

**Lex Loci:**

**A Survey of New Hampshire Supreme Court Decisions for the Past Year**

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Justice Horton made his "coming out", so to speak, in the opinions that the Supreme Court handed down in the last few months. As predicted, this new member of the Supreme Court, untainted by past judicial experience, brings a fresh approach to the important issues confronting the Court. Justice Horton's use of language in these first opinions is reminiscent of the writing of Justice Batchelder, giving a vivid twist to the prosaic job of rendering an opinion. For example, in *Smith v. Wedgewood Builders Corp.*, decided April 23, 1991, the Court had before it a rather mundane petition to quiet title, which was transformed in Justice Horton's entertaining language as being a case that

"arose as a complicated land claim spawned by land conveyancing practices familiar to many of the rural areas of our State. As development increases and land values rise, these conveyancing sins return to haunt us. In this case, a good measure of talented effort and six days of court time were expended to bring these problems to our attention."

Later, criticizing a drafted deed description "as careless and slothful, and as reflecting a bad conveyancing practice", Justice Horton proceeded to decide the merits of the case.

In a domestic relations case, *Gnirk v. Gnirk*, decided April 26, 1991, the Court had before it the issue whether there had been a substantial change in circumstances warranting a modification of a divorce stipulation when an adult child entered college, where the stipulation entered into by the parties did not provide for the payment of college expenses. Justice Horton, writing for the unanimous court, upheld the trial court's modification of the divorce stipulation, describing the defendant's husband's argument as portraying "children as uniform or fungible packages of expenditures". The Court established the domestic relations rule regarding the payment of college expenses for adult children as follows:

"The decision of a child to attend college is an increasingly important election. When a child has made this decision, the circumstances of the parent with whom he or she lives, as well as his or her own circumstances, may mean that the decision will effect a change substantial enough for consideration by a trial court in a petition to modify the original support order. A trial court may order the child's parents, though divorced, to provide a reasonable contribution toward the costs of postsecondary education if it is equitable in light of the circumstances of all of the parties."

Justice Horton's was the swing vote in the latest chapter of the ongoing epic of the Seabrook nuclear plant fight, *Richards v. Appeal of Campaign for Ratepayers Rights*, decided April 24, 1991. As longtime onlookers of this repetition of an old Norse saga (both in length and in murkiness) know, there has been a slim three to two majority on the Court in favor of the position of the Public Service Company of New Hampshire, with

Chief Justice Brock and Justice Batchelder in a consistent minority. Justice Horton sided with the remaining members of the old majority, Justices Thayer and Johnson, in a curious, unattributed, *per curiam* opinion upholding the rate plan approved by the PUC and negotiated between Northeast Utilities and the State of New Hampshire and embodied in the legislative act approving the negotiation, RSA 362-C. The majority opinion boils down to an approval of the legislation, holding that under this special statute the PUC was not obligated "to analyze the rate plan in accordance with traditional rate making principles, nor would such methodology be practical or consistent with the legislative delegation". The minority pointed out that "[o]ur decision today will effect electric ratepayers all over New Hampshire for the period remaining under the rate plan and perhaps longer." The minority would hold that the PUC approval was improper because

"the legislature contemplated, and rate payers and investors alike were entitled to, a careful and thorough review of the rate plan by the PUG in accordance with traditional ratemaking principles. Yet, the PUG, instead of determining whether the rates that New Hampshire ratepayers will be charged under the rate plan are 'just and reasonable,' focused its inquiry upon whether the 'rate plan yields the minimum rates necessary to finance the payment of the \$2.3 billion bankruptcy compromise to PSNH creditors and equity holders without unduly burdening ratepayers or the N.H. economy'."

*Niedzielski v. St. Paul Fire & Marine Insurance Company*, decided April 23, 1991, is an insurance coverage case involving the actions of a dentist who drilled more than his minor patient's tooth. The issue was whether the actions of a dentist insured under a professional liability policy, which provided coverage for damages "arising out of professional services rendered" to the insured's dentist's patients were covered by the liability policy. The particular circumstances giving rise to this issue related to the dentist's actions toward a ten-year-old female child patient, taken to the dentist's office by her mother, in order to have a decayed tooth repaired. Upon arrival, a dental assistant brought the child to an examination room and left her alone there, whereupon the dentist entered, placed a folded towel over the child's face so as to obstruct her vision, and proceeded to sexually assault her. Then the dentist, a professional to the hilt, took x-rays of the child's mouth and filled her tooth. The Supreme Court, speaking through Justice Thayer, took a narrow view of the coverage provided by the professional liability policy, held that there was no coverage since the dentist's actions "do not constitute 'professional services'". Viewing the claim in a "purely contractual light, it seems clear that the parties neither anticipated nor intended that an intentional sexual assault committed by the insured would be covered under this policy".

Two nonconforming use cases decided the same day, present an interesting contrast in approaches to the very important issue of the continuance of nonconforming uses, *Granite State Minerals, Inc. v. Portsmouth* and the *Cohen v. Henniker*, both decided July 8, 1991. In the *Granite State Case*, Justice Batchelder, speaking for a unanimous court, upheld a trial court's denial of a variance request by a nonconforming user to add three stories to his building. While acknowledging and distinguishing the *Cohen Case*, decided the same day, the approaches of the two Justices are quite dissimilar. Justice

Batchelder in *Granite State* held that nonconforming uses "violate the spirit of zoning laws and any enlargement or extension must be carefully limited to promote the purpose of reducing them to conformity as quickly as possible". The Court held that the three story addition was

"very simply an expansion of a nonconforming use. The enlargement of such use is carefully limited under the general policy of zoning ordinances . . . . This policy is based on the premise that if nonconforming uses are restricted as to change, expansion, or alteration, they will lose vitality and ultimately will expire."

In the *Cohen Case*, Justice Johnson, speaking for a unanimous Court, reversed a trial court's decision on an appeal from a zoning board which upheld the zoning board's decision to deny approval of a subdivision application seeking to convert a nonconforming seven apartment unit complex into a seven unit condominium complex. According to Justice Johnson, "[t]he right to continue a nonconforming use is recognized by the New Hampshire Constitution. . . and by New Hampshire statute." Such nonconforming uses are, quoting an authority on the subject, "a use of land which, at the time a restriction on that use went into effect, was established . . . and has not been discontinued or abandoned, [and which] can continue indefinitely". Relying on 356-B:5, which provides that no condominium may "be treated differently by any zoning or other land use ordinance which would permit a physically identical project or development under a different form of ownership", the Court held that to allow the ZBA to deny the conversion here would prevent the "land owner. . . from taking full advantage of his or her nonconforming use".

The case of *Zyla v. Turner*, decided May 6, 1991, brings to mind the old saying that "every man is a damn fool for at least five minutes every day: wisdom consists of not exceeding the limit." 1 The plaintiff in this action was a passenger in an automobile in which the driver was arrested for DWI by three local police officers and one state trooper. The plaintiff, the testimony went, "was obviously intoxicated, his speech mumbled and slurred, and his eyes glassy and bloodshot." [Does this sound familiar?] The officers arrested the driver, took him away and instructed the plaintiff not to drive the car and offered to call him a cab to get home, but he refused and he left the area by foot. The officers left the car, which belonged to the plaintiff's sister, abandoned at the side of the road with the keys still in the ignition. A half hour later, one of the arresting officers observed the same car being operated in an erratic fashion and stopped the vehicle and found the plaintiff driving it. The plaintiff failed the field sobriety tests and was arrested, but refused to take a breathalyzer test, whereupon the division of motor vehicles, based upon his refusal to consent to the test and upon the fact of his prior conviction for DWI, revoked his license. The plaintiff appealed his license revocation to the superior court, making vague claims of entrapment or a failure of the police to discharge their duty to take him into protective custody. The trial court, "looking at the whole picture", reversed the decision of the division of motor vehicles and the division appealed. In another Justice Horton opinion, a unanimous Supreme Court reversed the trial court holding that:

"[T]here is no constitutional right to refuse to submit to a chemical test. . . . it is left to the driver to choose whether to provide a sample for analysis, or invoke the statutory right to refuse, and face imposition of a civil penalty in addition to a possible criminal penalty. The consequences of this choice flow not from whether the driver may or may not be criminally liable, but from the exercise of the choice. Regardless of what factors led to [the defendant]'s driving of the vehicle, they are of little relevance to the inquiry into whether or not he freely and voluntarily made the choice of refusal. . . . Once having freely made this choice, the legislature may impose a civil penalty for the act of refusal."

Perhaps a better quotation for the plaintiffs conduct in this case would be from the Bible that says, "As a dog returneth to his vomit, so a fool runneth to his folly".

Several cases can be noted briefly. In *Fish v. Homestead Woolen Mills, Inc.*, decided June 12, 1991, the Supreme Court established the proposition that the owner of a dam has no duty to maintain a specific "safe" water level and is therefore not liable to a swimmer who is injured when he dives and hits his head on a rock, where the water level has been lowered by the dam owner but the level of the water still remains higher than the natural low-water mark. *Major v. Acorn Investment Company, Inc.*, decided March 27, 1991, contains a warning to all who voluntarily submit to arbitration of a dispute that the agreement to arbitrate should carefully set forth whether or not the arbitration award will, or will not, include interest from the date the action was begun. In *State v. Anaya*, decided June 12, 1991, the Court upheld the defendant's claim of "ineffective assistance of counsel" where the defendant's appointed legal counsel argued to a jury that the defendant should be convicted of a lesser charge than the principal charge. Despite the defendant's statement to his attorney that "I want to argue this case in Court. I want to prove my innocence", the court-appointed attorney inexplicably and astonishingly argued in his closing, as follows: "Please, please, please do as we're asking you: convict [the defendant] of being an accomplice to second degree murder. He was bad". In *Berg v. Kelley*, decided May 6, 1991, the Court used the statute of limitations savings provision, found in RSA 508:10, to protect a plaintiff whose attorney began (within the appropriate statute of limitations period) a superior court action using a district court writ, which the superior court clerk properly refused to enter. The plaintiff subsequently, within a year of the lapse of the original statute of limitation, brought and filed a proper superior court writ concerning the action and the Supreme Court allowed the action to continue.

A decision that continues to examine the tension between the rights of criminal defendants and the protection of a sexual assault victim, is *State v. LaPorte*, decided March 22, 1991. A unanimous Supreme Court had before it RSA 517:13, a law enacted in 1986 at the urging of child abuse prevention advocates, which provides that no discovery deposition can be taken of a victim who at the time of the alleged offense was under the age of sixteen years of age. In the well-written, tightly-reasoned opinion by Justice Johnson, the Court found that the statute, while expressing a legitimate state interest in protecting minor victims in sexual abuse cases, was unconstitutional under the equal protection clause of the state and federal constitutions. Finding a problem in the statute because the deposition prohibition extended to victims over the age of

sixteen since it applied to victims at the age of sixteen at the time of the alleged offense, the Court stated "[s]imply put, as applied to [the defendant], the words of the statute do not advance, its purported goal, the protection of children under the age of sixteen". Here the victim was under the age of sixteen years when the assault was committed but sixteen when the offenses were reported and over sixteen when the defendant sought to take her deposition. Reflecting the legitimate interest of the public and the legislature in protecting minor child abuse victims, the Court, instead of throwing the entire statute out, reformed it to allow the depositions of minor victims who are sixteen years of age or older at the time of the deposition.

*State v. Reid*, decided July 8, 1991, illustrates a defendant's using an audacious defense to a resisting arrest charge (RSA 642:2) where the defendant's admitted conduct was foolhardy, at best. The defendant was a passenger in a vehicle travelling at night on Interstate 93 stopped by a New Hampshire state trooper for erratic operation. The trooper activated his blue lights and alternating headlights to pull the vehicle over, but the vehicle failed to stop. The trooper then activated his siren and the vehicle finally pulled over. At the time of the stop, the trooper was dressed in his police uniform, including his gun belt and "Smokey the Bear" hat. The trooper approached the vehicle and requested the driver's license and registration and instructed all of the other occupants, including the defendant, who was in the front seat, to remain in the vehicle. While the trooper's attention was turned to the driver, the defendant got out of the vehicle and got to the trooper's cruiser, taking his keys, and leaving the trooper without lights or his police radio. The trooper attempted to arrest the driver, but the defendant jumped on his back. A scuffle ensued and the trooper and the defendant fought and rolled in the traveled lane of the highway. The trooper finally succeeded in getting free of the defendant, handcuffed the driver and retrieved the keys of his cruiser. He informed the driver and the defendant that they were both under arrest, but when the trooper attempted to handcuff the defendant, he resumed the struggle and grappled with the trooper, finally pushing him over the guardrail and down an embankment. At the bottom, the defendant landed on top of the trooper and bit his thumb and struck him in the face several times. The defendant was finally restrained with the help of additional officers and a "PR-24 baton".

The defendant's chutzpah defense against the resisting arrest charge was that he did not "recognize" that the person trying to make the arrest was a police officer!! The resisting arrest statute, RSA 642:2 makes criminal the actions of a person resisting "a person recognized to be a law enforcement official." The defendant claimed the State had failed to prove that he had subjectively recognized the arresting individual as a police officer. The trial court charged the jury that the defendant could be convicted if he "recognized or should have recognized" that the person trying to make the arrest was a police officer. The Supreme Court, in a tight, narrow decision, upheld the defendant's claim, and remanded for a new trial, holding that RSA 642:2 must be read in conjunction with the general requirements of culpability set forth in RSA 626:2 II (b) which defines "knowingly" as being "when [a person] is aware" of his conduct. The Court held that in order to convict the defendant on a resisting arrest charge, the State must show "that the defendant subjectively knew that the individual was a law enforcement official". Who

among you would have guessed the success of this defense? Kudos to the defense attorney for persevering in the defendant's cause.

**FOOTNOTE**

1. Elbert Hubbard, found in Dr. Peter's *Peter's Quotations*, p. 202 (1977).