

NEWS and VIEWS

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Fran DesRuisseux - The Woman Behind the Voice of Bouchard & Mallory

If you have ever called Bouchard & Mallory, you are already familiar with this phrase. But are you familiar with the woman behind the voice? Her name is Fran DesRuisseux and she is most definitely the voice of Bouchard & Mallory. Fran has been the receptionist for this firm since May of 1986. For 13 years, she has faithfully answered your calls, offered you a cup of coffee or tea, or conversed with you while you waited. For those of us who work here, Fran is our friend, our confidant, our conscience and our mother. This is our tribute to Fran and to those of you reading this article, it will give you a better insight into the woman behind the voice of Bouchard & Mallory.

Fran was born and raised here in Manchester. She has three sisters and a brother who also live in the area. Fran married her husband, Roger, in

1966, and stayed at home for eight years to raise her two sons and one daughter.

Prior to coming to Bouchard & Mallory, Fran worked as a service manager for a local grocery chain for eleven years. Fran sought employment in a less stressful environment. She had worked nights and week-ends as the service manager and with small children at home, she wanted a position that would give her the quality time that she needed with her children.

Fran interviewed with the office manager of Bouchard & Mallory and then sat down with Ken Bouchard, who hired her that day. I asked Fran if she had any regrets about the position at that time and she laughed and said, "I thought I had made a big mistake." Fran knew nothing about the legal industry. She didn't know what depositions or interrogatories were and found it very confusing when the

attorneys around her would dictate into their dictaphones. She kept getting up from her desk thinking they were talking to her. She recalls one phone call in particular during her first week at Bouchard & Mallory. Vincent Flewelling of Frontier Adjusters had called and asked to speak with the Silver Fox. Of course, Fran had no idea who that was and indicated this to Mr. Flewelling who remarked that she must be a new employee. Fran found out very quickly that Ken Bouchard was the Silver Fox!

Although the first few weeks were an adjustment for Fran, she settled in very well and began to understand the inner workings of a law firm. For Fran, this job is unlike any job she had before. She says that she does not wake up every morning and groan, "Oh no, not another day at Bouchard & Mallory!" She genuinely enjoys

her job and the people with whom she works.

When she is not at work, Fran's time is spent with family. She is a devoted mother to her three children who are all married and feels blessed to be a grandmother to her three granddaughters and one grandson, all of whom live close by. She enjoys knitting as a form of relaxation and throughout the years, she and her husband have traveled around the New England area on weekend getaways.

In November of last year, however, Fran's husband was diagnosed with lung cancer. It was determined to be inoperable. Roger began chemotherapy at the beginning of December and his last session will be at the end of March, 1999. The prognosis for Roger is still unknown, however, a recent CAT scan revealed that the tumors in his lungs had shrunk. Fran and her family remain cautiously optimistic and pray every day for a miracle. Roger will go for another CAT scan after his chemotherapy is completed and more will be known at that time.

Fran's life has drastically changed since learning of her husband's illness. She says that there is no long term planning anymore. She takes life a day at a time. "The little things that used to bother me are no longer important. I live each day as if it were a gift." Our thoughts and prayers are with Fran, her

husband and their family as they go through this difficult time in their lives.

Fran has been and will be for many years to come, a valued employee of Bouchard & Mallory. Fran is not just an employee, she is much more than that. She helps all of us through the day with her constant smile, her never-ending support and her motherly advice. For those of us who work at Bouchard & Mallory, Fran is our gift and we are blessed to have such a wonderful and caring person in our midst. Thank you, Fran. We love you!

**The Staff of
Bouchard & Mallory**

Worker's Compensation Diminished Earning Capacity Rates

When an employee is injured and entitled to worker's compensation, then receives a limited release to go back to work at some lower earning capacity job, he or she is entitled to a proportionately lower compensation rate. The calculation of this rate is complicated and depends on the federal minimum wage, the maximum compensation rate, the state's average rate, etc. Moreover, because these rates

change yearly, the calculation would have to be done yearly, incorporating the new figures. Because we handle worker's compensation cases, we had to do this calculation for our clients. Many years ago our office put this formula on a computer and published a Table of Diminished Earning Capacity. It was passed out at the yearly worker's compensation seminars and was relied upon extensively by those in the field. In fact, the Labor Department relies on our table and has referred questions to us.

Unfortunately, as a result of too many "vendors" wanting to pass out packets, we were told that we could no longer make the table available at the annual seminars. We did not have a current list of those in the field who would need these and would want our annual updates. We have decided to put the table in a loose leaf binder so that we only need to send annual updates rather than completely new packages (the data goes back to 1992 and the last edition contained 32 pages printed on both sides). This is an expensive project, but we are more than willing to give any adjuster a copy with annual updates.

If you or someone in your company would like a copy and would like to be put on our list for annual updates, please complete the post card attached to this issue of News & Views and so indicate.

NH Supreme Court Ups the Ante on Wrongful Death Cases

If the obscure expression "hedonic damages" didn't mean anything to you before, welcome to the New Hampshire Supreme Court's Brave New World of Damages. The court has just ruled that, under New Hampshire's wrongful death statute, the estate of the decedent can collect compensation for the decedent's "loss of enjoyment of life" - also known as hedonic damages. In the same case, the court also struck a blow to the state's \$150,000.00 cap on municipal liability.

Marcotte v. Timberlane /Hampstead School District, et.al. (N.H., February 9, 1999) is a case with a tragic beginning and an ugly end. Nicholas Marcotte was a second-grader playing during a school recess, when a soccer goal in the playground tipped over, killing him instantly. Investigation revealed that the goal had been designed by my client, Timberlane Soccer League. The league had proposed to the school district that it donate some soccer goals, in exchange for the right to play its league

games on school playgrounds. In the process, the league got a local business, Process Engineering, to donate the materials and labor to actually fabricate the steel goals. This set in motion a series of mishaps which eventually led to Nicholas Marcotte's death. First, the league's design of the goals made them too top-heavy. Second, Process Engineering then made them even more top-heavy. Finally, the school district ignored two incidents in the spring and summer of 1989, in which goals tipped over and students suffered minor injuries. The third tipping incident occurred on September 29, 1989, and it killed Nicholas Marcotte.

This case was tried all the way back in 1993. At that time plaintiff's counsel, Andrew Dunn of Devine, Millimet and Branch, was successful in persuading the trial judge to instruct the jury that, under New Hampshire's wrongful death statute, they could award the estate (which really meant his parents) damages for Nicholas' loss of enjoyment of his life. The estate could not present any expert testimony on what that value might be, but some testimony was allowed on Nicholas' hobbies, activities, etc. The plaintiffs did present expert testimony that the economic loss to the estate was a little over \$700,000. The jury eventually returned a verdict against all three defendants, for a total of

\$925,000. Therefore, it appears that they awarded a little over \$200,000 for the "hedonic damages".

Whether or not the New Hampshire wrongful death statute allows for hedonic damages has been a hotly debated issue for more than ten years, with trial court decisions going both ways. By the time this issue got to our Supreme Court for oral argument in the Spring of 1995, the debate was even hotter. Friend of court briefs were filed by a number of organizations, including the plaintiff's bar association and defense consortiums. In our brief, we contended that neither the language of the statute itself nor the way it has been interpreted for over 100 years provide for hedonic damages, and the Supreme Court should not overturn an interpretation of the statute which has held for that long.

The issue before the Supreme Court was strictly one of statutory construction. If the statute was "plain on its face" then the Court would just interpret its meaning; if not, then the Court would have to examine the legislative history of the statute, which was first enacted in 1887 and revised several times since. Nobody had found "hedonic damages" in the statute until more than 100 years after its enactment, and it was only in recent times that lawyers have been squabbling for years

about what it means. Therefore, all the defense lawyers were confident that the statute really was ambiguous - and the legislative history would have to be consulted. We were even more confident that anyone reading the history would have to conclude that the legislature never dreamed of providing such damages - so the plaintiffs would lose. Unfortunately, that is not what happened. The Supreme Court held that the statute plainly, on its face, provides for hedonic damages. (This probably would be very surprising to 100 years of legislators, judges and lawyers who didn't know that was what the statute said).

Just to make sure nobody missed the point, the justices also ruled that they would have reached the same conclusion from the legislative history. The court either didn't mention or glossed over many excerpts we had cited from various Senate and House debates (including quotes from prominent plaintiff's attorney Dave Nixon) which indicated in one way or another that nobody thought the statute had any such meaning.

After reading the court's decision (which is really a masterpiece of strained logic, in my opinion) Mark Mallory had an interesting question. If the statute has plainly said, for over 100 years, that plaintiffs can collect hedonic damages, why did all those plaintiff's lawyers

before the 1990's fail to plead them? Didn't they all commit malpractice? Can't they all be sued?

In any event, the Supreme Court wasn't done with its work for the day. (After all, the decision took almost four years to write; why not make the most of it?) After the verdict, Attorney Dunn, himself an insurance coverage expert, had tried to convince the trial judge that the school district's liability could not be restricted to \$150,000, the amount of New Hampshire's municipal liability cap. He relied on a portion of the statute (RSA 412:3) which provides that a municipality waives protection of the cap if it purchases higher coverage. In this case, the school district had a \$1 million policy, with another \$4 million umbrella. Therefore, he argued, the cap had been waived.

The school district responded that their coverage was not a waiver at all. In fact, they had purchased coverage for \$150,000. Then their policy provided that the additional coverage would apply ONLY to claims not covered by the cap (such as Federal civil rights actions) or ONLY if the cap were found unconstitutional (a real possibility). This seemed like a compelling argument to me - and the trial judge agreed. Unfortunately, Attorney Dunn found a more receptive audience in Concord. By a 3 to 2 vote-

and over a vigorous dissent by Justice Thayer and Chief Justice Brock - the court held that the cap was waived. Although this was good news for my client, the soccer league, I thought the court's logic was even more strained here than its reasoning on hedonic damages. If I didn't like that logic, think of the school district's poor underwriters, who reasonably believed they were setting premiums for a \$150,000 exposure and now learn that they were underwriting a \$5 million policy! And there are probably dozens of similar policies out there!

There are some unhappy lessons to draw from this case. First, wrongful death claims are now harder than ever to evaluate and defend. No expert can opine on what a person's life was worth. Suggestions that the decedent was leading an unhappy life would be risky to make to a jury. Awards could be very high or very low. Superior Court Judge McHugh tells me that in recent years he has routinely asked juries in death cases to make separate awards for economic loss and hedonic damages. He says that all the recent awards for hedonic damages have been ZERO. That's a very interesting observation - and Judge McHugh is a former plaintiff's lawyer. On the other hand, national studies have shown that

the typical award for loss of enjoyment of life is about \$150,000; but who is to judge what any given jury might do in any given case? However you look at it, this decision is going to make it much more difficult to evaluate these cases.

Second, insurers who write municipal liability policies had better review them carefully. Any attempts to limit coverage to the cap - if there is more coverage for anything else - are at serious risk.

Finally, we are again reminded that the New Hampshire Supreme Court is as hard to read as the entrails of an owl. After a decision like this one, you can't help wondering whether decisions are based on law and logic - or on the result a majority of the court wants to reach. If the latter is true, then our predictions can only be based on the personalities of the individual justices. If it's good legal thought you're looking for, our Supreme Court is not the place to find it. Ken Bouchard commented that, in terms of legal reasoning and response to good legal arguments, this decision ranks in our Supreme Court's Dirty Dozen. Nevertheless, we have to live with it.

Blake M. Sutton

1999 Legislative Updates

With any new year comes new goals, new resolutions, new beginnings, and most importantly for purposes of this article, new legislation. In the area of civil actions and litigation, there have been several changes to the law that became effective January 1, 1999.

! One such change concerns RSA 556:12, damages for wrongful death. A plaintiff may now bring an action allowing for the loss of a familia relationship where the decedent is either a parent for the loss of a minor child or a minor child for the loss of a parent. Damages allowed under this new section of the wrongful death statute cannot exceed \$50,000 per individual claimant.

! On a lighter note, both literally and figuratively, the maximum amount of damages that may be claimed in a small claims action has been increased from \$2,500 to \$5,000. RSA 503:1, I.

! The legislature has also changed the way in which juror lists are compiled. In accordance with RSA 500-A:1, IV, a master jury list is now a blended list of the voter list and the record of persons who hold New Hampshire driver's license or a Department of Safety

identification card - RSA 500-A:2 makes the master jury list, the voter list, and the Department of Safety list confidential documents only to be used by the Administrative Office of the Courts and trial courts for purposes of jury selection. RSA 500-A:6, III(b)(4) disqualifies a convicted felon from juror eligibility.

The 1998 legislature also repealed many exemptions that used to be allowed for otherwise qualified perspective jurors. For example, the Governor, Secretary and Treasurer of the State, judges, clerks of court, registers of deeds and probate, sheriffs, their deputies, attorneys, practicing physicians and surgeons, and firemen and policemen are no longer exempt from service.

The new law that became effective January 1, 1999 repealed certain exemptions merely rolling them into RSA 500-A:7-a listing juror qualifications. A juror must be 18 years of age or older on the first day of reporting for jury duty, must be a citizen of the United States and a resident of the county of the jury service, have the ability to read, speak and understand the English language, not be subject to any

physical or mental disability which would bar effective jury service and again, may not have been convicted of any felony which has not yet been annulled.

! In the employment and workers' compensation area of law, the legislature has changed paragraph I of RSA 281-A:48 which deals with the review of eligibility for workers' compensation. The legislature has added the language that "this section shall not apply to lump sum agreements, except upon the grounds of fraud, undue influence, or coercion." Thus, the legislature is limiting the review of either a denial or an award of compensation. No party of interest can now ask for a review with regard to lump sum agreements except if there is evidence of fraud or the like.

! Changes to the environmental laws in 1998 were extensive. However only a few became effective January 1, 1999.

For example, under RSA 482-A:26 and 27 relating to dwellings which extend over public waters, the law now requires any person reconstructing or repairing a dwelling over public waters to obtain a septic system approval.

Under RSA 107-D regarding the transportation of high level radioactive waste, the Department of Safety must coordinate and regulate the transportation of this waste by highway, water, or rail in this

state.

Enforcing oil spills under RSA 146-A:14, I and II, the powers of the Department of Environmental Services have been expanded to include violations of the law relative to oil discharge or spillage in surface waters or ground water.

! In the health law arena, there is an addition to the statute regarding quality assurance information of home healthcare providers. Under RSA 151:13-b, records of a quality assurance program of a home healthcare provider are confidential and privileged and shall be protected from any means of discovery. In limited circumstances, records may be produced. For example, the board of directors or trustees of a home healthcare provider may waive any privilege under this section and release the information. A program's records shall be discoverable in a legal action brought by a home healthcare provider to revoke or restrict a staff member's license or in a proceeding against a staff member which alleges repetitive, malicious action and personal injury. This statute actually became effective July 18, 1998.

! The new insurance laws for 1999 mostly affect health insurance. Two laws, however, are not strictly related to health insurance. These laws became effective in August, 1998. RSA 412:14-a effective August 25, 1998, deals with the use of credit reports, credit histories and credit

scoring models in underwriting and rating motor vehicle insurance. The law requires that the use of information contained in credit reports and the like for underwriting or rating purposes shall be based on objective, documented, and measurable standards and shall be used in a manner which affords appropriate consumer protections. The law leaves it up to the insurance commissioner to adopt rules under RSA 541-A to regulate the use of the information in underwriting and rating motor vehicle insurance. In RSA 414:4, IX, the legislature enacted a similar provision to RSA 412:14-a. Insurance companies may use credit reports and credit histories in underwriting and rating homeowners' insurance, subject to the same standards relating to motor vehicle insurance.

! Most of these laws that became effective on January 1, 1999 did not affect the way in which we currently practice. However, there are new laws affecting landlord/tenant actions which make these actions procedurally different from what they were on December 31, 1998. For example, a landlord can now request in the landlord/tenant writ up to \$1,500 of unpaid rent to be awarded in non-payment evictions. The district courts are just now refining the way in which we handle these actions and hopefully by April of this

year, the kinks of the new system will be finally worked out.

! In addition to the legislative changes for 1999, there are new court rules which affect the way in which we practice. In the superior and district courts, new rules affect interrogatories, motions for summary judgment, defaults, periodic payments, and motions for reconsideration. First, written interrogatories now require a statement on the first page of the interrogatories which state the principle requirements and procedures for interrogatories, sanctions and failure to comply. The rule changes can be found at Superior Court Rule 36, District and Municipal Court Rule 1.10(G). Bouchard & Mallory have already incorporated these changes before the new year.

As for motions for summary judgment, the Superior and District Court Rules now require both motions and responses to contain specific references to pleadings and other documents or exhibits. For example, page and line numbers must be included when citing to a deposition. These new rules can be found at Superior Court Rule 58-A and District Court Rule 3.11(A) and 4.18 (dealing with small claims).

Lynmarie Cusack

Stop All This JUNK MAIL!

In an effort to update and perhaps expand our mailing list, we would appreciate it if you would complete the enclosed post card. You can indicate whether you want your name kept on or taken off of our list, others who



should be put on the list, etc. You can also indicate if you or someone you know would like to receive our Diminished Earning Capacity Rate Table. We would be pleased to continue sending our newsletters to you and others who are interested, but we obviously don't want to bother you if you no longer need to read them.

Thanks!

New Hampshire Insurance Law Seminar

On April 16, 1999, Mark Mallory of Bouchard & Mallory will be one of four speakers at a one-day seminar on New Hampshire Insurance Law. The seminar is being held at The Courtyard in Manchester and is sponsored by Lorman Education Services. Registration runs from 8:30 a.m. to 9:00 a.m. Some topics include:

- * **Looking at different coverage**
- * **Declaratory judgments**
- * **Environmental claims**
- * **Employment claims and coverage**
- * **Automobile liability coverage**
- * **Uninsured motorist**
- * **Insurance bad faith**
- * **Ethical considerations**

For more information, please call Lorman Education Services at (715) 833-3940.

Bouchard & Mallory Defendant Verdicts



Anesthetic Malpractice Leading to Reflex Sympathetic Dystrophy - Or Psychiatric Disorder Leading to Chronic Somatization Disorder?

That was the issue presented in *Lecomte v. Ong*, which Mark Mallory tried to a defendant's verdict over ten days in July, 1998 in Hillsborough County Superior Court South. The plaintiff alleged that he had been the victim of medical malpractice when our client, Dr. DeKiam Ong, attempted to administer an interscalene nerve block for rotator cuff surgery on the left arm. As rather commonly occurs, Dr. Ong was unable to obtain complete regional anesthesia with the nerve block and had to use general anesthesia, for which informed consent previously had been obtained. Dr. Ong had to reposition the needle to locate the nerve during the attempted block, again a routine occurrence during this type of anesthetic procedure.

After his discharge from the hospital, Mr. Lecomte complained of severe arm pain, and

later complained of facial and tongue numbness splitting the midline, difficulty swallowing and a variety of related complaints. He attributed these problems to the failed nerve block and sued Dr. Ong. As the case progressed, so did his symptoms and the number of physicians from multiple specialties who attempted to diagnose the patient's disorder. Orthopedists, neurologists, anesthesiologists, pain management specialists and psychiatrists all became involved. As it turned out, the original rotator cuff surgery failed to reveal the torn rotator cuff that was finally repaired one and a half years after the initial procedure, though that did not cure the plaintiff's perceived chronic pain disorder.

He finally received a diagnosis of "reflex sympathetic dystrophy" (a.k.a. "complex regional pain syndrome"), which several of his doctors were willing to attribute to the failed nerve block.

Aggressive discovery of the plaintiff's prior medical and psychological records revealed that he had a twenty-year long history of chronic pain pro-

blems, depression and anxiety, which his own primary care physician had diagnosed as a somatization disorder. With the extraordinarily able assistance of Dr. George Battit, Senior Anesthesiologist at Massachusetts General Hospital, Dr. Richard Levy of Exeter, a neurologist, and Dr. Albert Drukteinis of Manchester, a forensic psychiatrist, we defended with the theory that not only was there no departure from the standard of care during the administration of anesthesia, but the plaintiff's pain syndrome was psychogenic in origin, not the result of Dr. Ong's "needle sticks."

Defending the case required Attorney Mallory to become an expert on the subject of reflex sympathetic dystrophy (RSD), which he accomplished with the help of our nurse/paralegal, Sara McNeil, RN. This can be a diagnosis with a genuine organic basis, unlike some other recently popular diagnoses like fibromyalgia. However, RSD, like fibromyalgia, is seen disproportionately in patients with prior psychiatric and chronic pain histories. The medical literature we relied on supported the opinions of our three experts that the plaintiff in all likelihood fell within the category of patients with a "psychogenic pseudo-neuropathy"-- in other words, a psychiatric disorder masquerading as a neurologic disorder through

the process of somatization.

The plaintiff's liability expert, an anesthesiologist from New Jersey, had considerable difficulty identifying exactly what Dr. Ong supposedly did during the procedure that he should not have done. Judge Sullivan refused to instruct the jury on the doctrine of *res ipsa loquitur* under that facts of the case. Plaintiff's counsel, Steve Maynard, made a last ditch effort to claim that, because of his client's preexisting cervical arthritis (which had not been disclosed to Dr. Ong by the patient), the interscalene nerve block should not have been attempted in the first place.

After about a half-day of deliberations, the jury found that Dr. Ong had not violated any applicable standard of care in his treatment of the patient and returned a verdict in his favor.

Anesthetic Malpractice Leading to Brachial-Plexopathy - or Just Bad Luck?

Coincidentally, Mr. Mallory tried another case involving a claim of anesthetic negligence in September, again in Nashua. The plaintiff was admitted to the hospital for colon resection surgery. General anesthesia was administered by Dr. Rebecca Kadish, with the assistance of a nurse anesthetist who was a co-defendant. When the patient awoke from the

procedure, he was pleased to hear he did not have cancer, but disappointed to find that he had numbness, weakness and loss of motion in his left arm. In this case, objective neurological testing confirmed that a nerve injury had occurred "peri-operatively." The plaintiff sued, claiming through his expert that such injuries do not occur in the absence of negligence.

The plaintiff's expert, Dr. Mervin Jeffries of Washington, D.C., testified that brachial plexopathy such as manifested by the patient almost always results from positioning the patient's arm at an angle beyond 90 degrees from the body, thus stretching the nerve. Neither Dr. Kadish nor the CRNA had any specific recollection of the procedure, but testified that neither would permit the operation to proceed had the arm been so positioned. They were permitted to testify about their routine practices in similar circumstances pursuant to Rule of Evidence 406.

Dr. Jeffries, who has testified on behalf of plaintiffs in more than 100 malpractice cases, had no medical literature to directly back up his position. The defendants' expert, Dr. Robert Stoelting of Indianapolis, Indiana, a leading authority in the field, supported his position with a series of peer reviewed studies supporting his testimony that intraoperative nerve injuries occur with some frequency even

when proper padding and positioning have been documented.

The jury deliberated approximately three hours before returning a verdict in favor of both defendants.

Did the Ladder Break and Cause the Plaintiff to Fall - or did the Plaintiff Fall and Cause the Ladder to Break?

This is the question that typically arises in product liability cases brought against ladder manufacturers and the case of *Iller v. Lynn Ladder Company* was no exception. Mr. Iller had been stringing Christmas tree lights on a pine tree in his yard, working from a six foot wooden step ladder. According to Mr. Iller and his next door neighbor, who was standing at the base of the ladder, the lower part of one of the front rails simply broke underneath him, causing him to fall to the ground and injure his back. He later had surgery for a herniated lumbar disc.

Plaintiff's expert wood technologist testified that the rail in question was made of sub-standard Pacific fir rather than of hemlock, as advertised, and that this allowed it to fracture under normal use conditions. However, he admitted that the fracture was an "inward" fracture at the first step, which had to involve significant lateral force, rather than just down-

ward force. He could not explain where that lateral force came from and was forced to admit that some tipping of the ladder occurred before the rail broke.

Our expert, Dr. George Kyanka, a professor of mechanical engineering and wood products technology at the State University of New York at Syracuse, testified that the rail in question was perfectly acceptable under the ANSI standards for the manufacture of wooden ladders, falling within the "Hem-fir" designation and meeting the strength and dimension requirements of the code. Moreover, Dr. Kyanka convincingly demonstrated that sufficient lateral force to break the ladder could not occur without it being tipped past the point at which its user was already falling off it!

The plaintiff, who had pre-existing back problems, did not seek immediate medical care and thereafter treated sporadically for several years before receiving the diagnosis of a herniated disc for which surgery would be required. The treating orthopedist made the causal connection between the ladder accident and the need for surgery. Our consulting neurosurgeon, Dr. James Wepsic of Boston, testified that the accident could only be considered a temporary aggravation and that the need for surgery was a result of the

natural progression of the underlying degenerative process. The plaintiff's credibility on this subject was not helped by the fact that he had not disclosed to any of his doctors a fall down a flight of stairs while moving a freezer, which occurred after the ladder accident and before his surgery. At trial, Mr. Iller did not dispute the notes of the therapist who recorded the later mishap but testified he simply had no recollection whatsoever of the event!

The jury deliberated only briefly before returning a defendant's verdict and Mr. Mallory enjoyed an undefeated 1998 jury trial record.

New Case Updates

Pike Industries, Inc. & a. v. Hiltz Construction, Inc. **No. 95-850, (N.H. September 24, 1998)**

The plaintiffs filed an action for contribution following a liability settlement for a personal injury. In 1991, a dump truck operated by Pike was waiting to enter a dump site operated by Hiltz. Due to muddy conditions, a back up of several trucks had occurred. The trucks waited in the road and the Pike truck, then at the end of the line,

proceeded to pass the line of parked trucks and eventually stopped. Lila Shores, the driver of an oncoming car, collided head on with the stopped truck.

Shores sued Pike for injuries sustained in that collision. The plaintiffs settled the case by paying Shores \$175,000.00 in exchange for Shores releasing the plaintiffs and Hiltz from any liability. Hiltz was not a party to that action. The plaintiffs then brought the instant action seeking contribution from Hiltz for Hiltz comparative share of fault in causing the action.

After a hearing on the merits, the trial court found Shores 30% liable, Pike 40% liable, and Hiltz 30% liable for the accident. The court found the settlement entered between the plaintiffs' and Shores to be reasonable and calculated that the total value of the case was \$250,000.00. The court reasoned that the settlement amount was consistent of the total value of the case, in light of Shores being 30% at fault. Where the settlement was \$175,000.00, the court reasoned that \$250,000 would represent the fairest assignment of the total value of the case and the court awarded the plaintiff \$75,000 representing Hiltz 30% share of liability of the case worth \$250,000.

On appeal, Hiltz argued that the trial court erred by raising theories of liability not disclosed in pretrial pleadings and that the

court applied an improper methodology in calculating damages. The Supreme Court affirmed. On the issue of pretrial pleadings, the court simply ruled that Hiltz did have notice based upon a summary statement that had included allegations that Hiltz had control of the dumping site and failed to provide adequate traffic control. The more interesting issue, however, dealt with the court's assessment of the value of the case and a computation of damages. On that issue, Hiltz argued that the term "obligation" contained in RSA 507:7-f, I, the contribution statute, in the context of parties who have entered into settlements, must refer to the settlement amount. The trial court considered the settlement amount of \$175,000, but calculated that, because Lila Shores was 30% at fault, the total "obligation" was \$250,000. The settlement, thus, represented \$250,000, reduced in light of Shores having been 30% at fault.

The Supreme Court ruled that the trial court having decided that the amount paid in settlement was reasonable, and having assigned fault to the parties, properly reasoned that the settlement amount accounted for Shores share of fault and was reduced accordingly. Thus, the Supreme Court reasoned that the logical result was that the full "obligation"

was \$250,000 and affirmed the trial court's decision.

Shaheen, Capiello, Stein & Gordon, P.A. & a. v. The Home Insurance Company
No. 96-118, (N.H. September 30, 1998)

The plaintiff law firm had formerly represented a client in executing a prenuptial agreement. The agreement omitted a provision that would have provided for the dissolution of jointly held property. In September of 1990, the client sought legal advice from the plaintiff for impending divorce proceedings. The plaintiff discussed the possibility of successfully arguing that even without the admitted provision, the client was entitled to sole ownership of the marital home under the agreement.

In November, 1991, the plaintiff applied for renewal coverage of professional liability insurance from the defendant. In response to the question whether it was aware of "any incident, act, or omission which might reasonably be expected to be the basis of a claim or suit arising out of the performance of professional services," the plaintiff failed to disclose the divorce action.

The prenuptial agreement was later found not to cover the disposition of the marital home. In October, 1992, one month after the ruling and 18 months after the plaintiff first learned of

the potential problem, the plaintiff notified defendant of a potential claim. The defendant denied any obligation to provide coverage to the plaintiff, claiming that its notice in October of 1992 was untimely. The Superior Court granted the plaintiff's petition for declaratory judgment and the defendant appealed.

The Supreme Court affirmed. The court held that the provision requiring insureds to report any incidents which could "reasonably be expected" to form the basis of a claim or suit is ambiguous, and construed it as imposing a duty on the insured to exercise its professional judgment in reporting potential claims.

Appeal of HCA Parkman Medical Center
No. 97-093, (N.H. October 14, 1998)

In this workers' compensation case, the respondent was injured in 1993 while working nights at the petitioner hospital in Derry, New Hampshire. At that time, the respondent was also employed by Mathison Higgins Congress Press in Woburn, Massachusetts. He initially received benefits based on the average weekly wage earned at both employers. The petitioner sought to reduce the re-spondent's benefits to reflect wages earned solely in New Hampshire. A compensation appeals board

denied that request.

The petitioner appealed and the Supreme Court reversed, holding that under RSA 281-A:15, III, the Massachusetts employer was not "subject to" the workers' compensation statute and therefore the respondent's earnings in Massachusetts could not be included in the calculation of average weekly wage.

Appeal of Eugene Brown, No. 93-505; 96-60, (N.H. November 4, 1998)

In another workers' compensation case, the employee appealed a decision of the compensation appeals board dismissing his workers' compensation claim on the basis of defective notice. He also requested that the court grant a motion for attorneys' fees associated with a prior appeal to the court.

The Supreme Court reversed and remanded the case to the board, holding that the board erred in finding that the employer was prejudiced by the employee's late notice of injury. The court held that, as a matter of law, the employer could not claim prejudice when the employee had reported his injury in accordance with reporting procedures established by the employer.

The Supreme Court also held that an employee prevails on appeal to either the board or the Supreme Court, and thus is

entitled to collect attorneys' fees under the workers' compensation statute, when the employee secures a legal right or financial benefit on appeal greater than the employee had received prior to the appeal. The Supreme Court also set forth the proper procedures to apply for attorneys' fees on appeal to both the board and the Supreme Court. The two-step process to determine an award of cost and fees is: (1) whether the claimant prevailed and is entitled to fees and costs under the statute; and (2) whether the amount of fees and costs requested are reasonable.