

**Lex Loci: A Survey of New Hampshire Supreme Court Decisions**

by Charles A. DeGrandpre, Esquire

The Supreme Court's inclination to freely reverse lower court decisions was evident in its recent decisions. Several cases that show the Court's proclivity are in the criminal area. *State v. Weber*, decided May 11, 1993 and *State v. Coons*, decided July 2, 1993. In the **Weber Case**, the Court reversed the defendant's conviction because he was denied a right to a fair and **public** trial, a violation of our New Hampshire constitutional provisions, part I, article 15. The trial court, relying on RSA 632-A:8 which provides for the *in camera* taking of the testimony of a victim under the age of 16, closed the court for the victim's testimony. However, the New Hampshire Supreme Court found unconstitutional the statutory provision because it provided that the testimony was to be heard *in camera* "unless good cause is shown" by the defendant, and this provision improperly required "the defendant to bear the burden of proof when the State is the party seeking to close a courtroom". In the **Coons Case**, the Supreme Court reversed the defendant's conviction because of the improper search of her purse while the police were executing a search warrant of the residence and person of another, where the defendant simply happened to be there at the time the search of the premises was underway. The case involves the issue of when a policeman "may conduct a patdown search for weapons of a suspect the officer reasonably believes or suspects may be armed". *Terry v. Ohio*, 392 S.c. 11968). The Court held the **Terry** doctrine does not permit a frisk for weapons unless there is a reasonable belief or suspicion directed at the person to be frisked that the person may have weapons. Here, the Court found that the police officer went beyond merely searching for a weapon but conducted "a full-blown search" of the defendant's purse where he found a small container which he emptied and found to contain "psilocybin mushrooms", a hallucinogenic drug reportedly used by "pre-Columbian Aztecs for ritual purposes." Where do they get these exotic drugs, anyway? The Manchester police are missing a good lead by failing to raid the museum gift shop at the Currier Art Gallery!! If these decisions illustrate the Court's readiness to reverse the lower courts' determinations in criminal proceedings, they also point out the consistently articulate and first-rate job done by the unsung chief appellate defender, James E. Duggan, who handles a substantial portion of the appeals for indigent defendants.

A series of three cases, all reversing the lower courts, are *State v. Cressy*, *State v. Luce* and *State v. Chamberlain*, all decided July 15, 1993. These cases explore the frontier of the nature and extent of expert evidence the prosecution is allowed to introduce in a criminal case to prove that a very young child has been sexually abused. *Cressy* is the key case, in which an unanimous Court reversed the convictions of the defendant because of the admission on behalf of the prosecution of an expert's testimony, a psychologist, who was allowed to testify that the symptoms exhibited by the child were "consistent" with those of a sexually abused child. The Supreme Court held that the expert's testimony must rise above a certain "threshold level of reliability to be admissible" under Rule 702 of the New Hampshire Rules of Evidence. The Court

pointed out that the psychologist herself testified that her psychological evaluations "are partly an art form" and the Court concluded that the consensus among scholars was that there "are as yet no scientifically reliable indicators of child sexual abuse." The Court held that the State could offer expert psychological testimony "explaining the behavior characteristics commonly found in child abuse victims to preempt or rebut any inference that a child victim witness is lying" but that was a far cry from the present case where there was an "absence of any recognizable, logical nexus between many of the identified symptoms and the conclusion that the children have been sexually abused". In *State v. Chamberlain*, the *Supreme Court*, relying on its opinion in **Cressy**, reversed the defendant's convictions because of the admission of expert testimony in the defendant's trial for felonious sexual assault of a young child where the expert offered by the prosecution based her conclusions on "the child sexual abuse accommodation syndrome" which relies on identifying several characteristics of the child victim and then concluding that the child had been abused by showing that the victim "exhibited behaviors and characteristics identical to those identified by the child sexual abuse accommodation syndrome". The expert was allowed to conclude her testimony by confirming that "the behaviors of the child victim were consistent with those of a child who had been sexually abused." The **Luce Case** is an almost unbelievable test of the outer the author is tempted to say, "fringe" limit of expert testimony in a felonious sexual assault case. Here, a psychologist was allowed to engage on the stand in a "blind interpretation" of certain drawings made by the child victim that the expert had not seen prior to taking the stand, and about which she had no knowledge of the circumstances surrounding their creation. Furthermore, the expert had never interviewed the child victim who had drawn them. The expert concluded that the drawings were "consistent" with those of a child who had been sexually abused. The Supreme Court found that the testimony "is a clear example of the type of unreliable evidence that we have held should be excluded from criminal trials", relying on the **Cressy Case**.

In a converse situation where the trial judge refused to allow an expert's testimony in *Mankoski v. Briley*, decided June 24, 1993, the Court (just to keep trial judges on their toes) reversed a trial judge who disqualified an orthopedic specialist who testified in the trial from rendering an expert opinion on the patient's psychological health. The Supreme Court held that it was an error to automatically disqualify an expert in a particular medical field from testifying as an expert in another field, because an inquiry should first be made as to the individual's particular qualifications to determine whether there was a sufficient foundation for the expert's specialist knowledge in another field. It must be darned hard to be a trial judge and retain a sense of humor?

A couple of attorney cases are worth noting. *Jones' Case*, decided July 2, 1993, was an unusual disbarment case, to say the least. Here the Court had before it the actions of an attorney, who represented a lawyer threatened with the termination of his employment by the New Hampshire United States Attorney's office, and who himself leaked to the press (without the knowledge of his client) the letter of termination being sought by his client in the judicial proceedings, although blaming the leak on the U.S. Attorney's office. This deception continued through a series of interrogatories and depositions, in which the attorney continued to place the blame

on the other side for the release of the letter to the press. The Supreme Court characterized the actions of the respondent attorney a "malefaction" that was "at the least, a dirty trick." The Supreme Court found particularly distressing the waste of judicial resources in dealing with this sort of deceptive behavior and found that the respondent attorney had breached his privilege of being an attorney and disbarred him. *Kelley's Case*, decided June 30, 1993, dealt with an issue rarely seen in our New Hampshire courts: whether a fee charged by an attorney is clearly excessive in violation of Rule 1.51aJ of the New Hampshire Rules of Professional Conduct. The case arose from the action of the Professional Conduct Committee to publicly censure the attorneys involved and the Supreme Court held that, although the attorneys involved had violated some rules of Professional Conduct, the finding of the referee which held that the defendants' fee was excessive must be reversed, because the Supreme Court "announc[e]d, for the first time, that whenever the committee alleges that an attorney has violated Rule 1.5(a) [no excessive fee should be charged], it must present evidence establishing a generally accepted, reasonable fee for the services in question," something the Committee hadn't done.

A classic conflict of laws question was before the court in *Ferren v. General Motors Corporation*, decided July 15, 1993. The plaintiffs, New Hampshire domiciliaries, sued General Motors for injuries allegedly suffered as a result of their exposure to lead dust while employed many years before at a GMC plant in Kansas. The Kansas statute of limitations law barred the suit, but the suit would be allowable in New Hampshire, if New Hampshire law applied, because of New Hampshire's liberal discovery rule. Using the classic "choice-influencing considerations" of *Clark v. Clark*, 107 N.H. 351 (1966), the Court held that "virtually all of the essential elements connected with the lawsuit are grouped within Kansas," and ruled that Kansas law applied even though the Court's ruling would mean the plaintiffs were without remedy.

*Pope v. Town of Hinsdale Planning Board*, decided May 20, 1993, is a split Supreme Court case in which the minority seems to have the better argument. At issue is that nettlesome issue which seems to confront cities and towns all over New Hampshire: how to **avoid** their obligation to provide manufactured housing choices for their citizens in the face of RSA 674:32 which provides that municipalities "shall afford reasonable opportunities for the siting of manufacturing housing, and the municipality shall not exclude manufactured housing completely from the municipality by regulation, zoning ordinance or any other police power". The town of Hinsdale refused a building permit request by the plaintiff who sought to expand his manufactured housing park located in the town. The majority held that the part of RSA 674:32 which provides that "municipalities **permitting** manufactured housing parks shall afford realistic opportunities for the development and expansion of manufactured housing parks" did not apply *where* a town through its zoning ordinance did not "*permit*" manufactured housing parks but rather accepted them as non-conforming uses. The dissent by Justice Horton, with whom Justice Batchelder joined, contended that the majority's discussion of whether or not the town permitted manufactured housing parks was pure semantics. Rather, the minority argued that, since Hinsdale had prior to amendment of its ordinance allowed mobile home parks,

the Court should not "countenance allowing a municipality, which has permitted establishment of parks, to summarily freeze the rights of those who acted under the park option by changing its pick on how it will satisfy its manufactured housing obligation".

Several cases can be noted briefly. *Delude v. Town of Amherst*, decided July 2, 1993, makes clear that a municipal zoning ordinance may be challenged by a petition for declaratory judgment. *Butler v. Walker Power, Inc.*, decided July 19, 1993 an employee discharge case, held that an employee handbook which clearly spelled out the fact that it did not create a contract of employment, left the status of the employee as that of an at-will employee who could be discharged at the will of the employer. *Appeal of Durocher*, decided July 19, 1993, contains what may perhaps be the secret of success before this Supreme Court. Here, two *pro se* claimants were successful in appealing denials by the Department of Employment Security for unemployment compensation. The secret appears to be conciseness, as the Court spoke in glowing terms about the claimants "refreshingly short two paragraph argument". It will be quite a challenge for advocates to surpass this test and the author offers a reward to any attorney who files a shorter one.

So that the state's property lawyers do not think that the author has forgotten them, *Boissonnault v. Savage*, decided May 20, 1993, is a case that will warm the very cockles of their hearts. This case makes clear how differently New Hampshire treats joint tenancies than many other states. The lower court denied the request of the plaintiff creditors who had levied upon a debtor's joint tenancy interest with his wife and obtained a deed by sheriff sale), to partition the defendant's marital residence. The trial court ruled that the defendant wife had retained her right of survivorship in the premises dispute the sheriff's sale but the Supreme Court pointed out that New Hampshire's joint tenancy interest is a different animal than most: "The conveyance of the joint tenant's interest at a sheriff's sale severs the joint tenancy and defeats the right of survivorship, after which the judgment creditor, as purchaser at the sale, becomes a tenant in common with the remaining cotenant". Furthermore, the defendant, relying upon her homestead right, claimed that she had a right, under the homestead law, to occupy the premises during her lifetime, but the Court ruled that the homestead exemption provision IRSA 480:3-a) "merely establishes the duration of the homestead right; it does not define the nature of the right itself. Therefore, we hold that RSA 480:3-a does not entitle the defendant to occupy the marital premises and preclude the plaintiff from seeking partition, at which time the homestead right may be accommodated." This latter holding makes abundantly clear that the homestead right in New Hampshire is merely a monetary protection and nothing more.

Finally, *Asselin v. Town of Conway*, decided July 2, 1993, is a nostalgic tour of rural New Hampshire, a decision in which the Supreme Court upheld the Town of Conway's prohibition against internally lit business signs. The description of Conway by Justice Johnson is a wonderfully idyllic vision of what a New Hampshire considers an ideal town to be:

Nestled in the Mount Washington Valley, Conway historically has been a tourist destination for activities in the White Mountain National Forest. Route 16 links the villages of Conway and North Conway and offers striking views of the mountains and ledges to the west. Substantial commercial development, primarily along this highway, has rendered part of the town a shoppers' Mecca. Hundreds of signs draw tourists in the day and evening hours to the shopping centers, lodging facilities, and restaurants clustered in the villages of Conway and North Conway and lining Route 16.

It brings tears of joy to the eye of a true New Hampshire taxpayer to know that big bucks can be made from a few mountains and ledges which otherwise would go untouched, undeveloped and unused. How about a Moat Mountain Cog Railway, terminating at dual water slides at White Horse and Cathedral Ledges, finally cascading into Diana's Baths? A tastefully, externally lit directional sign for the new attraction atop Mt. Chocorua. Required attire: tank top, swimsuit and flip-flops. Now that's an idea with dollar signs written all over it. Oh, New Hampshire!