

NEWS and VIEWS

BOUCHARD & KLEINMAN P.A.
ATTORNEYS AT LAW
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45 Bay Street
Manchester, NH 03104
(603) 623-7222

1 Merrill Drive, Suite 6
Hampton, NH 03842
(603) 926-9333

NILSSON, Joint and Several Liability, Allocation of Fault, Settlement Credits and Other Assorted and Sundry

Probably the most significant New Hampshire Supreme Court case in tort law was decided on December 29, 2003 but released for publication on January 23, 2004 (so it missed our case summaries for 2003). That case is *Nilsson v. Bierman*, 150 N.H. 393 (2003). Plaintiff was a passenger in a vehicle driven by Knight, who failed to stop at a stop sign and was struck by Bierman. Plaintiff suffered serious injuries which the jury evaluated at \$170,000. Knight had a limited policy of \$25,000, and the plaintiff settled with him for the policy limit.

At the Court's own initiative, the jury was instructed to apportion liability among **both** Knight and Bierman. The judge did this based upon New Hampshire's apportionment statute, which states, in pertinent part, that the judge must instruct

the jury to determine the fault of each party and apportion damages accordingly. The issue was whether Knight was considered a "party" after he settled out. The judge so instructed the jury, and the jury came back with Knight 99% at fault and Bierman 1% at fault (there was no allegation of fault on the plaintiff as a passenger). The Supreme Court affirmed the holding that allocations amongst all parties was proper, even parties whom had settled.

This statute was part of New Hampshire's reform of common law on contribution among joint tortfeasors, and resulted in a comprehensive approach to comparative fault, apportionment of damages and contribution. At the behest of the plaintiff's bar, the original statute provided that if the plaintiff could not collect against

the defendants most at fault, the Court could reallocate the fault proportionately among the remaining defendants, so that the common law concept of joint and several liability still survived. However, that was later amended to say that if any defendant was **less** than 50% at fault, that defendant would be severally liable and not jointly liable, and therefore liable for only his share of the fault.

This case adopts the notion that a defendant will only pay its share of liability in an accident. Under

Congratulations to Nicholas Wright!

*In 2005, Nick Wright joins
Bouchard & Kleinman as a partner.
The firm name will change to:
Bouchard, Kleinman & Wright*

*Nick will continue working out of
our Manchester office. Please feel
free to contact him via telephone at
(603) 623-7222 or e-mail at
nwright@bestnhlaw.com.*



the old system, a remaining defendant could be found liable for the full amount of damages, but in *Nilsson*, the defendant only had to pay 10% or \$1,700.

The Supreme Court did mitigate this somewhat by also holding that a defendant who is only severally liable, less than 50%, is not entitled to a credit for any amounts paid by the settling defendants. Thus, a defendant can get the advantage of being found a lesser percentage of fault, but may lose the settlement credit. This can lead to some interesting results.

Let's suppose that Knight settled for 60% of the damages. The jury, however, assesses Bierman with 51%. Now Bierman, as a joint tortfeasor is liable for the full verdict, but he receives a credit for Knight's 60% and only ends up paying for 40% of the damages even though a jury found him liable for 51%. However, if Bierman were only 49% at fault, he would only be severally liable, would pay 49% of the damages and would be entitled to no credit. Thus, a defendant could find it to his benefit, in a

case with another defendant having made a significant settlement, to suggest to the jury that he was more than 50% at fault.

In the scenario where Knight settles for 60% of the damages, and the remaining defendant is found 49% at fault, the plaintiff would actually receive 109% of his damages. There is a common law theory that no party can collect more than 100% of his damages, but that may well not override the statutory scheme as interpreted by our Supreme Court.

The *Nilsson* decision was equivocal on whether the jury should determine the liability of a potential tortfeasor who is not sued, although the Court noted that this was the majority view. In addition, the Court was equivocal as to whether a tortfeasor who is immune to suit, (i.e. an employer of the plaintiff or a municipality), would be considered a party at fault. The Court stated that the issue of whether such entities should be considered a "party" was not before the Court. Surely that was an invitation for defense lawyers to take exactly that position.

On balance, I believe that the decision clearly favors defendants because it allows defendants to argue for an allocation of liability to an "empty chair". In any case where you can divert liability to the settling absent tortfeasor, who has no lawyer representing him and who would likely be a witness called by the defense at trial, there

is a better chance that the present defendant will be only severally liable. Further, if the Court ever allows allocation to tortfeasors who have not been sued, which seems likely, it would seem this can only work to the benefit of the defendant tortfeasor.

One potential negative effect is that plaintiffs will likely bring suit against all potential defendants and keep them in the litigation to the end, resulting in increased defense costs. For example, Paul Kleinman was recently involved in a death case representing a party who was likely liable to some degree and had a limited \$50,000 policy. Although the carrier had offered the policy, plaintiff's counsel was concerned that the co-defendant, who had a deep pocket, would present an empty chair defense and argue for a significant liability allocation to our client. Consequently, we were kept in the case until it settled on the eve of trial.

Only time will tell how *Nilsson* works in practice, and I predict the Supreme Court will clarify some of these issues in the next few years. If the Court does allow assessment of negligence to non-sued tortfeasors, the trial lawyer's world will be a different place.

Ken Bouchard

If you have a topic that you would like us to write about, please e-mail us at:
news@bestnhlaw.com

Admissibility of Police Reports and the Officer's Liability Opinion



Another significant case recently decided by the Supreme Court on September 9, 2004, is one Ken tried some 20 months ago, *Carignan v. Wheeler*, No. 2003-407. The facts are rather straightforward. Plaintiff was a passenger on her husband's motorcycle. Defendant RV operator Wheeler (our insured) intended to make a left turn into one of the main entrances to the New Hampshire Speedway, and was stopped or nearly stopped with his directional signal on. A Speedway employee waived Wheeler into the entrance drive, and he began the turn. At a disputed time, Mr. Carignan pulled out to pass the RV by going around it to its left and collided with the RV as it was entering the driveway. Mrs. Carignan sued her husband, Wheeler and the Speedway.

The jury returned a verdict against Wheeler and the Speedway, and the case was appealed. The Supreme Court affirmed the verdict against the Speedway but remanded the case against Wheeler, holding that the trial judge should have held a hearing out of the presence of the jury to determine the trustworthiness of the police officer's statement in the police report that "the driver of the motorcycle made a wrong decision

in his attempt to pass the RV." Several attempts were made to get that statement and the report into evidence, but the trial judge repeatedly denied defense motions.

The Supreme Court's opinion is significant in that trial courts have routinely limited the admissibility of police reports and the opinions of police officers. The basis for admitting such a report or statement is that it meets the public records exception to the hearsay rule. Interestingly, although the officer's statement sure sounds like an opinion, the Court called it a finding of fact based on the officer's investigation. The Court stated that the trial judge should hold a hearing out of the presence of the jury in order to determine if the officer's sources of information indicated a lack of trustworthiness. The Court cited a federal Sixth Circuit opinion, *Baker v. Elcona*, 588 F.2d 551, 558 (6th Cir. 1978), that set forth four factors to determine trustworthiness: (1) the timeliness of the investigation; (2) the special skill or experience of the official; (3) the level at which the investigation was conducted; and (4) whether the report was made with any improper motive. The Court remanded the case against Wheeler back to the superior court for a determination of trustworthiness.

This case is very important because it indicates that police reports and officer's opinions (cast in the term "finding of fact"), which were universally not admitted in the state superior courts, will now be far more likely to be admitted. As long as the sources of information are reasonably reliable, the material will likely come in. Whether this will favor plaintiffs or defendants depends on what is stated in the accident report, but it is nevertheless a major change in the law.

The Plaintiff Was Not Where He Was Supposed To Be

Ken also recently tried the case of *Farquhar v. Boucher* in Coos County. This case involved a plaintiff kicked by a horse at a county fair. As you may be aware, New Hampshire has a rather strong equine immunity statute which provides immunity for the owners of a horse which, among other things, injures a spectator if the spectator is in a place where he or she is not supposed to be. The judge bifurcated the issue of liability and had the jury answer one question: was the plaintiff in an area where he was not supposed to be? The reasoning of the judge was that the statute is a threshold issue, and it would be easier for the jury to simply answer that question before going on to the plaintiff's other theory of liability and to deliberate damages.



The jury came back in ten minutes and the question was answered “Yes,” so the verdict was entered for the defendant. Ten minutes is a new office record! It was good to see that some juries see through a non-meritorious case immediately. Here, they felt so strongly they came back before lunch and gave up their free lunch the county would otherwise provide. I wish I could take full credit for it, but the fact is it was a lousy case!

*Federal Daubert
Standard for Experts
Adopted in New
Hampshire*

New Hampshire did pass a statute which is very important to litigation. Effective July 16, 2004, RSA 516:29-a was amended to adopt the *Daubert* standard for the admissibility of expert opinions in New Hampshire. This standard basically attempts to eliminate junk science by requiring the judge to act as a gatekeeper and specifically determine that the opinion is based on sufficient facts, is the product of reliable principles and methods,

and the witness has applied these principles to the facts of the case. In addition, the theory must have been tested, subject to peer review, have a known failure rate, and be generally accepted in the literature. This should be favorable to defendants in that it requires plaintiffs to produce competent and substantive expert testimony in those cases where expert testimony is required. If the plaintiff does not meet this burden, then the case should be dismissed.

In addition, the statute incorporates federal law on the disclosure of experts, and is a welcome change in that regard. For years, plaintiffs have supplied vague expert opinion disclosures by merely having counsel recite that the expert will testify that the defendant breached the standard of care.

The new statute requires a signed report containing all opinions and the reasons therefor, the data and exhibits used by the witness, the qualifications of the witness (including a list of all publications for the last ten years), the compensation the witness has been and will be paid, and a list of cases or depositions in which the witness has testified in the last four years. The statute also requires that no expert can be deposed until the required report has been submitted. The bottom line is that expert disclosures in the superior courts will now be far more informative allowing the defense an appropriate opportunity to evaluate the claim.

*The State Legislator
vs.
The Teenaged Girl*

This case pitted a rather self-important state legislator against a somewhat immature teenaged girl. Fortunately, at trial, the legislator maintained his persona as combative and evasive and my client presented as soft-spoken but self-assured. It also helped that I convinced her to remove her tongue ring and wear a sweater that hung below her belly to cover her various tattoos! I was able to speak with one of the jurors afterwards who noted that the jury sympathized with my client and felt that the plaintiff was much less credible. In retrospect, the key in this case was the way in which we were able to present my client to the jury and the cross-examination which brought out the plaintiff's worst characteristics.

The liability case was one that should have been ruled in favor of the plaintiff. The facts were as follows: the defendant was proceeding out of a carwash and attempting to turn left onto Loudon Road, a major thoroughfare in Concord with two lanes of traffic in each direction. A vehicle in the lane closest to her had stopped giving her the perception that it was safe to proceed. As she moved across into the second lane, she was hit by the plaintiff vehicle. The Judge allowed the defendant to testify that she thought that the

plaintiff was traveling too fast. This allowed me to argue to the jury that the plaintiff was comparatively at fault for speeding and not paying proper attention to his surroundings. Despite the evidence of comparative fault being rather thin, the jury found that the plaintiff was 50% at fault!

The plaintiff's primary injury involved severe bilateral thumb strains due to the force of the air bag deploying. He was in plastic casts for several weeks and required physical and occupational therapy. He also made complaints of low back pain. The medical bills incurred were \$6,200. The plaintiff also made a lost wage claim of \$22,000 for missing four months of work, including a claim that he lost 37 hours of overtime per week. Based on our subpoena of the employment file, we discovered that the plaintiff's actual average overtime was only approximately 10 hours per week. This became a centerpiece of the closing argument "that the plaintiff had some nerve submitting a grossly inaccurate claim."



The jury returned a verdict of only \$12,000 in damages, and while it is impossible to tell how this amount was itemized by the jury, it was clear that the plaintiff was significantly penalized for his overreaching. After the reduction for comparative fault, the judgment was \$6,000. Prior to suit being brought, the insurer had advanced the plaintiff \$10,000 for his wage claim that he was able to document. We had claimed that this advance was a credit to any judgment rendered, and thus, the plaintiff owed us \$4,000! This was our leverage to convince the plaintiff to walk away without filing a post-trial motion or appeal. The moral of the story: Make sure your teenaged insured has a preppy collegiate look and highlight the failings of a pompous politico plaintiff!

Paul Kleinman

Property Carriers:
BEWARE

The standard homeowners policy is required by New Hampshire statute, RSA 407:22, to include a provision that if a claim is denied, the insured in a first party property damage claim has one year from the date of denial in which to bring suit. RSA 407:15 specifically requires the carrier to notify the insured of this deadline. It states, "Unless the company shall notify the insured that any action will be forever barred by law if his writ is not served on the company within 12

months next after such notification, he may bring his action at any time."

Carriers have been dismayed when I see their notice letters and tell them that they are probably not valid because of the wording used by the adjuster. Sometimes I see the policy language cited instead of the statute. Under New Hampshire law, the statute overrides the policy. The only safe way to do this, in my opinion, is to quote RSA 407:15 as above. Typically the carrier should give the reasons for the denial and then state as follows: New Hampshire statute, RSA 407:15, provides, "Unless the company shall notify the insured that any action will be forever barred by law if his writ is not served on the company within 12 months next after such notification, he may bring his action at any time." - then say: "This letter is your notification under the statute" and nothing further. If you with all good intentions try to explain what the statute means, the likelihood is that the insured will claim that he was confused to get around the statute.

Ken Bouchard

*We want to thank our clients
for the business they send us
each year, and we wish
everyone a happy and
prosperous new year.*

Supreme Court Declines Three-Prong Test to Determine Violation of Consumer Protection Act



The New Hampshire Supreme Court has declined to accept a three-prong test to determine what type of conduct violates the Consumer Protection Act, RSA 358-A, *et seq.* In State v. James Moran d/b/a Exterior Solutions, the Supreme Court considered the appeal of Mr. Moran, who had been convicted *criminally* under the CPA for taking payment for a vinyl siding job and never performing the work, despite repeated requests. The question posed was to determine what behavior offended the Consumer Protection Act if it did not fall into one of the enumerated categories set forth in RSA 358-A:2.

Mr. Moran argued that the case was not one that violated the Consumer Protection Act, but rather, a simple matter of breach of contract. He further argued that for his conduct to fall under the Consumer Protection Act's general prohibition of unfair and deceptive acts, it would have to satisfy the three-pronged test the Supreme Court had set forth in

Hughes v. DiSalvo, 143 NH 576 (1999): "To determine whether the Consumer Protection Act applies to a particular transaction, we analyze the activity involved, the nature of the transaction, and the parties to determine whether a transaction is a personal or business transaction."

The Supreme Court rejected this argument, finding Mr. Moran guilty of rascalous conduct. The Court held that the three factors set forth in Hughes v. DiSalvo were only intended to determine whether a transaction was business or personal. To determine if conduct is unfair or deceptive, the court reinforced the amorphous and ill-defined "rascality test"; that is, whether the conduct would raise the eyebrow of one inured to the rough and tumble in the world of commerce. The Court pointed to its decision in Milford Lumber v. RCB Realty, 147 N.H. 15 (2001) for the factors it considers applicable to the rascality test:

1) Whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise – whether, in other words, it is within at least the penumbra of some common-law, statutory or other established concept of

unfairness;

2) Whether it is immoral, unethical, oppressive, or unscrupulous;

3) Whether it causes substantial injury to consumers (or competitors or other businessmen).

Thus, in order for a breach of contract claim to also fall under the Consumer Protection Act it must include "conduct in disregard of known contractual arrangements and intended to secure benefits for the breaching party...or fraudulent representations in knowing disregard of the truth." While the rascality test still appears to be comprehensive in its scope, the Court has provided some guidance with respect to the difference between a garden variety breach of contract claim and the more formidable CPA claim. Many breach of contract claims are filed in tandem with a claim for a violation of the CPA, mainly because attorneys are seeking the double or treble damages and attorney fees that the CPA provides. Hopefully Moran will eliminate some of these claims and provide a vehicle for dismissal of others.

Nick Wright

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www.bestnhlaw.com
Your comments are greatly appreciated. Please e-mail us at:
news@bestnhlaw.com

Musings About UM Arbitrations



Jury awards, while perhaps not as predictable, are generally much less than awards issued by UM arbitration panels. It is difficult to explain why this is true, though one reason may be that panels are comprised of lawyers who are more accustomed to higher awards. Most insurance policies provide that a dispute as to the amount owed for UM will be determined by arbitration. The most standard method is that each party chooses an arbitrator and then the two select a “neutral” third. There is no requirement under New Hampshire law, however, that UM disputes be resolved by arbitration.

Metropolitan Property & Casualty Co. removed the standard arbitration clause from its policy and instead inserted a provision that arbitration will be held only upon written consent of both parties, and if one of the parties does not consent, then the insured must file suit in court against Metropolitan and the uninsured driver. This provision was upheld in the 2000 Supreme Court case of *Funai v. Met. Prop. Cas. Co.*, 145 NH 642. The Court affirmed that a party has an absolute right to a trial by jury (in cases exceeding \$1,500) unless there is a clear waiver.

Allstate Insurance Co. has a provision that either party is permitted to request arbitration, but if the award exceeds the financial responsibility limit (\$25,000), then either party may appeal for a trial *de novo* in the appropriate court. I recently had a case in which plaintiff’s counsel challenged this provision as void against public policy. Justice Abramson of the Superior Court followed the decision in *Funai*, and upheld Allstate’s provision.

It seems to me that in today’s climate of more stingy jury awards, insurers should seriously consider managing their UM exposure by removing the right to arbitration clauses. If anyone requires assistance in drafting a new provision for Department of Insurance approval, please feel free to contact me or email me at: pkleinman@bestnhlaw.com

Paul Kleinman

Office Efficiency



Those of you who are familiar with the workings of our office know that we are efficiency nuts. Our latest technology is a search engine based on Google. We now have a computerized index of our

entire database, which is comprised of all the letters, memos of law and *every* document we have sent out in *every* case we have handled, going back years, which literally is thousands of files. This means that if we have done a memo of law on a given topic, all we have to do is type in a few key words, and we can find it within minutes if not seconds. We can then open the document and use it. This means that our clients can get the benefit of research already completed on another case. This will result in us eventually getting rid of our central memo file, which contained a paper copy of such research, and was much more difficult to index and access.

Worker's Compensation Carriers

This is just a reminder that our copyrighted computer generated table of Diminished Earning Capacity is updated each year based on the state average earnings rate and is available free on our website at: www.bestnhlaw.com. You can download it anytime. However, if you prefer, you can call us and we will send a printed copy. It is approved by the Labor Department (in fact, they use it as well). It is a lot easier to use the table to look up the employee’s wage and immediately get the DEC rate than to calculate it manually.

Pre-Trial Motion Practice Helps Limit Damages in Hit and Run Law Suit

A mother stands and watches helplessly as her daughter is run down in a snowy road. The driver never slows down before the accident and never stops after the accident. While it sounds like a factual scenario destined for a big settlement, this was the case that Bouchard & Kleinman, P.A. took to a jury in October of this year.

A mother and daughter had slid off a road on a snowy day and had exited their vehicle to wait for help when the defendant's vehicle approached out of control. The daughter was struck and carried on the hood of the car for one hundred feet, eventually rolling off as the driver of the car sped away – later to be caught and arrested on felony charges by the police. The mother had watched the entire incident and had believed her daughter was dead for the moments she laid in the road motionless. Luckily, the daughter had received only non-life threatening injuries.

Both mother and daughter sued the defendant. The case involving the daughter was quickly settled but the mother's settlement requests were unreasonable and it appeared quite clear that the matter was destined for a jury. The mother claimed a host of psychological conditions including anxiety, depression and PTSD

(post traumatic stress disorder). Given that the fact pattern had the potential to inflame the passions of a jury, the defense's most strategic moves came before the trial even started.

Even though we are generally reluctant to admit liability, it worked to our significant advantage in this case. We then moved pre-trial to exclude any evidence of the defendant leaving the scene, as it was not relevant to the issue of damages and was otherwise highly prejudicial.

The admissibility of the defendant's conduct after the accident is a question that has divided results throughout the United States. Many states have held that since it occurred after the collision, which actually caused the injuries, it cannot be relevant with respect to either liability or damages. Other states, however, have held that the defendant's conduct after an accident is relevant because it shows a culpable frame of mind. Unfortunately in this matter, the New Hampshire Supreme Court had referred to the probative value of such evidence as it pertained to the defendant's frame of mind in Johnston v. Lynch, 133 NH 79 (1990). However, since the opinion only spoke of its admissibility in terms of liability, this argument was defeated by

admitting liability in this case and proceeding only on the issue of damages.

At trial the Court did exclude any evidence pertaining to the defendant's conduct after the accident on the basis that its probative value was outweighed by its prejudicial effect. The plaintiff then attempted to amend her Writ of Summons to include conduct after the accident as a separate cause of action. When that relief was denied the plaintiff attempted to take a voluntary nonsuit in order to re-file, as the statute allows, within one year and bring a new law suit that included a separate claim premised on the defendant's conduct after the accident. This relief was also denied.

During trial the plaintiff was an unimpressive witness. And while she had hired a Harvard-trained psychologist to explain her illnesses to the jury and relate them to the accident, his overall testimony was far too technical for the jury to fully appreciate. Indeed, they appeared bored.

The trial resulted in a jury verdict of \$4,000, significantly less than the initial demand of \$100,000. While the plaintiff had not made a good impression on the witness stand, the most significant contributing factor to limiting damages in this case was blocking the plaintiff in her attempt to make the defendant's conduct after the accident an issue at trial.

Nicholas Wright