

# NEWS and VIEWS

**BOUCHARD & KLEINMAN P.A.**

ATTORNEYS AT LAW

Professionalism with a personal touch®

45 Bay Street  
Manchester, NH 03104  
(603) 623-7222

369 Lafayette Road  
Hampton, NH 03842  
(603) 926-9333

## ARE YOU HIP WITH HIPAA?

By now we have all heard about the dreaded HIPAA. HIPAA, in government speak, refers to the Health Insurance Portability and Accountability Act, but it can also refer to the Hell In Permitting Access to Anything about a patient. It was undoubtedly well-intentioned but, as often occurs when the government gets into the regulation of anything, it is overly-complicated and sometimes frustrates its own purposes, two of which were to increase patient privacy and their access to their own records.

An article in the Lawrence Eagle-Tribune highlighted some of the quirks people have experienced. One father was trying to iron out a billing problem relating to his daughter's treatment at a local hospital, and was informed that the information could only be given to the patient, his 20-month-old daughter! One of the mandates is that the patient must sign a form which gives the patient the opportunity to opt out of routine hospital communications to others,



such as the fact that they are in the hospital at all. A couple going in for the birth of their baby opted out, and the mother's parents, who were out of the country, couldn't get the hospital to acknowledge that the mother was a patient and in fact had already given birth to a healthy child. Members of the clergy were denied access to patients of their faith, some of whom wanted last rites.

Increased patient privacy was apparently a good goal. Prior to HIPAA, in many states, a patient's medical records could be sold for marketing, life insurance and other purposes. Although many health care professionals supported that

goal, the implementation by way of HIPAA has been a nightmare. The confusion over the provisions of the Act coupled with the extremely harsh penalties (up to \$250,000 in fines and 10 years in prison for both the organization and the individual employees) are prompting some employees simply to take the safest approach and release nothing. Ironically, states like New Hampshire and Massachusetts have long required patient consent to release records, so this Act has needlessly complicated the process.

What can insurance companies do to obtain records? First, use a proper HIPAA medical release form and fill it out carefully. That, however, may turn out to not be enough. Our law office has developed such a form, but we still get providers who insist that their specific form be used. In the past, we were able to have a plaintiff fill out totally blank authorization forms sent with interrogatories, then fill in the provider and the dates. Now, the process of obtaining the

complete prior and current medical record of a plaintiff has become and will remain more costly and time consuming. This is not good news because it will also slow down the discovery process significantly. Even prior to HIPAA, getting Mass. General to provide copies of records could take three months or more; now, all the small providers will take longer as well. Not only that, all providers will undoubtedly increase the cost of providing copies, costs which have been clear profit centers for many providers (i.e. \$50 for three or four pages of notes).

Enclosed is a copy of a fill-in-the-blanks medical authorization we developed. In the typical case, we generate a new form for each plaintiff, so that the authorization is printed by the computer. However,



we have also used the fill-in forms from time to time. You are welcome to reproduce these forms and use them as you see fit.

**Ken Bouchard**

## Wrongful Death Damages - How Much Is Life Worth?



“It is sometimes said that a wrongdoer is better off in causing death than in causing severe and lasting injury without death.” *Ham v. Maine-New Hampshire Interstate Bridge Authority*, 92 NH 268, 276, 30 A.2d 1 (1943). Up until relatively recently, it was indeed true that if you struck a pedestrian causing serious injuries, in terms of your exposure, you were better off going back and running over the victim to make sure they died! While that attitude was morally wrong, it was indeed the state of the law until our Supreme Court opened the door in 1999 by interpreting the wrongful death statute to allow what has been termed “hedonic” or loss of enjoyment of life damages. *Marcotte v. Timberlane School District*, 143 NH 131, 733 A.2d 394 (1999). A year prior to the *Marcotte* decision, the Legislature, effective January 1, 1998, allowed for consortium damages to a surviving spouse up to \$150,000. If the surviving spouse was responsible in part for the death, his or her share is diminished consistent with his or her share, or barred if greater than 50%. A year later, effective January 1, 1999, the Legislature allowed for the loss of familial relationship suffered by parents of a deceased minor child or by minor children of a deceased parent. There is a cap of

\$50,000 per individual claimant. For example, if a deceased parent left five minor children and a spouse, the surviving spouse would be entitled to up to \$150,000 in consortium damages and each minor child would be entitled to \$50,000 for a total of \$250,000 for loss of familial damages. These damages are independent of the damages allowed to the Estate, including the loss of enjoyment of life damages that may be claimed. Thus, since 1999, the whole landscape of death claims has effectively been changed resulting in potentially significantly greater awards.

Since there is no recovery for death at common law, the elements of damages are controlled by statute, RSA 556:12. These elements include: a) expenses to the estate, i.e., funeral/burial expenses, medical bills; b) pre-death conscious pain and suffering; c) the net economic loss to the estate; and, d) hedonic damages.

If the decedent was immediately rendered unconscious upon impact, the court may preclude the plaintiff from arguing pre-death pain and suffering as an element of damage. If the plaintiff can develop evidence that the decedent was gasping or moaning, even if only for a brief time period, i.e., a few seconds, this

would likely allow the plaintiff to argue the issue to a jury. Additionally, the New Hampshire Supreme Court has allowed mental anguish by a decedent in anticipation of the fatal accident. *Thibeault v. Campbell*, 136 NH 698, 622 A.2d 212 (1993). This can be presented by evidence of the decedent's fearful reaction in the moments preceding the accident. There are no limitations of these damages, and they may be significant in nature if the decedent can be shown to have suffered greatly prior to his or her death. Even if the suffering was only brief, depending on how the jury may be influenced by liability factors, an award for this element can be significant.

The net economic loss to the estate is determined by the amount the decedent would likely earn for the balance of his or her working life reduced by those necessary personal expenses he/she would have during the balance of their lifetime. This is computed by projecting his/her future lost wages, usually until retirement, including anticipated increases due to productivity and experience, then subtracting what portion of his/her income would have been spent for themselves, not anything that may have been spent for the family. That figure is then discounted to present value. The theory is to replace the decedent's monthly net income to his estate. These damages, except in very simple cases, must be presented by expert testimony through an economist. Some of the more liberal economists will also add an amount for lost household services that had been performed by

the decedent. Depending on whether the decedent was a high, low or non-wage earner will vastly affect the settlement value of a case. If the decedent is a young child, the process becomes extremely speculative (would the child go to college, work in one of the professions, etc.).

The jury instruction for hedonic damages provides that compensation is allowed for the shortening of the decedent's life. In other words, an item to be considered as damages recoverable in a death case is an amount of money, based on the



evidence, which recognizes the deceased's inability, by virtue of his or her shortened life, to carry on and enjoy life in a way he or she would have, had he or she lived longer. The question of how a jury awards for hedonic damages is the subject of much discussion amongst those evaluating claims. Some judges have indicated that juries will not award significant amounts for hedonic damages, however, this can be very case specific and dependant on the nature of the person's life and the manner in which they died.

Recently, I defended a classic case of hedonic death damages that we were able to settle at private

mediation. The case involved a 67 year-old grandmother of 13 children, mother of six children and wife of 45 years. She was enjoying her "golden years" with her grandchildren, enjoyed knitting and remained active in bowling leagues. Her life expectancy was approximately 16 years. She had some ailments including diabetes and hypertension, but nothing of a life threatening nature or significantly impairing her quality of life. She had gone in to the hospital to remove a benign cyst and died post-operatively due to an allegedly defective medical device. Unfortunately for the defendant, a large international manufacturer, the device was a new model, there was evidence of complaints with the model in the month prior to her death, and the model was recalled after her death resulting in a design change. The medical bills and funeral expenses were approximately \$30,000. An economist had rendered a report, which principally relied on a loss of household services to claim approximately \$150,000. There was disputed evidence that she suffered respiratory distress for a period up to two hours prior to losing consciousness. I consulted with various people on this case for purposes of evaluating the exposure including both plaintiffs and defense counsel. Although there was no consensus, the range (excluding the spouse's \$150,000 consortium claim) was as low as \$300,000 and as high as \$1,000,000. Clearly, the wildcard of hedonic damages played a significant role in increasing the value of a case that before 1999 pre-*Marcotte* would have had

limited value. In fact, pre-1999, the case value would probably have been limited to the bills and the economic component, which was also questionable based on its reliance upon imputed household services. Post-1999, we clearly had to concede the consortium claim to the surviving spouse of \$150,000 plus address the hedonic damage portion of the claim.

I am rather interested in what you think the value of this claim would be. If you could take the time to send me an email at [pkleinman@bestnhlaw.com](mailto:pkleinman@bestnhlaw.com), I will reply with the results.

**Paul Kleinman**

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[www.bestnhlaw.com](http://www.bestnhlaw.com)  
Your comments are greatly appreciated - please e-mail us at [news@bestnhlaw.com](mailto:news@bestnhlaw.com).

## Seeking Replacement Cost as the Measure of Damages in Subrogation Cases

Generally, the measure of damages in total-loss subrogation cases will be the fair market value of the property that was damaged or destroyed. Yet, some insureds choose to purchase insurance that guarantees them replacement cost coverage; that is, the policy covering the damaged or destroyed property dictates that the insured gets the replacement cost of that property, which can be substantially higher than the fair market value of the property. In most circumstances, a subrogation action stemming from this type of loss can only recoup the fair market value of the property damaged or destroyed, not its replacement cost. Insurers pay the replacement costs based on a contractual obligation and an increased premium; however, this contractual obligation does not extend to a third party that may be responsible for the damage in the first place.

While fair market value may be the general rule with respect to the measure of damages in subrogation cases, under certain circumstances insurers can pursue, and be successful in garnering, the replacement costs as the measure of damages. The situation arises when the insured has a statutory obligation to rebuild the damaged property.

In the case of Moulton v. Groveton Papers Co., 114 N.H.

505 (1974), the New Hampshire Supreme Court was asked to answer the following question:

Assuming liability, may the [plaintiff] recover from the defendants... for the cost of rebuilding two new replacement bridges and costs incident thereto, such as necessary dredging of river beds, although replacement bridges may (a) be larger than the old bridges, and (b) substantially exceed in cost the depreciated replacement value of the old bridges...?

The basis for the plaintiff's argument that prompted this question was that the plaintiff was obligated by statute to replace the destroyed bridges with larger, wider and far more expensive replacement bridges. Because the plaintiff had a statutory duty to rebuild the bridges and replace them with better bridges, the Supreme Court held that replacement cost of the bridges was the only fair measure of damages:

[r]ecovery of the *value* of the old bridges, as advanced by the defendants, will fall far short of being fair and reasonable compensation.... The cost of the bridges which the [plaintiff] is legally required to construct to replace the two bridges with which it was performing the legal

obligations imposed on it by the State is the measure of [the plaintiff's] loss.

Under this ruling, not only is replacement cost the measure of damages, but the plaintiff may also recover for incidental costs associated with the replacement, including any statutory obligation to improve the existing structure.

In a recent subrogation case litigated by Nick Wright of our office, we pursued recovery of \$215,000.00 for the destruction of a wastewater treatment plant destroyed by fire. The fire rendered the treatment plant inoperable. Because there is a statutory duty to operate any wastewater treatment plant so as not to create a nuisance or health hazard due to failure of that system (RSA 485-A:37), we argued that replacement cost was the measure of damages under the Moulton decision. The defendant, however, would not voluntarily accept this argument, and insisted on fair market value as the measure of damages. We filed a Motion for Partial Summary Judgment as to the Measure of Damages. The Court granted the Motion and held that replacement cost was the only measure of damages to be considered in the case. Shortly thereafter, the defendant doubled the amount of money it was willing to pay in settlement, and the case resolved without trial.

The Moulton rule is not widely known in New Hampshire. The potential to miss an opportunity to seek replacement costs as the measure of damages exists and can

lead to considerably lower recovery. Our firm has developed a specialty with respect to large loss subrogation cases. Attorney Nick Wright, a member of the National Fire Protection Association, has been especially successful in those cases dealing with fire loss. He has developed a strong network of experts relating to cause and origin as well as proof of damages. Ken Bouchard, who has a technical background in physics, has also handled a number of large subrogation cases involving defective products or negligence. Should you have any questions with respect to such cases, please feel free to contact either one of them.

**DEFENDANT'S  
VERDICT IN REAR-  
END COLLISION  
CASE**

I recently got a defendant's verdict in a case where I was defending a driver who rear-ended another motor vehicle on the Spaulding Turnpike.

The accident occurred at an exit ramp that had become backed up with rush hour traffic. The defendant was unable to stop his vehicle in time and collided with the rear of the plaintiff's vehicle. While generally such a situation favors the plaintiff with respect to liability, there was a truck that had overturned approximately ¼ mile past the exit, causing traffic to back up more than usual. Based on the situation, I argued that the defendant was faced

with a sudden emergency and acted instinctively. More importantly, I was successful in getting instructions submitted to the jury that said if the jury found the defendant was faced with a sudden emergency and acted instinctively as a result, he could not be found liable, even if his instinctive course of action led to the collision. In this case, the sudden emergency was the over-turned truck and the instinctive action was to slam on the brakes. The jury deliberated for approximately four hours and returned a decision in favor of the defendant.

While there is case law in New Hampshire indicating that the sudden emergency instruction and the instinctive action instruction are disfavored in motor vehicle cases, they may still be successfully argued under the right facts. Further, it is the plaintiff's obligation to object to these instructions, and in the case involving the rear-end collision on the Spaulding Turnpike, plaintiff's counsel assented to the instructions as submitted.

**Nicholas Wright**