

Lex Loci:
A Survey Of New Hampshire Supreme Court Decisions For The Past Year
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The Supreme Court, in its decisions in the last six months, has begun to settle in with its new membership. The opinions contain no major surprises but continue the trend reported previously of a surprising number of reversals of lower court actions. There have been some important decisions and a first opinion (a dissent) by Justice Horton.

The large number of criminal appeal decisions continues to be appalling. These decisions make unsavory reading, detailing a world of sordidness and depravity. Just the number of aggravated felonious sexual assault cases is sickening. And the victims: a girl still in elementary school under the age of eight (*State v. Peters*, decided January 28, 1991), a 15-year old stepdaughter sexually assaulted by her stepfather (*State v. Dalphond*, decided January 28, 1991), and a 13-year old daughter sexually assaulted by her father (*State v. Baird*, decided October 19, 1990). The *Baird Case* is particularly revolting: the father having been found guilty of child abuse of his 13-year old daughter, arranged to have his 12-year old son distribute at school the father's handwritten note indicating "in no uncertain terms that the defendant's daughter had engaged in sexual intercourse with him [the father] on numerous occasions" and "that anyone wishing to have sexual relations with the child need only call her at a referenced telephone number (that of her foster home) and she would readily comply".

Out of this quagmire of muck and squalor, some criminal decisions stand out. Among them is *State v. Peters* decided January 28, 1991. The Supreme Court had before it for the first time the issue whether the use of a video-tape deposition of a victim below the age of eight in a felonious sexual assault case violated the defendant's constitutional rights to confront and cross-examine all of the witnesses against him. A unanimous Supreme Court speaking through Justice Batchelder held that the use of a video-tape deposition as authorized by RSA 517:13-a II did not violate the defendant's confrontation rights, which were found not to be absolute but "may, in an appropriate case, give way to an important state interest." Comparing the New Hampshire constitutional provision (part I, article 15) with the federal constitutional provision (sixth amendment), the Court pointed out that the New Hampshire language of a defendant's right "to meet the witnesses against him face to face" was "the more precise of the two" provisions, the sixth amendment language providing more generally for a defendant "to be confronted with the witnesses against him". The Court's opinion delineates the tensions between the rights of a defendant to a fair trial and the interests of the State in protecting youthful victims. Although upholding the statute's constitutionality, the Court found that the statute had been unconstitutionally applied in the case and remanded for a new trial because the trial judge did not hold a hearing on the issue of the defendant's victim's unavailability to testify at trial. The Court pointed out that although RSA 517: 13-a II mandates, upon request, a video deposition of a victim under the age of 12 years, the statute does not mean that the deposition is per se useable at trial in lieu of the live

testimony of the victim. Rather, the trial judge "must make a specific finding, at the time of trial, that the victim or witness in a particular case continues to be unavailable to testify at trial, i.e., that good cause has not been shown for requiring live testimony".

A few other criminal decisions may be noted in passing. *State v. Pond*, decided December 28, 1990, makes clear that a prosecutor in New Hampshire (unlike many other states) does not require the permission of the trial judge to nol pros a case, the court having no right to interfere with the exercise of the prosecutor to enter a *nolle prosequi*. *State v. Leroux*, decided December 31, 1990, contains a warning to trial courts regarding the admissibility of filmed re-enactments of particular events, the Supreme Court stating that "a court should exercise caution when ruling upon the admissibility of a filmed reenactment in a criminal case. Most jurisdictions that have admitted filmed reenactments as evidence in a criminal case have required the proponent of this evidence to lay a proper foundation showing that the video tape or film accurately portrays the event in question. "

State v. Bertrand, decided March 8, 1991, is an egregious case of prosecutorial misconduct during the trial with the result that the trial judge declared a mistrial. Upon retrial, the defendant raised a double jeopardy defense and the Supreme Court agreed, holding that the defendant had never agreed to the mistrial and the court had abused its discretion in declaring it. The Court stated that the defendant had been entitled to a dismissal with prejudice and the trial court's granting of the mistrial without the request or agreement of the defendant, was improper.

State v. Torrence, decided March 13, 1991, contains a glimmer of humor in an otherwise fetid world of criminality. Confusion arose in the polling of the jury between the polling clerk and the jurors, as well as the court, in a robbery trial (RSA 636:1, III) in which the defendant was ultimately convicted of the lesser included offense of robbery without serious bodily injury, a class B felony (RSA 636:1, I). The colloquy between the polling clerk and the jury ran into trouble between the two offenses charged, and the clerk had to start again. The jury then retired and was then re-called by the judge, the court stating that "[w]hat happened with regard to the poll was a little bit unusual and may have been somewhat confusing, so I am going to go through the polling again." The jury, upon repoll, unequivocally made clear that the defendant had been found guilty of the lesser offense. The Supreme Court found that despite the confusion, there had been no injustice to the defendant, the Court placing heavy reliance on the judgment of the trial judge on the issue, and applied an abuse of discretion standard. The Court found that what had occurred was not coercion of the jury but confusion and the Court upheld the defendant's conviction.

A couple of cases of interest to the legal profession also came down in the last six months. In *Manchester v. Doucet*, decided November 9, 1990, the Court reversed a decision of the superior court that had denied a successful worker's compensation claimant his attorney's fees. The Supreme Court pointed out the language of RSA 281:37-a mandatorily provided that an employee if he prevails shall be entitled to his reasonable counsel fees "as approved by the court". The Court then went on to discuss

whether the one third contingency fee arrangement that the employee had with his attorney was proper and the Court left it up for the trial court to determine whether it should be approved. However, the Supreme Court made clear that it "has established that contingent fee agreements in worker's compensation cases are not per se unreasonable. While a contingent fee arrangement is not to be 'rubber-stamped,' it is one of a number of factors for a court to consider in determining a reasonable fee". In *Flint's Case*, decided November 9, 1990, the Supreme Court disbarred an attorney for two years in a case which did not involve a breach of fiduciary duty or criminal conduct through misappropriation or stealing of money, the Court holding that the "gravity of unprofessional conduct is not determined solely by the number of rules broken or by the particular rules violated, but is determined largely with reference to the attorney's behavior."

Have you ever had the feeling that municipal planning boards have become more autocratic and imperious than was ever old Moscovy under Ivan the Terrible. Well, there is good news for you and bad news in the recent decisions handed down by the Court, and the bad news seems to far outweigh the good. First the good news. In *Lemm Development Corporation v. Bartlett*, decided October 17, 1990, the Supreme Court held that the town of Bartlett's planning board had no authority to require a building permit from a developer who wished to add additional buildings and amenities to an already subdivided lot, where the town had never adopted site plan approval provisions under RSA 674:44, 1. Instead, the town relied on its subdivision powers but the Court rejected this argument, ruling that "[t]he nature of subdivision control caution us against allowing a planning board to expand its legislatively granted powers. Subdivision controls limit a property owner's ability to do with the property as he or she pleases. This Court has traditionally been mindful of a citizen's constitutionally guaranteed property rights and has been loathe to interfere with them unnecessarily."

That language sounds great but then compare that view with language of the same Justice (Johnson) in *New England Brickmaster Inc. v. Salem*, decided November 9, 1990. The issue before the Supreme Court was the power of the town of Salem's planning board to conditionally approve the plaintiff's site plan application under its site plan approval powers (RSA 674:43 and 44) upon the plaintiff paying a portion (almost \$40,000) of the costs of certain future *off-site* roadway improvements. This was a case of first impression. The Court had previously established that a planning board may condition the approval of a subdivision upon the applicant making contributions to off-site improvements (*Land/Vest Props., Inc. v. Town of Plainfield*, 117 NH 817 (1977)) but was confronted here for the first time whether the site plan approval powers of planning boards under RSA 674:44 gave planning boards similar powers regarding off-site improvements. The Court held unequivocally that the "legislature intended to give planning boards 'the tools to do their job' [and]...the legislature intended to grant planning boards the authority to condition approvals on the funding of off-site improvements at the subdivision stage, the site plan stage, or both, as the situation warrants." Advise your developer clients to belly up to the bar with a lot more money in their pockets.

There have been general business cases of note. In *Snyder v. New Hampshire Savings Bank*, decided March 13, 1991, a divided Supreme Court extended the right of notice in a foreclosure proceeding to lessees of recorded leases. *Davey v. Unital Corporation*, decided January 28, 1991, is the Court's first interpretation of a shareholder's right to a shareholder list under RSA 293-A:52. The Court, speaking through Justice Johnson in a well-reasoned and articulate opinion, upheld the shareholder's rights to obtain a shareholder's list, even where the shareholder makes clear that he is going to turn it over to a corporation making a tender offer for the subject corporation. The Court relied on cases in other jurisdictions interpreting the statute, putting reliance on the fact that RSA 293-A was based on the Model Business Corporation Act and the legislature's stated intent to provide for uniformity in interpretation with the laws of other states. The Court held that "[t]he test is whether the shareholder requesting a list has an independent, proper interest in obtaining the list, regardless of the amount or type of assistance any third party may give him or her"

In *Pappalardo v. Bank of Boston*, decided March 8, 1991, the Supreme Court held that the Department of Revenue Administration's power to distrain "goods and chattels" under RSA 80-8 does not extend to bank accounts. The Court held that in order to reach such bank accounts, the Department must utilize the trustee attachment procedure that does extend to choses in action and bank accounts, while the distraint procedure does not. The important difference here is that a debtor normally gets notice of a trustee attachment proceeding and may object while under the distraint statute, the debtor normally gets notice of a trustee attachment proceeding and may object while under the distraint statute, the debtor normally receives notice only after the bank turns over the funds to the Department of Revenue Administration.

Technical Aid Corporation v. Allen, decided March 13, 1991, is one of the few Supreme Court cases in recent years that upholds and enforces restrictive covenants in an employment contract against the departed employee. In a careful opinion, the Court looked at the three restrictive covenants sought to be enforced and found that two were enforceable and one not, but held that the covenants were separable and upheld the enforcement of the two valid covenants. The decision should be reviewed carefully when drafting such covenants or seeking to enforce them. It appears quite common that sloppy drafting occurs in connection with such covenants and care should be taken to be clear. The decision generally seems to be a victory for employers, since the Court stresses that "[e]mployers are entitled to require undivided loyalty from their present employees. Such a restriction is not a hardship to the employee, who by definition is not being prevented from plying his or her trade, nor is it injurious to the public interest." And, an employer "certainly has a legitimate interest in retaining the services of its current employees about whom an ex-employee has become knowledgeable."

Finally, a case to warm the cockles of a plaintiff's lawyer's heart, *Brannigan v.*

Usitalo, decided March 13, 1991.¹ With this more conservative court, it has been a long time since we have had a case like this. The issue was the constitutional validity of the noneconomic damage cap of \$875,000 in personal injury actions imposed in 1990 by RSA 508:4-d. The Supreme Court, speaking unanimously through Justice Johnson, unequivocally threw out the cap. Although the Court had recently implied that they might revisit the issue of caps and *Carson v. Maurer*, 120 NH 995 (1980) which had thrown out the medical malpractice cap, the Court appeared to be particularly nettled by the *amicus* brief of the insurance industry which argued that "*Carson's* legal antecedents are questionable and its scholarship unsound." Justice Johnson would have none of that. Repeatedly referencing the insurance industry's charge, the unanimous Court pointed out that the *Carson* decision throwing out the malpractice cap had been unanimous, had spanned 22 pages of the New Hampshire reports, and had been, as that opinion itself pointed out, "considered with special care". The Court went on to call attention to the fact that the *Carson* decision was "decided after considering the oral and written arguments of nine law firms and one individual appearing *pro se*, and the legal analyses of *Carson* were considered and performed carefully." Thus, administering the *coup de grace*, the Court, using *Carson's* "more rigorous judicial scrutiny" and standards, knocked down, one-by-one, the arguments in favor of the cap. Although the personal injury cap in the present case is 3 1/2 times as high as the medical malpractice cap in *Carson*, the Court threw it out as an unreasonable restriction on the private right of New Hampshire citizens to a judicial remedy and for violating the equal protection provisions of the State constitution. There was no doubt that the cap would have affected the outcome of this case because of "the extraordinary character of [the plaintiffs] alleged injuries": alleged medical malpractice that left the plaintiff scarred, his penis disfigured and incapable of erection and without sexual function. The lesson of this case seems to be that one should not criticize the legal soundness of a Supreme Court decision to the very court that was responsible for the decision.

ENDNOTE

1. The author is a member of a firm that filed an *amicus curiae* brief on behalf of the winning side in this case, and therefore his reflections may be biased.