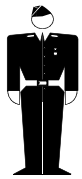


NEWS and VIEWS

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Mark Mallory Returns to Active Duty: First Two Cases are Winners



We are pleased to report that Mark Mallory has returned to full-time status following his wife's apparently successful - if nightmarish - treatment for a rare and very aggressive form of breast cancer. Our thanks to all of you who lent your support and prayers and patience to Mark and his family.

Mark's re-entry to active trial practice was marked by two back-to-back trial victories the last week of May and the first week of June.

Ripple v. Toys R Us

In the first case, Mark assisted Attorney Christine Friedman in the trial of *Ripple v. Toys R Us* in Merrimack County Superior Court. This

was a fascinating and very dangerous case involving a 15 year old boy who had developed a severe and debilitating condition of chronic daily headache following an accident at Toys R Us at the age of ten, when a number of 5-6 pound boxes of building blocks had fallen from a height of 12', several of them striking the boy on the head. Liability was admitted.

The central issue in the case was that of medical causation. The plaintiff, Kevin Ripple, had an unusual immune deficiency disorder that began to be treated with gamma globulin infusions at the age of nine. In the several months before the Toys R Us accident, Kevin had begun to experience abnormal post-infusion headaches of progressively lengthening

duration. After the accident, the boy experienced about ten days of mild and intermittent headache, followed by a severe two week headache after his next infusion. This led to his first referral to a pediatric neurologist specializing in headaches. He was treated for migraine, initially successfully, then developed a sinus infection several months after the accident. A severe headache occurred at around that time - and never went away to the date of the trial five years later!

The plaintiff was evaluated and treated by a host of physicians, including two world renowned headache specialists in Connecticut, who hospitalized the boy for about a week ten months after the accident. Unfortunately, even that did not improve his

condition. The case went into suit just as the three year statute of limitations on the parents' claims for reimbursement of medical bills was expiring. Plaintiff's counsel was not initially successful in obtaining an expert opinion on the issue of causation and only located such an expert - an osteopath - on the eve of the trial that was originally scheduled for mid-1998. The plaintiff was able to obtain a continuance and expert discovery began in earnest. It was at this point that Attorney Friedman stepped in to the breach and assumed the role of lead counsel, responsible for all of the discovery depositions and retention of defense experts.

By the time of trial, plaintiff's counsel had not only the osteopath, but the two renowned headache doctors from Connecticut on board for the effort to link the chronic daily headache to the accident, despite the fact that they had never made a diagnosis of post-traumatic headache throughout their course of treatment. Christine retained a prominent pediatric headache specialist from New York, as well as Dr. Rick Levy, a neurologist from Exeter, New Hampshire.

After a week long trial, the jury returned a verdict of

\$20,000.00 for Kevin Ripple, an entirely satisfactory result. Christine did all the heavy lifting, but appreciated Mark's assistance in cross-examining the osteopath and delivering the closing argument. (The osteopath, who "practices in the cranial field," testified that he could palpate the existence of "sheering forces" through the plaintiff's skull that led him to conclude that he had sustained a remote trauma!) Perhaps the most telling piece of evidence for our defense was the emergency room record from several hours after the accident which indicated that the plaintiff, who did have a lump on his head and a headache at the store, was not reporting any ongoing symptoms. In the end, the jury simply could not accept that such a relatively minor trauma could lead to the type of near catastrophic injury claims advanced by plaintiff's counsel.

Morin v. Heney

With *Ripple* out of the way, Mark Mallory proceeded directly to the next field of battle, Belknap County Superior Court, where he defended the case of *Morin v. Heney*, a rear-end motor

vehicle accident in which Ms. Heney admitted that she had run into the rear of the plaintiff's vehicle, at a very low speed, when her foot slipped out of her clog. There was no physical damage to either car. However, the plaintiff went immediately to the emergency room with mid and upper back complaints, which spread to her lower back the following day. The plaintiff had been diagnosed eight years earlier with a herniated disc at L4-5, though surgery had never been recommended she had a chronic course of intermittent flare-ups and sporadic treatment, with the last extended course of treatment some three years before the motor vehicle accident. Following the accident, she underwent a course of physical therapy, but ended up having surgery four months after the accident for what had become unrelenting radicular symptoms. Her treating orthopedist, Dr. Arnold Miller of Laconia, offered an opinion that the surgery was necessitated by the exacerbation related to the auto-mobile accident.

Mark retained Dr. James Wepsic, a consulting neurosurgeon in Boston, Massachusetts, who testified that the automobile accident could not reasonably be

related to the necessity for surgery. Dr. Miller testified by videotape deposition, falling prey to a cross-examination that demonstrated a fatal lack of familiarity with the medical records. The physical therapy records following the automobile accident indicated that the plaintiff had apparently recovered completely within two months thereafter. Then, buried in the records was an indication that the plaintiff had reinjured herself when she was picking up one of her children who was in the midst of a temper tantrum. Dr. Miller was forced to admit that this was a significant history of which he was totally unaware prior to the questions being posed on cross-examination.

Dr. Wepsic, on the other hand, demonstrated a complete mastery of the medical records and was a highly credible and convincing witness in refuting the claim that the low speed accident was a significant factor leading to the plaintiff's surgery. He particularly emphasized the fact that there were no severe or long lasting radicular symptoms reported by the plaintiff until more than three months after the accident -- and indeed a month after the "re-injury" involving the temper tantrum.

In closing, Mark argued

that it was for the jury to determine whether the fact that the defendant's foot slipped out of her clog rose to the level of negligence -- the failure to act reasonably to guard against a foreseeable risk of injury. The jury took less than 20 minutes to answer that question in the negative and render a defendant's verdict. This is the type of case in which the defeat of the plaintiff's injury claims in all likelihood made the jury's finding on liability possible.

Workers' Compensation

For those of you who handle workers' compensation cases regularly, you know that our Supreme Court takes a very active role in this area. The result often is that the workers' compensation rules change overnight with each decision. There have been several recent New Hampshire Supreme Court decisions that have potentially broad reaching effects for workers' compensation carriers. The first is *Appeal of CNA Companies* which was decided by the Supreme Court on December 30, 1998. For those of you who are familiar with

workers' compensation, you know that the Legislature has created a second injury fund. The purpose of the fund is to encourage employers to keep employees whom they know have an injury and to hire those who have had a previous injury. There are some procedural requirements that have to be met for making an application to the second injury fund. However, as long as those procedural requirements are met and the employee goes on to have a subsequent disability which results in liability that is substantially greater because of the combined effects of this injury and the previous one, the carrier can make an application for reimbursement from the fund. It can provide substantial relief to a carrier where an employee goes on to have a subsequent injury. This new decision broadens the situations where a carrier can make an application for reimbursement to the fund. In the *CNA* case, the employee had a knee injury in April of 1985. He had treatment for the injury and returned to work. On September 9, 1985, the employee lifted something which caused his knee to give out. When that happened, he fell backwards causing a back injury. The workers' compensation carrier for his employer

made an application for the second injury fund on account of this subsequent back injury. Initially, the state refused to make the reimbursement which is why the case was litigated up to the Supreme Court. Ultimately, the Supreme Court decided that a carrier may receive reimbursement from the fund in a situation like this even though the State made the fairly strong argument that this is really the same injury because it all stemmed from the original knee condition. The Supreme Court held that the statute did not require a new and discreet injury before reimbursement becomes possible.

This decision gives the potential for second injury fund reimbursement in a significant number of cases where an employee starts off with an injury and because of that injury some further disability results. One context might be a repetitive use injury to the right arm which because

of compensation might result in an overuse injury to the left arm. It is easy to imagine many other scenarios which, for the time being, will allow carriers to seek reimbursement from the second injury fund.

The second case is *Appeal of Paul Rainville*. I was counsel for the carrier on this case which was decided on February 8, 1999. This case has two potentially serious consequences for workers' compensation carriers. The first is in the realm of medical benefits under RSA 281-A:23. Before this Supreme Court decision, when a carrier lost a Department of Labor hearing and sought an appeal before the Compensation Appeals Board, the carrier was required to pay weekly benefits while the appeal was pending but was relieved of payment of the medical bills to medical providers. In all but the most extraordinary circumstances, therefore, those medical bills did not have to be paid while the appeal was pending. This was long the practice of the Department of Labor. In the *Rainville* case, while the carrier lost on the issue of medical bills at the first level, I ultimately prevailed on appeal to the Compensation Appeals Board which ruled that certain bills were neither reasonable nor

medically necessary. The carrier, therefore, did not have to pay them either before or after the appeal.

Claimant's counsel took an appeal to the Supreme Court on this issue among others. As was clear from the oral argument, the Supreme Court seemed to be anxious to overturn this longstanding rule. Indeed, that is what happened. The Court held that the Department of Labor has been misinterpreting its statutory mandate for all of these years and now requires payment of medical bills while the appeal is pending unless there is a specific stay of these bills issued by the Department of Labor. In this case, it yields a completely unfair result since the Supreme Court went on to affirm the Compensation Appeals Board ruling that the bills were not necessary! The only good news that we can draw from this decision is that so far the Department of Labor seems to be granting stays of the medical bills as soon as a case is appealed. However, the burden is now on the carrier to request such a stay.

The other aspect of this decision which will likely have a significant impact on carriers is in regard to the award of permanent impairments under RSA 281-A:32. In this case,



the claimant has a condition which his own doctors have found very difficult to diagnose and treat. After a great deal of testing and a variety of types of treatment, his ultimate diagnosis is myofascial pain and complex regional pain syndrome (formerly known as reflex sympathetic dystrophy or "RSD"). His treating doctor opined that he was entitled to an 18% permanent impairment award although he did not specifically use the AMA guidelines in arriving at this number. He did attempt to rely on them by using a certain chart for the rating of upper extremities. However, on cross-examination he admitted that the claimant did not have any of the conditions listed on that chart.

I won on this issue both at the first level and at the Compensation Appeals Board, primarily on the treating doctor's misuse or lack of use of the AMA guidelines, reference to which is required by statute. The Supreme Court seems to be loosening that statutory standard, however. It ruled that doctors can use their medical judgment to rate an employee for a permanency even if the guidelines would not specifically give a rating for such a condition. While the Supreme Court goes on to

caution treating doctors not to misuse this judgment, it certainly has the potential to open Pandora's Box.

Finally, in *Appeal of Wausau*, decided on April 13, 1997, the Court seems to have refined how it will treat cumulative trauma cases, which becomes an issue if the employee changes jobs or if the employer changes carriers as the condition develops. In *Wausau*, the Court held that where an employee is having symptoms and treating for those symptoms, the "injury" does not begin until the claimant suffers a loss in earning capacity - loses time for work.

The question looming on the horizon, which will have to be decided in a future case is whether the "injury" might begin when the claimant's job has to be modified because of the condition. Often this happens well in advance of losing time from work. Since the Supreme Court uses the phrase "earning capacity," it is something I expect will be argued by the carriers on the losing side of this bright line rule.

As I see it, the common thread running through these decisions is that our Supreme Court is very active in the area of workers' compensation and we must all be watchful of

their decisions. They can dramatically change overnight how these cases are handled.

Chris Friedman

OFFICE NEWS

Have you noticed our new letterhead? First, we have begun using the firm logo on our letterhead. Our old letterhead didn't look bad until you put it next to the new one. We hope you enjoy the new look.

Second, you will note the addition of the firm of Mittelholzer and Ferrini, with whom we have become associated. Bob Mittelholzer has been a sole practitioner for a number of years after having been trained at Ouellette and Hallisey in Dover. His firm does insurance defense work for a number of carriers. He also has developed a niche in handling large subrogation and third-party recovery actions. He is a strong believer that many subrogation and recovery actions in workers' compensation and other areas go unnoticed and are insufficiently developed. He has had notable success in developing this line of business

for some insurance carriers. He and Tom Ferrini are now associated with us in an informal relationship. They will be moving the primary site of their practice from Dover to Hampton. As a result, we will be taking over and renovating the entire building at the location of our Hampton office.

Another development is that Paul Kleinman will now be primarily located in the Hampton office as well. All of this means that we will be able to handle more cases of any complexity from the Hampton office. As you know, the Seacoast region is the fastest growing part of the state, and we are ready to service that increasing population.

Because of the demand for our services, we are expanding at a time when many insurance defense firms or departments are contracting. We believe that we will continue to grow with the business, but we will never lose our ability to respond quickly and in a personal way.

If you have been having problems communicating with us by email, please accept our apologies. We have had an ongoing problem with our service provider which resulted in internal email being fine but external email being spotty, especially on the

receiving end. We have had to threaten suit and replace much hardware and software. They tell us it is now solved, but if you email us and don't get a response, please call and ask why. Your message may be one that is lost in the nether nether land of electronic bits and bites.



"If the jumper cables don't work,
I'll pour in some more anti-freeze."

Similarly, we experienced a lot of problems with our aging telephone system which has finally been replaced with a new system of advanced design, automatic voice mail, etc. We hope you like the new system.

New Hampshire Jury Verdict Survey

We have just received the Jury Verdict Research statistics for 1999, based on verdicts in the state between

1993 and 1998. The results are rather interesting. For motor vehicle accidents, the recovery probability (the percentage of verdicts for the plaintiff) was 57% and the median award was \$27,750. However, this was skewed by a few very large verdicts, the highest being over \$2.4 million. Back and neck injuries had a median award of \$15,000.

Reflecting New Hampshire jurors' attitude that it gets snowy and icy in the winter, the recovery probability for slip and fall actions was only 30%. The median award was \$55,000, again skewed by a large verdict in excess of \$2 million.

Medical malpractice cases faced a recovery probability of 36%, with a median award of \$435,000. The occasional large verdict really makes all of these median awards not very meaningful.

Surprisingly, verdicts in New Hampshire were 2% *above* the national average for cases with similar injuries and specials. Carroll and Belknap counties were 6% above, while the other counties were 2% or 1%. More significantly, the recovery probability in New Hampshire was 44% overall as compared to a national average of 50%.

It must be remembered that

these figures were compiled over a six year time period. It has been the common experience of litigators that recent years have been much better for defendants. For example, in Hillsborough County South in Nashua, there have been 14 verdicts so far in 1999, and only four for the plaintiff, two of which were for \$4,000 and \$1,750. In 1998, plaintiffs won 5 out of 17. I serve as a superior court mediator and in Nashua they give you these statistics to remind plaintiffs that a trial is not statistically wise.

However, there are some signs that this wonderful trial environment may be tilting a little bit in favor of plaintiffs. The judges seem convinced that they have to help plaintiffs out. They have been making rulings so as to encourage defendants to settle. I sit on a superior court committee whose purpose is to suggest rewriting of some of the standard jury instructions, and I believe the committee was set up to make the instructions more favorable to plaintiffs. While I am fighting to maintain a defense perspective, it is not an easy battle.

In addition, as of January 1, 1999, a new method of selecting jurors was instituted. Historically, the jurors were selected by the town clerks

from the voting lists. The panel would be stuffed with elderly retired people, who invariably didn't like to give away a lot of money. A number of years ago the system was changed to select from the motor vehicle registration list. That resulted in jurors as young as 18 and a group, as a whole, who didn't show the same respect for the court system. Girls in tank tops and boys in jeans began showing up. The juries simply didn't spend the time to deliberate hard issues, and just didn't seem to care. I had one jury where we had to excuse a member because she was showing clear signs of alcohol consumption, and several other jurors we had to excuse for napping. The judges and attorneys were not happy - after all, what can deflate an attorney's ego more than a juror napping through their dramatic cross-examination!

The verdicts were unpredictable. The number of defendant's verdicts increased significantly, especially on small cases, but there was the occasional multi-million dollar verdict that no one could understand. Beginning this year, the panel was chosen from a blended list of both motor vehicle registrants and voter registration. In addition, the excuses for not serving as

a juror have all but been eliminated. It is too early to tell whether this will change the verdicts, but some judges report that the jurors are more intelligent and alert.

On a positive note, the new Commissioner of Insurance is Paula Rogers. I know Paula well, and she was previously a lobbyist for State Farm, among others. While I expect her to be fair to all, at least we now have someone in that position who understands the administrative burdens faced by carriers in the state. She also might be less likely to get the insurance department involved in disputes generated by irate plaintiff's lawyers dissatisfied with low or no settlement offers.

Kenneth G. Bouchard

Who's "on" First?

The battle between automobile carriers over who has excess and who has primary coverage in a "loaner" situation has been going on for years. A recent case at Bouchard & Mallory has caused this issue to be revisited prompting this re-examination of who's "on"

first in New Hampshire when both carriers' policies declare that their coverage is excess.

A fact pattern that illustrates the issue is as follows: the defendant brought her car to the shop for repairs. She was given a loaner car by Friedman Auto Leasing that was insured by Bouchard Insurance Co. While commuting home from work, the defendant was involved in a car accident striking and killing a bicyclist and was thereafter sued by decedent's estate. Prior to the date of the accident, Bouchard Insurance Co. issued a policy to Friedman Leasing that provided under its "other insurance" clause that if a Friedman vehicle was in the care and control of someone else, the liability coverage would be "excess." However, the defendant's personal auto policy, issued by Sutton Insurance Co., also had an "other insurance" clause stating that when an insured operated a temporary substitute car, Sutton's insurance coverage would be excess over any other collectible insurance. Thus, both Sutton and Bouchard purported to make their policies "excess" over the other insurance.

This precise issue has been decided by the New

Hampshire Supreme Court in the case of *Universal Underwriters Ins. Co. v. Allstate Ins. Co.*, 134 N.H. 315 (1991). In *Universal*, the Court was confronted with an almost identical fact pattern as set forth above. Universal insured the leasing company and Allstate insured the defendant. In *Universal*, Allstate declined to provide primary coverage and refused to participate in settlement of the claim. Universal filed a declaratory judgment action seeking pro rata indemnity from Allstate for both indemnity and cost of defense. The trial court ruled that the "excess" clauses in both policies were mutually repugnant and that each insurer was liable for a pro rata share of the settlement. Allstate appealed, arguing that Universal's risk under an "excess" policy was minimal and violated the Financial Responsibility Act (RSA 259:61).

The Supreme Court agreed with Allstate, declaring that Universal's excess clause violated the mandate of the Financial Responsibility Act which prescribed a minimum coverage for any one person of \$25,000. The Supreme Court rejected Universal's argument that its "excess" language was permissible because it operates to derive

benefit on the policy at the expense of Allstate and not its insured. In so doing the Court reasoned that the purpose of the Financial Responsibility Act is to provide protection to individuals and parties to a contract who may not by agreement limit the required coverage under the law. As such, a provision, such as an "excess" coverage clause which conflicts with the Act cannot be valid, at least up to the minimum limits of liability provided by the Act. Accordingly, the Supreme Court ruled that Universal had to provide primary coverage to the defendant, up to \$25,000, the minimum limit under the Act. Once that limit was met, it was permissible for Universal to make its coverage "excess."

But what happens now with two conflicting "excess" clauses by Allstate and Universal? Well, the Court ruled that the "excess" coverage provisions were mutually repugnant, should be disregarded, and each insurer would be liable for its pro rata share of a settlement based on the policy limits. Moreover, the Court held that an insurers has a duty to defend whether its coverage is primary or excess and ruled that both companies had a joint obligation to defend the

insured and share equally in the costs of doing so.

The above makes it clear that in New Hampshire, the company that insures a loaner vehicle will be considered primary at least up to \$25,000. After that, if two "excess" clauses exist, the costs of indemnity and defense will be shared on a pro rata basis. This is critical for insurers to keep in mind when accessing and valuing a bodily injury or wrongful death case that involves "loaner" situation and "excess" coverage clauses.

Stephen A. Duggan

NH Supreme Court Delays Cause Concern



In a recent article published by The Union Leader on June 16, 1999 entitled "NH Supreme Court Attracting Criticism for Decision Delays" by Nancy Meersman, Kenneth G. Bouchard and Blake M. Sutton of Bouchard & Mallory voiced their opinions regarding the lengthy time

frames for the New Hampshire Supreme Court to issue decisions. Three to four year-old appeals waiting to be decided are not uncommon for the Supreme Court. However, Supreme Court Clerk Howard Zibel says that they are "rare."

"We do have cases here over a year, but most are resolved in a reasonable time given the volume," stated Zibel.

In the landmark decision of *Marcotte v. Timberlane*, all parties, including Blake Sutton, attorney for Timberlane Soccer League, waited five years for a decision. "I really do not understand why it would have to take that long," voiced Sutton. "There comes a point where it's just too long." Kenneth Bouchard commented, "It seems the court is overloaded with just too many cases on appeal, and this needs to be addressed." Ken continued, "I don't think it's a matter of lazy judges or inefficient court procedures, it's a matter of not having the resources."

Recent Case Decisions

Property Carriers

The case of *Hacking v.*

Town of Belmont (May 14, 1999) is worrisome. The plaintiff was a participant in a basketball game against a Belmont team. She alleged that the town and its coaches and referees allowed the game to get out of control. She was twice knocked down and Belmont players stepped on her leg, resulting in injuries requiring surgery. The town, on behalf of all defendants, raised the doctrine of municipal immunity and raised the volunteer immunity statute, RSA 508:17, claiming that the town could not be held liable for actions taken by the volunteer referees and coaches.

The Court took the opportunity to scale back the municipal immunity doctrine, holding that it was limited to discretionary judgment activities concerned with municipal planning and public policy, and that referees and coaches were not municipal officials elevated to those functions. The court also held that before the volunteer immunity statute specifically requires that in the case of volunteer sports officials, they must first be shown to have possessed valid certification and knowledge of the rules before taking advantage of the immunity, and no such showing had been made.

Homeowner's policies generally cover the actions of a volunteer referee or coach, so beware!

For years we have wondered the extent of exposure under residential insurance policies covering household domestics. Was everyone working on your property a "domestic" under the statutorily mandated language in RSA 381-A:6? *Appeal of Richard Routhier*, answers that question in favor of the carriers. The plaintiff was an independent contractor without workers' compensation coverage cleaning windows at the residence. He fell off a ladder and became partially paralyzed. He filed for benefits under the carrier for the homeowner. The carrier denied benefits on the basis that there was no employer-employee relationship but rather one of an independent contractor. The Court held that the claimant was not a "domestic" or a "residence employee" despite the fact that neither term was defined in the statute, "domestic" was not defined in the policy and "residence employee" was defined in the policy without reference to an independent contractor. The message is that the Supreme Court can do what it wants to do, and can emphasize what it

wishes in order to get the desired outcome.

Kenneth Bouchard

Auto Carriers

The case of *Lessard v. Clarke* (May 14, 1999) is very important. One plaintiff was injured and another killed in an auto accident in New Hampshire, not far from the Canadian border. Coincidentally, all parties were residents of Canada, which had no-fault insurance which restricted the damages available to the plaintiffs. The Court held that Canadian law would apply to the case, even though suit was properly brought in New Hampshire. The "Choice of Law" doctrine is a five part analysis, each of which can go in either direction at the discretion of the court. The court considers (1) predictability of results; (2) maintenance of reasonable orderliness and good relationship among the states; (3) simplification of the judicial task; (4) advancement of New Hampshire's governmental interests; and (5) the court's preference for what it regards as the sounder rule of law. In past choice of law cases, our Supreme Court has almost consistently adopted New Hampshire law where the benefits were higher for the

plaintiff. Here, the Court made a notable departure and held that Canadian law should apply.

One important factor was that the issue was on damages only. New Hampshire law would apply on liability and on procedure (which would presumably include such issues as the statute of limitations, motor vehicle law, etc.). The most astonishing part of the decision from our plaintiff-oriented court was the holding that, even though the New Hampshire legislature has rejected no-fault on numerous occasions and that Canada had abandoned it two years after this accident, the Court could not say that New Hampshire's law on damages was "wiser, sounder and better calculated to serve the total ends of justice."

An interesting question is whether there would be a different result if the plaintiff had resided in New Hampshire. This is important to carriers because we have Massachusetts next door with its no-fault system. Clearly, if both parties are from Massachusetts and the accident happens in New Hampshire, the *Lessard* case will apply, and Mass. law will control on damages. If the defendant is from New Hampshire, in my opinion, *Lessard* would still

apply. If the plaintiff is from New Hampshire, it is an open question as to which law will apply.

Kenneth Bouchard

Uninsured Motorist and Workers' Compensation

We are very pleased to report on the case of *Farm Family v. Peck* (June 16, 1999) because it was handled by us. The claimant, Margaret Peck, was in an auto accident en route to a staff meeting held by her employer. Because of this, she was within the scope of her employment. She sought and received workers' compensation benefits. She also brought an underinsured motorist claim against Farm Family, her carrier. Peck claimed numerous injuries, the most controversial of which was a ruptured cervical disc and a triggering of multiple personality disorder. I remember her case quite well because I took her deposition and got to ask, "Which one am I speaking with now?" Another memorable event in this case was when we were called by the plaintiff's psychologist saying that her husband had threatened the attorney involved. We, of course, notified the police. All

that and no extra hazardous duty pay!

She made claim under her workers' compensation action for the cervical disc and the multiple personality disorder. The Labor Department held a hearing and denied benefits, holding that the disc and the mental problems were not causally related to the accident. The appeals board upheld the Labor Department, and she did not appeal. She brought an arbitration action and sought to make the same claims in front of arbitrators. In an effort to short circuit this process, and not desiring arbitrators to decide the issue, we brought a petition in Superior Court seeking a declaration that she was estopped from making a claim for those injuries because she had already litigated the question in the Labor Department and lost. Both sides submitted motions for summary judgment, and the trial court found for Peck, holding that the issue of whether the auto accident caused her injuries was not determined in the Labor Department action, and that causation for workers' compensation is different for a negligence action. We appealed to the Supreme Court, and that Court found that while a *defendant* could

arguably take the position that he had a right to litigate causation, a plaintiff who litigates the very issue in the Labor Department and loses cannot relitigate the issue in a tort action. None of her personalities won.

Kenneth Bouchard

Wrongful Death Cases

After holding that the Wrongful Death Statute on its face allows for hedonic damages in the *Marcotte* decision, the New Hampshire Supreme Court has not stopped there. In *Trovato v. Deveau*, (April 21, 1999), the Court held that the statutory limitation of \$50,000 in a wrongful death action where the decedent was not survived by a spouse, parent, child or dependent relative (RSA 556:13) was unconstitutional. I must say that the reasoning was tortured and stretched to the breaking point. The rationale was that there was a violation of equal protection because people who are injured and later die of unrelated causes can bring a wrongful death action without being subject to any cap. However, people who die as a result of the accident itself are limited to \$50,000, and

therefore the two groups are similar but treated differently. The dissent very clearly pointed out that the groups are in fact different in the very obvious way that one group relates to decedents dying as a result of the accident and the other with decedents dying of unrelated causes. It was a bad decision with poor reasoning, following on the heels of the *Marcotte* decision, which also ranks as one of our Court's worst. I must say, however, that the number of cases this will effect is quite small. I believe in my entire career I have come across two decedents without a spouse, parent, child or dependent relative.

This is also a reminder that for accidents happening after January 1, 1999, there is a new amendment to the Wrongful Death Statute which provides a loss of consortium claim for a surviving spouse with a cap of \$150,000 and a loss of familial relationship for each surviving parent where the decedent is a minor child, with a cap of \$50,000. We have already litigated and won the issue of whether the statute applies to accidents occurring before its effective date. Note that in each case, the comparative negligence of the decedent will still reduce or eliminate an award.

Kenneth Bouchard

Medical Malpractice

I recently litigated to a defendant's verdict two medical malpractice cases, coincidentally both involving alleged negligence which resulted in the amputation of a leg. The first case involved a fracture in an end stage of an elderly diabetic which did not heal. The claim of negligence was that the doctor did not repeatedly remove the cast to inspect the skin for breakdown. When the skin became infected, the leg had to be amputated. The doctor's defense was that the blood supply was so poor to her lower leg that she was not going to heal no matter what was done. Further, we showed that removal of the cast would result in loss of alignment and eventual amputation from non-union of the fracture.

The second involved a thigh fracture and severe lower leg contusion of a young woman who was injured in a motorcycle accident when her leg came into contact with a stone wall at 70 mph. The plaintiff claimed that the doctor failed to monitor the lower leg for compartment syndrome, which developed and de-stroyed all nerve and

muscle function in the lower leg, thereby requiring amputation. The defense was that the plaintiff lost her leg because of nerve damage at the site of the fracture in the thigh, and there was a hidden femoral artery injury which the doctor ultimately discovered which further compromised the blood supply to the leg. There is nothing that can be done for such nerve injuries; the doctor can only wait and hope for the best. We were able to show that compartment syndrome could not explain total paralysis below the knee. The jury in the first case deliberated for only a few hours, and in the second case for about 45 minutes before returning a verdict for the defendant.

Kenneth G. Bouchard

Inns of Court

Ken Bouchard has been invited to be a Master of the Inns of Court, which is an organization of judges and attorneys devoted to teaching younger attorneys how to ethically and properly practice law. He has also been selected as one of a small handful of attorneys for the U.S. District Court Pilot Mediation Program in the complex litigation area. He expects to serve as a mediator for sexual harassment and product litigation areas.

Mallory Attends Psychological Injury/Mild Head Injury/Chronic Pain Seminar

Mark Mallory recently attended the Insurance and Law Seminar on Psychological and Neurological Injury Claims, a three day program presented by Medpsych Corporation in New Orleans, Louisiana. The focus of the seminar was a detailed analysis of psychiatric and psychological injury claims such as post-traumatic stress disorder and mild head injury claims, and chronic pain disorders such as fibromyalgia and reflex sympathetic dystrophy. The presentation and cross-examination of neuropsychological testing evidence was covered extensively. The faculty consisted of psychiatrists, neuropsychologists and neurologists from around the country. Their presentations addressed the latest research findings and strategies for defending questionable claims of this type, which, as most of you know, constitute a major growth industry of the plaintiffs' bar.

Defense of psychological injury, mild head trauma and chronic pain cases has been a subspecialty of Attorney Mallory's for more than ten years. Please feel free to call him for a free consultation on any cases of this nature on which you may need guidance or a second opinion. Attorney Mallory is available to defend these cases in any of the ten counties of New Hampshire.

Two New Associates Join Bouchard & Mallory

Bouchard & Mallory is pleased to announce that Nicholas D. Wright and David W. Suchecki have joined the firm as of September 1, 1999.

A graduate of Franklin Pierce Law Center, Nicholas was a research assistant in the House of Commons in London, England before joining Bouchard & Mallory. He was also a counselor for abused and neglected children where he learned the importance of zealous advocacy for the rights of others.

David received his J.D. from Suffolk University Law School and clerked at several of Boston's premier law firms gaining considerable civil litigation experience. Before joining Bouchard & Mallory, David served as a judicial clerk for a Massachusetts District Court.

We are pleased to have both Nicholas and David joining our team. As with all the attorneys and staff here at Bouchard & Mallory, you'll come to appreciate the firm's "Professionalism With a Personal Touch."