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Lex Loci: A Survey of New Hampshire Court Decisions

by Charles A. DeGrandpre, Esquire *

Our founding fathers here in New Hampshire, when drafting the 1784 New Hampshire Constitution, used the English language in a beautiful and harmonious manner. The author is particularly fond of the provision found in Part I, Article 35, which provides that it is "the right of every citizen to be tried by judges as impartial as the lot of humanity would admit. . . judges should hold office so long as they shall behave well." This is particularly felicitous phrasing. Two other well-phrased New Hampshire constitutional provisions were featured prominently in a recent case, *Petition of Keene Sentinel,* decided August 27, 1992.

The first provision is found in Part I, Article 8, which states that "All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them. Government, therefore, should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted."

The second provision is the New Hampshire free press provision found in Part I, Article 22 of our Constitution: "Free speech and liberty of the press are essential to the security of freedom in a state: They ought, therefore, to be inviolably preserved." These two constitutional provisions clashed in the *Keene Sentinel* case, wherein a newspaper sought disclosure of the divorce records of a congressional candidate that were earlier ordered to be sealed by the superior court. The Supreme Court (only one Supreme Court Justice sitting, four superior court judges being called to the high bench to hear the case because the candidate had formerly served on the Supreme Court) first dealt with the petitionee candidate's claim that the motivations of the paper were political. The Court held that the "motivations of the [newspaper] - or any member of the publicare irrelevant to the question of access. We cannot dictate what should and should not interest the public." Next, the Court dealt with the right to privacy claim made by the petitionee. Relying on the quoted constitutional provisions, the Court found that "there is a presumption that Court records are public and the burden of proof rests with the party seeking closure or nondisclosure of court records to demonstrate with specificity that there is some overriding consideration or special circumstance, that is, a sufficiently compelling interest, which outweighs the public's right of access to those records." The Court went on to establish a five-prong set of procedures and standards to be used when a member of the public or the media seeks access to sealed court records, the substance of which places a very high burden on a party seeking nondisclosure. This decision will radically change the common practice of sealing records in divorce cases, and may have considerable application in many other types of litigated cases. The petitionee must appreciate the irony of the decision, for he is a noted scholar of our 1784 Constitution].

Witte v. Desmarais, decided September I, 1992, is a rare legal malpractice appeal to the New Hampshire Supreme Court. The case is an interesting review of the essentials for such an action. There have been very few such cases over the years. The decision does cite to an earlier New Hampshire federal district court case involving a legal malpractice action, *Fairhaven Textile v. Sheehan, Phinney,* 695 F. Supp. 71 (D.N.H. 1988). The *Witte Case* holds that the essentials of a legal malpractice action are the same as "the three basic elements of negligence: duty, breach, and causation of damages." Interestingly, in discussing the first element of such an action (" duty"), the Court said that there needs to be an attorney/client relationship. This observation, although *obiter dictum,* is surprising since it is generally believed that an attorney/client relationship is not absolutely necessary for recovery in all legal malpractice cases. It will be interesting to see how the Court develops this growing area of law.

Henniker v. Homo, decided August 14, 1992, involved a defendant who appealed from a bench trial in the Superior Court, a fine imposed upon him in the amount of $6,060 for maintaining a junkyard on his property without a proper license under a town zoning ordinance. The amount of the fine was based upon assessment of $10 for each of the days that the junkyard was illegally operated. The defendant claimed that he was deprived of his right to a jury trial because the amount involved exceeded $500, but a majority of the Supreme Court (two justices dissenting) held that the defendant committed a separate violation each day that he operated the junk yard and therefore, the amount in issue was below the $500 jury threshold. The majority conceded that if the civil fines had arisen from the same violation then the jury trial provision would have applied. This is an area of some dispute and it involves a basic constitutional right to a jury trial and will be the subject of further controversy as municipalities and the State seek to avoid the jury trial threshold by splitting a violation into bits that fall below the threshold.

Very tough issues are raised when a young child abuse victim is wanted on the stand by the prosecution as an accusing witness against the defendant. Since many of such children are very young, the question of their competency to testify is often an issue. In *State v. Mills,* decided July 27, 1992, a closely divided Supreme Court accepted the testimony of a four-year-old child victim. The issue evolves around New Hampshire's Rule of Evidence 601 that presumes that every person is competent to be a witness except as otherwise provided. Rule 601(b) further provides that a person is not competent to testify "if the court finds that the witness lacks sufficient capacity to observe, remember and narrate *as well as understand* the duty to tell the truth." (Emphasis added). This case was clearly a close call since the child when questioned by the trial judge seemed to want to tell the truth, but as the dissent by Chief Justice David A. Brock indicated, the child failed to indicate that he understood the difference between truth and falsehood. In an unusual, separate dissent, Justice William R. Johnson was particularly worried that the allegation of abuse arose in "a bitter custody and marital dispute." He would hold that a child's testimony in such a situation "should be allowed only after the most careful and precise questioning to determine if the child is, at that moment in time, free of parental or other influence, and that the child fully and

completely understands (1) the difference between truth and falsehood and (2) the obligation to tell the truth." This case appears to be the first allowing a child of such a tender age to testify, but as Justice Johnson's dissent points out, the majority opinion may very well mean that even younger children will be testifying in criminal cases. Where a citizen's liberty is at stake, trial courts should consider very carefully before allowing the admission of testimony of very young children.

The worker's compensation field was the subject of an important decision of the Court on October 14, 1992, *Thompson v. Forest.* In this case, the Court reversed its prior holding in the fairly recent *Esterbrook Case,* 127 NH 162 (1985), which had held that the legislature's barring of suits against coemployees was unconstitutional. In the instant case, the Court reversed that decision and upheld the legislative re-enactment after *Esterbrook* of the statutory provision which barred all rights of action by an employee against a co-employee, except for intentional torts against any officer, director, agent, servant or employee acting on behalf of the employer, or the employer's insurance carrier. Interestingly, the opinion, written by Justice Sherman D. Horton, was unanimous.

Several cases can be viewed briefly. In *Quinlan v. Dover,* decided October 14, 1992, the Court held that a city council's adoption of certain rezoning amendments is a legislative act and not a quasijudicial act. As such, a councilor is not disqualified to vote on a zoning amendment simply because he or she has expressed an opinion as to the appropriate disposition of the proposed measure. The Court distinguished the situation where a councilor has a conflict of interest and still votes on the rezoning amendment. In such case, the councilor would presumably be barred from voting. In *DiFruscia v. The New Hampshire DPW,* decided September 10, 1992, the Supreme Court let stand an action against the DPW which claimed that the decedent's death was caused by the improper implementation of a highway construction plan. The Court acknowledged that the DPW is granted immunity from lawsuits regarding the design, construction or rehabilitation of highways, which are discretionary with the DPW, but where a “discretionary decision has been made and approved by the appropriate individuals within the department. . . . The department is obligated to implement the plan” properly to provide the safeguards for motorists provided for in the plan.

Finally, *State* v. *Wilkinson,* decided September I, 1992, is proof of the saying that ”All marriages are happy. It is the living together afterwards that causes the trouble2." Here the defendant was convicted of pedestrian hit-and-run after being fingered by his estranged wife. The defendant first alleged that the search warrant at issue was improperly issued because it was based upon unreliable facts and secondly, that the wife's testimony at trial was a violation of New Hampshire Evidence Rule 504. The facts indicate that the defendant and his wife were living together at the time of the defendant's alleged hit-and-run. After the accident, the defendant told his wife that he had committed the crime when he confessed to her and showed her his dented car. They then separated and a year later the estranged wife telephoned the police, revealed her identity and her relationship to the defendant, and then snitched on him

as being the culprit, because she "wanted to clear her conscience". In an understatement, the defendant admitted that "the couple's marriage was not stable," and argued that the search warrant was improperly issued because the informant (his wife) had a motivation in making the call other than a sense of civic duty. The Court held that the wife's motivation was irrelevant, since her credibility as his wife and her claimed knowledge of the incident was sufficient. On the issue of whether the wife should have been permitted to testify, the defendant's actions at the time of the incident were even more foolhardy. The prosecution was able to show that the defendant had revealed to a friend that his car had been involved in a hit-and-run accident and another witness overheard part of that conversation. Both testified at the trial. In these circumstances, the Court held that the defendant had waived the privilege because there was no longer any marital confidence to the privileged communication. The Supreme Court upheld the defendant husband's conviction. All of which brings to mind the observation of H.L. Mencken who said that "A man may be a fool and not know it, but not if he is married.3"

ENDNOTES

Douglas, "The Tenth Amendment: The Foundation of Liberty", 16 NHBJ 286(1975); Douglas, "Judicial Review and the Separation of Powers Under the New Hampshire Constitutions of 1776 and 1784", 18 NHBJ 250 (1977); Douglas, "The Unique Role of State Constitutions: Raising State Issues in New Hampshire," 28 NHBJ 309(1987).

2 Raymond Hull, as quoted in *Peter's Quotations, Ideas for Our Time,* Page 321, by Dr. Laurence J. Peter (1977).

3 H.L. Mencken, as quoted in *Peter's Quotations, Ideas for Our Time,* Page 320, by Dr. Laurence J. Peter (1977).