

Lex Loci: A Survey of New Hampshire Court Decisions

by Charles A. DeGrandpre, Esquire

In this, the twenty-fifth year that he has been regularly writing this column¹, the author has taken the time to reflect upon how the present Court compares to past courts. The present Court's most striking attribute, to this observer, is its open receptivity to the appealing parties' arguments. Unlike the United States Supreme Court, where the justices tend to fall into pretty neatly defined subgroups (e.g., liberals, conservatives, strict constructionists, pro-abortionists, etc.), the justices of this Court seem to have the unique ability to decide issues, case by case, looking primarily at the merits of the arguments presented under the particular circumstances, rather than approaching each decision with preconceived notions. This is a unique Court that is hard to predict; one that does not decide the cases before it in a divivable fashion. A party with a good argument has a good chance of success with this Court.

If you want to know all about the very abstract issue of "forensic *DNA* profiling", read Justice Thayer's stellar opinion in *State v. Vandebogart*, decided November 20, 1992. All the author can say is, WOW!! Carefully picking its way through the mind-numbing scientific complexity of forensic *DNA* testing, the Court, in a case of first impression, approved the use of *DNA* testing in New Hampshire trial courts, approved the methodology used by the FBI laboratory in making the tests, but rejected the FBI's "population frequency calculation" (in this case, the FBI expert's opinion was that there was only a 1 out of 50,000 chance that the tested fluid was from another individual). On the latter point, the Court found that there was sufficient controversy about the statistical technique used by the FBI to estimate population frequencies to find that it was not generally accepted among human population geneticists. The Court held out that since *DNA* testing was "an evolving science," future discoveries could change its opinion in this area, but, for the present time, it would not accept the statistical population opinions proffered by the State. It is unclear to the author where this leaves the matter since it is the population statistic that is generally so devastating to the defendant that it makes it difficult to create any credible defense.

A fun case is *Petition of Tocci*, decided April 23, 1993, where the Supreme Court unanimously rejected a no-holds-barred attack by a New Hampshire attorney upon the power of the Court to order a unified bar and, in particular, upon the Court's authority to suspend him for non-payment of dues. This is clearly a case of the dog biting the hand who feeds him since the petitioner did not graduate from an accredited law school, but was allowed to take the New Hampshire bar examination when the Supreme Court granted his petition for an exception to their rule requiring graduation from an accredited law school for admission to the bar. The petition was an aggressive, broadside fusillade, attacking everything from the power of the Court to order unification of the bar, to allegations of violations of the petitioner's free speech, religion and conscience rights. The petitioner's incendiary charges included a complaint about the practice of the New Hampshire Bar Association "in frequently honoring and entertaining members of the

judiciary. . . . This frequent association with, **and base flattering of**, the members of the judiciary is plainly intending to induce the judiciary to be more concerned with maintaining good relations with members of the New Hampshire Bar Association than in impartial administration and the protection of the rights of citizens" (emphasis added). He also asserted that the New Hampshire Bar Association had embraced "militant feminism" (because the Bar has a female president?) and had an improper "close association" with the American Bar Association and the New Hampshire Civil Liberties Union, two organizations with which he vehemently disagreed. A unanimous Court, speaking through Justice Johnson, calmly and impartially considered all of the charges of the petitioner, even setting forth the petitioner's arguments in his own words at length, for all to read. Gracefully commenting upon the "strength and sincerity" of the petitioner's beliefs, the Court rejected all of his complaints, concluding:

"[The petitioner] strongly and sincerely has concluded that his conscience compels him not to pay dues to the NHBA. We have concluded, however, that the unification of the New Hampshire Bar is constitutional"

The petitioner was given ninety days to pay his dues or continue to be suspended from the practice of law.

From the torrent of recent attorney misconduct cases a few can be extracted for closer consideration. *Clark's Case*, decided December 18, 1992, makes clear that upon a petition to publicly censure an attorney, the Supreme Court may publicly consider the attorney's prior misconduct, contained in an earlier letter of private reprimand, where the reprimand was for identical misconduct. In *Whelan's Case*, decided December 31, 1992, the Court had before it a petition of the Professional Conduct Committee to impose a thirty-day suspension on an attorney who had asked his partner to draft a will from which the attorney benefited. The Court had previously publicly censured the partner who drafted the will which benefited the present respondent and the Court held that the attorney, although he did not draft the will, was in violation of Rules 5.1(c)(2) and 8.4(a) of the Rules of Professional Conduct "which provide respectively, that a lawyer shall be responsible for another lawyer's violation if the lawyer is a partner in the law firm in which the other practices, and that it is professional misconduct for a lawyer to knowingly assist or induce- another to violate or attempt to violate the Rules of Professional Conduct, or to do so through the acts of another." The Court, however, found that there were mitigating circumstances and rejected the thirty day suspension sought by the Professional Conduct Committee and instead imposed a public censure of the attorney. In *Welts' Case*, decided February 12, 1993, the Court rejected the petition of the Professional Conduct Committee for a six-month suspension and instead ordered a public censure of the attorney. The Court, although declining to adopt the American Bar Association's thirteen mitigating factors contained in the Association's "Standards For Imposing Lawyer Sanctions", found its own mitigating circumstances in the present case: the attorney's cooperation with the Committee, his inexperience in the practice of law, his timely, good faith efforts to rectify the consequences of his misconduct and finally, his confessed "remorse". In *Robertson's Case*, decided April 23, 1993, the Court publicly censured an attorney who so fervidly represented his tort

plaintiff client that, in attempting to wring a settlement offer from the defendants, he accused opposing counsel of committing some 25 felonies and other crimes and of committing professional misconduct, (all of which he threatened to report to the authorities unless the case was settled) and, further, accused one of the attorneys of being "psychotic". The respondent attorney argued that he was only being a zealous advocate, urging the settlement of his case, and warning the defense attorneys of the consequences if settlement were not reached. No settlement offer was forthcoming and a jury verdict was later rendered at one-half the amount sought by the plaintiff's attorney. The Supreme Court sided with the referee who found that the attorney had "exceeded the parameters of zealous advocacy" and had "engaged in an undertaking with the substantial purpose to embarrass and burden the attorneys" for the defendant. The Court publicly censured the attorney and ordered him to pay the costs incurred by the Committee and Bar Counsel in prosecuting the matter.

It's hard to find an **interesting** insurance coverage case but *M. Mooney Corp. v. US.F. & G.*, decided December 3, 1992, is an exception. The question before the Court was whether a "comprehensive general liability insurance policy" with "broad form property damage and completed operations coverage" covered the costs of repairing some forty-seven individual condo fireplaces. The facts demonstrated that the insured had negligently constructed over fifty condo fireplaces and that one fireplace had caused a fire to its condo unit. The fire marshal found, after an inspection, that four other units revealed charring adjacent to the fireplace and, as a result, he prohibited the use of all fireplaces pending correction of the hazard. The insured made the expensive changes to all of the fireplaces but the insurance company would pay only for the five to which damage had occurred, claiming that there had been no "occurrence" as required by the policy and that there were policy exclusions that denied coverage for the forty-seven unburned units subject to the fire marshal's prohibition of use order. The Court split three to two [as this and the next case show, it's clear that in coverage cases Justices Brock and Thayer generally are loathe to find coverage while Justices Johnson, Horton and Batchelder generally tend to find coverage]. Justice Johnson, writing for the majority, examined "the fine print" of the insured's policy and found the provisions ambiguous and interpreted them against the company. The scathing dissent, authored by Chief Justice Brock, charged that the majority had "engaged in what may be characterized as nothing less than verbal gymnastics in order to find coverage". The dissent would find that there had been no occurrence because no "accident" had occurred to the forty-seven remaining fireplaces.

*Coakley v. Maine Bonding and Casualty Company*², decided May 25, 1992, is a watershed insurance coverage case arising in the context of a toxic waste site cleanup as ordered by the United States Environmental Protection Agency. A three-judge majority, again led by Justice Johnson, found for the insured in part and for the carrier in part. The Court ruled that the insurance carrier's contract to pay "damages" under a general liability policy included remedial costs but not preventive costs. Thus, the cleanup of existing damage to the ground water beneath the landfill was covered as well as some \$1,250,000.00 of investigative costs of finding the cause of the contamination. Not covered were the very substantial costs (\$20,000,000.00) of investigating and

implementing a plan to prevent further migration of contaminants into the ground water. The majority's admitted "refining" of the word "damages" was harshly attacked by Chief Justice Brock writing for himself and Justice Thayer as dissenters. The dissenters argued that the majority's opinion, was internally contradictory, left precedent "in shambles" and misread earlier cases, while the majority for its own purposes turned to an "unwarranted resort to dictionary definitions in order to find the term 'damages' to include response costs." The majority's opinion seems to comport with the majority trend among the states in such environmental coverage questions. There is logic to both arguments, but the decision is probably best seen in societal terms by which the burden of environmental cleanups is shared between the government and insurance carriers, instead of placing the costs entirely upon the taxpayer.

Several cases can be briefly noted. In *Appeal of Toczko*, decided December 18, 1992/ the Supreme Court upheld the procedure, established by rulemaking, of the Commissioner of the Department of Safety by which jet skis are banned from lakes and ponds upon petition and a public hearing only, rather than a judicial proceeding. *Murdock v. City of Keene*, decided April 13, 1993, establishes that a jailer, having physical custody and control over a prisoner, may be liable in tort if the jailer's reckless conduct proximately caused injury to the prisoner. In *Barksdale v. Town of Epsom*, decided December 23, 1992, the Court held invalid the town's attempted end run around a clearly invalid school voucher program, by which a taxpayer who sent his child to schools other than the Town's school system were entitled to a tax abatement. The Court simply held that the abatement procedure was not legislatively authorized. In *Appeal of Northern Utilities, Inc.4*, decided December 3, 1992, the Supreme Court overturned a PUC order which required local natural gas distributing companies to absorb some of the costs ordered by the Federal Energy Regulatory Commission (FERC), holding that the United States Natural Gas Act pre-empted state jurisdiction in such cases. Consequently, the gas distributing companies were allowed to "pass through" the entire costs ordered by FERC.

State v. Fitzgerald, decided March 30, 1993, stands for the proposition that a defendant who has been prosecuted for his conduct in failing to stop at a red light has no double jeopardy argument when he is later indicted for negligent homicide and the state relies on the red light violation as a part of its case in chief. The Court reasoned that a motor vehicle violation was intended by the legislature not to be a criminal matter but a civil matter and held that, under rulings of the United States Supreme Court, a person may have imposed upon him both a civil and a criminal penalty for a single act without violating the double jeopardy clause. *State v. King*, decided March 2, 1993, is a warning to all New Hampshire superior court judges in criminal cases to refrain from commenting upon the evidence, unless great care is taken to even-handedly comment upon both the prosecution's charges and the defendant's defenses. The opinion makes clear that the Court firmly believes that superior court judges should not comment at all upon the evidence or upon the credibility of witnesses. In a case of significance to New Hampshire constitutional interpretation, the Supreme Court in *Warburton v. Thomas*, decided November 20, 1992, held that the gubernatorial override provisions of the New Hampshire constitution (Pt. II, Art. 44) required only a vote of two-thirds of the members

present and voting, a quorum being present, rather than two-thirds of the entire body thereby strengthening the hand of the legislature over the governor.

There is growing evidence that the trial courts are increasingly awarding attorney's fees, only to have such awards vacated by the Supreme Court. In both *Dover v. Kimball*, decided November 25, 1992 and *Guaraldi v. The Trans-Lease Group*, decided December 3, 1992, the Court found that the requisite finding of "bad faith" was absent and reversed the trial court's award of attorney's fees. The *Kimball Case* confounds! A member of a municipal planning board, *ex parte*, and prior to the scheduled, formal hearing, waded in to a boundary and zoning controversy by coming to the site of the dispute at the instigation of one side, and opined that (1) they were "getting screwed", (2) he was going to vote against the other side's zoning application at the forthcoming hearing and (3) the application would never be accepted at the hearing, all of which came to pass. The Supreme Court took a surprisingly tolerant view of the conduct of the city official and, despite the specific findings of the trial court that the planning board member had prejudged the case, the Court recast his actions as representing simply an attempt by a municipal officer to assist a citizen seeking his assistance under the zoning ordinances!

State v. Smart, decided February 26, 1993, is the appellate denouement of the sensational Pamela Smart murder trial that was contemporaneously broadcast nationally on television. After the defendant's conviction, she changed lawyers and the new appellate attorneys held several, well-publicized press conferences, rashly claiming that the trial had been fatally infected by publicity, that the defendant had been treated unfairly and that the conviction would be overturned on appeal. These claims were found by the Supreme Court to be groundless. The defendant bemoaned the "circus-like atmosphere" which she claimed equated to the court room shambles that the United States Supreme Court had decried in the famous *Sam Shepherd Case*, 384 U.S. 333 (1966). The Supreme Court specifically stated that it had carefully reviewed the thirty hours of videotapes of the trial, and commended the trial judge for his performance during what was admittedly a highly publicized case:

We might add that the videotapes have given us an unusual first-hand glimpse of the trial judge at work. His commanding presence throughout, shown by his demeanor with counsel and with the jury, was apparent. The defendant's trial took place in a courtroom dominated not by the media but by the presiding judge.

Our New Hampshire superior court judges are seldom recognized and commended for their evenhanded, day-by-day, administration of justice in our trial courts, always subject, for the slightest mistake, to second-guessing by the Supreme Court. It is always easy for the author to comment on cases where the trial court is reversed by the Supreme Court but in the vast majority of cases what was said of Judge Gray in the *Smart Case* would apply to all our trial judges.

It is probably difficult for this generation of citified and aesthetic yuppies to understand why a pile of chicken manure, on a hot, sunny day, is a public nuisance, *per se*. The

malodorous scent of a truckload of chicken manure sitting in the hot sun for the better part of a week is hard to describe if you haven't experienced it yourself. In *Koch v. Randall* decided December 23, 1992, the Court had before it the complaints of a town, through its health officer and of a neighboring trailer park, that the defendant (landowner and lessee farmer) had dumped a load of chicken manure in close proximity to the farmer's boundary line with the trailer park. The health officer asked the farmer to plow the manure under, but offering several excuses, he did not plow the manure under for some days. The trailer park instituted an action against the defendants and while that suit was pending, the very next year, "a similar course of events followed": spring arrived and a load of chicken manure was delivered and placed near the property line between the farm and the mobile home park and not plowed under until over a week later, despite the repeated complaints of the mobile home park tenants and the town health officer. There was some evidence of bad intent because, although the defendants had 7.7 acres available in which to place the manure, they chose to dump it close to the trailer park boundary for the second year in a row. The town finally moved to get an injunction against the defendants when repeated excuses to plow the manure under were offered, and the case was joined with the earlier suit by the owner of the trailer park. The defendants, continuing their "don't bother me" attitude, failed to answer either case and the trial court took the petition as *pro confesso* and received evidence concerning the reeking pile of manure. The trial court ordered the defendants to pay the town's and the trailer park owner's attorney's fees. The farmer and the owner appealed and the Supreme Court upheld the award of attorney's fees since there was ample evidence that the defendant's obstinate and deliberate course of conduct made the litigation necessary. In twenty five years, the author has read a lot of chicken s - - - cases, but this is the first that involved the real McCoy.

ENDNOTES

1. This column was created, and authored for several years, by the author's former colleague at the McLane office, G. Marshall Abbey, presently of the Illinois and New Hampshire bars.
2. The author's firm represented one of the parties in this appeal and, therefore, the author's view may be colored.
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