

## **LEX LOCI: Recent New Hampshire Supreme Court Decisions**

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Recent decisions of the New Hampshire Supreme Court are a mixed bag. There are several advisory opinions rendered to both houses of the legislature during this second year of the annual session era, as well as cases involving welfare fraud, domestic relations, child abuse, insurance declaratory judgment actions and several cases involving evidentiary issues arising in the course of trial. There was also the customary case in which the Supreme Court overruled a DES determination.

Turning first to an evidentiary issue case, *Felon v. Thayer*,\* decided February 27, 1986, takes a broad view of the trial process. A unanimous Supreme Court reversed and remanded this appeal by the plaintiff in a medical malpractice case in which the jury returned a verdict for the defendants. On appeal, the plaintiff claimed that the trial court had improperly prevented her from calling as a witness a New Hampshire physician who had been consulted by the defendant as an expert. The problem was that the defendant's expert agreed that the defendant had been negligent. The defendant moved on to a new expert. When the plaintiff learned of the existence of the negative opinion by the first expert during the deposition of the defendant's listed expert witness, the plaintiff subpoenaed the doctor to trial and the defendant sought to prevent the plaintiff from calling the doctor as a witness. The subpoenaed doctor took the position that he did not want to testify and the trial court agreed that he should not be compelled to testify against his will. Adding salt to the wound, the defendant's attorney then argued in closing that the plaintiff's case was founded on the opinion of a "hired gun" and chastised the plaintiff for failing to obtain a New Hampshire medical expert.

Justice Batchelder's opinion for the unanimous Court began "by affirming the principle that a trial is essentially a search for the truth." The Court then went on to rule that the plaintiff was "incorrectly prevented...from compelling an expert, who was initially consulted by an adversary, to appear as a witness" and extended the rule further by holding that "the rule favoring testimonial compulsion should be applied to all experts, including doctors, appraisers and others." On a related issue, the Court also held that it was permissible for the plaintiff, when calling the recalcitrant expert, to inquire into the fact that the doctor had been first contacted by the defendant, stating that "the fact that a party's adversary first contacted the expert is material to the weight and the credibility of that expert's testimony and we think the jury should have the opportunity to consider this fact."

Can parties to a domestic relations matter stipulate between themselves to a different and more lenient standard to govern future changes of child custody? This issue was raised in *Butterick v. Butterick*, decided March 3, 1986, where the parties had stipulated that a "best interest" standard would control future requests for change of custody, rather than the stricter standard of *Perreault v. Cook*, 114 N.H. 440 (1974) which requires a showing that there is strong possibility of harm to the child if he remains with the custodial parent. The Supreme Court answered the question posed with a

resounding "no," holding that the *Perreault* standard "is generally the correct standard for trial judges to employ in considering petitions for modification of child custody decrees; therefore, the fact that the parties agreed, in a divorce decree stipulation, to apply a different standard should be given no effect by the superior court." Another issue in this case was whether the plaintiff (the father) was entitled to have his child support payment to his former wife reduced where the former wife now had custody of fewer children than previously. The Court held that a modification downward was not sufficiently proved by the fact that the former spouse had custody of fewer children. A downward adjustment was justified only if there was such a change in the circumstances of the parties as to make the continuance of the original order improper and unfair. Even though the former wife had custody of fewer children, the Court denied the reduction requested and found that the plaintiff husband's income had increased substantially while the former wife's support payments had not increased to reflect the cost of living.

*Petition of Chapman*,\*\* decided May 8, 1986, explored the role of the New Hampshire Bar Association in its legislative activities before the General Court. Specifically, the plaintiff, a member in good standing of the New Hampshire Bar Association, claimed that his constitutional right of free speech was violated by the Association's improper legislative activities in opposing the so-called "tort reform" legislation pending before the legislature. The plaintiff sought an injunction against the Association but the New Hampshire Supreme Court was unanimous on this issue, denying his requested injunctive relief. The Court issued three opinions, coming down roughly three to two: The minority (Chief Justice King and Justice Batchelder) found no fault with the role of the Association in its activities against tort reform, while the majority (Justices Brock and Johnson, who were joined by Justice Souter in a concurring opinion) would find that the Association's lobbying activities were proper in some instances but improper in others. The ultimate issue became whether the Association's legislative activities fell within the "administration of justice" phraseology of the constitution of the Bar Association.

The majority took a detailed look at each piece of legislation in the tort reform package opposed by the Bar Association and found that in some cases the Bar Association was entirely proper in taking a position on the matter and in some cases the matter fell outside the Association's proper role, the majority holding that "the Association should limit its activities before the General Court to those matters which are related directly to the efficient administration of the judicial system; the composition or operation of the court; and the education, ethics, competence, integrity and regulation as a body of the legal profession. That test may be easier to state than to put into effect. For example, the majority held that the Association could properly support or oppose proposed legislative acts providing for the creation of an enforcement mechanism for the rights of contribution, providing for the promulgation of standards for the qualification of expert witnesses, providing for the creation of periodic payment schemes for cases in which future damages are found to exceed \$50,000, and providing for the allowance of double costs where the court finds an action is clearly frivolous. On the other hand, the majority held that the Association should take no position on measures providing for the establishment of a substantive right of contribution, providing for the allowance of limited

contributions from employers, providing for the creation of ceilings on municipal liability and damages for non-economic losses, and providing for the establishment of standards for negligence action against public entities and employees arising from pollutant incidents.

On the other hand, the minority of the Court would hold that all of the components of the tort reform package related directly to the administration of justice since "for better or worse, if the General Court enacts these proposals, the administration of justice in New Hampshire will have been significantly altered. The subject of the tort reform package is law itself and the lawyers are uniquely qualified to advise the legislature about it." It is important to note that the petitioner did not seek to de-unify the Bar Association and, indeed, all of the Justices of the Court expressed agreement "that the history of the unified bar since its creation is one of the impressive accomplishment and service to the public and lawyers of our State."

Interesting and significant cases abound. *Morvay v. Hanover Insurance Companies*, decided March 3, 1986, involved a situation with which attorneys are often confronted in fire damage cases where local fire officials or the defendant insurance company concludes, on extremely shaky information, that the fire for which recovery is sought is the result of arson. In *Morvay*, the plaintiff homeowner did not take the matter sitting down. Instead, he sued the investigators hired by the insurance company, claiming that the investigative agents had a duty to the plaintiff insureds to use good faith and fair dealing in its investigation. A unanimous Court was not bothered that there was no privity between the insured and the investigators. The Court held that "although the contractual relationship exists solely between the insurer and the investigators, and the investigators may give reports only to the insurer, the insured is a foreseeably affected third party." As a consequence, the Court held that the investigators owe a duty to the insured as well as to the insurer to conduct a fair and reasonable investigation of the insurance claim.

The Supreme Court has never ruled on the propriety of the activities of genealogical investigating companies who investigate estates that list no close heirs in the obituary notice. If the genealogical service finds an heir to such an estate, the genealogical service contacts the heir (without telling the heir of the specific estate) and indicates that the heir may have an interest in an estate. In return for the heir's agreement to share his inheritance (in the present case, 40 percent to the genealogical service), the genealogical service then files the heir's claim for the heir's share of the inheritance, something the heir is legally entitled to anyway. In *Altshuler Genealogical Service v. Farris*, dated May 12, 1986, the Supreme Court had before it such a contract, but the issue was not whether or not the agreement was fair or contrary to public policy. Rather, the issue was whether the genealogical service which entered into a contract with a non-resident heir (the contract being made outside of New Hampshire), could enforce its 40 percent claim against the heir's share of a New Hampshire estate by an attachment made in New Hampshire against the heir's share of the proceeds due the heir. The Supreme Court held that it could not, finding that the defendant genealogical service did not have sufficient contacts with New Hampshire to enable the court to

exercise its jurisdiction in a manner consistent with traditional notions of fair play and substantial justice. The Court recognized that the presence of the inheritance in the New Hampshire estate and its attachment by the genealogical service did satisfy the statutory requirements for the exercise of quasi-in-rem jurisdiction. However, the Court held that this was insufficient since, "with out more, the existence of the attachable New Hampshire *res* and the alleged contract does not satisfy the constitutional due process requirements."

Another case of significant interest and of first impression is *Lavoie v. Hollinracke*, decided April 9, 1986. In this case, the Court had before it a factual situation where one of two defendants settled out with the plaintiff during jury deliberations. Subsequent to that happening, the jury returned with a question indicating that they might be unable to agree. The trial judge elected to respond to the jury's question concerning a lack of agreement in order to keep the jury's deliberations going, without notifying them of the settlement with the one defendant. The jury then returned a substantial verdict, dividing the amount equally between the two defendants under the comparative negligence statute. The plaintiff then sought to collect the entire amount from the one remaining defendant, less the money it had settled for with the other defendant. The Supreme Court agreed that the defendant was liable on this basis.

The first question (which surprisingly had not previously been decided in New Hampshire) was whether the comparative negligent statute applied, where there was no negligence claimed by the plaintiff. The Supreme Court ruled that the statute did not apply where there is no negligence of the plaintiff, the Court resting its decision on the fact that the comparative negligence statute replaced the old contributory negligence rule and "that the provisions of the statute are premised on the existence of plaintiff negligence." Turning to the issue of whether the jury should have been informed that the plaintiff had settled with one defendant, the Court pointed out that there were two divergent rules across the country. The first is the "court rule" where it is held that the jury should not be informed of the existence or amount of such a settlement and the "jury rule" which permits the disclosure of the existence and amount of such a settlement. The Court took a middle road, stating that the jury should not be informed of the *amount* of a pre-verdict settlement, but it was in the sound discretion of the trial court to decide whether the jury should or should not be informed of the existence of a pre-verdict settlement.

Several shorter cases can be noted briefly. In an insurance coverage case in which the insurance policy covered members of the named insured's "household," the Supreme Court held that someone living in a separate dwelling, although on the insured premises, is not a member of the named insured's household. *Howard v. Hartford Insurance Company*, decided March 3, 1986. The double jeopardy clause of the federal constitution does not prevent the defendant from being convicted of two negligent homicide offenses, where on one set of facts, the defendant killed two victims. *State v. Bailey*, April 11, 1986.

In *Connolly's Case*, decided April 9, 1986, the Supreme Court makes clear that disbarment, and not suspension, is the penalty where an attorney has misused clients' funds. *Feuerstein v. Gilmore*, decided February 27, 1986, determines that a party on appeal to the superior court from a Department of Labor hearing may introduce all evidence admissible generally under the evidentiary and procedural rules that apply to superior court trials and is not limited to evidence presented at the Labor Department hearing. *Coffey v. Bresnahan*, decided February 27, 1986, deals with the statute of limitation surrounding estates. The issue was whether a plaintiff who has a claim against a deceased person can extend -the six year statute of limitations pursuant to the provisions of RSA 556:28, which provides that a person with a claim against a decedent may petition the superior court for a judgment in his favor where the court finds that justice and equity requires it and the plaintiff is not chargeable with culpable neglect in not bringing his suit within the time period provided by law. The Court held that the statute may be so construed and held that the trial court has discretion in allowing the claim of the plaintiff after the expiration of the six year statute, where, as here, the estate was still open and any judgment rendered is likely to be satisfied by the insurance coverage available. It was also extremely important in the Court's opinion that the plaintiff was a minor and allegedly incompetent and suit was being prosecuted by her parents.

There are some cases which are just plain wrongly decided and, in the author's opinion, *Barnes v. New Hampshire Karting Association, Inc.*, decided May 12, 1986, is one of them. The author's judgment, sometimes jaundiced, may be so affected in this case since the Supreme Court expressed no doubt it was correct and it was unanimous in its decision. The issue raised in the case was the validity of a so-called "Release and Waiver of Liability" agreement that purported to operate as a release from liability of the defendant's future negligence. The plaintiff, attracted to the defendant's business establishment, sought to enter his go-kart in a race put on by the defendant. He was required to sign a multi-paragraph "Release and Waiver of Liability" form in order to receive a "pit pass." The plaintiff did not read the form since he testified that he was in a long line of waiting people for the race and that the defendant's employees urged them to move along quickly. The defendant proceeded to take a practice run, and was injured as a result of the defendant's alleged failure to properly post a flag man to warn drivers of a disabled vehicle on the track. The defendant testified that although he did not read the document, he did understand he was signing some sort of release or waiver.

The unanimous Supreme Court surprisingly upheld the lower court's granting of the defendant's motion to dismiss the plaintiff's action, because of the release signed by the plaintiff. The Supreme Court held that the release was not contrary to public policy since the "[p]rovision of racing facilities is not a service of great importance to the public, nor is racing a matter of practical necessity." This analysis seems to overlook the common law rule that business operators who invite people upon their premises for the purposes of making a profit cannot exculpate themselves from liability by requiring their invitees to sign meaningless (to the invitee) agreements. Nor did the Supreme Court find that there was any substantial disparity in bargaining power among the parties. This was so despite the fact that the plaintiff was required to sign the release in order to use

the racetrack, the Court holding that since the plaintiff "was under no physical or economic compulsion to sign the release," the release was not against public policy. The Court also did not seem to be disturbed by the language of the release and waiver of liability which broadly exculpated the defendant race track operator from any negligence whether on the racing surface or the pit areas, but also on "all walkways, concessions and other areas pertinent to any area where any activity related to the event shall take place." The Court recognized that in New Hampshire the general rule is that exculpatory contracts are generally prohibited but refused to apply the rule in this case because it found that the agreement did not contravene public policy. Such agreements should be deemed to be against public policy as a matter of law. The Court's analysis, it is submitted, puts "the kart before the horse" (pun intended).

\* The author is a member of the firm that represented the plaintiff in this action. \*\* The author is a member of the Board of Governors of the New Hampshire Bar Association, the defendant in this appeal.