Name of Preparer - Hilary Bouchard, Esq. and Ben Wahrer
Thompson & Bowie, LLP
City and State of Firm
Portland, Maine
Overview of State of Maine Court System
A. Trial Courts
Maine's courts are divided into two separate trial entities: Superior Court and District Court, the latter of which includes the Small Claims Division. The Superior Court is the court of general jurisdiction where jury trials occur. There is no monetary limit in this court. Trials are set on a trailing docket basis and subject to discretion as to when the case will be heard. The Maine Supreme Court has issued an order requiring cases to be assigned to a specific judge in certain counties. It is expected that this system will permit much more notice and ease of handling trial lists than previously provided. The Maine District Court is a non-jury court which handles misdemeanor criminal cases and civil cases. There is no monetary limit in District Court. The Maine Rules of Civil Procedure and the Rules of Evidence apply in District Court and judgments are often rendered on the day of trial by the court. A Small Claims action is available for claims less than $6,000 in value. **14 M.R.S.A. §7482.** Plaintiffs can plead down the amount of their claims. Small Claims actions are subject to the Rules of Small Claims Procedure and commenced by filing a statement of claim in the District Court. The rules of evidence do not apply and no answer is required by the defendant. Individuals are permitted to represent themselves, as are corporations by way of management. No discovery is permitted and the defendant has the right to appeal to superior court on both questions of law and with a request for a jury trial. It is noteworthy that the Maine court system now also includes the Business & Consumer Court. In certain cases filed in the Superior Court, parties may apply for transfer to the Business & Consumer Court, which is a statewide docket comprised

Maine's courts are divided into two separate trial entities: Superior Court and District Court, the latter of which includes the Small Claims Division. The Superior Court is the court of general jurisdiction where jury trials occur. There is no monetary limit in this court. Trials are set on a trailing docket basis and subject to discretion as to when the case will be heard. The Maine Supreme Court has issued an order requiring cases to be assigned to a specific judge in certain counties. It is expected that this system will permit much more notice and ease of handling trial lists than previously provided.

The Maine District Court is a non-jury court which handles misdemeanor criminal cases and civil cases. There is no monetary limit in District Court. The Maine Rules of Civil Procedure and the Rules of Evidence apply in District Court and judgments are often rendered on the day of trial by the court.

A Small Claims action is available for claims less than $6,000 in value. **14 M.R.S.A. §7482.** Plaintiffs can plead down the amount of their claims. Small Claims actions are subject to the Rules of Small Claims Procedure and commenced by filing a statement of claim in the District Court. The rules of evidence do not apply and no answer is required by the defendant. Individuals are permitted to represent themselves, as are corporations by way of management. No discovery is permitted and the defendant has the right to appeal to superior court on both questions of law and with a request for a jury trial.

It is noteworthy that the Maine court system now also includes the Business & Consumer Court. In certain cases filed in the Superior Court, parties may apply for transfer to the Business & Consumer Court, which is a statewide docket comprised of selected actions involving business and/or consumer disputes. Cases that may be transferred to the court are those in which the principal claim or claims involve matters of significance to the transactions, operation or governance of a business entity and/or the rights of a consumer arising out of transactions or other dealings with a business entity. Cases transferred to the Business & Consumer Court received specialized and differentiated judicial management, and follow a specific set of rules propounded by the Court.

In addition, the United States District Court has two separate courts in Maine, one in Portland and one in Bangor. The federal court has diversity jurisdiction which

14 M.R.S.§ 501 provides that:

Personal and transitory actions, except process of foreign attachment and except as provided in this chapter, shall be brought, when the parties live in the State, in the county where any plaintiff or defendant lives; and when no plaintiff lives in the State, in the county where any defendant lives; or in either case any such action may be brought in the county where the cause of action took place. Improper venue may be raised by the defendant by motion or by answer, and if it is established that the action was brought in the wrong county, it shall be dismissed and the defendant allowed double costs. When the plaintiff and defendant live in different counties at the commencement of any such action, except process of foreign attachment, and during its pendency one party moves into the same county with the other, it may, on motion of either, be transferred to the county where both then live if the court thinks that justice will thereby be promoted; and be tried as if originally commenced and entered therein. Actions by the assignee of a nonnegotiable chose in action, when brought in the Superior Court or in the District Court, shall be commenced in the county or division when brought in the District Court, in which the original creditor might have maintained his action.

B. Statute of Limitations

In General

Maine's general statute of limitations for civil actions is six (6) yeas. **14 M.R.S.A.§ 752**. The cause of action typically accrues when the damage occurs, i.e. at the time the individual is hurt or the property damage actually occurs.

INTENTIONAL TORTS

Actions for assault and battery, false imprisonment, slander and libel all must be commenced within two (2) years after the cause of action accrues. **14 M.R.S.A.§ 753.** However, the six (6) year statute of limitations, rather than the two (2) year limitation, is the statute applicable generally to "personal injury" actions and thus is to be used in suits brought pursuant to **42 U.S.C. § 1983**, the Federal Civil Rights statute. **Small v. Inhabitants of City of Belfast**, 796 F.2d 544 (1st Cir. 1986). It is therefore likely that the Maine Supreme Judicial Court would hold that such "intentional" torts as intentional infliction of emotional distress would be governed by the six (6) year statute of limitations rather than the two (2) year limitation of this particular section.

WRONGFUL DEATH
An action by a personal representative of the deceased person to recover damages for wrongful death must be commenced within two (2) years from the date of death. **18-A M.R.S.A. §2-804(b).**

CONTRIBUTION
An action for contribution must be brought within six (6) years after a party becomes obligated to pay damages. However, that obligation may not accrue until such time as there has been a judgment against the party, which may be after a jury verdict against a tortfeasor.

SUBROGATION
The statute of limitations for a subrogation action follows the statute for the underlying cause of action.

MEDICAL MALPRACTICE
An action for medical malpractice must be commenced within three (3) years after the cause of action accrues. But if the cause of action relates to a foreign object in the body, the statute does not commence until the patient discovers or reasonably should have discovered the harm. **24 M.R.S.A. §2902**. In 1998, the Legislature modestly reformed the medical malpractice screening panel process. Most significantly, the Legislature enacted **24 M.R.S.A. § 2857, sub§-1**, which provides that if panel findings "are unanimous and unfavorable to the person accused of professional negligence, the findings are admissible in any subsequent court action for professional negligence against that person by the claimant based on the same set of facts upon which the notice of claim was filed."

GOVERNMENTAL LIABILITY/MAINE TORT CLAIMS ACT
Every claim against a governmental entity or its employees must be brought within two (2) years after the cause of action accrues. **14 M.R.S.A. §8110**. Moreover, notice must be served on a governmental entity within 180 days after the cause of action accrues. **14 M.R.S.A. §8107**. However, notice is not required for a third-party action against a governmental entity. In 1999, the Legislature increased the Maine Tort Claims Act damage limit from $300,000 to $400,000. **14 M.R.S.A. §8105.**

ARCHITECTS/ENGINEERS
This statute of limitations is the first so-called "split" statute. It is technically not a statute of limitations, but a statute of repose. All actions against duly licensed architects or engineers must be commenced within four (4) years after the

malpractice or negligence is discovered, but in no event more than ten (10) years after substantial completion of the construction contract or the services provided. Although no Maine Supreme Court decision has interpreted this section, at least one Superior Court justice ruled that an action for contribution is limited by the ten (10) year provision from the date of substantial completion. Thus, if a general contractor or other insured has a claim against an architect or engineer based on a construction project, that claim should probably be included as soon as possible by way of third-party action or other action. **14 M.R.S.A. 752-A.**

SKI AREAS
All civil actions for property damage, bodily injury or death against a ski area owner, operator, tramway owner or operator or its employees is subject to a 2-year statute of limitations. This statute applies both to skiing and to hang gliding. **14 M.R.S.A. §752-B.**

ATTORNEYS
The statute of limitations is six (6) years; however, the statute begins to run from the date of the act or omission, not from discovery of the negligence. The only exception to this rule is in regard to either real estate title opinions or wills. **14 M.R.S.A. §753-B.**

SALE OF GOODS
The Maine Uniform Commercial Code provides that the statute runs four (4) years from the date of sale, which is deemed to be the date of breach of contract for purposes of beginning the statute of limitations. Note: This provision does not apply where personal injury is alleged as the result of a breach of implied or express warranties. In that case, the statute runs from the date of injury. **11 M.R.S.A. §2-725.**

UNINSURED MOTORIST
The statute of limitation is six (6) years for UM claims, since the action is considered one for breach of contract. **Young v. Greater Portland Transit District**, 535 A.2d 417 (Me. 1987). More significantly, the six (6) years begins to run when the carrier denies the claim. **Palmero v. Aetna Casualty & Surety Co.**, 606 A.2d 797 (Me. 1992).

PRODUCT LIABILITY
The six (6) year general statute of limitations applies to actions for strict liability or product liability under Maine's strict liability statute. 14 M.R.S.A. §221. The cause of action generally accrues at the time of the injury. **Goodman v. Magnavox**

Company, 443 A.2d 945 (Me. 1982).

FIRE INSURANCE
An action must be brought within two (2) years after "inception of the loss". **24-A M.R.S.A. §3002**. Any shorter period of time designated in the policy is void. **Norton v. Home Insurance Company**, 320 A.2d 688 (Me. 1974).

INSURANCE POLICIES
The statute will depend on what type of insurance policy is being considered. For life insurance, the statute of limitations is three (3) years after the cause of action accrues. **24-A M.R.S.A. §2525**. However, for an uninsured motorist claim, the general statute is six (6) years unless otherwise specifically provided for in the policy. **Young v. Greater Portland Transit District**, 535 A.2d 417 (Me. 1987). Importantly, the Maine Supreme Court has held that the statute begins to run when the insured denies the claim in a UM case, based on breach of contract. **Palmero v. Aetna Casualty & Surety Company**, 606 A.2d 797 (Me. 1992). Where no coverage existed, the Court has held that the statute runs from the date of loss. **Chiapetta v. Clark Associates**, 521 A.2d 697 (Me. 1987). No insurance policy may provide for a statute of limitations of less than two (2) years from the time when the cause of action accrues. **24-A M.R.S.A. §2433**.

INSURANCE AGENTS
A cause of action accrues for failure to provide coverage on the date of loss, not when the insured discovers the absence of coverage. **Kasu Corp. v. Blake, Hall & Sprague**, 582 A.2d 978 (Me. 1990).

LAND SURVEYORS
All civil actions against duly licensed surveyors must be commenced within four (4) years after the negligence is discovered, but not more than twenty (20) after completion of the plan or of the professional services if no plan is prepared. **14 M.R.S.A. §752-D.**

SEXUAL ACTS TOWARDS MINORS
Actions based upon a sexual act or sexual contact may be commenced at any time. As of April 7, 2000, Maine repealed the existing statute of limitations for these actions. **14 M.R.S.A. §752-C**.

ISSUES AFFECTING STATUTE OF LIMITATIONS

Minors

For minors, the statute of limitations is extended from the age of majority through the end of the particular statute. For example, the general statute of limitations of six (6) years would extend a minor's cause of action until he or she reached age 24. Of course, the minor can bring the claim at any time under age 18 through a parent or next friend.

Disabilities
If a person is mentally ill, imprisoned or outside the limits of the United States when the cause of action accrues, the action may be brought within the time limits after the disability is removed. **14 M.R.S.A. §853.**

Fraud
If a fraud is committed which entitles any person to an action, or if a person fraudulently conceals the cause of action from the person entitled to it, the action may be commenced at any time within six (6) years after the person discovers that he or she has a cause of action. **14 M.R.S.A. §859.**

Death
Where an insured died intestate and an appellant filed a petition for formal adjudication of intestacy and appointment as personal representative after the expiration of the three-year statute of limitations, the Supreme Court affirmed the ruling of the probate court that barred the petition. **Estate of William Kruzynski**, 2000 ME 17, 744 A.2d 1054. The appellant was seriously injured in a car accident involving the deceased insured in 1992, when the appellant was fifteen. The insured died a year later, but no probate proceedings were filed until 1999 when the appellant sought appointment as personal representative of the estate as a creditor in accordance with the statute. The appellant did not learn of the insured's death for at least three years. The appellant had filed the petition for appointment within the six-year statute of limitations for bringing personal injury actions, but not within the three-year statute of limitations for appointment of a personal representative. As a result, and because claims cannot be presented to an estate until there is a personal representative, the appellant was unable to recover for her injuries from the 1992 accident. It is not clear what an attorney's duty would be with respect to keeping apprised of the status of potential defendants in order to avoid a similar result.

C. Time for Filing an Answer

Complaints must be answered within twenty (20) days in both court systems. Defaults are extremely significant in that the effect of the default for failing to

answer the Complaint within twenty (20) days is to admit liability. This is perhaps the most extreme sanction which a court can impose, and courts are reluctant to impose that sanction for discovery abuses. It is therefore critically important that an answer be filed within twenty (20) days of service of Summons and Complaint.

D. Dismissal Re-Filing of Suit

Maine Rules of Civil Procedure, Rule 41(b) provides that:

(b) Involuntary Dismissal: Effect Thereof.

(1) On Court's Own Motion. The court, on its own motion, after notice to the parties, and in the absence of a showing of good cause to the contrary, shall dismiss an action for want of prosecution at any time more than two years after the last docket entry showing any action taken therein by the plaintiff other than a motion for continuance.

(2) On Motion of Defendant. For failure of the plaintiff to prosecute for 2 years or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant.

(3) Effect. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision (b) and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

Liability

A. Negligence

Under Maine common law, a plaintiff who brings a cause of action for negligence must establish that the defendant owed him a duty of care, the defendant breached that duty, and the breach was a proximate cause of some injury to the plaintiff. **Estate of Cilley v. Lane**, 2009 ME 133, ¶ 10, 985 A.2d 481, 485.

Comparative Negligence/Comparative Fault

In Maine, comparative negligence is a defense. However, under Maine's system, if the claimant is found by the jury to be equally or more responsible for the damage sustained than the defendant, the claimant cannot recover. **14 M.R.S.A. §156.**

Herrick v. Theberge, 474 A.2d 870 (Me. 1984). If the plaintiff is found to be negligent, but less negligent than the defendant, plaintiff's damages will be reduced to the extent deemed just and equitable by the jury, taking into regard the claimant's share in the responsibility for the damages.

For strict liability, comparative negligence is not a defense. However, comparative fault, i.e. assumption of the risk, is.

Res Ipsa Loquitur

Res ipsa loquitur is a doctrine which permits a jury to infer negligence in the absence of any other explanation for an accident. However, for the jury to infer that the harm suffered by the plaintiff was caused by the negligence of the defendant, the plaintiff must prove the following:

1. The event is of a kind which ordinarily does not occur in the absence of negligence;

2. Other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and

3. The indicated negligence is within the scope of the defendant's duty to the plaintiff.

Poulin v. Aquaboggan Waterslide, 567 A.2d 925 (Me. 1989). However, the mere happening of an accident is not evidence of negligence. **Pratt v. Freese's, Inc., 438 A.2d 901 (Me. 1981).** In **Pratt,** an elevator door malfunctioned causing the plaintiff injury but no explanation as to the cause of the malfunction was given.

Premises liability

The possessor of land owes a duty to use reasonable care to persons lawfully on the premises. **Erickson v. Brennan**, 513 A.2d 288 (Me. 1986). There are no longer distinctions between invitees or licensees. The only difference in duty is between a trespasser and all those others lawfully on the premises. **Poulin v. Colby College**, 402 A.2d 846 (Me. 1979).

With respect to trespassers, the owner or possessor need only refrain from willful, wanton conduct or reckless acts of negligence. **Cogswell v. Warren Bros. Road Co.**, 229 A.2d 215 (Me. 1967).

Possession of land is determined by occupancy and the intent to control. **Hankard v. Beal**, 543 A.2d 1376 (Me. 1988) In **Hankard**, plaintiff fell on some ice in a parking lot of a store. Defendants had retained the right to enter and plow snow from the parking lot. Thus, an issue of fact existed as to possession.

In contrast, the mere opportunity or ability to control did not create a duty to do so. In **Hughes v. Beta Upsilon Building Association**, 619 A.2d 525 (Me. 1993), plaintiff was injured in a fraternity mud football game. The defendant had no affirmative duty to prevent harm to the plaintiff from an activity it did not sponsor, even though it could have done so at its election.

Parties by written agreement may also limit duties. In **Jerryco. v. Union Station Plaza**, 625 A.2d 907 (Me. 1993), the landlord's lease did not require it to maintain the sewer line or to provide dry space. The Court held that the landlord had no duty to the tenant, absent either a latent defect known to the landlord or a gratuitous undertaking to make the repairs.

A possessor of land is not liable to persons lawfully on the premises for physical harm caused by any activity or condition on the land whose danger is known or obvious, unless the possessor should anticipate the harm, despite such knowledge of obviousness. **Williams v. Boise Cascade Corporation**, 507 A.2d 576 (Me. 1986). Thus, a duty to warn may exist if the landowner should anticipate the harm despite the invitee's knowledge of the condition or despite the obviousness of it. Furthermore, a landowner may be required to take other steps besides merely warning its invitees to protect them from harm. Such duties may include barricades, persons stationed at the site, or other similar measures. **Baker v. Mid-Maine Medical Center**, 499 A.2d 414 (Me. 1985) (spectator hit by golf ball at tournament.)

However, such duty may not extend to a homeowner who hires independent contractors to do work on his house. That mere fact does not transfer the possessor's duty into the duty of a general contractor, i.e. the duty of care to the general's workmen and subcontractors. **Hodgdon v. Jones**, 538 A.2d 281 (Me. 1988). Accordingly, the fact that one of the employees was injured while doing renovation work to the house, in the absence of a general contractor hired by the owner, did not make the owner the de facto general contractor and thus liable in the absence of knowledge of the defect in the floor.

In **Libby v. Perry**, a group rented the Augusta Armory and plaintiff fell on slippery steps within the area a person would have to exit following the close of the event. In those cases, even though the area may not be under the absolute control of the

invitor, the invitor is still liable for failing to provide the invitee with a reasonably safe passageway. **Libby v. Perry**, 311 A.2d 527 (Me. 1973).

In what may be considered a change in Maine law, the Supreme Court specifically held that businesses which anticipated customers using their facilities may have to take measures to protect customers from injury, even while a storm is in progress. **Budzko v. One City Center**, 2001 ME 37, 767 A.2d 310. The court held that business owners have a duty to reasonably respond to foreseeable damages and keep premises reasonably safe when significant numbers of invitees may be anticipated to enter or leave the premises during a winter storm. Such duty may include shoveling, sanding or salting and/or warning business invitees of the dangerous conditions.

The Law Court held that a store could be found negligent in failing to prevent the assault of a customer by another person who had been in the store earlier. In **Kaechele v. Kenyon Oil Company, Inc.**, 2000 ME 39, 747 A.2d 167, a person had been in the store earlier and had gotten very angry with one of the clerks who would not sell him cigarettes without identification. The police department had received calls from the store on previous occasions on this same type of issue. The Supreme Court upheld the verdict against the defendant on the grounds that it should reasonably have anticipated the assault where the tirade against the clerk lasted approximately fifteen minutes, people hearing the tirade were concerned about possible dangerous behavior, and at least one person suggested that the police be called but no immediate call was made, and the assaulter's violence escalated over time.

B. Negligence Defenses

Comparative Negligence/Comparative Fault

In Maine, comparative negligence is a defense. Under Maine's system, if the claimant is found by the jury to be equally or more responsible for the damage sustained than the defendant, the claimant cannot recover. **14 M.R.S.A. §156**. **Herrick v. Theberge**, 474 A.2d 870 (Me. 1984). If the plaintiff is found to be negligent, but less negligent than the defendant, plaintiff's damages will be reduced to the extent deemed just and equitable by the jury, taking into regard the claimant's share in the responsibility for the damages.

Assumption of Risk

The doctrine of assumption of the risk has mostly been abolished in Maine except in limited contexts. See e.g., **32 M.R.S.A. § 15217** ([E]ach person who participates in the sport of skiing accepts, as a matter of law, the risks inherent in the sport and, to that extent, may not maintain an action against or recover from the ski area operator, or its agents, representatives or employees, for any losses, injuries, damages or death that result from the inherent risks of skiing."). When a plaintiff is alleged to have lacked due care in encountering a known risk created by the defendant's negligence, the plaintiff's conduct is now "judged in terms of contributory fault and weigh against the causal negligence of the defendant." **Wilson v. Gordon**, 354 A.2d 398, 402 (Me. 1976).

Last Clear Chance & Unavoidable Accident

Maine does not recognize the defense of "last clear chance," See **Cushman v. Perkins**, 245 A.2d 846, 850 (Me. 1986), nor the doctrine of unavoidable accident. See **George v. Guerette**, 245 A.2d 138, 143 (Me. 1973).

Sudden Emergency Doctrine

The "sudden emergency doctrine" is still a recognized defense under Maine law. See **Hargrove v. McGinley**, 766 A.2d 587, 590 (Me. 2001). Under this doctrine, a person who is confronted with an emergency situation is not held to the same standard of conduct as one who is not in such a situation.

Immunities

Governmental Agencies

Except as otherwise expressly provided by statute, all governmental entities are immune from suit on any and all tort claims. **14 M.R.S.A. §8103(1).**

There are certain limited exceptions to this immunity. These include:

1. ownership or use of automobiles and other vehicles or equipment;

2. construction operation or maintenance of public buildings;

3. sudden discharge of smoke or pollutants; and

4. construction, street cleaning or repair operations on highways, bridges, sidewalks, runways, etc., sudden discharge of smoke, etc.

14 M.R.S.A. §8104-A (1-4).

Employers

An employer who has secured payment of workers' compensation benefits, either by obtaining workers' compensation insurance or by qualifying as a self-insured employer, is immune from suit by employees. **39-A M.R.S.A. §107.**

Charities

A true charitable organization is immune from liability under the doctrine of charitable immunity. **Mendall v. Pleasant Mountain Ski Dev., Inc**., 159 Me. 285, 286, 191 A.2d 633, 634 (1963). However, a charitable organization waives its immunity for liability to the extent of insurance coverage. **14 M.R.S.A. §158**. Damages are limited to the policy limits.

To qualify for charitable immunity, an institution must be supported by charitable contributions. In **Thompson v. Mercy Hospital**, 483 A.2d 706 (Me. 1984), the Court held that Mercy Hospital did not qualify as a charitable institution because less than 5% of its income was derived from charitable contributions.

The immunity extends to directors, officers and volunteers. **14 M.R.S.A. §158-A**. Such immunity also extends to any cause of action for negligence which occurs within the course and scope of the activities of the charitable organization in which the director, officer or volunteer serves.

Good Samaritans

Any person who voluntarily without expectation of compensation renders first aid, emergency treatment or rescue assistance to a person in need is not liable for damages for injuries as a result of such aid, unless such injuries were caused willfully, wantonly or recklessly, or by gross negligence on the part of such person. **14 M.R.S.A. § 164.**

This statute does not apply to any such aid rendered at a hospital or clinic. Other statutes extend this immunity to physicians, osteopathic physicians and school

employees. **24 M.R.S.A. §2904**; **32 M.R.S.A. §2594**, **20-A M.R.S.A. §4009(4)**.

Food Donations

A good faith donor of canned or perishable food, apparently fit for human consumption at the time that it is donated, to a bona fide charitable or not for profit organization for free distribution is immune from civil liability. Again, the limitation is for simple negligence. If an injury or death is the result of gross negligence, recklessness or intentional misconduct of the donor, the immunity does not apply. **14 M.R.S.A. § 166**. The distributor is also immune, as is a hospital or other health care facility and any eating establishment, provided each is licensed as required by statute.

Insurance Inspections

The furnishing of or failure to furnish insurance inspection services relating to the issuance or renewal of insurance does not subject the insurer or its agents or employees to liability for damages from injury, death or loss as a result of any act or omission by such people in the course of such services. **14 M.R.S.A. § 167**. However, the immunity does not apply if the injury, loss or death occurs during the actual performance of inspection services and was proximately caused by the negligence of the insurer, its agents, employees, or service contractors. Other exceptions to the immunity include inspection services under a written service contract or defined loss prevention program, as well as any instances in which the act or omission constituted a crime, actual malice or gross negligence.

C. Gross Negligence, Recklessness, willful and wanton misconduct

The Law Court has implied that a cause of action for wanton misconduct exists under Maine law. See **Blanchard v. Bass**, 153 Me. 354, 358, 139 A.2d 359 (1958). In **Blanchard**, the Law Court has defined wanton misconduct as follows:

"Wanton misconduct differs from negligence in kind and degree. In our view, wanton misconduct is neither a willful wrong in the sense of an intentional infliction of harm, nor negligence in the sense of a failure to use due care. Due care is the care exercised by the reasonably prudent man under like circumstances.

Carelessness is the characteristic of negligence; a reckless disregard of danger to

others, of wanton misconduct. "Wantonly" means without reasonable excuse and implies turpitude, and an act to be done wantonly must be done intelligently and with design without excuse and under circumstances evincing a lawless, destructive spirit. It is a reckless disregard of the lawful rights of others, such a degree of rashness as denotes a total want of care, or a willingness to destroy, although destruction itself may have been unintentional."

D. Negligent Hiring and Retention

In **Fortin v. Roman Catholic Bishop of Portland**, the Law Court recognized the tort of negligent supervision. 2005 ME 57, ¶ 39, 871 A.2d 1208, 1222. The court held that "if a plaintiff asserts the existence of facts that, if proven, establish a special relationship with a defendant in accordance with section 315(b) of the Restatement (Second) of Torts, an action may be maintained against the defendant for negligent supervision liability in accordance with section 317 of the Restatement." Id.

Section 315(b) provides that there is a duty to control the conduct of a third person to prevent him from causing harm to another if "a special relation exists between the actor and the other which gives to the other a right to protection." Restatement (Second) of Torts § 315(b) (1965). If a special relationship exists pursuant to section 315(b), a plaintiff is then entitled to assert a claim for negligent supervision pursuant to section 317, which provides:

A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if

(a) the servant

(i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or

(ii) is using the chattel of the master, and

(b) the master

(i) knows or has reason to know that he has the ability to control his servant, and

(ii) knows or should know of the necessity and opportunity for exercising such control.

Restatement (Second) of Torts § 317 (1965).

E. Negligent Entrustment

While there is little case law on this cause of action, Maine courts have recognized a cause of action for negligent entrustment. "Negligent entrustment requires a finding of the right to control whatever has been entrusted to another." **Barnes v. Lee**, CIV.A. CV-01-179, 2003 WL 1666449 (Me. Super. Feb. 19, 2003). Further, a claim for negligent entrustment does not require a finding of agency or scope of employment. Id.

F. Dram Shop

The "Maine Liquor Liability Act" replaces so-called Dram Shop Act cases. See **28-A M.R.S.A. §2501-2520.** Any person injured as a result of negligently or recklessly serving liquor may bring an action against the server. However, neither the intoxicated individual, assuming that he is at least 18 years old, nor the estate of the intoxicated individual nor any other person claiming damages arising out of personal injury to the intoxicated individual, may sue the server.

The limitation on damages for losses other than medical care and treatment is $250,000. This act is the exclusive remedy against servers, and liability is several, not joint. This cap has been held constitutional by the Maine Supreme Court. **Peters v. Saft, 597 A.2d 50 (Me. 1991).** Thus, the intoxicated individual and the server are not jointly and severally liable to the plaintiff but only liable for each one's proportionate causal share of fault. Additionally, no action against a server may be maintained unless the intoxicated individual is both named as a defendant in the action and is retained until the litigation is concluded by trial or settlement. The Supreme Court held that if a plaintiff settles with the intoxicated person, his ongoing suit against the server is barred. **Swan v. Sohio Oil Company, 618 A.2d 214 (Me. 1992).**

The statute of limitations is two (2) years for such action. Additionally, the plaintiff

must give written notice within 180 days of the date of the server's conduct creating liability. Failure to give written notice within 180 days will result in dismissal unless plaintiff can demonstrate good cause for not doing so. These two requirements are similar to the Maine Tort Claims Act requirements.

If the server is a licensed individual, that individual may be liable for negligently serving liquor to a visibly intoxicated person or to a minor. The standard for comparison is that of a reasonable and prudent person. Moreover, the server is not chargeable with the knowledge of an individual's consumption of liquor or other drugs off the server's premises unless that individual's appearance and behavior or other facts would put a reasonable and prudent person on notice.

If the person serving the alcohol is not a licensee, such as an individual or someone at a social gathering, that individual has to be guilty of reckless conduct to impose liability. If such server recklessly provides liquor to a minor or recklessly serves to a visibly intoxicated person, liability can be imposed. This type of conduct will be limited to extreme cases of excessive consumption of liquor or active encouragement to consume substantial amounts of liquor.

In the context of social parties, the Maine Supreme Court held that defendant employers owed no duty to the plaintiff to exercise reasonable care to prevent an employee, who consumed self-supplied whiskey, from driving. **Trusiani v. Cumberland and York Distributors, 538 A.2d 258 (Me. 1988).** The court held that to impose that duty on an employer, when there were no signs of visible intoxication of the employee, would result in making the employer strictly liable for the employee's action. The court warned, however, that there may be circumstances under which an employer may have a duty to exercise reasonable care in warning or prohibiting an employee from operating a vehicle.

However, it is important to note that just because liquor was involved in the case, a defendant is not necessarily protected by the Maine Liquor Liability Act. In **Thibodeau v. Slaney, 2000 ME 116, 755 A.2d 1051,** a plaintiff who had been drinking fell off defendant's roof while helping him do work on his house. Plaintiff imbibed before he started work and testified that defendant provided him with more alcohol. Defendant denied that he had provided any liquor, but that he was aware the plaintiff had consumed alcohol before getting there. The Law Court held that

the act did not apply because plaintiff was not claiming that defendant negligently served him alcohol. Rather, he alleged that allowing an inebriated person to go on a roof was negligent under common law. Thus, there was no bar to the claim.

In contrast, the court applied the act to bar an action against a server who failed to get a taxi for the plaintiff and the plaintiff was hit by a car while waiting in the road. **Jackson v. Tedd-Lait Post # 75, American Legion, 1999 ME 26, 723 A.2d 1220.** In **Jackson,** the court stated that the purpose of the legislative history behind the Maine Liquor Liability Act supported its conclusion that a server had no obligation or liability regarding transportation of intoxicated persons.

G. Joint and Several Liability

Joint and Several Liability

In a case involving multi-party defendants, each defendant is jointly and severally liable to the plaintiff for the full amount of the plaintiff's damages. **14 M.R.S.A. §156**. Where the injury is the result of concurring negligence of two parties, each is fully liable to the plaintiff and the question must be left to the jury whether the first wrongdoer's act was the proximate cause of the injury. **Roberts v. American Chain & Cable Co., 259 A.2d 43 (Me. 1969).** Thus, both defendants are equally liable to the plaintiff and the jury will apportion fault between defendants.

Contribution Among Tortfeasors

A right to contribution exists among joint tortfeasors and joint tortfeasors are required to contribute amounts proportionate to their causal fault. **Packard v. Whitten, 274 A.2d 169 (Me. 1971).** Generally, when one has discharged or may be obligated to discharge more than his share of common liability, he is entitled to contribution from any other joint tortfeasor whose negligence concurred with his in producing injury. **Roberts v. American Chain and Cable Co., 259 A.2d 43 (Me. 1970).** An intentional tortfeasor cannot shift through contribution any part of the judgment to others. **Bedard v. Greene, 409 A.2d 676 (Me. 1979).**

A joint tortfeasor directly liable for injury to another may seek contribution from another joint tortfeasor who is not legally liable to the plaintiff. That may be true even if his fault is not greater than that of the plaintiff and thus comparative negligence would normally bar the suit. **Otis Elevator Co. of Maine, Inc. v. F.W.**

Cunningham & Sons, 454 A.2d 335 (Me. 1983).

For example, if a plaintiff brings an action against a manufacturer on a strict liability basis, the manufacturer may bring a third-party action for contribution against a tortfeasor whose negligence contributed to plaintiff's injuries. Even though the theories of liability are different, both parties contributed to the harm to the plaintiff. Thus, contribution may be obtained from another party where the theory of liability against the other party is different from that of the Plaintiff against the Defendant. The Defendant is also entitled to have the jury assess percentages of causal fault for each Defendant at trial. **14 M.R.S.A. § 163**.

The Law Court has recently held that joint tortfeasors seeking contribution from one another have a constitutional right to a jury trial. The injured parties in **Thermos Co. v. Spence, 1999 ME 129, 735 A.2d 484,** were burned in a fire caused by a flammable gas leak from a propane gas cylinder in a general store. After filing suit against the maker of the cylinder and settling the claim, the cylinder maker filed a contribution action against the owners of the general store. The Court concluded that the two essential features of a contribution action are a division of causal responsibility for the injury, and an apportionment of damages. The Court noted that because the division of causal responsibility in a negligence action had always been a jury issue, the contribution action could likewise be tried before a jury. Any other result would allow the first defendant to settle and would deprive all other joint tortfeasors of a jury trial on the negligence issue.

H. Wrongful Death and/or Survival Actions

Who May Bring

Under Maine's wrongful death statute, **18-A M.R.S.A. §2-804**, a wrongful death suit must be brought by and in the name of the personal representative of the deceased person. **Buzynski v. Knox County**, 188 A.2d 270 (Me. 1963). However, a viable fetus is not a "person" for purposes of the Wrongful Death Act. **Milton v. Cary Medical Center**, 538 A.2d 252 (Me. 1988). See also **Shaw v. Jendzelec**, 1998 ME 208, 717 A.2d 367. The action is for the benefit of all statutory beneficiaries, typically spouse and dependents.

What Is Recoverable

The jury may give damages as it shall deem a fair and just compensation as follows:

1. pecuniary injuries resulting from the death to the persons for whose benefit the action is brought;

2. reasonable expenses of medical, surgical and hospital care and treatments;

3. reasonable funeral expenses; and

4. damages not exceeding $500,000 for the loss of comfort, society and companionship of the deceased to the persons for whose benefit the action is brought, and in addition may give punitive damages not exceeding $75,000 $250,000, provided that the action is commenced within 2 years after the decedent's death.

18-A M.R.S.A. §2-804.

The $500,000 limit is for the entire action, not per beneficiary. That amount includes emotional distress.

Punitive damages are only recoverable if the plaintiff shows by clear and convincing evidence that the defendant committed the tort with actual or implied malice. **Tuttle v. Raymond**, 494 A.2d 1353 (Me. 1985).

I. Vicarious Liability

"Maine applies the Restatement (Second) of Agency to determine the limits of imposing vicarious liability on an employer." **Mahar v. StoneWood Transp.**, 2003 ME 63, ¶ 13, 823 A.2d 540, 544. Specifically, an employer may be liable for the actions of its employee if the actions were taken in the "scope of employment." Id. The Restatement (Second) of Agency § 228 provides:

(1) Conduct of a servant is within the scope of employment if, but only if:

(a) it is of the kind he is employed to perform;

(b) it occurs substantially within the authorized time and space limits;

(c) it is actuated, at least in part, by a purpose to serve the master, and

(d) if force is intentionally used by the servant against another, the use of force is not unforeseeable by the master.

(2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.

J. Exclusivity of Workers' Compensation

An employer who has secured payment of workers' compensation benefits, either by obtaining workers' compensation insurance or by qualifying as a self-insured employer, is immune from suit by employees. **39-A M.R.S.A. §107**. The employee specifically waives such a cause of action as well. Such waiver includes a loss of consortium claim by the spouse. **McKellar v. Clark Equipment Company, 472 A.2d 411 (Me. 1984).**

The Maine Supreme Court has also ruled that an employer is not subject to a third-party action for contribution under those circumstances except in very specific circumstances. **Diamond International v. Sullivan & Merritt, 493 A.2d 1043 (Me. 1985).** Those specific instances occur only if the employer specifically waives its workers' compensation immunity or if it has a contract with the third-party plaintiff which requires the employer to specifically indemnify the third party for actions brought by its own employees.

The exclusivity provisions also extend to torts which might be considered more than simple negligence. In **Beverage v. Cumberland Farms Northern, Inc., 502 A.2d 486 (Me. 1985),** the Supreme Court upheld the exclusivity defense in a situation where the employee was raped while working for Cumberland Farms. Even though plaintiff had alleged reckless conduct, the Court still found that the Workers' Compensation Act barred the action.

Not all conduct is immune from suit, however. In **Cole v. Chandler, 2000 ME 104, 752 A.2d 1189,** a supervisor sued two of his employees and his employer for defamation, invasion of privacy, interference with advantageous economic relations, intention infliction of emotional distress and punitive damages. The claim arose out of plaintiff's being terminated after an investigation of complaints of sexual harassment by the individual defendants. In a noteworthy decision, the Law Court concluded that the individual defendants were immune from liability on

the defamation claim except to the extent that it sought damages for economic or reputational injuries. The court stated that it had consistently applied a broad and encompassing construction to the workers' compensation exclusivity provisions. The court noted that it had already refused to carve out an exception for intentional torts. **Li v. C.N. Brown Company, 645 A.2d 606 (Me. 1994).**
However, the court allowed the claim for defamation and interference with advantageous economic relations to the extent that these torts sought recovery of economic injuries, as opposed to mental or physical injuries. Accordingly, the workers' compensation immunity did not apply and the lawsuit could proceed as noted above.

In **Hawkes v. Commercial Union, 2001 ME 8, 764 A.2d 258,** the Supreme Court allowed an action for invasion of privacy, among other things, against a workers' compensation insurer for the actions of its private investigator. The Court found that the interim lump sum settlement by the Employee for release of all claims was ambiguous as to whether it was only a release for claims relating to the injury. The reach of the agreement was an issue of fact to be determined at trial.

In contrast, where a co-worker pulled a chair out from underneath another during a lunch break, the court held that the lawsuit was barred. **Easler v. Dodge, 1999 ME 140, 738 A.2d 837.** Typically, a defense under workers' compensation is that the conduct amounted to "horseplay," which therefore did not arise out of or in the course of employment. The Supreme Court held that the paid and authorized lunch break directly served the employer's interests and constituted an inherent condition of employment and thus was in the course of employment. **Easler** suggests the court will continue to take a very broad view of workers' compensation immunity.

Damages

A. Statutory Caps on Damages

Wrongful Death

Damages for a wrongful death action are capped at $500,000. See **18-A M.R.S.A. §2-804.**

Maine Tort Claims Act

Damages in suits against governmental entities and employees are capped at $400,000. See **14 M.R.S.A. §8105.**

B. Compensatory Damages for Bodily Injury

In a typical civil action, the plaintiff may recover the following damages:

A. Reasonable past and future medical expenses;
B. Lost wages;
C. Future lost wages or loss of earning capacity
D. Past and future pain and suffering
E. Loss of enjoyment of life
F. Permanent impairment; and
G. Mental anguish/emotional distress

Damages must be proved to a reasonable certainty. **Michaud v. Steckino, 390 A.2d 524 (Me. 1978).**

C. Collateral Source

A tortfeasor may not offset damages paid by a third party against the tortfeasor's liability. **Werner v. Lane**, 393 A.2d 1329 (Me. 1978). In other words, the fact that the Plaintiff collected workers' compensation benefits, medical bills were paid by an insurer, or other damages were paid by third parties, may not be used to offset recovery. However, evidence of receipt of such benefits may be admissible on other grounds, such as lack of motivation to return to work or failure to obtain appropriate medical care.

D. Pre-Judgment/Post-Judgment Interest

The following applies only as to the rate of accrual on interest prior to July 1, 2003. For actions in which the damages claimed or awarded do not exceed the $30,000 jurisdictional limit of the District Court, the interest rate is 8% per year. For other actions, pre judgment interest is equal to the United States Treasury Bill rate immediately prior to the date from which the interest is calculated (usually the date of judgment), plus 1%. **14 M.R.S.A. § 1602-B(7).**

For interest accruing after July 1, 2003, the following rules apply. In small claim actions, prejudgment interest is not recoverable unless the rate of interest is based on a contract or a note. **14 M.R.S.A. § 1602-B(1).** In all civil and small claims actions involving a contract or note that contains a provision relating to interest, prejudgment interest is allowed at the rate set forth in that contract or note. **14 M.R.S.A. § 1602-B(2).** In any other civil action, prejudgment interest is allowed at the one-year United States Treasury bill rate plus 3%. **14 M.R.S.A. § 1602-B(3).**

Prejudgment interest accrues from the time notice of claim is served upon the defendant until the date on which an order of judgment is entered. If no formal notice of claim has been given to the defendant, prejudgment interest accrues from the date on which the complaint is filed. **14 M.R.S.A. § 1602-B(5).** Prejudgment interest may not be added to the judgment amount in determining the sum upon

which post-judgment interest accrues. **14 M.R.S.A. § 1602-B (6).**

In all civil and small claims actions, post-judgment interest is allowed at a rate equal to the T-Bill rate plus 6%, unless the action involves a contract or a note containing a provision relating to interest. In that case, the applicable rate is the higher of that set forth in the note or contract or the T-Bill rate plus 6%. Post-judgment interest accrues from and after the date of entry of judgment and includes the period of any appeal. In actions involving a contract or note that contains a provision relating to interest, the rate of interest is fixed as of the date of judgment. If the prevailing party at any time requests and obtains a continuance for a period in excess of 30 days, interest is suspended for the duration of the continuance. On petition of the nonprevailing party and on a showing of good cause, the trial court may order that interest awarded by this section be fully or partially waived. **14 M.R.S.A. §1602-C.**

E. Damages for Emotional Distress

Generally

In **Vicnire v. Ford Motor Credit Co.**, 401 A.2d 148, 154-55 (Me. 1979), the Law Court summarized when a plaintiff can recover damages for emotional distress. The Court remarked:

[A] plaintiff may recover damages for emotional distress resulting from the tortious conduct of a defendant in three distinct situations. First, as traditionally provided, mental distress or 'pain and suffering' accompanying physical injury caused by tortious conduct is compensable. Second . . . a plaintiff may recover damages for emotional distress resulting from negligent conduct (even though that conduct caused no direct physical injury) if the distress is 'substantial and manifested by objective symptomatology,' that is, results in illness or bodily harm. And, third . . . a defendant is subject to liability if he engages in extreme or outrageous conduct that intentionally or recklessly inflicts severe emotional distress upon another.

Legal Malpractice

The Law Court has held that emotional distress damages are not recoverable in legal malpractice cases "when the only injury is economic, except in situations where the tort was intentional." **Garland v. Roy**, 2009 ME 86, ¶ 24, 976 A.2d 940, 948.

Contracts

"The general rule is that damages for emotional distress as a result of a breach of contract are not recoverable." **McAfee v. Wright**, 651 A.2d 371, 372 (Me. 1994)

F. Wrongful Death and/or Survival Action Damages

Who May Bring

Under Maine's wrongful death statute, 18-A M.R.S.A. §2-804, a wrongful death suit must be brought by and in the name of the personal representative of the deceased person. **Buzynski v. Knox County,** 188 A.2d 270 (Me. 1963). However, a viable fetus is not a "person" for purposes of the Wrongful Death Act. **Milton v. Cary Medical Center**, 538 A.2d 252 (Me. 1988). See also **Shaw v. Jendzelec**, 1998 ME 208, 717 A.2d 367. The action is for the benefit of all statutory beneficiaries, typically spouse and dependents.

What Is Recoverable

The jury may give damages as it shall deem a fair and just compensation as follows:

> 5. pecuniary injuries resulting from the death to the persons for whose benefit the action is brought;
>
> 6. reasonable expenses of medical, surgical and hospital care and treatments;
>
> 7. reasonable funeral expenses; and
>
> 8. damages not exceeding $500,000 for the loss of comfort, society and companionship of the deceased to the persons for whose benefit the action is brought, and in addition may give punitive damages not exceeding $75,000 $250,000, provided that the action is commenced within 2 years after the decedent's death.

18-A M.R.S.A. §2-804.

The $500,000 limit is for the entire action, not per beneficiary. That amount includes emotional distress.
Punitive damages are only recoverable if the plaintiff shows by clear and

convincing evidence that the defendant committed the tort with actual or implied malice. **Tuttle v. Raymond**, 494 A.2d 1353 (Me. 1985).

Survival Actions

Maine's wrongful death statute is silent on pre-death damages other than for what was discussed above, i.e. expenses for medical, surgical, and hospital care. However, a so-called survival action is permitted under **18-A M.R.S.A. §2-804(c)** for conscious pain and suffering. There is no limitation on the amount which can be awarded and will depend on the length and the nature of the conscious pain and suffering pre-death. Maine has not addressed the issue of "fear of death" as a separate element of such conscious pain and suffering.

G. Punitive Damages

Punitive damages can be recovered only where actual or implied malice is shown. Proof must be by clear and convincing evidence, or be "highly probable". **Tuttle v. Raymond, 494 A. 2d 1353 (Me. 1985).** Most civil cases will not meet this burden.

Punitive damages are not available for breach of contract. **Drinkwater v. Patten Realty Corp., 563 A.2d 772 (Me. 1989).**

Punitive damages may not be awarded against municipal corporations and governmental agencies, unless expressly authorized by statute. **Foss v. Maine Turnpike Authority, 309 A.2d 339 (Me. 1973).**

The amount of punitive damages under Maine law is in part determined by its deterrent effect and must therefore bear some relationship to the actual wealth of the defendant. **Braley v. Berkshire Mutual Insurance Co., 440 A.2d 359 (Me. 1982); Hanover Insurance Co. v. Hayward, 464 A.2d 156 (Me. 1983).**

H. Diminution in Value of Damaged Vehicle

An insurer's liability for damages is measured by "amount necessary to 'repair' the vehicle" and the insurer is "not liable for the diminution in the value of the vehicle." **Hall v. Acadia Insurance Company, 2002 ME 110, 801 A.2d 993.** However, judging from other cases, it would appear if one sued a third party personally, then the calculation of damages would be different. The standard rule of damages in Maine for property damage is the difference in the before and after fair market value of the property. **Smith v. Urethane Installations, Inc., 492 A.2d 1266 (Me. 1985).** The Court has also held that the proper measure of property damage is that measure of damages which most precisely compensates the plaintiff

for its loss and which may be used without conjecture or speculation. **Wendwood Corp. v. Group Design, Inc., 428 A.2d 57 (Me. 1981).** It is reasonable to assume, therefore, that if the decrease in fair market value of the automobile is greater than the cost of repairs, that additional amount of damages would be recoverable in third-party claims.

I. Loss of Use of Motor Vehicle

Motor Vehicle Rental Expenses

Under **14 M.R.S.A. § 1454**, the owner of the motor vehicle is entitled to recover reasonable rental costs actually expended for a replacement motor vehicle during such time as the vehicle cannot be operated. The time limit is 45 days for rental and this statute applies to both commercial and non-commercial vehicles. **Flynn Construction Company Inc. v. Poulin, 570 A.2d 1200 (Me. 1990).** This statute is the exclusive remedy for recovery of motor vehicle rental expenses.

Evidentiary Issues

A. Preventability Determination

Maine courts have yet to address this question.

B. Traffic Citation from Accident

M.R. Evid. 80F(d)(3) provides that "[a]n answer that a violation is not contested shall not be admissible as an admission in any civil or criminal proceeding arising out of the same set of facts."

Moreover, a plea of guilty to a traffic infraction, which is by definition civil, is ordinarily not admissible on a collateral estoppel or res judicata basis. **Morrell v Marshall**, 501 A.2d 807 (Me. 1985). The better practice to avoid the argument is to plead nolo contendere or otherwise handle the underlying matter to avoid this potential problem in any later civil suit.

Additionally, violation of any safety statute, i.e. motor vehicle operation statute, is admissible as evidence of negligence. Thus, a jury would be instructed that violation of the statute is evidence of, but not conclusive on, the defendant's negligence. **French v. Willman**, 599 A.2d 1151 (Me. 1991).

C. Failure to Wear a Seat Belt

Maine law requires that all persons must either wear seatbelts or be secured in a child safety seat. The child safety seat requirement applies to children under the age of four. However, the non-use of either seatbelts or the mandatory child safety seat is not admissible in evidence to show negligence on the part of the operator or passengers except in a trial for failure to wear safety belts. **29-A M.R.S.A. §2081**

D. Failure of Motorcyclist to Wear a Helmet

There is no general requirement that motorcycle riders wear helmets in Maine. However, any person under the age of 15 who either rides on or operates a motorcycle, whether on the road or off road, must wear protective headgear. **29 M.R.S.A. § 1376**. Additionally, every person who operates a motorcycle for a period of one year after completion of the motorcycle driving test shall wear protective headgear.

Unlike the seatbelt and child seat laws, there is no prohibition against admissibility of failure to wear a helmet. Presumably, therefore, such evidence would be admissible at trial as evidence of negligence.
Motorcycles are subject to the same laws as motor vehicles. Mopeds are included within the definition of motor vehicles as well.

E. Evidence of Alcohol or Drug Intoxication

Admissible. See **12 M.R.S. § 10703**.

F. Testimony of Investigating Police Officer

Admissible, subject to the discretion of the trial judge concerning relevance and unfair prejudice. See **Fowles v. Dakin**, 160 Me. 392, 395, 205 A.2d 169, 171 (1964)

G. Expert Testimony

The Law established a two-part test for determining when expert testimony is admissible. Under the test: "A proponent of expert testimony must establish that (1) the testimony is relevant pursuant to M.R. Evid. 401, and (2) it will assist the trier of fact in understanding the evidence or determining a fact in issue." **Searles v. Fleetwood Homes of Pa., Inc**., 2005 ME 94, ¶ 21, 878 A.2d 509, 515–16. Further, to meet the two-part test, "the testimony must also meet a threshold level of reliability." Id. ¶ 22, 878 A.2d at 516 (quotation marks omitted). This is because "[i]f an expert's methodology or science is unreliable, then the expert's opinion has no probative value." **State v. Irving**, 2003 ME 31, ¶ 12, 818 A.2d 204. The Law Court reviews a trial courts determination that an expert's testimony is sufficiently reliable for clear error. **Tolliver v. Dep't of Transp.,** 2008 ME 83, ¶ 29, 948 A.2d 1223, 1233.

H. Collateral Source

A tortfeasor may not offset damages paid by a third party against the tortfeasor's liability. **Werner v. Lane**, 393 A.2d 1329 (Me. 1978). In other words, the fact that the Plaintiff collected workers' compensation benefits, medical bills were paid by an insurer, or other damages were paid by third parties, may not be used to offset recovery. However, evidence of receipt of such benefits may be admissible on other grounds, such as lack of motivation to return to work or failure to obtain appropriate medical care.

I. Recorded Statements

Maine Rules of Evidence, Rule 803(5) provides that:

Recorded Recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly. If admissible, the memorandum or record may be read into evidence but shall not be received as an exhibit unless offered by an adverse party.

J. Prior Convictions

Maine Rules of Evidence, Rule 609 provides that:

(a) General Rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a specific crime is admissible but only if the crime (1) was punishable by death or imprisonment for one year or more under the law under which the witness was convicted, or (2) involved dishonesty or false statement, regardless of the punishment. In either case admissibility shall depend upon a determination by the court that the probative value of this evidence upon witness credibility outweighs any unfair prejudice to a criminal defendant or to any civil party.

(b) Time Limit. Evidence of a conviction under this rule is admissible only if less than 15 years have transpired since said conviction or less than 10 years have transpired since termination of any incarceration period therefor.

(c) Effect of a Pardon, Annulment, or Certificate of Rehabilitation. Evidence of a conviction is not admissible under this rule if the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure.

(d) Juvenile Adjudications. Evidence of a juvenile adjudication in the proceeding open to the public may be admitted under this rule. Evidence of a juvenile

adjudication in a proceeding from which the public was excluded may be admitted under this rule only in another juvenile proceeding from which the public is excluded.

K. Driving History

In **Fortier v. Lovejoy**, 520 A.2d 1303 (Me. 1987), the Court held that prior automobile accidents are almost never admissible because of the severe potential for prejudice. Although the pre-existing injuries were clearly admissible, the reasons for the injuries were not.

L. Fatigue

Although the Law Court has never addressed the question directly, evidence of fatigue is likely admissible subject to the discretion of the trial judge concerning relevance and unfair prejudice.

M. Spoliation

The Law Court has never recognized a cause of action for spoliation of evidence. See **Butler v. Mooers**, CIV. A. CV-00-737, 2001 WL 1708836 (Me. Super. June 13, 2001)(discussing the cause of action).

Settlement

A. Offer of Judgment

OFFER OF JUDGMENT

In a case where liability is clear and/or expenses may be significant, Rule 68 of the Maine Rules of Civil Procedure permits the defendant to make an offer of judgment. This offer is a pleading which permits the plaintiff, if plaintiff accepts it, to obtain a judgment for an amount certain plus costs to date. Such an offer can be made at any time more than ten (10) days before trial. If the offer is declined and a judgment is awarded for less than the offer, defendant is entitled to costs which are incurred after the making of the offer. Such cost may include deposition costs, expert witness fees and other costs.

An Offer of Judgment is a handy tool in cases where the demand is unreasonable but defendant acknowledges that it is likely liable and will owe a certain amount of money in any event.

B. Liens

Workers' Compensation Liens

By statute, an employer and workers' compensation carrier have a lien on any benefits paid as the result of a third party's fault in a work-related injury. **39-A M.R.S.A. §107**. The lien is recoverable, for example, in an automobile accident case where the employee is at work and is injured by another driver who is not a co-employee. In such circumstances, the entire lien minus costs of recovery and

reasonable attorney's fees is recoverable. See **Perry v. Hartford Accident & Indemnity Company, 481 A.2d 133 (Me. 1984).**

If the recovery is greater than the actual benefits paid, the excess goes to the employee. **39-A M.R.S.A. §107**. The lien does not extend to any benefits not paid pursuant to the Workers' Compensation Act, i.e. pain and suffering or loss of consortium. **Dionne v. Libbey-Owens Ford Company, 621 A.2d 414 (Me. 1993).** An employer is not required to pay the entire cost of recovery and attorney's fees, but simply a proportionate share of the costs of collection.

If an employee settles with the third-party tortfeasor and then pursues a workers' compensation claim, the employer is entitled to set off against any subsequent liability the net amount the employee has recovered in settlement from the tortfeasor. The net amount would be the actual settlement minus a proportionate share of costs of collection including attorney's fees. **Overend v. Elan I Corporation, 441 A.2d 311 (Me. 1982)**

If the third-party tortfeasor pays the employee more in settlement than the employer's lien, the employer is still liable for ongoing benefits. However, the employer is entitled to offset any future liability against the unrecouped portion of the tortfeasor's payment. **Liberty Mutual Insurance Company v. Weeks, 404 A.2d 1006 (Me. 1979).**

But, no lien or offset is available on an uninsured or underinsured motorist claim if it is the Employee's personal auto policy. **Wallace v. City-of South Portland, 592 A.2d 1076 (ME 1991).** Only where it is the Employer's policy will the court enforce the lien.

Department of Human Services Liens

The Maine Department of Human Services has a statutory lien for any medical benefits paid to the plaintiff pursuant to either a Medicaid program or MaineCare. **22 M.R.S.A. §14**. Section 14(2)(D) requires the plaintiff or any attorney representing such plaintiff who makes a claim to recover the medical costs paid to notify the department in writing with information as required by the Department of the existence of the claim. Furthermore, a disbursement of any award, judgment or settlement may not be made to a recipient without the recipient or recipient's attorney first providing at least ten (10) days written notice to the Department of the award, judgment or settlement. If a dispute arises between the commissioner and the recipient as to the settlement of any claim, the third party or the recipient's attorney shall withhold from disbursement to the recipient an amount equal to the

commissioner's claim.

The burden under the statute is on the plaintiff or plaintiff's attorney to satisfy the lien. The statute is silent with respect to an insurer's obligation if a settlement is paid to the plaintiff without also paying the DHS lien. If the lien is known, it is advisable to include DHS' name on any settlement check unless other arrangements are made.

Additionally, with respect to child support payments, Maine law provides that the court must issue an Immediate Income Withholding Order in any action which the court issues or modifies a child support order. **19-A M.R.S.A. §2651**. The importance of these orders is that in certain circumstances, settlements in personal injury cases may be subject to DHS child support liens and withholding orders where child support obligations may exist on the part of the plaintiff.

Private Insurer Liens

Sections 2729-A and 2836 of Title 24-A provide that there is an equitable lien right in any tort recovery for health insurers. Both sections require prior written approval from the insured. Because the statutes create an equitable lien, payments may be reduced on such liens based upon numerous factors, including liability, comparative negligence or other defenses, or on the exigencies of trial.

This equitable lien does not give Blue Cross/Blue Shield or other health insurers an automatic right to recover when a case is settled. In **Associated Hospital Service of Maine v. Maine Bonding and Casualty, 476 A.2d 189 (Me. 1984),** Blue Cross/Blue Shield paid the medical expenses and notified the tortfeasor's carrier, Maine Bonding, of its subrogation right. Without notice to Blue Cross/Blue Shield, Maine Bonding settled the underlying claim and refused to reimburse Blue Cross/Blue Shield. The Supreme Court held that Maine Bonding merely insured the tortfeasor against liability, and because there was no judgment against the tortfeasor, there was no right of action against the insurer. Rather, Blue Cross succeeded only to the rights of the plaintiff and thus it had to obtain a final judgment against the defendant before pursuing a claim against Maine Bonding to "reach and apply" the proceeds of the liability policy.

A group health plan which requires payment of medical expenses but contains no subrogation clause does not create equitable rights of subrogation. **McCain Foods, Inc. v. Gerard, 489 A.2d 503 (Me. 1985).** In **McCain Foods,** the court held that the medical services were required and the insurer had the primary obligation to pay these expenses. Since the policy contained no subrogation clause, no equitable rights were going to be afforded to the carrier. Had the plan contained a

subrogation clause, however, the right could have arisen by contract. Thus, if a lien is asserted in a particular case, it may well be worth determining whether the contract is sufficient to permit such lien to be asserted.

Hospital Liens

A hospital is given a statutory lien for all reasonable charges for hospital care, treatment and maintenance of an injured person. **10 M.R.S.A. §3411**. The lien does not apply to workers' compensation claims or against accident or health insurance policies owned or running to the benefit of the injured person. The lien also does not take precedence over the claim or contract for attorney's fees by plaintiff's counsel.

In order to perfect the lien, written notice containing the name and address of the injured person along with details of the treatment must be filed with the clerk of the municipality in which the hospital is located not later than ten (10) days after the patient has been discharged. It also must be prior to the payment of any monies to such injured persons as a result of the claim. The hospital must also send by registered mail copy of such notice to both the alleged tortfeasor(s) and the insurance carrier. **10 M.R.S.A. §3412**.

If the lien is properly perfected, neither a settlement nor release is valid to discharge the lien unless the hospital joins in or executes a release. The lien remains viable for a period of one year from the date of payment of such settlement and the hospital may enforce the lien by civil action against the parties who made the payment. **10 M.R.S.A. §3413.** The hospital may also collect from the plaintiff or injured party at its election.

C. Minor Settlement

MINOR SETTLEMENTS

By statute all minor settlements must be approved by the court, whether or not an action has been filed. **14 M.R.S.A. § 1605**. Under Rule 17A M.R.Civ.P., the court must be provided with medical records, medical bills, and factual information in order to assess the fairness of the settlement. If a minor settlement is not approved by the court, the settlement is not valid.

The practical effect of this statute is that if the minor plaintiff's condition worsens or he wishes to file suit later or at the age of majority, the settlement will not be a bar to the suit. That is true even if a release has been obtained from the minor plaintiff.

Conversely, if the minor settlement is approved by the court, such approval has the effect of a judgment and will forever bar any further action by the minor plaintiff even after attaining the age of majority.

If a lawsuit is not pending, the Court requires that a file be opened with the appropriate filing fee. The court order approving the minor settlement is thereby placed in the file and docketed and becomes a public record for purposes of any further proceedings and use in the future.

The courts also require in all cases that the proceeds of a minor settlement be deposited in a bank, subject to withdrawal only upon approval by the court or upon the minor reaching the age of 18. The reason for this is to avoid having the money spent by the parents.

D. Negotiating Directly with Attorneys

Permitted

E. Confidentiality Agreements

"[A]n employer, under a proper restrictive agreement, can prevent a former employee from using his trade or business secrets, and other confidential knowledge gained in the course of the employment, and from enticing away old customers ...." **Roy v. Bolduc**, 140 Me. 103, 107, 34 A.2d 479, 480-81 (1943). "The confidential knowledge or information protected by a restrictive covenant need not be limited to information that is protected as a trade secret by the UTSA." **Bernier v. Merrill Air Engineers**, 2001 ME 17, ¶ 15, 770 A.2d 97, 103. To be enforceable, however, restrictive covenants must be reasonable and the determination of the reasonableness of a restrictive covenant is a question of law. See **Brignull v. Albert**, 666 A.2d 82, 84 (Me.1995)

F. Releases

A general release usually gives up any further contribution from the releasee. **Norton v. Benjamin, 220 A.2d 248 (Me. 1966).** In **Norton,** the court held that a general release is a bar to a right of contribution between joint tortfeasors. Defendant had settled with one of plaintiff's insurance carriers for property damage only, but executed a general release. That release barred a subsequent claim for contribution against that plaintiff for personal injury where the other plaintiff had sued the defendant.

However, unless the releasee expressly reserves his right of action against the releasor, a general release bars any further litigation arising out of the same cause of action. **Butters v. Kane, 347 A.2d 602 (Me. 1975).** Thus, without an express reservation of rights to pursue claims for contribution, the making of a settlement is a complete accord and satisfaction of all claims of immediate parties to the

settlement arising out of the same accident.

Moreover, unless there is an express reservation of rights, when a general release is executed between two parties and one party has bargained for and accepted the other party's release of all claims arising from a specific occurrence, implied in that bargain is a reciprocal release by the other party of any claims inconsistent with a settlement effected by the release. **Cyr v. Cyr, 560 A.2d 1083 (Me. 1989).**

A formal release signed by a plaintiff barred his lawsuit against a racetrack. **Hardy v. St. Clair**, **1999 ME 142, 739 A.2d 368**. However, because his wife did not sign a release, her claim for loss of consortium against the racetrack was not barred and was permitted to go forward.

One further complicating factor involves claims for contribution by a third party not involved in the original action. A general release does not bar contribution under those circumstances, absent an indemnity agreement in the initial release. Under those circumstances, even if the original defendant has obtained a general release in settlement, that defendant is still potentially liable as a third-party defendant on an action for contribution at some future date. Such an indemnity agreement does not prevent the third-party action from proceeding but merely insulates the releasee from any future financial exposure. Effective 08/11/00, the legislature approved by statute the use of so-called "Pierringer" releases. **14 M.R.S.A. §156.** A released defendant may now be dismissed with prejudice from the case, including claims for contribution, if the release or settlement agreement prohibits the plaintiff from collecting against the remaining parties that portion of any damages attributable to the released defendant's share of responsibility. The released defendant is still subject to discovery, and the language of the release has to be specific to comply with the statute.

Concurrently with the change in §156, the legislature changed **14 M.R.S.A. §163**. In a trial involving a Pierringer-released defendant who was no longer present, the court must nevertheless admit the negligence or other fault to the jury for apportionment. If the jury apportions the liability on the settling defendant, the judge shall reduce the judgment by the amount determined attributable to the defendant's share of the responsibility. If the jury makes no apportionment, the judgment is reduced by the amount of the settlement. The option either to have an apportionment or simply deduct the amount of the settlement remains with the defendant who did not settle. It is not clear what happens if one defendant wishes to apportion and the other wishes to take the offset. The reason that this choice matters is that if a defendant elects to apportion liability, and the jury concludes

that it is one hundred percent the fault of the remaining defendant, then the remaining defendant does not get the benefit of the reduction for the settlement already paid. **Thurston v. 3K Kamper Ko.**, **482 A.2d 837 (Me. 1984).**

Nevertheless, in the appropriate case, the use of a Pierringer release, and subsequent dismissal from the case could result in savings to the defendant who elected to proceed along those lines.

G. Voidable Release

The Law Court has held that, although "a valid release will extinguish a cause of action, the release will nevertheless be set aside if shown to be the product of fraud, misrepresentation, or overreaching."**LeClair v. Wells**, 395 A.2d 452, 453 (Me. 1978)(internal citations omitted).

Transportation Law

A. State DOT Regulatory Requirements

An overview of the State DOT regulatory requirements are available at: http://www.maine.gov/sos/cec/rules/17/chaps17.htm

B. State Speed Limits

The highest speed limit in the state is 75 mph.

C. Overview of State CDL Requirements

An overview of State CDL Requirements can be found in the Maine CDL Manual, available at: http://www.maine.gov/sos/bmv/licenses/MaineCommercialManual.pdf

Insurance Issues

A. State Minimum Limits of Financial Responsibility

FINANCIAL RESPONSIBILITY

Private Autos

The financial responsibility requirements in Maine are as follows:

- $50,000 in the event of bodily injury to or death of one person as a result of any one accident;

- $100,000 in the event of bodily injury or death of two or more persons in any one accident;

- $25,000 in the event of injury to or destruction to property of others as

a result of any one accident;

- $2,000 for medical payments

29-A M.R.S.A. § 1605

Every operator or owner of a motor vehicle must maintain insurance on that vehicle. Such proof of insurance must be presented to a law enforcement officer at the time of any stop. Failure to produce either a motor vehicle insurance identification card or a card issued by the Secretary of State is *prima facie* evidence that the motorist is uninsured. That motorist has until 24 hours prior to the court appearance to provide proof of insurance, at which point the proceeding for violation of the law shall be dismissed.

29-A M.R.S.A. § 1601

NOTE: The driver must produce evidence that the vehicle was insured at the time of the stop.

Rental Autos

See **29-A M.R.S.A. §1611.**

Vehicle Dealerships

Vehicle dealerships must provide proof of insurance of at least of $100,000 per person and $300,000 per accident for any vehicle for sale before license and registration plates can be issued. In lieu of insurance, the dealership may file appropriate bonds with the Secretary of State. **29-A M.R.S.A. § 1612**. The dealership's policy is the primary insurance for any loss, and any operator's policy is considered excess coverage. **24-A M.R.S.A. § 2909**.

B. Uninsured Motorist Coverage

UNINSURED/UNDER-INSURED MOTORIST

Maine's financial responsibility laws now mandate insurance for all vehicles. **29-A M.R.S.A. §1601.** The limits are $50,000/$100,000 with a $25,000 property damage requirement. Automobile policies must provide at least $50,000 in uninsured and under-insured motorist coverage as well. **24-A M.R.S.A. §2902.**

(But see Section (C)(1) below)

WHAT CONSTITUTES

A pure uninsured motorist claim is a direct action against the insured's own carrier where the tortfeasor is uninsured. **Young v. Greater Portland Transit District, 535 A.2d 417 (Me. 1987).** Whether or not the defendant can pay the judgment personally is irrelevant. The three requirements for proof of an uninsured motorist claim are as follows:

1. The injured party must prove he is an insured;
2. The driver is uninsured; and
3. The driver was negligent.

It is not necessary to obtain a judgment against the uninsured motorist first. The damages recoverable are exactly the same as in a third-party liability action. Moreover, the UM carrier can be and usually is named as a defendant, such that the issue of insurance will be presented to the jury.

STACKING

Stacking of different uninsured motorist policies is permitted under Maine law. **Wescott v. Allstate Insurance Company, 397 A.2d 156 (Me. 1979).** The most frequent example occurs when a plaintiff is a passenger in a car which is hit by an uninsured motorist. The passenger/plaintiff would have a claim under both the operator's uninsured motorist policy and his or her own policy, assuming it was different. Thus, a plaintiff may have more than one UM policy which would provide coverage for any given accident. Because premiums are paid for each policy, the Maine Supreme Court has permitted them to be aggregated, thus providing a total of the combined limits of both policies. The **Wescott** court expressly declined to decide whether an insured has the right to bring a direct action against her insurer without first proceeding against the underinsured tortfeasor. In **Greenvall v. Maine Mutual Fire Insurance Company, 1998 ME 204, 715 A.2d 949,** however, the Court held that it was not necessary for the plaintiff to get a judgment against the underinsured tortfeasor before the plaintiff could sue the insurer. The insurance carrier may be made a direct defendant on this first party claim, which is in the nature of a breach of contract action.

There are limitations on stacking. First, UM policies can be stacked only to the extent that they involve different policies for which different premiums are paid. Thus, if two vehicles are insured under a single policy, stacking is not permitted.

Dufour v. Metropolitan Property & Liability Insurance Co., 430 A.2d 1290 (Me. 1982). In certain circumstances, a carrier may also avoid stacking where that carrier has insured two vehicles under two separate policies. **Gross v. Green Mountain Insurance Company, 506 A.2d 1139 (Me. 1986).** In **Gross,** the plaintiff tried to stack UM coverage under two separate policies for which separate premiums were paid. However, the specific policy language prohibited an insured from stacking UM coverage in separate policies owned by the insured when he was operating one of the several insured vehicles at the time of the accident.

Similarly, the UM statute did not require stacking where two or more cars are insured under a single policy, even though separate premiums are paid. **Dufour v. Metropolitan Property & Liability Insurance Company, 438 A.2d 1290 (Me. 1982).** The policy clearly and unambiguously restricted coverage to a specified amount greater than the statutory minimums. Thus, the Court upheld the judgment precluding stacking under the circumstances.

RELATION TO LIABILITY INSURANCE

Since Maine is now a compulsory insurance state, the more likely scenario involves an under-insured vehicle. The minimum insurance requirements are $50,000/$100,000 and damages may exceed that amount or the liability insurance amount of the tortfeasor. To determine if a vehicle is "under-insured," the tortfeasor's liability limits are compared with the limits for the uninsured motorist policy. For example, if the liability limits on the tortfeasor's vehicle are $50,000 and the UM limits are $100,000, the insured's vehicle is "under-insured" by $50,000. That additional $50,000 is available under the insured's own policy. **Connolly v. Royal Globe Insurance Company, 455 A.2d 932 (Me. 1983).** In **Mullen v. Liberty Mutual Insurance Company, 589 A.2d 1275 (Me. 1991),** the tortfeasor's limits were $100,000. Stacking the two UM policies resulted in a total of $65,000 of coverage. Thus, the vehicle was not under-insured even though Mullen had received in settlement only $5,000 of the $100,000 available.

Determinations of underinsured status are "per accident", as opposed to "per person." See **Botting v. Allstate Insurance Company, 1998 ME 58, 707 A.2d 1319.** In **Botting,** three insureds were injured and their underinsured motorist coverage was $100,000 per person and $300,000 per accident, and the liability policy was $100,000. The issue was whether the comparison to determine underinsured status should be made to the single-person limit, in which case the tortfeasor would not be underinsured, or the per accident limit, in which case he would be underinsured by $200,000. The Court held that the comparison should be

to the per accident limit because to do otherwise "would deprive [the insureds] of underinsured motorist coverage and would be contrary to the purpose of" the underinsured motorist statute.

For purposes of determining whether a vehicle is under-insured, the amount of each individual tortfeasor's liability insurance is compared to the individual under-insured coverage. **Tibbetts v. Maine Bonding & Casualty Company, 618 A.2d 731 (Me. 1992). Tibbetts** involved a three-car accident. One tortfeasor's liability limits were $300,000, paid to the Plaintiffs. Another tortfeasor's liability limits were the statutory minimum of $20,000. The Plaintiffs' own UM policy was in the amount of $300,000 and contained a policy limit reduction clause. The Court compared the UM coverage of $300,000 with the one tortfeasor's liability limits of $20,000/$40,000 and concluded that Plaintiffs were "under-insured" by $260,000. Further, policy provisions purporting to reduce the insurer's liability by amounts received in settlement from third parties are void to the extent the insured is not fully indemnified.

C. No Fault Insurance

Maine does not employ the "no-fault" system of insurance. A bill has been submitted to the Maine Legislature over the past several sessions but has been routinely defeated each year.

D. Disclosure of Limits and Layers of Coverage

24-A M.R.S.§ 2164-E provides that:

Upon written request by a claimant or the claimant's attorney, an insurer doing business in this State shall provide the claimant or the claimant's attorney with the liability coverage limits of that insurer's insured. The insurer must provide the liability coverage limits within 60 days of receipt of the written request.

An insurer who fails to comply with this section is subject to a penalty of $500, plus reasonable attorney's fees and expenses incurred in obtaining the liability coverage limits.

E. Unfair Claims Practices

Private Right of Action

Although statutory, the Maine Unfair Trade Practice Act is grounded in tort law. Pursuant to The Maine Unfair Trade Practices Act ("UTPA"), "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or

commerce are declared unlawful." **5 M.R.S.A §207 (2002)**. "Trade and Commerce" is defined by the UTPA as, "the advertising, offering for sale, sale or distribution of any service and any property, tangible or intangible, real, personal, or mixed… [including] any trade or commerce directly or indirectly affecting the people of this State**. 5 M.R.S.A. §206(3) (2002)**. The UTPA allows private individuals who have lost money or property as the result of deceptive acts or practices in the conduct of any trade or commerce to enforce liability for a violation of **§207**. **5 M.R.S.A. §213(1) (2002).**

Defining "Unfair" and "Deceptive"

To succeed in a private action under the UTPA, a court must find unfairness or deceit on the part of the defendant **5 M.R.S.A. §213(1)**. Unfortunately, the UTPA does not include a definition of the either the term "unfair" or "deceptive." **State v. Shattuck**, **2000 ME 38, ¶ 13, 747 A.2d 174, 178**. To determine what constitutes unfairness or deception under the UTPA, courts are guided by interpretations offered by the Federal Trade Commission (FTC) and the federal courts. **5 M.R.S.A §207(1)**; **Suminski v. Maine Appliance Warehouse, Inc**., **602 A.2d 1173, 1174 n. 1 (Me. 1992).**
To justify a finding of unfairness, a three part test applies**. Tungate v. MacLean-Stevens Studios, Inc., 1998 ME 162, ¶ 9, 714 A.2d 792, 797**. To succeed in a private action which alleges unfairness, all three parts of the test must be proven by the plaintiff. Id. First, the act or practice "must cause or be likely to cause, substantial injury to consumers." Id. Second, substantial injury must not be "reasonably avoidable" by consumers**.** Id. Third, the risk of injury must not be outweighed by any countervailing benefits to consumers or competition**.** Id. Alternatively, a plaintiff can succeed in a private action under the UTPA by proving deceit on the part of the defendant. An act or practice is deceptive if it is a "material representation, omission, act or practice that is likely to mislead consumers acting reasonably under the circumstances." **State v. Weinshenk, 2005 ME 28, ¶ 17, 868 A.2d 200, 206.** A failure to disclose information that is "important to consumers and, hence, likely to affect their choice of, or conduct regarding a product is material." Id. Additionally, a failure to disclose information may constitute a deceptive act even in the absence of a legal duty compelling disclosure. Id. Furthermore, acts or omissions may be unfair or deceptive even when unknowingly perpetrated. **Binette v. Dyer Library Ass'n, 688 A.2d 898, 907 (Me. 1996).**

Damages and Attorney's Fees

For damages to be awarded under §213 the injury must be substantial. **Tungate,1998 ME 162, ¶ 9, 714 A.2d at 797.** On that issue, the Law Court denied a **§213(1)** claim based on an insubstantial injury. **Tungate**,**1998 ME 162, ¶ 10, 714 A.2d at 797.** The court in that case reasoned that where the difference between a school portrait package that received a commission and those that did not was as little as $1.25 the injury to the plaintiff was too insubstantial to require relief under **§213(1).** Id. If a Plaintiff proves a substantial injury resulting from an unfair trade practice, he is also entitled to reimbursement of reasonable attorney's fees. For fees to be awarded, the claimant would likely have to submit billing records separating out the costs of litigating the UTPA claim from any other the other claims.

F. Bad Faith Claims

The Maine Supreme Court held that there is no independent tort of bad faith in Maine. In **Marquis v. Farm Family Mutual Insurance Company, 628 A.2d 644 (Me. 1993),** the Court reaffirmed that there is an implied duty to act in good faith and in fair dealing between insureds and insurance companies. However, the Court held that the standard common law remedies for breach of contract, coupled with the late payment statute and unfair claims practices statute noted above, were sufficient to protect insureds. Moreover, no emotional distress claims are permitted and no punitive damages are awardable against an insurance company for "bad faith claims handling."

In **Stull v. First American Title Ins. Co., 2000 ME 21, 745 A.2d 975,** the Court reaffirmed that independent tortious conduct is required to recover emotional distress and punitive damages. Here, issuing a policy inconsistent with the original commitment letter, without more, is merely a breach of contract. The plaintiff could not sue in his personal capacity for what would have been damages to the company he owned.

The Court leaves open, however, the question of an excess verdict against an insured after the carrier's failure to settle within policy limits. How the Maine courts would handle such a case in terms of a carrier's duty is unknown. There is a split of authority nationwide, with three different standards imposed: absolute liability, subjective bad faith or negligent claims handling.

In **County Forest Products v. Green Mountain Agency Inc., 2000 ME 151, 756 A.2d 948,** the Court found that insurers had acted in bad faith due to the actions of the insurers' adjuster by adjusting the loss with "the goal of coming within the lower policy limits" and that the adjustment was "grossly substandard and not conducted in a fair and good faith manner." At issue was whether or not the

insured had applied for increased policy limits, which the insurer and agents disputed. When the loss exceeded the initial lower policy limits, but was within the higher policy limits that the insured thought they had contracted additional coverage for, the insurer and agents colluded to pay within the limits of the original policy limits. The Court also found that the insurers' failure to pay the appraisal award constituted bad faith.

G. Coverage-Duty of Insured

Generally, the duties of an insured are governed by the terms and conditions of the relevant insurance policy. Maine courts have not established any common law, nor are there is any statutory law imposing additional requirements upon insureds.

H. Fellow Employee Exclusions

In an issue of the duty to defend and indemnify, the Law Court upheld a Superior Court ruling after a jury waived trial that the insurance company was not required to defend or indemnify the Defendant in a negligence action. In **U.S. Fidelity and Guarantee Co. v. Rosso, 521 A.2d 301 (Me. 1987),** Rosso had a business auto policy covering his pick-up truck. The exclusion which USF&G relied upon was that the insurance did not apply to bodily injury to any employee of the insured arising out of or in the course of his or her employment by the insured. USF&G agreed to defend Rosso but reserved the right to withdraw that defense and deny indemnification.

While the underlying action was pending, USF&G brought a declaratory judgment action. The facts produced at trial showed that Rosso was a logger and forester who lived on a farm. He raised livestock mostly for his own use but also sold excess dairy products and otherwise earned income from the farm. The Plaintiff, Rilings, was injured when he fell from a load of hay piled in Rosso's pick-up truck. Rosso employed Rilings at the time. The Superior Court concluded that he was an employee and thus the exclusion did not require USF&G either to defend or indemnify Rosso in the personal injury action.

The Law Court strongly emphasized that normally an insurer's duty to defend should be decided summarily and in favor of the insured if there exists any legal or factual basis which could be developed at trial that would obligate the insurer to pay under the policy. The Court emphasized that there was no reason why the insured should have to try the facts of the underlying action simply to get the insurer to defend him. On the other hand, the duty to indemnify may depend on the actual facts or legal theory behind the underlying action. Nevertheless, if the insured goes to trial on the indemnity issue without seeking a preliminary determination of the duty to defend, he may be deemed to have waived his right to object to a simultaneous declaratory judgment against him on the duty to defend.

The Law Court, in a footnote, expressed concern that the Superior Court decided both of these issues together. The Court noted that simultaneous declaratory judgments on an insured's duty to defend and indemnify should be limited to particular situations, as in cases involving non-payment of a premium, cancellation of the policy, failure to cooperate or lack of timely notice.

Finally, the Court held that the language of the exclusion was unambiguous and that a contract of employment was created by mutual agreement that one is to labor in the service of the other. In this case, an employment relationship had clearly been established. Moreover, the Court rejected Ross's argument that Rilings was a "domestic employee" and therefore was not excluded from coverage. The Court limits the definition of "domestic employee" to one who works in the house or on household chores.