

Lex Loci: A Survey of New Hampshire Court Decisions

by Charles A. DeGrandpre, Esquire

Can a little girl sue her Mommy for her Mommy's negligence that caused injury to her before her birth? This intriguing question was answered affirmatively, in one of the most fascinating cases to come down from the Supreme Court in many a year, *Bonte v. Bonte*, decided October 30, 1992. There are three short opinions in the case in which the Court split three to two on this issue. What is fascinating is the break-down among the Justices: Justices Thayer (who wrote the majority opinion), Horton and Johnson voted for an affirmative answer, while Chief Justice Brock and Justice Batchelder voted for a negative answer. The real surprise is to see Justice Thayer in the majority and Justice Batchelder in the minority; the author would have thought that their positions would have been reversed.

Justice Thayer's short majority opinion is a succinct, scholarly approach to the issue. First, noting that the Court had previously permitted a child to maintain a cause of action for negligence resulting in prenatal injuries caused by **third parties** (*Bennett v. Hymers*, 101 N.H. 483 (1958)), the Court next turned to its earlier abandonment of the parental immunity doctrine in a series of cases in the 1960's. The majority then found no reason not to apply the logic of these cases to the present issue:

"Because our cases hold that a child born alive may maintain a cause of action against another for injuries sustained while in utero, and a child may sue his or her mother in tort for the mother's negligence, it follows that a child born alive has a cause of action against his or her mother for the mother's negligence that caused injury to the child when in utero."

Justice Johnson concurred specially with the majority, but cautioned that a "right of a child to bring suit against his or her mother for injuries caused to the child before birth is fraught with difficult issues which should be resolved by a careful, case-by-case development of the law". He found no problem with the easy facts of this case where the mother's alleged negligence was her failure to cross a street carefully, thus causing her to be hit by an automobile. But what if the mother's claimed negligence is her failure to eat properly during her pregnancy? What if she used alcohol during pregnancy? She smoked? Etc. etc., etc.

These are the questions that bothered the dissenters. The minority opinion [interestingly, cowritten by Justices Brock and Batchelder) would hold that the special quality of the mother-child relationship requires not a "mechanical application of logic" but rather the consideration of public policy grounds and what "is fair and just." The dissenters agonized over their decision, noting that the "issue is difficult, and we have not reached our conclusion with ease or without doubts. However, the dissenters were clearly troubled by the cases that they could see coming down the pike, in which "after-the fact judicial scrutiny of the subtle and complicated factors affecting a woman's

pregnancy may make life for women who are pregnant or who are merely contemplating pregnancy intolerable." Although not mentioned in the opinion at all, it appears to the author that, hovering on silent wings above the conference table, was the abortion issue.

State v. Wallace decided October 30, 1992 represents an appalling example of the court's system inability to bring to justice a father who flees from his responsibility to support his own children. The defendant's artful, and successful, dodge began on March 12, **1982** when he was ordered to make weekly child support payments. In December of **1988** he was \$4,000 in arrears and a new court-approved settlement was put into place. The father failed to comply with this agreement and in a June **1989** hearing, he claimed he was unable to make any further payments. He was ordered to work with the State's unemployment office and the Division of Human Services, but he failed to comply with this latest order and he was fined and found in contempt of court and sentenced to five days in the house of corrections (which he apparently never served). On April 26, **1990** (almost eight years to the day of the first order) he was again found in contempt of court and ordered to pay a weekly sum plus something toward the arrearages. The defendant failed to comply with that order. Finally, in July of **1991** (a year and a half after the first contempt hearing) the defendant was ordered to pay child support on a new basis and the superior court sentenced him to three successive weekends in the house of corrections. The dodge successfully continued, and, without serving the sentence, the father appealed. The Supreme Court reversed, stating that the superior court had failed to distinguish the line between civil and contempt proceedings. Although the case had "elements indicative of civil contempt," the defendant was sentenced to a determinate sentence that he could not shorten by complying with the order. That made the proceeding look like a criminal contempt proceeding and in such a proceeding the State must prove beyond a reasonable doubt that the defendant did not comply with the order, which the State failed to do here. The Court vacated the contempt order and remanded for further proceedings in the superior court. It is likely that the father will be able to continue another three or four years, if not more, his further misuse of the judicial system to avoid his just responsibility to his child. There ought'a be a law preventing this kind of charade!!

A couple of municipal law cases are interesting. In *Island Shores Estates Condominium Association v. City of Concord*, decided November 4, 1992, the Supreme Court held that a cause of action on behalf of condominium purchasers did not exist against a municipality for the negligent performance of a building inspection by the city's Code Enforcement Department, which inspected the condominium units and issued certificates of occupancy even though the units did not meet the city's building codes. Justice Horton's murky majority opinion is framed in terms of duty. In essence, the majority found that the defendant city had no duty to protect the plaintiff, either under common law or under any statutorily imposed duty. Justice Brock, who concurred, would have adopted the more easily applied "public duty rule", previously announced by the Court in *Hartman v. Town of Hooksett*, 125 NH 34 (1984). The public duty rule represents a limitation on liability for municipal acts that are carried out for the general welfare, unless there is a special relationship between the municipality and the plaintiff

resulting in a creation of a duty to use due care for the benefit of particular persons such as the plaintiff.

In another municipal law case, *Turco v. Barnstead*, decided October 30, 1992, a closely divided Supreme Court reversed the superior court that had denied the plaintiff landowner's claim that the municipality was estopped from not maintaining a road upon which they had built their home. It is hard not to be sympathetic to the plaintiffs here. They owned a 60-acre plot of land in the town and had vacationed in a seasonal cottage on the land for thirty-three years. In 1987 they decided to build a year-round home. The plaintiff's land fronted on Garland Road and was .3 miles from a regular highway. The issue became whether Garland Road was a class V or class VI highway, as the status of the road at the time of the plaintiff's application for a building permit was not clear. The town had earlier taken steps to classify the road as a Class VI highway and the town had not maintained the road since 1976. However, the New Hampshire Department of Transportation records listed it as a class V road even up to the time of trial. As a result of the State's listing, the town received money from the State to aid in the highway's maintenance, presumably used elsewhere in the town. Moreover, the "Official Town Road Map" signed by the town's board of selectmen as late as 1990 indicated that the road was a class V highway. In August 1987, the plaintiffs approached one of the town's selectman, raising questions concerning the acquisition of a building permit; the plaintiffs also expressed concern that the town might not maintain the road. This particular selectman assured them that the town would maintain the road. In the fall of 1987 the plaintiffs applied for and received a building permit for a 24 x 40 foot wood frame house and expended \$67,000 to build it, after receipt of the building permit. The home was a modular home and it was on the day of delivery of the home to the plaintiff's lot that the plaintiff first heard, via the town grapevine, that the town might not maintain the road. In consternation, the plaintiffs approached all of the town's selectmen who suggested that the plaintiffs submit a warrant article for the upcoming town meeting. The selectmen never told the plaintiffs that they considered the road a Class VI highway. The plaintiffs filed the warrant article but withdrew it on the advice of the selectmen who indicated to the plaintiffs that, based on a recent court case, the selectman could take care of the problem without a vote of the town meeting. Finally, in May of 1989 the Selectman asked the plaintiffs to attend a meeting where they confronted the plaintiffs with a request that they pay \$87,000 to bring the road up to grade, after which the selectmen would agree to maintain it. The plaintiffs refused and brought suit in the lower court and the trial court upheld the town's refusal. On appeal, a three Justice majority of the Court speaking through Justice Batchelder found that the town was estopped to deny the plaintiff's request for an injunction ordering the town to maintain the road, the Court finding the estoppel being in the issuance of the building permit. The opinion is quite narrow. The Court refused to reverse the town's denial of a subdivision request by the plaintiffs (also appealed by the plaintiffs) because their property did not front on a Class V or higher road and stated that the trial court should only order that the plaintiffs be granted "reasonable access to their property for the time being, without necessarily imposing upon the town a duty to improve or maintain the road to a standard accepted for any particular road class."

The dissenters, speaking through Justice Horton, felt that the Supreme Court was supplanting the trial court's role as the fact finder and would uphold the trial court since "under these circumstances, it is not our call". All of which brings to mind Mr. Dooley's observation that "[a]n appeal is when you ask one court to show its contempt for another court." In the end, the Court's narrow decision probably is proper, given the reliance of the plaintiffs here on the actions of the town officials. This is another example of the maxim that "hard facts make bad law."

The world turned upside down. That's an apt description of the field of probate law field after the Supreme Court's decision in *In re Estate of Rolfe*¹ decided November 4, 1992. After two years of deliberation, the Supreme Court unanimously overthrew the probate court's fee guidelines for fiduciaries and their attorneys. In their place, the Court established a whole new set of guidelines, the keystones of which are (1) the keeping of the time records by fiduciaries and attorneys and (2) the existence of a fee agreement between administrator and attorney. The Court pointed out that the fee guidelines, which had been adopted by the probate judges in 1973, had never been approved by them, but yet had become "the cornerstone of all estate executor and attorney fee valuations".

The Court, speaking forcefully through Chief Justice Brock, ruled that the probate courts must separately consider and determine the fees for administrators and executors. As for administrators, the Court placed great emphasis on the added work or responsibility and the risk involved with larger estates and held that "the size of the estate is but one factor to be considered, with the final executor's fee determination being based on the actual work performed and the concomitant articulable risks and responsibilities in a particular case." The Court recommended that although administrators should keep time records, the probate court need not "base its ruling solely on the time records submitted. Rather, the goal is to give the probate court a clearer picture of the time and nature of the work involved instead of just a bottom line statement of the size of the estate."

Turning to attorneys' fees, the Supreme Court adopted the already well-accepted eight factors affecting the determination of the reasonableness of attorneys' fees in general, which are based upon the Professional Code of Responsibility and are found as Rule 1.5 (a) of the New Hampshire Code of Professional Responsibility. These eight factors, which are "non-exclusive", include the time and labor involved, the novelty and difficulty of the questions involved, the skill requisite to perform the legal services properly, the fee customarily charged in the locality for similar legal services, the amount involved and the results obtained, etc., etc.

The Court admonished attorneys to keep accurate, detailed time records" evidencing the work performed and the time expended." However, the Court made clear that the time involved in an estate is, alone, not determinative of a reasonable fee. The Court concluded its opinion by urging attorneys in estate administrations to enter into a fee agreement at the assist of the administration because although "such an agreement is not binding on the probate court, it is certainly an important factor to be considered when determining the final fee." To the author, the result was not surprising. There will

undoubtedly follow a lengthy period of adjustment and testing while the individual probate courts and the administrators and attorneys wrestle with their greater responsibilities in establishing reasonable compensation in the administration of estates. As the new fee standards develop, the probate courts must not make the probate procedure impractical or unfair or else citizens will avoid the probate system entirely, either by turning to a statutory adoption of the Uniform Probate Code's informal probate procedure or by turning to the increased use of revocable trusts administered outside the court system.

State v. Dushame decided November 4, 1992 is the appellate progeny for a DWI-influenced accident that caught the attention and anger of the New Hampshire citizenry when a ten year old girl was killed when struck by a car while sitting on her father's stopped motorcycle in the breakdown lane of the Everett turnpike, while he stopped to put on his motorcycle helmet. A car driven by the defendant and traveling in the breakdown lane at high speed suddenly appeared, and despite being waved back, the car did not reduce its speed or steer onto the roadway; "instead, the driver waved back". After the crash, the defendant was given a blood test that showed a .33 blood alcohol content, which according to the evidence offered by the state police, roughly translated to "eighteen alcoholic drinks consumed between when the defendant was first observed drinking that afternoon until the time of the crash." Worse yet, the defendant had five prior DWI convictions!! One is compelled to ask how it is possible that one can still be allowed to drive after this many DWI convictions? The defendant was charged with manslaughter and negligent homicide caused by intoxication. He was convicted and appealed these issues: (1) whether the state could offer the prior DWI convictions for the purposes of showing recklessness, an element of the crime of manslaughter and (2) whether the trial court properly substituted an alternate juror who heard all the evidence in the case for a juror who was excused for cause after the jury began its deliberations. The Court split into different majorities on the two issues. On the issue of whether or not an alternate juror could be substituted after the jury deliberations began, the Court found that although the trial judge (Dalianis J.) had skillfully and carefully handled the jury substitution process, the statutory authority dealing with jurors and their alternates simply did not permit an alternate juror to be seated after deliberations had begun. On that issue, Chief Justice Brock, and Justices Batchelder, Johnson and Horton concurred and therefore the defendant's conviction was reversed and a new trial ordered. On the issue of whether the prior convictions could be used (without any showing that the convictions were based on fact patterns similar to the present one) Justices Thayer, Horton and Johnson concurred, making a majority on this issue, that held that "evidence of the defendant's driving record showing his past experience of repeated arrests, convictions and punishment for DWI may be deemed relevant to the question of whether the defendant acted recklessly when he subsequently drove his vehicle in intoxicated condition." It must have been hard for the *Court* to resist the understandable temptation to throwaway the key and let the defendant rot in jail.

ENDNOTES

1. The author's firm filed a brief in this appeal and, therefore, the author's view may be colored.

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