experience with blueberry burns. M.A. Whitney brought Michael to the blueberry fields, provided him with a pair of insulated coveralls to wear over his clothes, and assigned him the job of walking behind a burning machine on an unseasonable 85°F day.

Continued on page 5



Identifying System Failures and Organized Chaos

■ Daniel G. Kagan, Esq.

Every tort lawyer knows the simple definition of negligence: “failure to use ordinary care under the circumstances.” When presented with a new case, we are trained to look at an individual’s behavior and see where it failed to meet this familiar standard. Identifying failures of relevant individuals is an appropriate starting place, but the wise tort lawyer goes beyond this to look for the system failure that caused the harm or injury.

Importance of System Failure Analysis

System failure analysis is rooted in the engineering principle of Failure Modes and Effects Analysis (FMEA). FMEA is a systematic, proactive method of evaluating a process to identify where and how it might fail, what could happen when it fails, and what can be done to prevent failures. FMEA differs from system failure analysis in the timing: engineers apply FMEA proactively, whereas tort lawyers identify failures in systems that have already occurred.

There are pragmatic reasons to apply a disciplined system failure analysis in every tort case. While Maine’s joint and several liability law allows recovering one hundred percent from any tortfeasor, many tortfeasors have insufficient insurance or assets to satisfy a judgment for the plaintiff’s full damages. While jurors may identify with and resist assessing significant damages against an individual tortfeasor, a well-developed analysis can shift juror focus to the system failures of a faceless entity.

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Firm News

■ Maine Crash Victim Awarded \$47K

A jury voted unanimously to award \$47,800 in damages to a woman who was forced to give up her dream of becoming a nurse after she was seriously injured in a car crash. Attorney Travis Brennan represented the victim.

■ Maine Hunter to Pay Compensation

A hunter from Hartford has agreed to pay compensation to the landowner he shot during a Halloween 2012 dispute. Attorney Daniel Kagan represented the victim.

■ Maine Police Chase Dispute Ends in Settlement

Attorney Benjamin Gideon has successfully negotiated a settlement with the town of Rockport, Maine, and its police department for the wrongful death of a 16-year-old girl during a high-speed police chase. Gideon represented the mother of the deceased victim.

■ Attorney Benjamin Gideon Appointed to Professional Ethics Commission

Attorney Benjamin Gideon has been appointed to the Professional Ethics Commission of the Maine Board of Overseers of the Bar. Gideon's four-year term began Jan. 1, and continues through 2020.

■ Super Lawyers Recognition

New England Super Lawyers has selected nine Berman & Simmons attorneys for its 2016 directory. The list includes Steven Silin, Benjamin Gideon, Julian Sweet, Jodi Nofsinger, and Jack Simmons as "Super Lawyers," and Travis Brennan, Alicia Curtis, Susan Faunce, and Timothy Kenlan as "Rising Stars."

■ Best Lawyers in America Recognition

Six Berman & Simmons attorneys have been selected for the Best Lawyers in America® 2017 directory, including Benjamin Gideon, Daniel Kagan, Jodi Nofsinger, Steven Silin, Jay Sweet, and Jack Simmons. In addition, Gideon was named a Maine "Lawyer of the Year" for product liability litigation for plaintiffs. In addition, Berman & Simmons has been selected as a Tier 1 law firm for its core practice areas in the annual Best Law Firms directory published by U.S. News – Best Lawyers®.

■ Attorney Susan Faunce Earns National Recognition

Attorney Susan Faunce has been named by Benchmark Litigation as a "Top Litigator Under 40," a new accolade meant to honor the achievements of the nation's most accomplished legal partners under 40.

System Failure, continued from page 1.

Role of Organized Chaos in Tort Cases

Sometimes system failure analysis in tort cases requires unraveling the "organized chaos" inherent in certain endeavors. The Oxford Dictionary defines organized chaos as a "situation or process that appears chaotic while having enough order to achieve progress or goals." It is up to the tort lawyer to identify when the evident chaos is real and has caused harm. System failure analysis can help with this determination.

Brake Failure and Wrongful Death

A lawsuit we filed arising out of a 2013 tragedy in Bangor highlights the importance of system failure analysis. The City of Bangor's prized antique fire truck lost its brakes while participating in the Fourth of July parade. Without brakes, the fire truck ran over another parade entrant, killing him. The obvious tortfeasor, the driver of the fire truck, was very sympathetic: a firefighter in the community who was distraught over his role in the tragedy. He had limited insurance protection and pursuing his assets was outside the plaintiff estate's comfort zone. We sued the driver, but believed our case should not focus on him. In order to identify alternatives we developed and applied a system failure analysis.

Creating a flow diagram is a key step in effective system failure analysis. Exhibit 1 is the flow diagram we developed in this case. Analyzing each step critically helped us identify and name two institutional defendants whose causal role might otherwise have been overlooked.

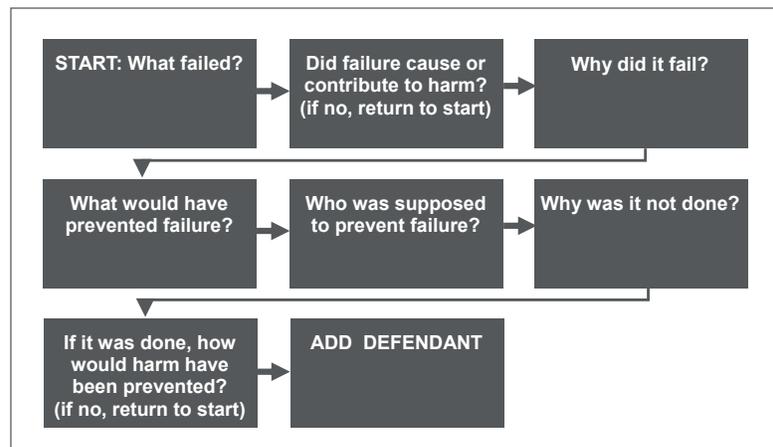


Exhibit 1. System failure analysis is rooted in the engineering principle of Failure Modes and Effects Analysis (FMEA). Creating a flow diagram is a key step in effective system failure analysis.

System Failure Analysis Aids Identification of Institutional Defendants

One institutional defendant named was the City of Bangor. The firefighter was acting within the scope of his employment at the time of the tragedy, so we brought a claim against the city on a theory of vicarious liability. This approach would include the city as a defendant but would keep the case focused on the actions of the sympathetic firefighter. We wanted to pursue a claim of direct negligence against the city. Through system failure analysis we focused on the firetruck's maintenance—we knew the brakes had failed, and that this failure caused the tragedy.

Continued on page 3

System Failure, continued from page 2.

System failure analysis led us to discover that there was no system in place to check the brakes and ensure they would stop the vehicle. The fire truck's maintenance was a classic example of failed "organized chaos," as there were multiple individual actors involved in caring for the antique fire truck, but no one was tasked with checking the brakes. Therefore the brake failure was not just an accident but the inevitable result of a failed system.

System failure analysis led us to a second institutional defendant: Kiwanis, the parade organizer. We knew that a parade involving more than a thousand entrants and 30,000 spectators required careful planning and organization. We focused our discovery on the many tasks required to hold a safe and successful event of this magnitude. In doing so we discovered specific safety rules that the event organizer had promised to follow, and brought forward evidence confirming it had not. The parade had many independent actors performing individual tasks, but no one took responsibility for assuring that the safety rules were followed. We knew we had identified a system failure and felt confident we could prove it at trial.

Resolution

Our wrongful death case resolved out of court for a confidential settlement amount. ■



Determining Agency in Medical Malpractice Cases

■ Miriam A. Johnson, Esq.

When a patient presents at a hospital or a practice affiliated with a hospital, whether the doctor is an employee of the hospital is usually the last thing on the patient's mind. If the doctor's treatment results in a medical malpractice claim, however, the identity of the doctor's employer may become a central issue of the litigation.

With more Maine hospitals, particularly those in rural areas, hiring *locum tenens* physicians¹ and other contractor physicians, the issue of agency is more likely to arise. A hospital may claim that a physician accused of negligence is not an employee or agent of the hospital, and, therefore, not covered by their insurance. The status of a physician or other provider is not determined by the hospital. It is a legal determination based on a fact-intensive analysis of the physician's employment status. Many doctors are employees of hospitals. Even when they are not directly employed by the hospital, they may be shown to be agents of the hospital.

A successful plaintiff's attorney recognizes this issue early in litigation and plans a case to document agency accordingly. Because an agency determination is so fact-specific, developing a strong record early and throughout the case is crucial.

The Law Court defines agency as "the fiduciary relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." *Camden Nat'l Bank v. Crest Constr., Inc.*, 2008 ME 113, ¶ 19, 952 A.2d 213, 218. There are two general types of agency: actual and apparent.

Actual Agency

Actual agency can be through either express or implied authority. Both express and implied authority depend on the principal giving consent. *Libby v. Concord General Mut. Ins. Co.*, 452 A.2d 979, 982 (Me. 1982). Both are established by the perceptions of the agent, not the third party. *Id.*

Express authority is "that authority which is directly granted to or conferred upon the agent . . . in express terms by the principal . . ." *Id.* at 981. Express terms may include an employment contract, statutory authority, or a statement from the principal.

If express terms are missing, actual agency can still be established through implied authority. Implied authority is "actual authority circumstantially proven from the facts and circumstances attending the transaction in question." *White v. MaineGeneral Medical Center*, SOMSC-CV-2009-06 (Me. Super. Ct., Som. Cty, Sept. 24, 2010). In proving agency based on implied authority, an attorney should seek to establish facts demonstrating that the principal granted

Continued on page 4

Determining Agency, continued from page 3.

authority to the agent. Who hired office and support staff? Who determined staff responsibilities? Who trained the staff? Who paid the staff? Did the doctor practice at other hospitals? Did the doctor maintain his or her own office outside the hospital? Who was responsible for billing? See *White*, p. 5. These facts will all be considered in determining whether the doctor is acting on behalf of the hospital and subject to its control. If the facts support the claim, the doctor is considered an implied agent of the hospital.

Apparent Authority

Apparent authority goes to whether the principal knowingly permits the agent to hold himself out as possessing authority. In other words, did the patient reasonably believe the doctor had the authority to act on behalf of the hospital? Was that belief traceable to the hospital's manifestations? See Restatement (Third) of Agency § 2.03.

A plaintiff's attorney should find out which facts her client relied on when concluding that the doctor had the authority to act on behalf of the hospital. Did the doctor perform surgery at the hospital? Did the hospital feature the doctor in advertisements, on its website, or in other material? Was the doctor using business cards or other documents which featured the hospital letterhead? If so, was the client aware of these things *before* the negligent treatment? See *Richardson v. Kalvoda*, CUMSC-CV-10-648 (Me. Super. Feb. 11, 2014)².

Extensive Discovery

Extensive discovery in areas concerning the physician's employment status may seem far removed from the facts of alleged medical negligence and associated medicine in a claim. But if the issue of agency arises, it is best to be prepared. This is done by anticipating the issue before the first depositions are taken and by properly making a factual record of the issue throughout the discovery phase of litigation. This may include taking depositions, pursuant to M.R. Civ. P. 30(b)(6), of practice managers and hospital administrators. By getting ahead and staying ahead of the issue, a plaintiff's attorney sets him or herself up for a favorable summary judgment decision and a favorable outcome for the client. ■

¹ A *locum tenens* physician works on a temporary or part-time basis and is generally matched with a hospital through a staffing agency. *Locum tenens* is a Latin phrase that means "to hold the place of or to substitute."

² Note that Berman & Simmons attorneys Susan Faunce and Jodi Nofsinger successfully litigated two recent Superior Court cases in Maine that examine the issue of agency: *Richardson v. Kalvoda* and *White v. MaineGeneral Medical Center*.



Attorney Esther Yoo joins Berman & Simmons

Attorney Esther Yoo of Falmouth has joined the Berman & Simmons law firm, where she will represent plaintiffs in personal injury cases. Yoo, who officially joined the firm in September, works in the Lewiston office.

A native of California, Yoo graduated from Harvard University and earned her law degree at the UCLA School of Law, where she was a Senior Editor of the UCLA Law Review. Yoo was a law clerk for the Honorable Dolly M. Gee of the U.S. District Court for the Central District of California, and most recently worked as an associate attorney at Pierce Atwood, LLP in Portland, Maine. ■

Firm News

■ Attorney Daniel Kagan Featured in National Report

A national four-part series on amusement park safety and liability featured attorney Daniel Kagan. The series, published in Bloomberg BNA's Product Safety and Liability Reporter and on the Bloomberg website, explores amusement park safety data. In addition, the series examines the important roles played by government regulators and prominent safety lawyers like Kagan, in keeping people safe.

■ Lawyers Featured at Legal Year in Review Event

Attorneys Benjamin Gideon and Alicia Curtis served as faculty for the Legal Year in Review seminar and webcast held recently by the Maine State Bar Association. Fewer than 20 lawyers from around the state were selected to serve as faculty for the event.

■ Presentation at Maine Fall Trial Lawyers Seminar

Attorneys Alicia Curtis and James O'Connell gave a presentation entitled "Enough Already? Evidence Necessary to Prove Causation in a Personal Injury Case" at the Fall Trial Lawyers Seminar held by the Maine Trial Lawyers Association.

■ Presentations at University of Maine School of Law

Attorneys Susan Faunce and Travis Brennan recently gave a presentation titled "Medical Malpractice Cases in Maine: How it Works" to students at the University of Maine School of Law as part of the firm's "The Practice of Law" series. Attorney Craig Bramley was a guest speaker for the law school's Externship program and gave a presentation titled "Preparing for Private Practice."

■ Robbie Foundation Fundraiser

Berman & Simmons donated \$2,000 and was a champion sponsor of the Robbie Foundation's "No Limits Run, Walk, and Roll" 5K fundraising event. The event is a major fundraiser for the nonprofit organization whose mission is to provide adaptive equipment, therapy services, and other assistance not covered by insurance to Maine children with special needs.

■ Good Shepherd Food Bank Donation

The winning team of Berman & Simmons' recent wellness challenge voted to pool their individual awards as a collective donation to Good Shepherd Food Bank. A total of \$450 was donated to help the organization in support of its fight against hunger.

Negligence on Blueberry Field, continued from page 1.

Within hours of starting the burn, Michael became disoriented and his behavior became erratic. He was rushed to a nearby hospital where his core body temperature was measured at 108°F. Michael was unconscious and on the verge of death. A breathing tube was inserted and he was transported by helicopter to a hospital in Bangor for treatment of heat stroke. Michael spent four days in the intensive care unit. Miraculously he survived, but his near-fatal heat stroke caused permanent injuries to his legs and right shoulder.

The selection of world-class experts was another critical step to develop the leverage we needed to prevail in this case.

Overcoming the Workers' Compensation Bar

As a threshold matter, we first had to analyze whether Michael could even bring a negligence claim against his employer for the injuries he experienced. Pursuant to Maine's workers' compensation statutes, every employer that purchases workers' compensation insurance is shielded from civil liability. In other words, if an employer has purchased workers' compensation insurance, an employee cannot bring a negligence claim against the employer for injuries incurred on the job. Typically, the only remedy for an employee injured at work is workers' compensation benefits. Unfortunately, workers' compensation benefits do not provide for the employee's pain and suffering, mental anguish, or loss of enjoyment of life.

Initially, it appeared that Michael's claim would be barred; we determined that M.A. Whitney did not have workers' compensation insurance, because the company fell within an exception in the law for agricultural employers.

Severity of Michael's Injuries

Determining the full extent and severity of Michael's injuries represented another important consideration in this case. There was little dispute that this incident caused Michael's acute injuries, such as respiratory failure, unconsciousness, and dangerously high body temperature. The insurance company for the Defendant initially argued that Michael's continued leg and shoulder pain were unrelated to the burn incident, and that his continued complaints of leg and shoulder pain represented malingering.

In order to address this issue, we had to fully understand Michael's physical status, from the medical course of treatment he received in the hospital, to the treatment by his primary care provider, physical therapists, physiatrist, and orthopedic surgeon. After reviewing Michael's course of treatment and speaking in person with his medical providers, the causal link between the burn incident and Michael's lasting injuries became clear. Establishing this causal link was instrumental in ensuring that Michael received full and fair compensation for his injuries.

Selection of Appropriate Experts and Trial Technology

The selection of world-class experts was another critical step to develop the leverage we needed to prevail in this case. To establish M.A. Whitney's negligence, we retained an occupational workplace safety expert who had worked for OSHA for over 29 years and who taught undergraduate- and graduate-level courses on occupational health safety. Our liability expert was able to articulate the reasonable and common sense steps that the Defendant should have taken to protect Michael.

To substantiate Michael's damages from his injuries, we retained a doctor who was a medical school professor and board-certified in critical care medicine. We also retained a physical therapist who conducted a functional capacity examination; a vocational rehabilitation expert; and a Ph.D. economist who calculated the value of Michael's lost wages. Our experts testified live at trial, and were critical to our goals of highlighting M.A. Whitney's negligence and articulating the full extent of Michael's injuries and damages.

In addition, we used advanced trial technology to present Michael's case as powerfully and persuasively as possible. Our presentation of evidence included the use of electronic trial presentation software, enabling us to quickly and efficiently play video excerpts from witnesses' prior deposition testimony. Whenever a witness's testimony was inconsistent with his or her prior deposition testimony, we were able to play the witness's video deposition and impeach the witness. This was a powerful tool in undermining the credibility of the Defendant's witnesses.

Successful Outcome

Ultimately, the success in this case hinged upon the tireless work of several attorneys and staff members at Berman & Simmons, including my collaboration with James O'Connell, who graciously agreed to try the case with me. The legal experience, hard work, and financial resources that were brought to bear in this case were instrumental to its successful outcome. ■

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."

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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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Notable Law Court Cases in 2016

■ Alicia F. Curtis, Esq.

The Law Court Affirms a Jury's Ability to Infer Causation from Adequate, Reliable Evidence

In a 2009 decision, *Addy v. Jenkins*, the Law Court threw into question a jury's ability to infer causation when a plaintiff cannot remember specifically how or why he was injured—at least according to a strong dissent by Justice Silver. Justice Silver questioned whether the Law Court had overruled prior precedent allowing a jury to infer *how* and *why* a plaintiff tripped and fell from evidence of *where* she fell—for instance through testimony the plaintiff, walking down stairs covered with torn linoleum, had tripped on a specific spot where torn linoleum was located. (*Thompson v. Frankus*, 115 A.2d 718 (Me. 1955)).

Seven years after Justice Silver's dissent in *Addy v. Jenkins*, the Law Court responded in *Estate of Smith v. Salveson*, 2016 ME 100. It specifically noted that precedent like *Thompson v. Frankus* is still good law, and affirmed a jury's ability to infer causation with an appropriate foundation.

How much and what kind of evidence is enough to allow a jury to infer causation when a plaintiff cannot remember how or why the injury occurred? Careful analysis of Law Court cases through the years demonstrates the importance of building a strong evidentiary foundation through direct and circumstantial evidence, physical evidence, eyewitness testimony, and expert opinion when necessary.

I think of this evidentiary foundation as the *who, what, when, and where* of proof of causation; *who* being other witnesses, *what* being physical evidence of the defect causing injury, *when* being proof the defect existed at the time of injury, and *where* being direct contact with the specific defect. *Estate of Smith v. Salveson* affirms that when a plaintiff's attorney develops adequate, reliable evidence of these elements, the jury may still exercise its traditional role in inferring *how* and *why* an injury occurred.

Evidentiary Privilege Distinguished from 'Confidentiality': The Law Court Sheds Light on a Distinction with a Difference

The plaintiff in *Pinkham v. Dep't of Transportation* claimed the Department (DOT) paid him unfairly for property taken to widen U.S. Route 1A in Ellsworth. (*Pinkham*, 2016 ME 74). He sought to discover the DOT's appraisals of all other property taken for the same road-widening project. The DOT objected that appraisals were confidential by statute, and the trial court agreed.

On appeal, the Law Court held it was erroneous to conflate confidentiality in the context of a request under Maine's Freedom of Access Act (FOAA), with privilege in the context of the "closed universe" of litigation. The statute protected records from disclosure to the *general public* in response to a FOAA request, but it did not protect against the discovery request of a litigant.

As the Law Court explained, even confidential information is presumptively discoverable in litigation, unless an evidentiary privilege applies. Privileges arise from relationships society deems worthy of protection—such as that between spouses, or a doctor and patient—and are created by statute only when the statute expressly identifies documents as privileged, or states they are not subject to subpoena, discovery, or use as evidence in a legal proceeding.

Pinkham provides useful guidance to plaintiffs' attorneys for discovery of otherwise confidential information. ■