2011 DEVELOPMENTS IN MAINE TORT LAW

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The theme in this year's tort cases was back to basics. Both the Maine state and federal courts were reluctant to expand theories of liability. Instead, the decisions repeatedly analyzed the cases utilizing the basic elements of the cause of action, whether based in traditional common law negligence (i.e., was a duty of care owed to the injured person and was the injury proximately caused by the breach) or analyzing a new theory by carefully parsing the elements of the Restatement (Second) of Torts.

The Court continued to refuse to expand liability for the acts of third persons [*Davis v. Dionne, 26 A.3d 801, 2011 ME 90 (bus trip); Gniadek v. Camp Sunshine at Sebago Lake, Inc*., 11 A.3d 308, 2011 ME 11(sexual assault).] In the same vein, the Court insisted on proof of the difficult requirements of "confidential relationships" and thereby limited the higher duties that flow from that special relationship. [*Erlich v. Ouellette, Labonte Roberge*, 637 F.3d 32 (1st Cir. 2011)("the actual placing of trust and confidence in fact by one party in another and a great disparity of position and influence between the parties to the relation.")]

The Court remains concerned about "opening the floodgates" to infliction of emotional distress lawsuits, particularly among domestic partners, and underscored the high standard to prove "severe" emotional distress. [*Lyman v. Huber 10 A.3d 707, 2010 ME 139 ("*the "severity" requirement is met by showing "bodily harm, i.e., 'severe emotional distress accompanied or followed by shock, illness, or other bodily harm, which in itself affords evidence that the distress is genuine and severe'.")]

There were several medical malpractice cases in both the state and federal courts, which demonstrated both the rewards and difficulties of pursuing malpractice claims. Compare *Seabury–Peterson v. Jhamb*, 15 A.3d 746, 2011 ME 35 ($1+ million jury verdict affirmed in failure to diagnose recurrent breast cancer case, $700,000 for pain and suffering, $300,000 for loss of consortium, and $12,257 for medical costs) with the long struggle in *Samaan v. St. Joseph Hospital*, 744 F.Supp.2d 367, 744; F.Supp 2d 372, 755; F.Supp.2d 236, 764; F. Supp.2d 238, 274 FRD 41 (D.Me 2010-11)[Judgment for the doctor without trial on grounds that plaintiff's medical expert scientific methodology was inadequate.]

Given the Court's generally conservative bent, the most surprising case of the year was a statute of limitations issue in a medical malpractice case, *Baker v. Farrand*, 26 A.3d 806, 2011 ME 91. The Court had ruled in 2008 that the Health Care Security Act did not permit accrual of a medical malpractice cause of action based on the continuing treatment doctrine. *Dickey v. Vermette*, 960 A.2d 1178, 2008 ME 179. In *Baker,* however, the Court re-examined the provisions of the Act in an excellent example of how to use the whole statutory context as a basis for statutory construction. By finding that the Act permitted the application of the continuing treatment doctrine, the Court reversed the trial court and held that the plaintiff whose physician failed to diagnose prostate cancer could sue for injuries more than 3 years old.

The Court continued to affirm the award of punitive damages in several cases. *Estate of Hoch v. Stifel*, 16 A.3d 137, 2011 ME 24 ($3 Million in punitive damages in elder abuse case); *Morin v. Eastern Maine Medical Center*, 779 F.Supp2d 166 (D. Me 2011)($150,000 in punitive damages in EMTALA case); and *Graham v. Brown,* 26 A.3d 823, 2011 ME 93 ($5000 in punitive damages in domestic abuse case.)

The Legislature stayed away from tort reform in 2011 and made only one minor statutory change which affects torts. Public Law, chapter 78 repealed the old financial responsibility requirement of $350,000 on rental passenger cars (29-A MRS §1611) and now, rental passenger vehicles must provide the same financial responsibility requirements as other passenger cars under 29-A MRS 1605.

I. Negligence Theories

A. Does the Defendant Owe the Plaintiff a Duty of Care and What is the Scope of that Duty?

1. Slip and Fall – Tough Cases

Davis v. RC & Sons Paving, Inc., 26 A.3d 787, 2011 ME 88 (Me. 2011).

- **Third party harmed by a breach of contract may only sue for breach of contract if the contracting parties intended that the third party have an enforceable contract right. Restatement of Contracts §302**

- **Failure to sand following a snow storm does not create a dangerous condition giving rise to a duty of care to pedestrians**

Davis was an employee of St. Mary's in Lewiston and slipped and fell in a parking area which RC & Sons Paving had contracted with the hospital to plow and sand. The Law Court affirmed summary judgment for the plowing company.

Davis argued that the company owed her a duty of care as a third party beneficiary of its contract with the hospital. In affirming summary judgment for the company, the Court relied on the elements set out in §302 of the Restatement (Second)

of Contracts, Contract Beneficiaries, Intended and Incidental Beneficiaries, and found that Davis failed to show that the hospital intended to benefit its employees with the contract.

Further, the Court found that any third party beneficiary status was "immaterial" because Davis had only alleged tort claims and not a contract claim. ("Tort obligations and contractual obligations "create separate and distinct predicates of liability" "). The Court also rejected Davis' negligence theory that the company had created a dangerous condition of untreated ice, covered by a thin skim of obscuring snow, by failing to treat the ice after plowing the area. The Court acknowledged that it had recognized in other cases that "the reasonable foreseeability of injury to others from one's acts or from one's failure to act raises a duty in law to proceed in the exercise of reasonable care." However, it found that the plowing company didn't create the slippery ice that remained under the snow – the weather did and, therefore, affirmed the summary judgment for the company.

Justices Silver and Jabar dissented, and recommended remand for the further development of the facts regarding the company's response to the storm:

> It makes no sense to remove any legal duty at precisely the moment a snow and ice removal business begins to respond to the triggering storm, simply because the business had no hand in causing the storm. I would hold that R C & Sons had a duty "to reasonably respond to a foreseeable danger posed to ... invitees by a continuing snow or ice storm." Id. This duty is consistent with that expressed in section 324A of the Restatement (Second) of Torts (1965).

2. No Duty to Protect from Acts of Third Parties

Davis v. Dionne, 26 A.3d 801, 2011 ME 90

- **The general rule is that an actor has no duty to protect others from harm caused by third parties.**
- **While a common carrier has the highest duty of care, that duty ends when the passengers have safely exited the bus.**
- **There is no fiduciary duty on the part of a trip organizer to protect the participants from each other.**
- **The Maine Liquor Liability Act 28–A M.R.S. §§ 2501–2520 is "the exclusive remedy against servers for claims by those suffering damages based on the servers' service of liquor."**

After he exited a chartered bus at the conclusion of a business promotion trip, Davis was struck and seriously injured when a drunk participant in the trip drove his

truck into him. The Court affirmed summary judgments in favor of the chartered bus company and the business which organized the trip.

Davis argued that the bus company had the duty to prevent drunk participants from driving after the bus trip ended. While a common carrier has a heightened standard of care, the Court determined that the bus company's duty ends after it discharges the passengers safely at a safe location:

> We have declined to extend the duty of a common carrier "to include an in loco parentis type of responsibility to intervene in an arguably intoxicated passenger's life, perhaps against the passenger's wishes, to ensure that the passenger does not harm himself or herself after the common carrier has given the safe exit that the law requires."

Davis also argued that he had a special relationship with trip organizers which imposed a duty on them to protect him from other participants. However, Davis failed to prove the two requisites of a fiduciary relationship: a disparate power relationship between them and a reasonable basis for placement of trust and confidence in the superior party.

> We decline to recognize a generalized fiduciary duty on the part of one who organizes and leads a trip to protect trip participants from one another and do not reach the issue as to whether some other factual scenario may give rise to a special relationship or a fiduciary duty on the part of a trip organizer or trip leader.

Gniadek v. Camp Sunshine at Sebago Lake, Inc., 11 A.3d 308, 2011 ME 11

- **Absent a special relationship, there is no duty to protect others from the criminal conduct of a third party.**

- **For a fiduciary relationship to exist, there must be both a great disparity of position and influence between the parties and a reasonable basis for the placement of trust and confidence in the superior party in the context of specific events at issue.**

- **An actor is required to guard against the intentional misconduct of others only "where the actor's own affirmative act has created or exposed the other to a recognizable high degree of risk of harm through such misconduct, which a reasonable man would take into account."**

- **Apparent authority exists only when the conduct of the *principal* leads a third party to believe that a given party is its agent.**

Two months after her camp session was ended, the camper was sexually assaulted in New York by a volunteer she met at the camp. The Law Court affirmed summary judgment for the Camp.

The camper argued that due to her age (17), her chronic illness (brain damage), and use of anti-depressants, the Camp had both a fiduciary and custodial relationship that imposed a higher duty of care. The Court agreed that the plaintiff was vulnerable; however, she only spent one week a year at the camp and there was no "great disparity of position and influence between the parties" required for a fiduciary relationship. Further, the Court found that there was no custodial relationship because she attended the camp with her mother. But any custodial relationship is "circumscribed by temporal and geographic limitations," and the camper had left camp two months before the attack in New York.

The camper also argued that the Camp created the risk of harm because it circulated contact lists of the families, counselors and volunteers. Absent evidence that the camp knew that the volunteer demonstrated a high risk that he would sexually assault campers, the court found that a contact list didn't create a "peculiar opportunity" for third party misconduct. The Court also rejected the camper's theory that the Camp was liable under an agency theory relying on the Restatement of Agency §3.11(2) that apparent authority ceases when it becomes unreasonable for the third party to believe that the agent continues to act with actual authority.

B. Loss of Consortium

1. Derivative or Independent cause of action?

Steele v. Botticello, 21 A.3d 1023, 2011 ME 72.

- **Husband's release of his claim was not a bar to the wife's separate claim for loss of consortium**

Husband settled his claims for tortious assault for $50,000 and no release was obtained from his estranged wife. Thereafter, wife sued the tortfeasors for loss of consortium. When entering summary judgment for the tortfeasors, the trial court relied on *Brown v. Crown Equipment Corp.*, 2008 ME 186, to conclude that husband's release barred wife's loss of consortium claim because it was derivative of husband's underlying tort claim. The Law Court vacated the judgment.

The Court (Levy, J.) made a detailed analysis of the prior opinions on loss of consortium, recognizing that "[t]he terms 'derivative' and 'independent' are imprecise, and may be misleading" as they are used to describe loss of consortium injuries and loss of consortium claims." Although arising from the same underlying facts as the injured spouse's claim, a statutory loss of consortium claim (14 MRS §302) can be asserted independently. The Court distinguished *Brown*, which held that loss of consortium damages are subject to the traditional defenses to the claims of the injured

spouse, including reduction for comparative negligence. The Court concluded that the husband's release of his claim was not a bar to the wife's separate claim for loss of consortium:

> Read together, *Brown*, *Hardy*, and *Parent* instruct that a loss of consortium claim and its underlying claim may be separately pursued even though the spouse's loss of consortium injury derives from the other spouse's bodily injury, both claims arise from the same set of facts, and both claims are subject to the same defenses. Because the two actions may be brought separately, they may also be settled separately, and the release of one claim does not necessarily preclude the other.

2. Allocation of "inchoate" personal injury recovery in Divorce Agreement.

Ramsdell v. Worden, 17 A.3d 1224, 2011 ME 55

The divorce judgment provided that husband was entitled to 80% of any recovery for personal injuries he had suffered and wife was entitled to 20%. After recovering $2 million in damages in a personal injury action, former husband argued that wife was entitled to a percentage of only the damages the jury awarded for what he characterized as "marital assets," i.e., lost past earnings, past medical expenses and past household services. The trial court held that wife was entitled to 20% of the total recovery and the Law Court affirmed. The Court held that the divorce judgment treated all of the husband's potential recovery as marital property and, therefore, wife was entitled to 20% of the whole recovery under the judgment.

C. Professional Negligence

1. Legal Malpractice – Collateral Estoppel effect of Fee Arbitration Award.

Kurtz & Perry, P.A. v. Emerson, 8 A.3d 677, 2010 ME 107

- **The contract-based legal malpractice claim concerning the fee agreement was barred by collateral estoppel.**
- **However, the Panel decision did not bar the legal malpractice claim that the attorney breached his duty of zealous representation by negotiating a divorce settlement that did not require the former husband pay all of her attorney fee.**
- **Expert testimony required.**

The attorney sued his divorce client in Superior court for $34,000 in unpaid fees and the client counterclaimed for breach of contract and malpractice. The action was stayed while the Fee Arbitration Panel resolved the fee dispute. After the Panel decided

in favor of the attorney, the Superior Court entered summary judgment for the attorney. The Law Court held that:

> The findings made by the Fee Arbitration Panel, *to the extent necessary to its determination*, have preclusive effect for purposes of collateral estoppel.

Summary judgment was affirmed as a result of client's failure to designate an expert witness.

> Expert testimony is required in a legal malpractice claim to establish the appropriate standard of care and whether an attorney breached that standard of care, except when the breach or lack thereof is so obvious that it may be determined by a court as a matter of law or is within the ordinary knowledge of laymen.

In this case, determining a breach of the standard of care was not "obvious." Instead, a determination of whether the attorney should have included a provision requiring the ex-husband to pay her attorney fees required the assistance of expert testimony with an understanding of the calculations, negotiations, and strategy involved in resolving the terms of a complex divorce settlement.

2. Medical Malpractice.

Samaan v. St. Joseph Hospital, 744 F.Supp.2d 367, 744; F.Supp.2d 372, 755; F.Supp.2d 236, 764; F. Supp.2d 238, 274 FRD 41 (D.Me 2010-11)

- **The Power of Daubert.**

- **Standard of Proximate Cause for Medical Malpractice – Loss of a Chance.**

This Bangor federal court medical malpractice case wins this year's prize for producing the most paper – Judge Woodcock wrote five (5) published decisions as well as several unpublished ones in this medical malpractice case, and the case was adjudicated on motions without a trial.

The plaintiff, Samaan, was on a flight from Italy to New York when he suffered a stroke. The plane landed in Bangor and he was transported to St. Joseph's Hospital emergency room. The central issue was whether the Defendant emergency room physician's decision not to administer "tissue plasminogen activator" (t-PA), a drug which can reduce the effects of a stroke, was a proximate cause of the patient's disability. He sued in state court and the defendants removed to federal court based on diversity.

In the first round, 744 F.Supp.2d 367, the Court denied Defendant's Motion in Limine to exclude the testimony of Plaintiff's expert, Dr. Tikoo, who opined that the failure to administer t-PA was the proximate cause of the patient's injuries. The defendants claimed that Dr. Tikoo's methodology was scientifically flawed. The Court denied the motion to exclude testimony, finding that it was the province of the fact-finder to weigh the expert's presentation of the relevant data to evaluate whether the requisite proximate cause standard was met. However, at the end of his opinion, the Court suggested that a more fulsome evidentiary record might lead to a different result.

Following the Judge's "suggestion," there was a *Daubert* hearing to permit the Judge to determine whether Dr. Tikoo's expert testimony is admissible under Rule 702. The hearing was done with a split-screen videoconference in the courtroom in which the opposing experts could see and hear each other as well as the Court. The Court's decision that Dr. Tikoo's opinion was not supported by sound science or reliable methodologies is published at 755 F.Supp.2d 236.

The threshold legal issue was whether the Maine law required that the plaintiff show that the defendant's negligence was "more likely than not" to have caused the damages, or whether Maine would accept the lower "loss of a chance" standard in which the plaintiff is only required to prove "that he was deprived of a significant chance of avoiding harm." The Court reviewed the Maine decisions and determined that the Maine court had never adopted the loss of a chance doctrine. The Court declined to adopt the loss of a chance doctrine:

> "A federal court must not "create new rules or significantly expand existing rules. We leave those tasks to the state courts.""

In his analysis of whether Dr. Tikoo's opinion that the patient was more likely than not to have recovered but for the failure to administer t-PA, the Court not only considered the opposing experts testimony but also did its own analysis of the scientific studies:

> "A district court may exclude expert testimony if the expert's conclusion does not logically follow from his methodology…A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered."

After the exclusion of its primary expert witness, plaintiff tried to rely on statements by his treating physicians that if the t-PA shot had been given within three hours, his left side should have been saved from paralysis. The court found that plaintiff had failed to designate these doctors as experts in accordance with the scheduling order and precluded their testimony. Without an expert witness on causation, the Court reconsidered its previous denial of the defendant's motion summary judgment, and judgment was entered for the defendants. 274 FRD 41.

Seabury–Peterson v. Jhamb, 15 A.3d 746, 2011 ME 35.

- **Impermissible Golden Rule Argument.**

- **Jury verdict of $1,012,257 affirmed in failure to diagnose recurrent breast cancer case: $700,000 for pain and suffering, $300,000 for loss of consortium, and $12,257 for medical costs.**

In closing arguments, the plaintiff's counsel emphasized the deterioration of the plaintiff's quality of life caused by her untreated pain, stating: "No one would want to switch places right now more than Donna Peterson." Defense counsel objected, and the trial court gave a curative instruction. On appeal, the medical defendants argued that the court should have granted their motion for a mistrial because counsel made a "Golden Rule" argument that encouraged the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence. While the counsel did violate the rule, the Court held that it was an isolated comment that was promptly and effectively cured and therefore the trial court did not abuse its discretion in denying the motion for mistrial.

Morin v. Eastern Maine Medical Center, 779 F.Supp.2d 166 (D. Me 2011)

- **Emergency Medical Treatment and Active Labor Act ("EMTALA").**

- **Punitive Damages.**

The jury awarded $50,000 in compensatory and $150,000 in punitive damages to a Millinocket woman who was refused admission to EMMC because her fetus was dead. Ms. Morin was 16 weeks pregnant when she started having what she thought were labor pains but when she arrived at EMMC, the ER determined that the fetus was dead. The ER physician in consultation with the on call obstetrician refused to admit her and told her to go home and await "nature taking its course," i.e. have the miscarriage at home. She returned home; several hours later locked her boyfriend/husband out of the bathroom and had a miscarriage on the bathroom floor. She placed her unborn son in box and paced back and forth all night while holding her son and herself hemorrhaging.

The Court denied all of EMMC post trial motions. Throughout the litigation, EMMC maintained that the EMTALA does not cover women who are carrying non-viable fetuses since delivery of a dead fetus is not "labor". The Court had already denied EMMC's motion for summary judgment finding that "EMMC's position is legally wrong and morally questionable:

> The Court is nonplussed at EMMC's disquieting notion that EMTALA and its regulations authorize hospital emergency rooms to treat woman who do not deliver a live infant differently than women who do. EMMC's

contention is not justified by the language of the statute or its implementing regulations and has disturbing policy implications.

In refusing to set aside the punitive damage award, the court found there was clear and convincing evidence of implied malice:

> The EMMC doctors not only sent Ms. Morin away in violation of the law and but it also thereby consigned her to a humiliating, risky and solitary home delivery. The trial evidence was sufficient to establish by clear and convincing evidence that "although motivated by something other than ill will toward any particular party," EMMC's actions were "so outrageous that malice toward a person injured as a result of that conduct can be implied."

Jacob v. Kippax, 10 A.3d 1159, 2011 ME 1

- **Display of Screening Panel Decision.**

Malpractice screening panel's unanimous finding of no negligence is admissible as evidence with six instructions. 24 M.R.S. § 2857(1)(C). Therefore, the display of the enlargement of the actual finding for limited periods during the defense closing was permissible. Exclusion of evidence under Rule 403 of prior Board of Dental Examiners discipline affirmed.

Baker v. Farrand, 26 A.3d 806, 2011 ME 91

- **Accrual of Statute of Limitations based on Continuing Negligent Treatment.**

- **Interpretation of statutory section within the context of the whole statutory scheme to give effect to the Legislature's intent.**

In *Baker*, the Law Court interpreted the three-year statute of limitations of the Maine Health Security Act, 24 M.R.S. §2902, so as to permit the accrual of the cause of action based on the continuing negligent treatment doctrine.

From 1996 through 2006, the primary care physician tested the patient's prostate-specific antigen levels (PSA) as part of annual physicals. Starting in 2002, the patient had PSA levels in excess of the normal range; however, the physician did not refer the patient to a urologist until 2006, who diagnosed prostate cancer after biopsy.

The patient filed a notice of claim on September 14, 2007 and the Superior Court ruled that claims for any acts before September 14, 2004 were barred by the three year statute of limitations.

Section 2902 provides, in relevant part:

> Actions for professional negligence shall be commenced within 3 years after the cause of action accrues. For the purposes of this section, a cause of action accrues on the date of the act or omission giving rise to the injury . . . This section does not apply where the cause of action is based upon the leaving of a foreign object in the body, in which case the cause of action shall accrue when the plaintiff discovers or reasonably should have discovered the harm.

The Superior Court's decision seemed consistent with a 2008 Law Court decision, *Dickey v. Vermette*, 960 A.2d 1178, 2008 ME 179:

> In setting a three-year period of limitations, declaring that the cause of action "accrues on the date of the act or omission giving rise to the injury" and carving out a specific exception for foreign objects, the Legislature effectively declined to adopt the continuing course of treatment doctrine.

(Vigorous and separate dissents by Justices Alexander and Silver.)

Thus, in order to adopt the continuing course of treatment doctrine in *Baker v. Farrand*, the Law Court (Levy, J.) had to distinguish *Dickey v. Vermette* and change its statutory construction of section 2902. Based on a stipulation in *Dickey*, the 2011 Court asserted that it had "declined to consider the adoption of the continuing treatment doctrine" in *Dickey*.

On the statutory construction, the Court found that the use of the singular in section 2902 (a cause of action accrues on the date of the **act** or **omission** giving rise to the injury) does not mean that the cause of action accrues upon the occurrence of each negligent act or occurrence that proximately caused an injury. The Court reasoned that "act or omission" is not defined in section 2902; however, looking at other definitions in the Health Security Act, the Court concluded that the "Act allows for the possibility that two or more negligent acts or omissions might combine to proximately cause a patient's injury." For example "professional negligence" is defined by section 2502(7) to include plural "act**s** or omission**s**, which means either single acts or "a series of related acts or omissions that proximately cause a harm."

Based on this statutory analysis, the Court concluded:

> A plaintiff may bring a single action alleging continuing negligent treatment that arises from two or more related acts or omissions by a single health care provider:
>
> - where each act or omission deviated from the applicable standard of care and,

- to at least some demonstrable degree, proximately caused the harm complained of,
- as long as at least one of the alleged negligent acts or omissions occurred within three years of the notice of claim.

Erlich v. Ouellette, Labonte Roberge, 637 F.3d 32 (1st Cir. 2011)

- **Accountant and Actuary are not fiduciaries to pension fund for purpose of applying the "discovery rule" to toll statute of limitations in a professional negligence action.**

The first circuit court of appeals rejected the claim of the New England Carpenters pension fund that the discovery rule governed the statute of limitations in its action against its actuary and auditor for overpayments of more than $3.5 million from 1973 to 2005. The error was not discovered until 2006 and the fund brought suit in 2009. The district court held that all damages occurring before 2003 (6 years before 2009) were time barred.

Under the general six year statute of limitations, 14 MRS §752, the Maine courts consider an action "accrued" when a plaintiff receives a judicially recognizable injury, no matter when the injury is discovered. However, in some limited instances, the discovery rule is applied (e.g. attorney malpractice based on a negligent tile search, foreign object surgical malpractice and asbestos). Further in *Nevin v. Union Trust Company*, 726 A.2d 694 (Me. 1999), the Law Court applied the discovery rule to claims against a bank providing significant financial management services based on the bank's fiduciary role.

The pension fund argued that it had a "confidential relationship" with the actuary and auditor that permitted the application of the discovery rule. Because the auditor and actuary's financial skills far exceeded their clients, a board that consisted largely of craftsmen, it argued that disparity in knowledge prevented the Fund from discovering its injury until the limitations period had expired for almost the entire period of alleged wrongdoing.

The Court found no Maine cases applying the discovery rule to actuaries and auditors and found no facts demonstrating "the actual placing of trust and confidence in fact by one party in another and a great disparity of position and influence between the parties to the relation." Instead, the complaint described "arms-length, contractual arrangements between the board of a sizable pension fund and professionals providing routine, even mechanical, financial services."

Finding that applying the discovery rule to these circumstances would be a "significant step in expanding Maine law", the Court affirmed the district court. "A diversity court must take state law as it finds it, 'not as it might conceivably be, some day; nor even as it should be.'"

OTHER TORT CAUSES OF ACTION

A. Intentional Infliction of Emotional Distress

1. Domestic Relationships

Lyman v. Huber 10 A.3d 707, 2010 ME 139

Following a bench trial, Judge Delahanty awarded $106,000 to ex-girlfriend for intentional infliction of emotional distress over the course of their 15-year relationship. The Law Court vacated and ordered judgment for the boyfriend, because there was insufficient evidence to prove the necessary element of emotional distress "so severe that no reasonable person could have endured it."

> Establishing that a plaintiff's emotional suffering qualifies as "severe" normally requires proof of manifestations of the emotional harm such as "shock, illness or other bodily harm" unless the defendant's conduct is found to have been so extreme and outrageous that proof of bodily harm is not needed.
> *Comment k to section 46 of the Restatement (Second) of Torts*

In the context of domestic relationships, the Court struggled with defining the line between severe enough emotional distress to give rise to civil damages under a tort theory and emotional distress that should be remedied with other legal protections:

> We are mindful that the form of emotional distress experienced by Lyman is serious, and that the law rightfully sanctions those who seek to control their domestic partner through emotionally abusive and coercive behaviors. There are various remedies for the victims of such conduct, including a statutory action for protection from abuse. See 19–A M.R.S. §§ 4001–4014 (2009). As we recognize today, a civil action for intentional infliction of emotional distress may also be available to some victims.
>
> But our application and development of this civil action in the context of domestic relationships must also account for the sad reality that dysfunctional domestic relationships are not uncommon in modern society. <u>If the elements of proof governing actions for intentional infliction of emotional distress are left vague or set too low, we risk elevating all dysfunctional domestic relationships into potential damages actions</u>.

In earlier intentional infliction of emotional distress cases, the Court had used the admittedly "amorphous standard": "Emotional distress that is "severe" is that which is "extremely intense"." How intense? So intense that "no reasonable person could be expected to endure it." See Curtis, 2001 ME 158, ¶ 10, 784 A.2d at 23.

The Court found that in most cases, the "severity" requirement was met by showing "bodily harm, i.e., 'severe emotional distress accompanied or followed by

shock, illness, or other bodily harm, which in itself affords evidence that the distress is genuine and severe'." Comment k to §46 of the Restatement (Second) of Torts. The Court favored expert testimony on the objective symptoms:

> In most instances, proof of objective symptoms will require expert testimony to establish that the plaintiff's emotional injury qualifies for a diagnosis such as shock, post-traumatic stress disorder, or some other recognized medical or psychological disease or disorder.

In the context of domestic relationships, the court articulated a very high threshold to meet the "severity" test:

> Moreover, the standard recognizes that in the context of domestic relationships, recovery may be available in cases involving cumulative acts over an extended period that are in the nature of "coercive, controlling behavior that invades important individual rights of the abused party," Martha Chamallas & Jennifer B. Wriggins, *The Measure of Injury* 75 (2010), <u>but only if the resulting emotional harm to the plaintiff is so severe that no reasonable person could be expected to endure it and the harm is manifested in symptoms that would support a recognized diagnosis</u>.

In the case of Ms. Lyman, the Court found that the following evidence was not enough to be "severe" and vacated the Trial Court's judgment on that basis:

> Lyman described feeling inadequate and withdrawn, socially paralyzed, and fearful and intimidated by Huber's controlling and compulsive behavior. Her friends described her as being, at times, "guarded, jumpy, and withdrawn," "shaken," and "tense, afraid and on edge."
>
> Although these findings describe intermittent symptoms associated with emotional distress, Lyman endured the distress over the course of her fifteen-year relationship with Huber as evidenced by the fact that she successfully managed her business, she met the demands of daily living, *she never requested assistance from the police or other public officials, and she did not seek treatment from a medical or mental health professional.*
>
> Even if we assume that Lyman's condition qualified for a recognized medical or psychological diagnosis, we cannot conclude that her emotional distress was so severe that no reasonable person could be expected to endure it.

The evidence in *Lyman* was qualitatively different from that in another domestic intentional infliction of emotional distress case in which the Court affirmed $50,000 in compensatory damages and $5,000 in punitive damages awarded to the former girlfriend.

Graham v. Brown, 26 A.3d 823, 2011 ME 93

- **Intention Infliction of Emotional Distress upheld in domestic Case**

Unlike *Lyman,* in *Graham,* a default judgment had been entered against the boyfriend and the issue on appeal was whether the compensatory damages were excessive and the punitive damages justified. While the boyfriend was not permitted to contest liability, the facts recited in *Graham* paint a picture of outrageousness of behavior and objective symptomology that was missing in *Lyman*:

> Brown committed frequent acts of physical and emotional abuse against Graham. The acts committed included:
>
> - throwing her across a room so that she fell on her face and jaw, and nearly fell twelve feet into a basement;
> - aggressively pulling Graham out of her truck, causing bruising on her arm;
> - striking her hand with a drum stick, injuring her hand when he knew that she was studying to become a massage therapist and would need the use of her hands;
> - refusing Graham assistance when she developed a uterine infection after an abortion, and telling her that she deserved to die;
> - refusing her assistance after she had a miscarriage and telling her that she deserved the miscarriage and deserved to bleed to death;
> - shoving Graham backwards into a cement step, resulting in injuries to her back and spine;
> - on multiple occasions, hitting, slapping, or head-butting Graham during arguments;
> - on several occasions, punishing her young son in front of her by covering his mouth so that he could not breathe;
> - on several occasions, emptying onto the driveway potted plants that Brown knew were important to Graham; and
> - throwing Graham's cat against a chimney because it annoyed him.

These facts supported the award of punitive damages, i.e., clear and convincing evidence ("Brown's conduct was so outrageous that malice can be implied").

Unlike *Lyman*, Graham sought treatment from a psychotherapist and was diagnosed as suffering from post-traumatic stress disorder, anxiety disorder, depression, and insomnia, all resulting from Brown's actions. Further, Graham's emotional condition prevented her from performing her chosen profession and she had to find alternative work for less pay.

If *Lyman* had presented these facts, it is unlikely that the trial court's award would have been vacated.

2. Negligent Infliction of Emotional Distress.

Bonney v. Stephens Memorial Hosp., 17 A.3d 123, 2011 ME 46

- **Limited Immunity for disclosure of health care information to police.**

- **No private right of action under HIPAA.**

While the plaintiffs were in the emergency room for treatment for skull fractures, a security guard at the hospital learned that they had been victims of a violent assault (the ½-inch blow from a hammer gave it away). When the guard said he was going to call the police, the plaintiffs told him not to call the police. The guard called the police, the police went to the victims' house, observed marijuana cultivation and the plaintiffs were convicted of drug trafficking. The plaintiffs sued for violation of HIPPA, common law privacy, and negligent infliction of emotional distress.

The hospital's primary defense was that it had immunity for unauthorized disclosure of confidential health care information to the police. It argued that under 30–A M.R.S. §287(3), physical examination of crime victims, healthcare providers who report assaults to law enforcement when serious bodily injury has been inflicted have immunity for the report, even when no authorization from the patient is obtained. While the trial court accepted that defense (Clifford, J.), the Law Court imposed a much narrower interpretation of the statute, limiting its application to those examinations conducted "for the purpose of obtaining evidence for the prosecution." In the plaintiffs' case, however, no law enforcement officer had requested the examination for the purpose of prosecution – the Bonneys drove themselves to the hospital.

The Law Court did affirm the trial court's finding that HIPAA does not provide a private right of action on the individual damaged by the unauthorized disclosure. The Court adopted the reasoning of several other courts that HIPAA was silent on private enforcement and there was no evidence that Congress intended to create a private action in an otherwise comprehensive statute. The Court did hold that HIPAA standards could be evidence of the standard of care in the state law privacy and negligent infliction of emotional distress claims.

3. Products Liability

Burns v. Architectural Doors and Windows, 19 A.3d 823, Prod.Liab.Rep. (CCH) P 18,635, 2011 ME 61

- **No Duty to Warn of Obvious Defect.**

- **Failure to plead negligence theory – Respect for the trial judge.**

A mechanic at Whited Ford in Bangor was injured when an overhead garage door struck his head and knocked him to the ground. The defendant manufactured the

new door, which, as installed, continued to be operated by the existing closing mechanism. The jury found on special interrogatories that the defendant did not have a duty to warn and plaintiff appealed.

The single count complaint alleged that the garage door was in a defective condition and unreasonably dangerous to the ultimate user of the door because it did not have a mechanism that would cause it to stop or reverse if it encountered an object. (i.e. basic product liability with no negligence count.) The trial court "read the complaint generously" in denying summary judgment, because the defendants sold only the door and not the closing mechanism.

Prior to trial Plaintiff tried to morph his original product liability claim into a "duty to warn that the door should only be used with an operator with a safety mechanism." The trial court did not allow the plaintiff to argue or offer evidence on a variety of alternative theories, which were never pled, including Plaintiff's "defective-as installed" argument based on the component parts doctrine, Restatement (Third) of Torts: Products Liability §5, which the Maine court has never adopted.

The unpleasant dynamics between plaintiff's counsel and the trial court undermined his "notice pleading" arguments:

> Neither before nor after the summary judgment was entered did Burns take steps to add a claim to his complaint or otherwise amend his complaint to clarify his cause of action (which probably would not have been allowed 2 years into the suit). Nonetheless, he sought to offer proof at trial of several alternate claims, despite the court's consistent reminders about the nature of the cause of action being tried.
>
> > The presentation to the jury was made unnecessarily complicated by counsel's persistence in ignoring the court's clarification of the claim as a product liability claim for failure to warn, causing the court at one point to announce at sidebar, "it's going to stop."

In this context, the Law Court held that the trial court properly denied plaintiff's "efforts to circumvent the effect of the court's clarification in the summary judgment order." Whether a more detailed multi-count complaint filed at the beginning of the suit would have made a difference is unclear. What is clear is that plaintiff's counsel's behavior colored Chief Justice Saufley's willingness to be generous or flexible on notice pleading.

4. Fraud.

Estate of Hoch v. Stifel, 16 A.3d 137, 2011 ME 24

- **Personal Jurisdiction.**

- **Compensatory Damages –Post-Death Transfers.**

- **Punitive Damages - Elder Abuse.**

The defendants ran the Naturhotel, a German spa, and fraudulently obtained $3.7 million from Dr. Hoch, a frail 85 year old physician (now deceased), and who had practiced medicine in Franklin County for 40 years. Judge Murphy imposed a constructive trust on $3.7 million in assets located in the United States and Germany and awarded $3 million in punitive damages. The Law Court affirmed.

The threshold issue was whether Maine had personal jurisdiction over the defendants and the authority to impose a trust on assets located in Germany. The Court easily found that that the due process requirements were met. Due process is satisfied when:

> (1) Maine has a legitimate interest in the subject matter of the litigation;
>
> (2) the defendant, by his or her conduct, reasonably could have anticipated litigation in Maine; and
>
> (3) the exercise of jurisdiction by Maine's courts comports with traditional notions of fair play and substantial justice.

As for the imposition of a constructive trust on assets in a foreign country, the Law Court found that action was well within the equity powers of the Superior Court. Quoting a 1929 Tennessee decision, the Court said:

> It is settled by the great weight of authority that a court of equity of one state or country, having personal jurisdiction of the necessary parties, and therefore the power to compel a conveyance, may declare and enforce a trust, including a constructive trust, relating to real property in another state or country.

The defendants objected to the admission of evidence of the disposition of Dr. Hoch's assets pursuant to a will the defendants had her execute in Germany, claiming that a German probate court had exclusive jurisdiction over the validity of the will. The Court rejected that argument, pointing out that tort damages are intended to make the plaintiff whole by compensating him for all the losses proximately caused by the defendant. "By virtue of the tortious actions they took before Hoch's death…, the Stifels proximately caused damage to Hoch before her death *and to her estate after her death."* The Court carefully examined the trial court's valuation of Dr. Hoch's brokerage assets in Germany, made a 100,000 euro change, and otherwise affirmed the award.

As for the punitive damage award of $3 million, the Court found the defendants' conduct "grossly reprehensible," and the amount fair, given the one-to-one ratio in comparison to the compensatory damages. The Court held that evidence of the defendant's financial circumstances was not necessary to making a punitive damage award. The Law Court affirmed the punitive damage award, with enthusiasm:

> Although most of the events that support an award of punitive damages … occurred in Germany, Maine has an interest in "expressing society's disapproval of intolerable conduct" toward a woman who, for forty years, lived and worked here, maintained assets here, and sought the benefits and protections of Maine's laws. Additionally, Maine has an obvious interest in deterring the defendants and others, from engaging in such outrageous conduct—an extreme example of elder abuse—in the future. We affirm the punitive damages award.

Lund v. Smith, 2011 WL 2050555 (D. Me 2011)

- **Fraud and Breach of Fiduciary Duty by Financial Advisors.**

It is hard enough to survive summary judgment on a fraud claim, but in this case the plaintiff's affidavit stated adequate specific evidence of forgery and misrepresentations to support Pre-Judgment Attachment and trustee process in the amount of $1.2 million.

Harvey v. Dow, 11 A.3d 303, 2011 ME 4

- **Promissory Estoppel may work even if fraud can not be proven.**

The defendants owned 125 acres of land in Corinth. Their daughter built a home on a parcel of land which she claimed her parents promised to deed to her after the house was built. The daughter sued for a judgment compelling her parents to convey the real property to her under theories of breach of contract, breach of fiduciary duties and fraud. After a two day bench trial, the trial court found for the parents.

On her first appeal, the Law Court agreed with the trial court that the parents had not made an express promise to convey any specific piece of property at any time certain. However, the Law Court held that the parents' more general promises to convey the land, combined with their assistance on the construction of her house, could support promissory estoppel as outlined in §90 of the Restatement (Second) of Contracts, and remanded back to the lower court. On remand, the trial court made no new factual findings and again entered judgment for the parents, again on the grounds that the parents' actions and statements "did not amount to a sufficiently specific and unambiguous promise cable of current enforcement through promissory estoppel."

On the second appeal, the Law Court reviewed this legal conclusion *de novo* and instructed the court to enter judgment for the daughter based on promissory estoppel. The Law Court stated that:

> In our view, however, the Dows' acquiescence, support, and encouragement of Teresa's construction of a house on a parcel of their land conclusively demonstrate their intention to make a present conveyance of that property. After making general promises to convey land to Teresa, Jeffrey Dow, Sr. "approv[ed] the site of Teresa's house, obtain[ed] a building permit for it, and then buil[t] a substantial part of it himself."

Recognizing that the "assessment of damages is within the sole province of the factfinder," the Court then offered some guidance, based on comment d of §90 of the Restatement (Second) of Contracts:

> [T]he same factors which bear on whether any relief should be granted also bears on the character and the extent of the remedy. In particular, relief may sometimes be limited to restitution or to damages or specific relief measured by the extent of the promisee's reliance rather than by the terms of the promise. Unless there is unjust enrichment of the promisor, damages should not put the promisee in a better position than performance of the promise would have put him. In the case of a promise to make a gift, it would rarely be proper to award consequential damages which would place a greater burden on the promisor than performance would have imposed.

RECENT LEGISLATION

Public Law, chapter 78:

An Act to Bring Maine's Minimum Financial Responsibility Laws Pertaining to Rental Vehicle into Conformity with Privately Owned Vehicles

29-A MRS §1611 previously imposed a financial responsibility requirement of $350,000 combined single limit on rental passenger vehicles, the same as that required for emergency vehicles and for-hire transportation vehicles for transporting freight or merchandise. As amended, rental passenger vehicles must provide the same financial responsibility requirements as other passenger cars under 29-A MRS 1605:

1) For damage to property, $25,000;

(2) For injury to or death of any one person, $50,000;

(3) For one accident resulting in injury to or death of more than one person, $100,000; and

(4) For medical payments pursuant to section 1605-A, $2,000.

Public Law, chapter 32:

An Act to Repeal the Restriction on Serving or Executing Civil Process on Sunday
Repealed 14 MRS §705.

Public Law, chapter 18:

An Act Regarding Repeated Animal Trespass

7 MRS §4041. The Animal trespass statute imposes liability on an owner or keeper of an animal for damages caused when the animal trespasses after due notice. In 2011 the Legislature made clear that cats are excepted from the definition of animal.

You gotta love it!