

Firm News

■ Military Veteran Awarded \$150K in Car Crash Case

An Androscoggin County jury awarded \$150,000 to Coleen Elias, a U.S. Coast Guard veteran, after she suffered a neck injury in a car collision. Attorney [Travis Brennan](#) represented Elias. The verdict was over 7.5 times greater than the defendant's \$18,000 offer of judgment.

■ Maine Supreme Judicial Court Affirms Original \$2 million Medical Malpractice Jury Award

The Maine Supreme Judicial Court affirmed the original \$2 million jury award to Berman & Simmons' client Robbie Nason of Greenbush, ME, following an appeal by the defendants Eastern Maine Medical Center (now known as Northern Light Eastern Maine Medical Center) and Dr. Timothy Pruchnic. Attorneys [Jodi Nofsinger](#), [Susan Faunce](#), and [Taylor Asen](#) represented Nason.

■ Attorney Benjamin Gideon Admitted to the Inner Circle of Advocates

Attorney [Benjamin Gideon](#) has been admitted to the Inner Circle of Advocates, an invitation-only, national organization that limits its membership to no more than 100 of the top plaintiff trial lawyers in the nation. Attorney Gideon is only the second lawyer in Maine history to be invited to join this group.

■ Attorney Travis Brennan Appointed to Advisory Committee on Rules of Civil Procedures

Attorney [Travis Brennan](#) has been appointed by the Maine Supreme Judicial Court to the Advisory Committee on Rules of Civil Procedure. The committee is tasked with reviewing the Civil Rules and considering proposed changes to the Rules.

■ Attorney Taylor Asen Appointed to Maine Legislature's Right to Know Advisory Committee

Attorney [Taylor Asen](#) has been appointed by the Speaker of the Maine House of Representatives to serve on the State's Right to Know Advisory Committee. This committee is a resource concerning Maine's Freedom of Access laws.

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cases under the Act required two-pronged proof (likely future earnings plus proof of specific financial loss to the statutory beneficiaries), the Act's 2009 amendment eliminated the latter requirement.

Establishing a Decedent Child's Pecuniary Loss

Establishing a decedent child's pecuniary loss requires evidence of habits, as well as the child's capacity for achievement, education, temperament, and character. *Bowley v. Smith*, 131 Me. 402, 406, 163 A. 539, 541 (Me. 1932). While it is the Estate's

burden to show the decedent had the capacity to earn as claimed, this burden is eased somewhat by the Court's instruction to the jury that it need not find earning capacity precisely or to a mathematic certainty, and that it has (wide) discretion in reaching its finding. *Id*; *McKay v. New England Dredging Co.*, 92 Me. 454, 459, 43 A. 29, 30.² Further, as the focus for pecuniary loss is on earning *capacity*, there is no requirement that the estate produce proof of an exact income or a specific profession or specialty that would generate that income. *Id*. Other means of meeting this burden include demonstration of the family's culture of education and achievement. For example, expert testimony can establish the statistical likelihood of a child's earnings given parents with high school versus college educations.

While the 2009 amendment to the Act allows the child's pecuniary loss to get to the jury, there is still the challenge of overcoming understandable—perhaps even expected—juror skepticism about projecting a child's achievements over a lifetime. Poorly presented, a child's pecuniary loss claim risks not only rejection of that claim but tainting the rest of the wrongful death claim by overreach.

Teens' Histories Support Compelling Pecuniary Loss Claims

Fortunately, both our cases involved remarkable teens whose histories supported compelling pecuniary loss claims. While looking into the claim, we learned that the high school junior had identified herself as a physician since childhood, had spoken and written about this goal extensively, and had even job-shadowed with a practicing physician the summer before her death. She was also an exceptional student academically, athletically, socially, and in extracurricular activities. Her parents were well-educated, having earned college and graduate degrees. We felt confident jurors would see her for what she was—an exceptional young woman, a star among stars, likely to continue her excellence and meet her goals at every level.

The young man, in contrast, was an indifferent student with no love for organized education. His parents owned a logging business that, from his earliest days, he aspired to take over. From the time he was a toddler, his father took him into the woods to work and taught him to operate all manner of equipment. We were able to show that the young man had attended logging equipment shows throughout the Northeast, wearing a name badge identifying himself as the "Future Owner" of the family business. Following the family's lead, we spoke with and secured as witnesses numerous loggers and woodsmen who had worked alongside the young man. Each spoke with heartfelt conviction and glowing admiration for the decedent's equal measure of work ethic and skillful operation. A short stint as a substitute operator for a local lumber yard caught the eye of the yard manager, who became another strong witness for us.



Our client's son, who was killed at 21 years old by a drunk driver, had talked since he was a child about following in his father's footsteps and owning his family's logging business. His aspirations were clear, as depicted in this drawing he created at age four.

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Some Recovery Earmarked for Pecuniary Loss Compensation

The facts underlying the claims we presented for these two teens could not be more different, but each was successful due to a common theme. Neither teen had an earnings track record as a predicate to recovery for pecuniary loss, but both teens had demonstrated dedication to achieving their respective goals. As a result, both cases settled with a substantial portion of the recovery earmarked for pecuniary loss compensation.³

Financial accountability for the consequences of one's bad acts is at the core of our tort system. Thanks to the 2009 amendment to the Act, no longer are tortfeasors automatically insulated from the full measure of the harm they cause when their deceased victims are children. ■

¹ 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.A. § 2-804(b) ² "It is evident that the pecuniary damages to be recovered under this statute can never be ascertained with exactness nor with any satisfactory degree of approximation. Unlike ordinary questions of the legal measure of damages, this relates wholly to the future. There can never be knowledge. The conclusion arrived at must be based on probabilities instead of facts. The only facts that can be ascertained are those which occurred before or at the time of the death. From that data, what would probably have occurred had not the wrongful act or neglect of the defendant intervened, must be conjectured as carefully as possible." McKay at 459, A. at 30. ³ Confidentiality agreements in both cases protect from release the specific settlement details beyond "the cases resolved on terms satisfactory to all parties."



Attorney Adam Arguelles Joins Firm

Attorney Adam Arguelles, a Massachusetts native, has joined Berman & Simmons. He will represent clients in medical malpractice, wrongful death, and personal injury cases, from the firm's Lewiston office.

Prior to joining Berman & Simmons, Arguelles dedicated nearly a decade to federal government service. Most recently, Adam clerked for Judge John A. Woodcock, Jr. of the U.S. District Court for the District of Maine. Previously he served at the White House as Special Assistant to the President for Legislative Affairs and in the leadership of the U.S. House of Representatives as Assistant Floor Director to the Majority Whip.

Arguelles graduated from Georgetown University's School of Foreign Service and earned his law degree from Stanford Law School. ■



Firm Names Travis Brennan and Dov Sacks as New Partners

Berman & Simmons has named trial attorneys Travis Brennan and Dov Sacks as its newest partners.



Attorney Travis Brennan represents clients in claims involving medical malpractice, personal injury, and defective products. Since joining the firm in 2014, he has successfully litigated dozens of cases across Maine in both state and federal court. Brennan's work has been recognized by leading national legal organizations; he has received an "AV Preeminent" rating by Martindale-Hubbell, and has been named a "Rising Star" by Super Lawyers. Brennan is a Maine native with degrees

from Bowdoin College and the University of Maine School of Law.

Attorney Dov Sacks represents clients in medical malpractice and personal injury and has developed a specialty practice in Maritime Law. He has advocated for dozens of clients in Maine and New Hampshire since joining the firm in 2014, and has earned multiple distinctions during his career, including being named a "Rising Star" by Super Lawyers. Sacks is a graduate of Harvard College and The George Washington University Law School. ■

Firm News

■ Attorney Susan Faunce Appointed to the Local Rules Committee of the U.S. District Court for the District of Maine

Attorney *Susan Faunce* has been appointed by the U.S. District Court for the District of Maine to serve on the Local Rules Advisory Committee. The committee studies the rules of practice and makes recommendations to the Court concerning its rules and procedures.

■ Attorney Susan Faunce Advocates for Women Lawyers

Attorney *Susan Faunce* has been elected to serve as the Women's Law Section representative on the Maine State Bar Association Board of Governors. The member-run committee provides women lawyers a forum to network, explore professional development opportunities, and discuss issues of interest.

■ Attorney Jodi Nofsinger Appointed to Judicial Nominations Advisory Committee

Attorney *Jodi Nofsinger* has been appointed by Gov. Janet Mills to serve on her Judicial Nominations Advisory Committee. The committee screens candidates for judicial appointments.

■ Attorney Jodi Nofsinger Recognized in Super Lawyers®

New England Super Lawyers has selected attorney *Jodi Nofsinger* in its Top 100 New England Super Lawyers List and its Top 50 Women New England Super Lawyers List.

■ Attorney Mike Bigos Presents at National Trial Lawyers Meeting

Attorney *Michael Bigos* presented a legislative and political update during an American Association for Justice (AAJ) convention meeting. Topics included Maine's election results, the impact of rank choice voting in Maine's second congressional district, and 2019 legislative proposals.

■ Berman & Simmons Supports ILAP's Lewiston Office

The immigrant Legal Advocacy Project (ILAP) has opened a Lewiston office as part of an effort to serve more immigrants in Maine's communities. Berman & Simmons has pledged \$20,000 per year for five years to help ILAP establish and maintain the office.

About the Firm

Berman & Simmons, P.A., is a firm of 19 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.

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TRIAL ATTORNEYS

Notable Law Court Cases, continued from page 1.

The Law Court upheld admission of the insurer's conduct over a Rule 411 objection, reasoning the evidence was not introduced to prove the defendant was insured against liability. In other words, it was not used to prove insurance coverage for the compensatory or punitive damages. The Law Court found it unnecessary to reach the second requirement in Evidence Rule 411 to exclude insurance evidence—its use to prove the defendant acted negligently. Additionally, the evidence was admissible without any attempt to hide the identity of the insurer, for instance through identifying the insurer only as an unnamed agent of the defendant. These facts are notable in demonstrating the Law Court's openness to admission of insurance evidence in the right circumstances.

West v. Jewett affirms that evidence of insurance is admissible when the conduct of the insurer is at issue, or for such long-recognized purposes as proving agency, ownership or control, or the bias or prejudice of a witness.

Pitfalls on the Road to Admission of Business Records in Evidence at Trial

Two different Law Court decisions of 2018 highlight challenges in admitting business records into evidence, when documents held by one business were actually created or modified by another. In *M&T Bank v. Plaisted*, a mortgage servicer attempted to foreclose on a mortgage relying on documents from a second servicer, who shared the same electronic system and had "virtual" contacts with it. 2018 ME 121. In *Avis Rent A Car System v. Burrill*, a rental car company attempted to prove the value of a totaled rental car by submitting into evidence documents from third parties, including a vehicle valuation report. 2018 ME 81.

In both cases, the Law Court held the documents were inadmissible, because technical requirements to establish a witness as the business record's custodian were not met. In *Plaisted*, "virtual" contacts between the two mortgage servicers did not make one servicer's employee the records custodian for the other, when the employee did not know the physical location of the other's offices, the identity of the person at the other servicer who made entries into their shared electronic record, or when the entries were made relative to events. Although business may have come to trust and rely on more anonymized, virtual interactions, the Law Court requires a different standard based on personal interactions and personal knowledge to qualify a records custodian.

In *Burrill*, a rental car employee qualified as custodian of records the company created, but could not qualify for records created by third parties. The dissent noted the rental car company was perfectly reasonable in relying on the third-party valuation by a trusted outside company, but this was not enough in the absence of personal knowledge about how the valuation was created, maintained, and sent to the rental car company, according to the majority. These cases serve as a warning the Law Court continues to uphold technical requirements for admission of business records despite recent changes in technology. ■

Do you have a client who has been harmed by a dangerous drug or medical device?

Cases we are currently handling:

- Inferior Vena Cava ("IVC") Filter
- Hernia Mesh
- 3M Combast Arms™ Earplugs
- Metal-on-Metal Hip Implant
- Talcum Powder
- Sorin Stöckert 3T Heater-Cooler Device
- SLGT2 Inhibitor
- Valsartan

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