

## LEX LOCI

Charles A DeGrandpre

The recent decisions of the Supreme Court were the first in which Justice Johnson participated in the writing of the opinions and thus are the first decisions of the Court as it is presently constituted. These decisions foreshadow a chilly reception for the recognition of new causes of action in the development of our common law. Three decisions authored by Justice Souter, in particular, are illustrative of the Court's new close scrutiny of claims for recognition of new causes of action.

In the first, *Bagley v. Controlled Environment Corporation*, decided January 6, 1986, the Court, speaking unanimously through Justice Souter, refused to extend the doctrine of strict liability to cover claims of environmental pollution caused by the disposal of hazardous wastes. The Court reviewed New Hampshire's previous reluctance to accept strict liability, stating that "strict liability for damages has traditionally met with disfavor in this jurisdiction." The Court noted that the Supreme Court had refused to adopt the doctrine of strict liability founded upon the old famous English case of *Rylands v. Fletcher*, L.R 3 H.L. 330 (1868) that established the rule that an occupier of land who brings and keeps upon it anything not naturally there, and likely to cause damage if it escapes, is liable for damages for all the direct consequences of such an escape, even if he is wholly free of negligence. The Court pointed out that the only exception to New Hampshire's non-acceptance of strict liability since 1956 was the case of *Buttrick v. Lessard*, 110 N.H. 36 (1969) which extended the doctrine of strict liability to the purchase and sale of unreasonably dangerous and defective products. The Court concluded by refusing to adopt the position of the Restatement (Second) of Torts that would impose strict liability where an abnormally dangerous activity actually results in harm to others. The Court did not leave the plaintiff without a remedy, however, stating that under RSA 147-A relating to hazardous waste facilities, the plaintiff had a recognizable cause of action for violation of that statute. The Court's analysis, particularly in its rejection of the position of the Restatement, portends that a plaintiff seeking to expand the boundaries of our common law will have to be very persuasive to convince this Court.

Another recent opinion by Justice Souter is *Rockhouse Mountain Property Owners Association, Inc, v. Town of Conway*, decided January 6, 1986 in which the Supreme Court refused to recognize a "so-called constitutional tort" for damages claimed by the plaintiff to be caused by actions against a municipality and its officials who have acted under color of law and with discriminatory intent against the plaintiff. Revealingly, Justice Souter phrased the question as follows:

As in any case in which we are asked to recognize a new cause of action, it is a *question of policy* whether it would be wise to provide the relief that the plaintiff seeks. (Emphasis supplied.)

This test seems to be far different than the test that the Court has used previously, when it has placed great reliance upon Article 14, Part 1 of the New Hampshire Constitution that guarantees that every citizen "is entitled to a certain remedy... for all injuries he may receive." The Court in the recent case answers its own policy question in the negative, saying that the Court should "be wary of thinking abstractly about the suitability of a tort remedy to enforce the obligation of equal protection."

In the third decision by Justice Souter, *Soucy v. The State of New Hampshire*, decided December 5, 1985, a unanimous Supreme Court upheld the dismissal by a trial court for failure to state a cause of action of a claim by the plaintiffs that an order of the trial court had resulted in an inverse condemnation of their property without proper compensation. The factual situation showed that in a criminal case for arson, the defendant's counsel asked the superior court for an order to preserve for a jury view the partially destroyed building owned by the plaintiffs and alleged to have been the subject of arson by the defendant. The plaintiffs moved in the superior court to vacate the order so they could sell or renovate the damaged building but their motion was denied. Many months later, the State *nol prossed* the arson case against the defendant. The plaintiffs brought the present action against the state to recover compensation for the alleged taking. Speaking through Justice Souter, the Court distinguished the case from a taking by an exercise of the police power, which is legislative in nature. Rather, the Court described the action as an exercise of the judicial power and therefore distinguished it from the *Burrows Case*, 121 N.H. 590 (1981). This latter case is former Chief Justice Grimes' legacy to the law of New Hampshire which grants inverse condemnation damages to persons whose property is improperly regulated or zoned by actions by local authorities. The Court found that the exercise of judicial power in the present instance was necessary to preserve the State's "right to every man's evidence." To hold otherwise, the Court reasoned, would be to impose a heavy burden upon the public. The Court recognized that this general principle left the plaintiff property owners with little remedy or re course. Its answer, however, was to hold that the plaintiff's "remedy is an appeal to this court rather than an award of money damages." One can be sure that this was small solace to these plaintiffs. To summarize the law in this area at this point in time, it appears that the inverse condemnation doctrine of the *Burrows Case* will be narrowly applied by the Court. Further, in all cases where a new cause of action is sought to be recognized, the burden will be on the moving party to persuade the court that not only has the plaintiff suffered damage and is without remedy, but also that the recognition of the new cause of action is wise under public policy considerations. It appears that these cases mark a major turning point for the Court.

There have been many other important decisions by the Court. In *In Re Lisa G.*, decided January 6, 1986, Justice Johnson in one of his first opinions held that the district courts have jurisdiction to appoint a guardian ad litem at county expense to represent the interests of children in need of services (CHINS), even where the child has a court appointed attorney. The Supreme Court found that there was no indication "that the legislature intended to restrict the long-standing authority of any court to appoint a guardian ad litem [which is] a well established common law rule." The Court

specifically held that even though the juvenile had court appointed counsel, a second role of the guardian ad litem in a CHINS case is to represent the child's best interest as would a concerned parent and where, as in the present case, the parent of the child was unable to represent that interest, the appointment of a guardian ad litem was called for.

Several cases can be noted in passing. In *State v. Perra*, decided December 31, 1985, the Court discovered an extremely rare bird in New Hampshire, the implied repeal of one legislative act by passage of a later act by the legislature. The Court recognized that the climate in New Hampshire for repeal by implication is "frosty and inhospitable" but found that the case before it was a case where the facts indicated that the legislature had simply overlooked the earlier statute. In such a situation, the Court stated that its function was to "effectuate the legislature's expressed intent, even when the legislature may have been careless in expressing it."

*State v. Bonalumi*, decided December 5, 1985, is an example of an extreme extension of the excited utterance exception to the hearsay rule. The Court approved the admission of testimony of the defendant's wife against her husband in a criminal case when the utterance was made spontaneously in response to a startling event. The event here, however, was simply the fact that the wife, later and not at the scene of the arrest, had learned that her husband had been arrested and faced a jail sentence and heavy fine for driving while intoxicated. It is stretching to find that the excited utterance exception applied in this situation, but the Court may have been influenced by the fact that the trial judge had admitted the evidence in a case where the facts were overwhelmingly against the position of the defendant, who was charged with DWI, subsequent offense. In *State v. Smith*, the Court made clear that it was *not* a necessary element for conviction for aggravated felonious sexual assault under RSA 632-A:2 that the State show that the defendant (husband of the victim's babysitter) received "sexual gratification" by the performance of the alleged felonious act, here the penetration of the vagina of a 7 1/2 month old child by the defendant's finger.

Do you have a cause of action when your neighbor builds a building that inadvertently encroaches upon your property three-tenths (.3) feet? To any tried and true real estate lawyer, the answer to that question would seem to be a resounding "yes." Surprisingly, the Master in this case ruled that there was no cause of action for this small encroachment and nonsuited the plaintiff after the close of the plaintiff's evidence. The Master ruled that the plaintiff had failed to make out a *prima facie* case because his own surveyor was somewhat ambiguous as to whether an encroachment occurred at all. However, the Supreme Court reversed, holding that so long as there was "some evidence from which a reasonable trier of fact could conclude there was an encroachment, the plaintiff was entitled to proceed with his case."

In *State v. Bailey*, decided December 4, 1985, the Supreme Court took a surprisingly open view toward broadened voir dire examination. Requests for attorney voir dire examination, which to most trial attorneys is better than apple pie, mother and the American flag rolled into one, has always been poorly received by superior court judges.

However, the Supreme Court, while not approving attorney voir dire, did recommend that the superior court judges give "a receptive rather than a grudging response to requests for supplemental voir dire." Even this step forward would mark a great change in New Hampshire trial practice. *State v. Bailey* made another substantial change in the well-worn traditions of New Hampshire trial practice by requiring that a record be made at bench conferences between the judge and prospective jury members. The traditional practice in New Hampshire is to exclude the attorney and the stenographer from such conferences, apparently on the ground that a prospective juror will be more candid with the judge if he does not have a host of people waiting on his every word. The Supreme Court refused to allow the attorney's request that he should be present at such conferences, but did rule that the attorney was entitled to a record of the conversation so that he could cross check a judge's subsequent summation to counsel of the jurors comments.

What better way to end this column than with a discussion of a blockbuster case, the last and final round of the Public Service Company's judicial travail in the building of the Seabrook I Nuclear Station. Although it can be expected that there will be further appeals as the ratemaking process goes forward, this case is the last obstacle to the Public Service's completion of the first of two proposed nuclear plants. A blockbuster case deserves a blockbuster opinion and the Supreme Court did not disappoint anyone with its eagerly awaited opinion. The Supreme Court split 3-2, Justices Souter, Johnson and Brock in the majority in a *per curiam* opinion and Chief Justice King and Justice Batchelder in the minority. The majority opinion is 35 pages long and the dissent 25 pages long, for a total of 60 pages. The length of the opinion may herald a return to the age of Justice Doe when 50-page opinions were common. The opinion is extraordinary both in the magnitude of its effect upon citizens of the State and for the language used by the majority and minority in what is a battleground of words. It is impossible to deal at length with all of the issues raised by this decision. Focusing only on the more dramatic elements, it is clear that the majority's opinion steps back from the Court's earlier ruling in the *Appeal of Easton*, 125 N.H. 205 (1984), which directed the Public Utilities Commission to find whether the public good was advanced by the proposed financing under review. The majority extensively used dissenting Commissioner Aeschliman's separate opinion which would have approved the financing request but only upon conditions, which, in her view, would protect ratepayers from the full cost of recovery through rates and from further risk if Unit 1 could not be completed. The majority found that while they might disagree with some of the Commission's conclusions or might find them optimistic, the conclusions were not clearly unreasonable stating that the "ultimate issue before this court on appeal is whether the party seeking to set aside the decision of the commission has demonstrated by a clear preponderance of the evidence that such order is contrary to law, unjust or unreasonable." Upon this reasoning, the majority allows the Commission to take into account "sunk costs," thereby doing a considerable end run around the anti-CWIP statute. On the bankruptcy issue (whether the company's bankruptcy would be a better alternative than that of the present financing), the Supreme Court upheld the Commission's conclusion that the company's bankruptcy would not serve public interest. On the thorny issue of Commission forecasts of the rates which consumers can expect if the financing were granted and Seabrook Unit I

completed, the majority made many points that will be keystone citations in later rate cases. The Supreme Court majority summarized the Commission's role in the rate-making process as follows:

[I]n a proceeding to set rates the commission must set a reasonable rate of return to be allowed on costless depreciation of used and useful property, provided the cost may not include anything imprudently wasteful. A determination to risk of reasonable rate of return, prudence, and usefulness alike, required the exercise of judgment and discretion in determining the recognition that is appropriately due to the competing interests of the company and its investors and of the customers who must pay the rates to provide the revenue permitted.

It should now be apparent that a rate or structured rates charged to customers is reasonable within the meaning of the statute when it will produce and demote a revenue that has been determined, in limited, by balancing a relatively weighing investor and customer interests. The Commission must exercise judgment in balancing those interests when it determines the allowable extent of operating expenses, when it identifies the property whose prudently incurred costs are included in the rate base, and when it sets a reasonable rate of return on that rate base. As the reasonable rate is the rate resulting from a process that must consider the competing interest in the investing customer it must determine the appropriate recognition that each deserves.

The majority held that the forecasted rates resulting from the approval of the financing and the completion of the nuclear power plant (estimated by many to be astronomical) were not unreasonable, although the majority warned again that it was vital for the commission to establish future rates at a "level that will not be oppressive to consumers or the New Hampshire economy which is unfair to stockholders." It is hard to believe that the rates as forecast would not fail to meet this test.

The dissenters begin by pointing out that the majority opinion "paves the way for an extraordinary and potentially disastrous increase in PSNH rates. The repercussions of this decision will extend for decades." The dissent blisters both the Commission and the Public Service Company, by inserting into the opinion a table of the "wildly inaccurate predictions" of both estimated total costs completion and estimated completion date previously made by the Company and the Commission. The dissent points to the Company's "dismal record" in forecasts and stated that the Company's "wildly inaccurate predictions" ... [were made] *to intimidate* the commission." (Emphasis supplied.) As to the commission, the dissent pointed out that the commission "apparently refuses to learn from the past" and has permitted "a foundering utility to borrow the better part of the billion dollars without determining whether the people of this state or the utility itself can withstand the harsh economic effects that lie ahead." The dissenters draw a particularly dark and bleak picture of the effect that will be the result of these "unprecedented rate increases for New Hampshire rate payers." The dissent would also hold that the commission's decision on bankruptcy was incorrect and that the bankruptcy of the Company would have better protected the New Hampshire rate payers. The future would ultimately decide which of these two monumental opinions is correct. If the

Commission's and the Company's forecasts do not hold true, and rate increases even greater than that presently forecasted come about, the dissenters' opinion will be a framework upon which the Company and the Commission will be crucified.