

Lex Loci:
A Survey of New Hampshire Supreme Court Decisions For The Past Year
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The New Hampshire Supreme Court, in its decisions in the past year, appears to have taken a turn to the right, becoming more conservative in its approach. There have been a surprisingly large number of decisions in which the opinion of the lower court has been reversed by the Supreme Court and the Court appears quite ready to substitute its own judgment for that of the trial courts. It remains to be seen whether the change in the membership of the Supreme Court that occurred during the past summer will result in any changes in the approach of the Court.

There have been many decisions of important magnitude in the past year, and many others that can be forgotten. Among the latter are countless criminal decisions which, of course, are important to the defendant, but which raise very few new issues of significant importance to the general practitioner. On the other hand, there have been some decisions that will not only affect the practice of law but may also alter the world in which we practice.

An example of the latter is *New Hampshire Municipal Trust Workers' Compensation Fund vs. Flynn*, decided April 11, 1990. This constitutional law case is probably the most far-reaching case of the past year. It will probably affect all our lives as citizens of the State of New Hampshire in a very direct way. The case involved an interpretation of the 1984 Amendment ratified by the citizens of New Hampshire concerning inundated programs:

"Art. 28-a. Mandated Programs. The state shall not mandate or assign any new, expanded or modified programs or responsibilities to any political subdivision in such a way as to necessitate additional local expenditures by the political subdivision unless such programs or responsibilities are fully funded by the state or unless such programs or responsibilities are approved for funding by a vote of the local legislative body of the political subdivision."

The Amendment was highly controversial at the time of its adoption, primarily because the consequences of its passage remained unclear. Party lines were split. Many conservatives supported it, while some felt it was playing into the hands of the taxers. The case actually arose in terms of an appeal by the Commissioner of the State Department of Labor from a ruling in the superior court from the Compensation Fund's claim that an amendment to the workers' compensation law adopted in 1989 contravened the 1984 constitutional amendment. The Supreme Court, in a split decision (Justice Batchelder for the majority), took an expansive view of the Amendment stating that it:

"was designed to prohibit the State from placing additional obligations on local government without either obtaining their consent or providing the necessary funding."

Applying this rule to the 1989 statutory amendment to the workers' compensation law, which changed the presumption whether a municipal fireman suffering from cancer incurred the disease while employed, the majority ruled that the term "responsibility" in the amendment was "understood" by the delegates to the Constitutional Convention:

"to act as a sweeping prohibition against all State mandates that, for one reason or another, may not be categorized as a program."

Therefore:

"the constitutionality of a particular State mandate under Article 28-a does not hinge solely on whether or not it may be categorized as anew, expanded or modified program, but also on whether or not the mandate imposes upon local government an. additional fiscal obligation".

The majority went on to uphold the Superior Court's finding that the presumption created by the amendment to the workman's compensation law would result in an increased number of successful claims against cities and towns and therefore was barred by the 1984 constitutional amendment. The majority opinion boils down to a ruling that if a statutory change imposes upon local government "a new fiscal obligation", *of any sort*, it is prohibited by the amendment.

This sweeping view of the amendment was actually endorsed by dissenters Justices Souter and Thayer, although in a narrow dissent these Justices would have remanded the case for the determination of the issue of what would happen where a statutory change that imposes a new burden on the towns also affects old or pre-existing town responsibilities. The dissenters, however, did endorse the basic premise of the majority, that the intent of the amendment is pretty clearly set out in the simple terms and language of the amendment since "their distinctiveness is clear". As the dissenters correctly predict, the simple terms of the amendment "promise a long future of litigation before they become exactly understood". The interpretation of the amendment by the Court has caused consternation in State circles. An article in the August 16, 1990 *Union Leader* carried a headline concerning the ruling that the decision "**LEAVES THE STATE UNSURE OF POWERS - AFFECT ON SCHOOL, AND ENVIRONMENTAL REGULATIONS IS UNCERTAIN**". Indeed, if the view of the members of the Supreme Court expressed in this decision continues, the entire basis of the present manner of funding our State and local governments will be substantially changed. Some sort of broad base tax appears a likely result. This is somewhat amusing in light of the fact that the 1984 amendment was the subject of much discussion and debate on all sides and it was generally supported by the conservative fiscal factions of the State of both parties.

There are a couple of cases that affect attorneys or professionals, one a disciplinary case and another involving the taxation of attorneys. The disciplinary decision,

Bourdon's Case, (November 16, 1989), is another example of the present Court's tough stance on misconduct or malpractice by attorneys. Here, an attorney appealed a finding of the Professional Conduct Committee calling for his suspension, arguing that he should have been censured or reprimanded instead. On appeal to the Supreme Court, the Court disbarred him! The justices unanimously added as an additional requirement to his ability to seek reinstatement after two years that he must meet all requirements applicable to applications for admission to the bar, including passing a bar examination. This was not a case of embezzlement or criminal activity, but is merely another sorry example of an attorney's inattention to his practice, conflicts of interest, concealment of adverse developments from his clients, and, in general, failing to properly represent his clients so that they were harmed by his conduct.

The taxation case affecting attorneys as business persons is *Opinion of the Justices* decided March 9, 1990. This is another in the series of opinions by the Supreme Court in response to advisory requests by the New Hampshire legislature concerning proposed legislation to broaden the business profits tax. The central thrust of the proposed 1990 legislation was to get around the problem that small businesses (particularly doctors, lawyers, accountants, etc.) end up paying no business profits tax because they take all of the profits out as permissible compensation. The bill under review attempted to limit the compensation deduction by allowing a maximum compensation credit against the tax of \$2,800 per employee. All of the justices found that the proposed legislation with the credit violated part I, article 12 of the New Hampshire Constitution by impermissibly classifying taxpayers. Furthermore, the Court split 4-1 upon the question of whether the legislature could enact legislation disallowing any deduction for compensation. The majority held that such a scheme would be constitutionally permissible, while Chief Justice Brock argued that:

"the imposition of the business profits tax upon the enlarged class of property, which includes employee compensation, would also violate the proportional and equal taxation requirements of the State Constitution."

This is an issue that will not go away, particularly in light of both the need for increased state revenues and the increasing evidence that only a very small proportion of New Hampshire businesses pay any business profits tax at all.

Family Bank & Trust v. White, decided November 16, 1989 is an unusual case which highlights a little known section of the revised statutes (RSA 384:18) which prohibits the officer or an employee of a bank from receiving any fee or benefit from any borrower or applicant for a loan from a bank. Here, a borrower borrowed monies from the bank and after the receipt of the funds, turned around and loaned a portion of the proceeds to the bank employee who closed the loan and who was a personal friend. When the borrower defaulted, the bank sought to recover the loan, but the borrower claimed that the only amount he owed was the amount of the loan less the amount loaned to the bank employee, citing RSA 384:18. The Supreme Court disagreed, holding that not only had the loan to the bank employee occurred after the loan had closed, but that the bank employee involved had no power to approve or disapprove the loan so there was no

"inducement" as required by the statute.

Another banking law case is *Leroux v. Bank of New Hampshire*, decided December 28, 1989. The case stands for the proposition that a foreclosing priority mortgagee may recover its accrued interest, late charges and foreclosure costs from the foreclosure proceedings, even if these items, when added to the principal amount due, results in a sum that exceeds the principal amount appearing on the face of the mortgage, all to the detriment of junior lien holders. This decision sheds some light on that very gray area of mortgage law known as "future advances", which have been held to be secured by a mortgage if the obligation to make the advance exists when the mortgage is executed.

Amoskeag Bank v. Chagnon, decided April 11, 1990 is a highly unusual case which, however, has general application when a mortgage is improperly recorded. Here, the improper recording was a substantial one and involved a fight between three junior creditors over the surplus funds from a first mortgagee's foreclosure sale. The most senior junior creditor in time was a second mortgagee that was properly executed and acknowledged, but through inadvertence, the document actually recorded included two first pages of the mortgage, and the signature page of *the promissory note*. Obviously missing was the signature and acknowledgement of the mortgage page which was not recorded. Two later attaching creditors claimed that the mortgage was not effective as against them. One of the two remaining junior creditors had conducted a title search and one had not.

Pointing out that New Hampshire is a "race-notice" jurisdiction, the Court drew a distinction between the duties of a searching bona fide purchaser for value and an attaching creditor. Although a searching BFP would have been put on notice to inquire further upon finding the improperly recorded mortgage, this was not true of attaching creditors, whether or not they actually made a title search or not:

"Because of the profound differences between the goals of a BFP and an attaching creditor, we hold that an attaching creditor need not investigate outside of the record to determine whether a mortgage has, in fact, been properly executed and acknowledged."

A family law case of significance is *Preston v. Mercieri* decided April 11, 1990, which dealt with the question of court ordered grandparent visitation rights and involved the precise question "whether the adoption of a child by a step-parent, which automatically distinguishes the right of a natural parent, also divests the Court-decreed visitation of grandparents on that side." In a careful and well-reasoned opinion written by Chief Justice Brock, the Court answered the question in a negative. Extensively reviewing the law of other states on the issue, the Court held that in New Hampshire the rights of a grandparent to visit existed in the common law beyond any statutory law [which was not relevant here] because:

"the plaintiffs visitation privileges are founded on the best interest of the child, rather than on any statutory recognition of inherent or derivative rights of kinship."

The Court placed much stress on the fact that this was a nontraditional adoption and that a child's adoption by his stepparent has no effect, per se, upon the court-ordered visitation rights of his paternal grandparents. The Court's opinion might have been affected by the egregious conduct of the child's mother who was engaged in a "bitter war" with the paternal grandparent. In the midst of contesting the child visitation rights, the mother and her new husband, secretly and without notice to the grandparent, processed the step-parent adoption and then announced unilaterally to the grandparent that the court's order of visitation was "null and void" and terminated visitation rights. It was hard to feel sympathetic to the mother in this factual context.

Is it permissible for a testator to establish a charitable trust that discriminates by establishing scholarships for "boys" only, or for students who must be "Christians" if the recipients are picked by local school authorities? The answer to this question is found in *In re: Certain Scholarship Funds*, decided May 24, 1990. This is an important decision concerning the *cy pres* doctrine and its distinction from the doctrine of deviation from trusts. A split Supreme Court, (Justice Batchelder for the majority and Chief Justice Brock in the minority), ruled that the application of the doctrine of *cy pres* could be applied to certain wills to change the restrictions on certain scholarships from "boys" and "Protestant boys" to "students," holding that it was appropriate for the Court:

"to use its *cy pres* powers to preserve the primary intent of the testators, which was to aid deserving students at Keene High School in their pursuit of a college education".

Peculiarly, the Director of Charitable Trusts argued that the Court, instead of using its *cy pres* powers as it did, should rather have used its equitable powers of deviation, to reform the trusts by simply striking out the participation of public officials in the scholarship award process, but still leaving gender and religious restrictions upon the scholarship awardees!! This is an interesting position for the State Attorney General office to take in light of the language in Article I, Part 2 of the New Hampshire Constitution which specifically prohibits gender or religious discrimination. The majority of the Court relied on the statutory *cy pres* doctrine as set forth in RSA 498:4-a that broadly describes the *cy pres* doctrine to be applicable whenever the purpose of a trust:

"is or becomes impossible, impractical or *illegal or obsolete or ineffective or prejudicial to the public interest to carry out*".

The majority of the Court found that part I, article 2 of the New Hampshire Constitution forbids the State to discriminate on the basis of creed and gender, and the Court found that the role of certain public officials in the award of the scholarships was impermissible state action.

Chief Justice Brock in dissent gave heavy weight to the intention of the testator, stating that:

"neither our State or our Federal Constitution requires this Court to write a 'better' will for decedent in terms with reflect the breath of concern and conception characteristic of a

public welfare program."

The Chief Justice, writing eloquently of the "sanctity of wills", stated that:

"the power to dispose of property through testamentary devise is a privilege which the State confers by statute, and regulates through the process of probate administration" and "the freedom of testation is a cherished right which permits a testator to breathe his last, secure in the expectation that the law will venerate, and not frustrate, his last wishes",

and would find no state action here.

The doctrine of municipal immunity was before the Court in *Dover v. Imperial Casualty & Indemnity Company*, decided April 30, 1990, which resulted in a split Supreme Court decision. This was a slipping and falling case against the city for injuries allegedly suffered on a city sidewalk because of the accumulation of "slippery substances" on the walk. Relying on RSA 507-B:2, I, the defendant city claimed the benefit of the exemption created in the 1975 revisions to the municipal liability law. This statute provides for liability by a municipality for negligence generally, except for liability arising from the ownership, occupation, maintenance or operation of "public sidewalks, streets, highways or publicly owned airport runways and taxiways." A three-judge majority led by Chief Justice Brock concluded, "municipal immunity, as a judicially created doctrine, no longer exists". The majority conducted a judicial analysis that concluded that the exception was unconstitutional:

"We hold that RSA 507-B:2, I, is not constitutionally justified because it violates equal protection provisions found in part I, articles 2 and 12 of the State Constitution by impermissibly denying parties injured on municipal highways and sidewalks a right to recover as provided in part I, article 14. Although the right of recovery may be limited, RSA 507-B:2, I, provides communities with too broad an exemption from liability for negligence. The statute is arbitrary and does not bear a fair and substantial relation to the object of the legislation."

Justices Souter and Thayer dissented in a long and narrow opinion written by Justice Souter, who would further into re-examine the bedrock case of *Carson v. Maurer*, 120 N.H. 925 (1980) which invalidated the statutory cap on private medical malpractice awards.

Thorpe v. State, decided May 24, 1990 is another example of the more conservative bent of the Court. Here the Court reversed a Board of Claims award on behalf of a prisoner at the state prison who was misdiagnosed as having syphilis. The diagnosis proved to be wrong and the prisoner sought compensation for his damages that included emotional distress. Although there appeared to be evidence to support the emotional distress, and there appeared to be evidence that the defendant suffered a physical injury as a result, the Supreme Court overturned the award of the Board of Claims, holding that:

"expert testimony is required in all negligence cases where emotional distress damages are claimed, regardless of the forum in which the case is litigated".

This case seems to be a step backwards from the usual New Hampshire tendency to allow the trier of fact to judge the testimony and the evidence, and if there be such evidence to support the trier's fact conclusion, it will not be disturbed.

A couple of insurance coverage cases show the court taking a narrow look at the issues before it. In *Curtis v. Guaranty Trust Life Insurance Company*, decided November 19, 1989, the parents of a school age child purchased a policy offered by the Concord School District described as "Twenty-Four Hour Accident Coverage". Approximately one year later, the parents' nine-year-old daughter was injured when struck by an unattended car that rolled down a hill and struck her while she was playing on the family driveway. Despite the broad sounding policy title and the fact that the insured never got a copy of the policy, but instead only an illustration of the policy which described "in summary fashion" the coverage under the policy, the Court found the policy (as illustrated by the information provided to the parents) contained an unambiguous exclusion for any injury involving a motor vehicle. Thus the "Twenty-Four Hour Accident Policy" simply did not cover accidents involving motor vehicles. One wonders what the parents thought they were buying in the first place.

United Services Automobile Association v. Wilkinson, decided December 8, 1989 is an underinsured motorist case involving a fleet automobile policy and an umbrella comprehensive liability policy. The Supreme Court, reversing the trial court in part, held that no intrapolicy stacking would be allowed under the fleet policy because the fleet policy clearly had language that precluded such stacking, even though a separate premium was paid per vehicle. Concerning the umbrella policy, there was in place the common type of umbrella policy entitled "Commercial Comprehensive Catastrophe Liability Policy". This policy did not contain any specific reference or endorsement concerning uninsured motorist coverage and the underinsured plaintiffs sought recovery under the policy. The Supreme Court agreed with the defendant insurance company that "umbrella-type policies differ from typical motor vehicle liability policies" and "do not fit the legislative definition of a motor vehicle liability policy" under the uninsured motorist statute. The Court opined that the legislature was free to require uninsured motorist coverage to be equal to liability coverage from any source, including umbrella type policies, and hopefully the legislature will do just that.

Who really "wins" a condemnation case, on appeal to the Supreme Court, when the jury verdict is higher than the award of the Board of Tax and Land Appeals, but less than the landowner sought? The answer is found in *Fortin v. Manchester Housing Authority*, decided (March 4, 1990) where the condemnor first offered \$265,000 for the property and offered expert testimony of that valuation at the hearing before the Board of Tax and Land Appeals. The condemnee's expert testified that the fair market value is \$400,000 and the Board of Tax and Land Appeals awarded \$362,000 to the condemnee. Both parties appealed the award to the superior court. The condemnee

now offered in the Supreme Court the testimony of a new expert who testified that the fair market value of the property was \$620,000 while the condemning authority countered with its previous appraisal of \$265,000. The condemnor also put in evidence of the condemnee's prior lower appraisal. The jury awarded damages in the amount of \$369,000, or, \$7,000 more than the Board decision appealed from, and the condemnee sought attorneys' fees because it claimed to be the "prevailing party", pursuant to R.S.A 498-A:27. The Supreme Court held that since the condemnee received \$97,000 more than the condemnor had originally offered, the trial court was correct in ruling that the landowner was the prevailing party before the Board. The next question considered by the Court was whether the condemnee was the prevailing party in the superior court action. On this issue, the Court ruled that the answer to the question depends upon which of the parties appeals. If the condemnee alone takes an appeal, then the condemnor is considered to have accepted the ruling of the Board in lieu of its original offer and the condemnee will be the prevailing party only if the amount of the reassessed damages exceed the amount awarded by the Board. If, on the other hand, the condemnor appeals, whether or not the condemnee appeals, the condemnor is considered to have rejected the Board's award and continues to bear the burden of proving that the amount of its original offer would justly compensate the condemnee. In such a situation the condemnee prevails when any amount is assessed above the original offer. Here the Court found that the condemnee was the prevailing party both before the Board and in the superior court, holding that it is:

"not the evidence of value presented at trial which determines the prevailing party in the superior court; it is the amount which has been offered as compensation for the condemned property".

The doctrine of affirmative collateral estoppel was before the Court in two cases from the past year, *Metropolitan Property & Liability Insurance Company v. Martin and The Petition Of Breau*, both decided November 13, 1989). These cases involve the concept of *affirmative* collateral estoppel that greatly expands the commonly encountered, but complicated, doctrine of collateral estoppel. In the Breau Case, the Court defined the doctrine of collateral estoppel as being used offensively when:

"it results in determining an issue effect over the actual or potential objection of a present respondent, by applying a determination reached in a prior proceeding in which the respondent was also a party."

In the Breau Case, the New Hampshire State Board of Education used a Canadian province's Minister of Education's prior determination of certain facts to support its revocation of the petitioner's teaching certificate. The New Hampshire Board considered the Minister's order as an administrative judgment for the purposes of establishing the facts upon which the New Hampshire Board subsequently acted. The Supreme Court upheld the Board's decision that the teacher was affirmatively collaterally estopped from relitigating that issue.

In the Martin Case, the defendant, as administrator of the decedent's estate, brought

claims for underinsured benefits from each of several insurance policies. The insurance company plaintiff in this case instituted a declaratory judgment proceeding in the superior court. However, another insurance company against which the defendant had made claim on behalf of his decedent, petitioned the superior court to enjoin the arbitration of the claim under its own policy, asserting that there was no coverage. The insurance company in the other case obtained a favorable judgment against the defendant, and the plaintiff insurer in this case moved for summary judgment on the basis of offensive collateral estoppel, arguing that the judgment for the other insurance company rested upon a finding against the defendant concerning the residence of the decedent which was determinative of the central issue in the present declaratory judgment action. The trial court refused to apply the doctrine of offensive collateral estoppel and the Supreme Court reversed, holding that the doctrine applied here. The Court's expansion of the collateral estoppel doctrine in these cases is significant since it appears to be using the doctrine to estop parties in subsequent actions even where they are not the same parties in the prior action and even where the subject matter of the prior action is not the same as the subsequent action. It will be interesting to watch further developments to see if the Court continues to expand this doctrine.

Radkay v. Confalone, decided May 24, 1990 involved the related doctrine of *res judicata*. The defendant claimed that the plaintiffs action should have been dismissed because the plaintiff could have raised his claim for damages in his earlier petition for declaratory judgment involving the same lease. The trial court agreed, but the Supreme Court reversed, basically because of the *sui generis* nature of a declaratory judgment petition:

"The legislature created declaratory relief as a means for parties to determine their legal or equitable rights at an earlier stage than would be possible if the matter were pursued in other established forms of action".

Even though the plaintiff could have presented his claim in the earlier action, the Court distinguished the case from *Eastern Marine*, 129 N.H. 272, because here the prior action involved declaratory relief. Specifically, the Court found that the earlier action simply requested possession of the parcel of property in contest but made no specific claim for the damage relief the plaintiff sought in the subsequent action. Under such circumstances, the Court held that the plaintiff was not barred from further litigation involving legal or equitable claims of recovery concerning the lease. This case seems to come very close to *Eastern Marine* where the plaintiff could have litigated certain issues in the prior case but did not, but apparently the Court's decision depends entirely upon the fact that the earlier action in this case was a declaratory judgment action.

Litigators should be aware of *Lowell v. U.S. Savings Bank Of America*, decided March 8, 1990 which establishes the rule that the plaintiff loses his right to a jury trial if he does not so elect upon the filing of the writ, even in a situation where the defendant claims the right of a jury trial in his appearance or answer but subsequently waives it. The Court held that the plaintiff was not entitled to rely upon the defendant's demand for jury trial and the plaintiffs consent was not required for the withdrawal of the jury trial request

by the defendant. The rule of this case is that if you want a jury trial, make sure you have properly indicated it when the writ is filed.

Blaisdell v. Rabb, decided March 8, 1990 and *Quality Discount Market Corp. v. Laconia Planning Board*, decided March 9, 1990 both involve the issue of whether the property interest in contest created an easement or a license. In the Rabb Case, the plaintiffs claimed that they were entitled to an easement by implication while the defendant claimed that the plaintiffs had been given a revocable license. The Supreme Court upheld the trial court's finding that no easement by implication arose in the case because such an easement arises "only because the parties so agreed". Here the defendants pointed to evidence that they had given the plaintiffs a written document that created a revocable license only and the Court found that this was evidence that no easement by implication would be presumed. In the Quality Discount Case, the defendant claimed a right to use the plaintiff's parking lot because an earlier indenture had created an appurtenant easement running with the defendant's land. Reversing the trial court, the Supreme Court held that the defendants' predecessors in title were given a personal license only to the parking facilities, which expired when they sold the property to the present defendant. The issues raised by such cases can easily be avoided by clearly designating in the operative document the type of interest granted, be it an easement, a personal license, a license for life, etc.

Finlay Commercial Real Estate Inc. v. Paino, decided April 11, 1990 is another in the long line of countless real estate brokerage cases that are often litigated in our courts. Here the defendant sought to recover a real estate brokerage commission relying on an oral listing agreement. The defendant demurred, relying upon the plaintiffs' noncompliance with a rule of the New Hampshire Real Estate Commission requiring listing agreements to be in writing. The Supreme Court reversed the trial court's holding that the plaintiff broker was barred from recovery, ruling that:

"while the lack of a written listing agreement may be good cause for the board to take action against a license, it is not sufficient reason for the seller to get the benefit of a windfall. [The rule] does not act as a bar to the collection of a commission when the criteria necessary to establish entitlement to a commission have been established."

Whispering Pines v. Gagnon, decided December 29, 1989 answers a previously unanswered question under New Hampshire landlord and tenant law: whether an appeal from a decision of a district court may be taken directly to the Supreme Court. Not surprisingly, the Supreme Court answered in the negative, even though it had previously accepted such cases. The Court held that the proper route for a party to appeal from a final judgment of a district court in a landlord and tenant action is to the superior court.

A decision involving the continuing validity of a long outstanding settlement offer is *Provencal v. Vermont Mutual Insurance Company*, decided March 9, 1990. Some three years after the plaintiff suffered injury, the defendant insurer, without any litigation having begun, made an offer to settle the case. The offer contained no expiration date

or time limitation. The prospective plaintiff did not "immediately" respond to the settlement offer. Another three years went by and the statute of limitations expired. The plaintiff, apparently discovering this fact, wrote a letter purporting to accept the settlement offer two days after the expiration of the statute of limitations. The Court held that the situation of the parties had changed substantially when the possibility of suit had been eliminated and therefore held that the offer had expired upon the running of the statute of limitations. The Court did not address the issue of whether or not the three-year-old offer could have been accepted a day or two before the expiration of the statute of limitations? This makes for an interesting issue in future cases.

A case that demonstrates the perils of arbitration is *Rand v. Aetna Life & Casualty Company*, decided March 9, 1990. The case arose under the uninsured motorist law (commonly the plaintiffs policy contains a provision requiring arbitration), the Supreme Court upheld an arbitration award for the defendant even in light of substantial evidence that the plaintiff was entitled to some recovery. However, since there had been no transcript of the proceedings before the arbitrator (which the plaintiff could have provided) and because the arbitrator simply ruled for the defendant without any written opinion, the Supreme Court held that it was powerless to overturn the arbitrator's award. The trial court had actually ordered the arbitrator to explain his award but the arbitrator had refused and the Supreme Court held that the arbitration rules of the American Arbitration Association that governed the arbitrator did not require the arbitrator to do so.

National Grange Mutual Insurance Company v. Smith, decided May 24, 1990 stands for the proposition that in an uninsured motorist carrier case involving the award of prejudgment interest, the proper period of time for the computation of interest began from the date of the verdict in the underlying action. The decision is murky and difficult to understand, but what the case apparently means is that the insurer is not obligated to pay interest on interest, but simply interest from the date of the verdict on the underlying suit, and is not entitled to interest that the plaintiff in the underlying suit would have been entitled to if the defendant in the underlying action had been fully insured.

Dudley v. Becky, decided December 29, 1989 involved an issue of the relative rights of adjoining land owners to divert surface water upon their property to the detriment of the other. The Court ruled that:

"a land owner may manage or control diffused surface water in any manner, provided it is reasonable in light of the interest affected thereby in determining whether the measures taken by the landowner to control or manage diffused surface water are reasonable, a court must consider the extent of the alteration of the natural or existing runoff patterns, the importance and nature of the land and its use, and the foreseeability and magnitude of any resultant damage."

In *MacNeil v. Brownell*, decided May 23, 1990, the Court established the proposition that although it is the general rule that where there is a discrepancy between distance or location of a particular metes or bound and a physical monument, monumentation will

ordinarily control over measurements or locations contained in the deed. However, where the identity of the monumentation or its location is the product of speculation and there is evidence that brings into question reliance upon such monumentation, the monumentation will not control over the metes and bounds deed description.

Lowell v. The U.S. Savings Bank Of America, decided March 8, 1990 involved the termination of an employment agreement for cause, the defendant claiming that his termination was not effective upon the action of the board of directors of the employer corporation because the board had failed to state its reasons for his dismissal contemporaneously with its vote to terminate the contract. The Supreme Court rejected this claim, stating that the employment contract itself contained no such requirement and therefore the employer would not be held to such a duty. While an employer must have a proper reason for his or her discharge of an employee under a "for cause" employment contract, there is no requirement that the reasons be set forth in any particular fashion to the employee, absent a contractual provision requiring it.

Finally, it has been pointed out to the author on several occasions in past years that he has a "plaintiffs bent" and a somewhat jaundiced view of insurance carrier defense positions. To give lie to that view, once and for all, the author points to the case of *Maguire v. Merrimack Mutual Insurance Company*, decided April 13, 1990, where the defendant insurer, in the author's opinion, got the shaft. This is an interesting case on the issue of the appropriateness of the award of attorneys fees in a superior court legal action. The plaintiffs sought in the action to recover against their fire insurance carrier for fire damages sustained to their property. The insurer defended on the basis that the property had been subject to arson, by the plaintiff or others. By use of special verdict forms, the jury indicated that they found, by a preponderance of the evidence, that the fire was set by the plaintiffs themselves and returned a verdict for the defendant insurance company. The company then sought its attorney fees and the trial court denied them! The Supreme Court affirmed the trial court's decision, holding that the test was whether the trial court has abused its discretion in denying the insurer's request for fees. The Court found that there was no abuse in light of the fact that the trial court had found that the evidence was conflicting, including the testimony of the experts called on both sides, and that the issue was "close". The Supreme Court particularly put weight on the fact that the decision was based upon a preponderance of the evidence, the lowest test possible, and held that the trial court's explanation "indicating the court's belief that the jury could have resolved the disputed issue either way, since the evidence was so close" was sufficient to sustain his decision not to award attorneys fees. The insurance carrier here must feel, as did Lord Cornwallis at Yorktown that "The World Turned Upside Down."