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Lex Loci: A Survey of New Hampshire Supreme Court Decisions

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The Supreme Court's recent opinions include some of the last decisions written by Justice Batchelder prior to his retirement. The New Hampshire Bar will surely feel the absence of his wit, clarity and imagination. Justice Batchelder never forgot for whom he fashioned justice, the common, ordinary citizen. This column is dedicated to the work of this fine jurist. As Dave Nixon would put it, "We'll miss you, Billy Batch!"

The recent decisions of the New Hampshire Supreme Court continue to demonstrate that the Court is a leader in the area of crafting new remedies in the constantly changing and growing area of tort law. The Court has a well-deserved and historical reputation *for* a reasoned expansion of our common law to allow for the development of new rights and remedies in the tort area. The recent decisions of the Supreme Court, several by Justice Batchelder, confirm that open, but cautious, approach to claims for new tort remedies. This column will concentrate on the many important tort cases recently handed down by the Court.

Two recent tort cases illustrate well the Court's approach in expanding our common law of negligence, *Hickingbotham v. Burke,* decided July 24,1995, and *MacLeod v. Ball,* decided August 17,1995. Both cases involved factual situations where the plaintiff, a minor, was given alcohol by another. The lead case is *Hickingbotham,* which involved an action alleging that the defendants, "as social hosts, were liable for injuries [the plaintiff] suffered after they served him alcohol at a party held in their home." The plaintiff rested his case on (1) a statutory cause of action under RSA 179:5 which provides that no person shall give to a minor or person under the influence of liquor an alcoholic beverage and, (2) a claim under common law negligence principles that would recognize a duty of a social host to exercise care in giving alcohol to a guest. The trial court dismissed the plaintiff's claim for failure to state a cause of action, but a divided Supreme Court reversed this finding.

The majority opinion, written by Chief Justice Brock, took up the challenge presented by the claims and forged a broad opinion not restricted to minor plaintiffs only. The Court first ruled that RSA 179:5 grants no civil right of action based on a violation of this statute, although under its prior holdings, the violation of the statute can be used as evidence of negligence.

Turning next to the main issue of the alleged cause of action based on common law negligence, the majority conceded that this was a case of first impression in New Hampshire and noted that most of the other jurisdictions which have considered the issue of social host liability, whether to an intoxicated guest or to any injured innocent third party, had decided the question in favor of the social host. However, the Court found that the basis for the prevailing rule of common law was faulty, being primarily based on the obvious fact that one could not become intoxicated by reason of liquor

furnished him if he did not drink it, i.e., the proximate cause of the intoxication was not the furnishing of the liquor, but the consumption of it by the guest.

The Court then reviewed the history of the regulation of alcoholic beverages in the state and noted that it had previously recognized under our common law principles a common law dram shop action against liquor licensees for both the injured intoxicated patron and those third parties who were injured by the intoxicated patron. The Court then looked to public policy considerations and found that there were many similarities between sales by liquor licensees and social hosts and ruled that

a plaintiff who is injured as a result of a social host's service of alcohol may maintain an action against that social host, so long as the plaintiff can allege that the service was reckless. A social host's service of alcohol would be reckless if the host ‘consciously disregard[ed] a substantial and unjustifiable risk' of a high degree of danger.

The degree of recklessness required must involve "a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation" and the Court held that the traditional elements of common law tort action applied to an action based on social host liability. Specifically, the Court found that the comparative fault provisions of our law applied to such actions. As to the latter, the Court held that "[a]n injured drunken guest must demonstrate a severe degree of recklessness to demonstrate that a defendant was more at fault than the plaintiff."

The majority went on to indicate that an injured innocent third party would also have an action against the social host and such an innocent third party would have only to show ordinary negligence, not recklessness, and the principles of comparative fault would also impose a lessor burden upon the injured third party. The Court further specifically held that the social host's liability was not based solely upon the guest's age, indicating, however, that an intoxicated guest may be more likely to recover if he is a minor than an adult.

Justice Horton, speaking for himself and Justice Thayer, would find that ordinary negligence only would be required to base a cause of action against a social host, stating that the correct rule should be that "when a social host knows or should know that a guest is becoming intoxicated and knows or should know that the guest is likely to drive, it is a breach of the duty of care to provide the guest with alcohol"

In a subsequent case, *MacLeod v. Ball,* the minor plaintiff was given alcohol that the defendant bought and illegally gave to the plaintiff in violation of RSA 179:5. The following day, the plaintiff consumed excessive amounts of the donated alcohol (but not as a social guest of the defendant) and was subsequently injured when he fell off a bridge. The Court applied the same rule as *Hickingbotham,* and held that there was a common law action against the defendant if the defendant's delivery of the intoxicating beverages was reckless. The Court held that it was a question for the jury to decide whether or not the defendant's actions were the proximate cause of the plaintiff's injury.

In a negligence case that brought nationwide attention to our Supreme Court, *Tebbetts v. Ford Motor Company,* decided September 19, 1995, the Court was confronted with a claim the basis of which was that the defendant automobile manufacturer defectively designed an automobile in which the plaintiff was injured because it did not contain an airbag on the driver's side. The automobile was manufactured before federal regulations required the installation of driver's side airbags. The question turned upon the issue of whether the federal Safety Act preempted state common law principles of negligence. The superior court had granted Ford's motion to dismiss and the Supreme Court reversed. In a well-written Batchelder opinion, a unanimous Court found that the federal Safety Act did not specifically preempt state common law and held that the action could be maintained. The Court cautioned that by merely allowing the action, it did not mean that a jury would find that Ford had acted unreasonably in its failure to provide an airbag.

Another fascinating case exploring the outer parameters of negligence law is the Court's decision in *Welzenbach v. Powers,* decided June 30, 1995. A unanimous Court, in an opinion by Justice Batchelder, was confronted with a factual situation where the plaintiff had fathered a child in a meretricious relationship with the defendant and had been adjudicated the father of the child in a subsequent paternity action in the superior court. The plaintiff father then brought an action against the defendant mother, under common law principles, asking for ages because he alleged he had relied upon the assurances the defendant mother that when they had engaged in consensual sexual relations she had taken adequate contraceptive measures. The father's intrepid and imaginative claim was dismissed by the trial court and a unanimous Supreme Court affirmed, on public policy grounds. The Court found that to permit such actions while simultaneously encouraging paternity actions for support "flies in the face of all reason" and held that despite the New Hampshire constitutional provision providing for remedies to injured persons (part 1, article 14): "some risks exist without the benefit of a legal remedy." To hold otherwise would "invite the courts into the bedrooms of the citizens of this State. If the plaintiff wishes to turn the forces against him by 180 degrees, he must make his case in the first instance in the legislature." We are going to miss such forceful and colorful language.

In another important negligence case, *Marquay v. Eno*, decided July 11, 1995, the Court explored the issues of the duty of a school to protect its students from sexual abuse by its employees. In a case certified from the United States Federal District Court, the Court used a remarkably similar analysis as it used in *Hickingbotham* to judge whether a statutory or common law action arose, using a very traditional, careful analysis to such questions. The Court first addressed whether or not a violation of the abuse reporting statute, RSA 169-C:29, creates a private right of action and held that "the reporting statute does not support a private right of action for its violation because we find no express or implied legislative intent to create such civil liability."

Turning next to the question of whether "a common law cause of action exists based on an alleged failure to exercise a recognized duty of reasonable supervision" of its employees, the Court recognized a new tort ruling that "a special relationship exists

between schools and students [which] include the compulsory character of school attendance." The Court held that under the common law "a duty of supervision is owed to each student" but that this "duty falls upon those school employees who have supervisory responsibility over students and who thus have stepped into the role of parental proxy." Furthermore, the Court found that these common law duties may give rise to liability for abuse that occurs after graduation in certain circumstances. The Court, however, refused to recognize a new "constitutional tort" based upon a denial of a student's constitutional rights to equal protection because the Court stated that it "will avoid such an extraordinary exercise [by creating a constitutional tort] where established remedies -- be they statutory, common law, or administrative -- are adequate."

Anglin v. Kleeman, decided October 3, 1995, involved the all too common case of a foreign object left in a patient's body after surgery. It never ceases to amaze the author that such an elemental mistake can be made, and is in fact, made more frequently than one would ever think. Can't these nurses and doctors count anyway? Instead of Organic Chemistry, operating room nurses and surgeons should be obliged to repeat Arithmetic 1 in med school! In the present case, the foreign object left in the plaintiff's body was a four by eighteen inch lap sponge (!) and the plaintiff sued both the doctor and the hospital. Each such sponge has a marker that should show up on a post-operation X-ray, but it was missed here and is missed in many other cases. The jury returned a verdict against the hospital only (and a low one at that) and the plaintiff appealed, claiming that the surgeon should be considered "the captain of the ship and therefore liable wheneyer a foreign object is retained in a patient regardless of a surgeon's own negligence." This would impose strict liability said the Supreme Court and the Court instead ruled that "in modem medicine, the surgeon is a member of a team of professionals, and we see no reason why the surgeon should be deemed responsible for the actions of other professionals neither employed nor controlled by him." Interestingly, the doctrine in a *res ipsa loquitur* was not applied in the case because the plaintiff did not request such an instruction. This seems to be a major mistake, since, in the author's view, the application of the doctrine was appropriate and would have led to a verdict against the doctor as well as the hospital.

In two recent personal injury decisions, the Supreme Court was confronted with issues of the application of the statute of limitations, and more particularly, the discovery rule. In *Glines v. Bruk,* decided August 22,1995, the Court applied the statute of limitations to a personal injury action in a case where the plaintiff suffered a back injury as a result of a defect in a mechanical loading dock. The plaintiff first sued the owner of the premises, but later found out under discovery process that the loading dock's defect may have been caused by others. The plaintiff then sued the other alleged tortfeasors but these suits were brought beyond the period of the statute of limitations. The plaintiff relied upon the discovery rule but the Supreme Court held that at the time of his injury, the plaintiff knew that his injury was caused by a defect in the loading dock. The discovery rule applies only in situations where the plaintiff "is unaware of either his injury or that the injury was caused by a wrongful act or omission." Since in this case the plaintiff knew both the fact of the injury to his back and the fact that there was some casual link

to the defective loading dock, the Court held that the discovery rule was not applicable.

In *Conrad v. Hazen,* decided September 27,1995, the Court held that the former six year statute of limitations applied to an action where the injury occurred before the change to the three year statute but where the injury or its cause was not discovered until sometime after the enactment of the three year statute, the former statute governs:

a plaintiff who alleges an injury based on a defendant's conduct that occurred prior to July 1, 1986, but where either the injury or its cause was not discovered until sometime after that date, would have the benefit of the six-year statute of limitations and the common law discovery rule.

In the author's view, horses are inherently dangerous critters and anyone fool enough to mount one assumes the risk that something unfortunate (like getting kicked or falling off, for example) will happen. The author himself avoided mounting a horse until he was past the age of 40 and the experience of being that high off the ground on a moving animal with a mind of its own confirmed what his common sense had already told him: riding a horse is a hazardous activity. *Wright v. Loon Mountain Recreation Corporation,* decided August 22, 1995, involved an accident to a plaintiff while on a horseback riding tour. The defendant, the horse provider, knew just how risky the business of horseback riding can be and it required the plaintiff to sign a long and detailed exculpatory agreement. The agreement showed how knowledgeable the defendant was about horses since in repetitive language, the plaintiff rider was required to acknowledge that "horseback riding is a HAZARDOUS ACTIVITY," that "the use of horses involves a risk of injury to any and all parts of my body," that "it is not possible to predict every situation and condition of the terrain a horse will be ridden on," and that therefore "it is impossible to guarantee the horse I am riding will react safely in all riding situations." However, just as Emperor Joseph said to Mozart, concerning his opera "The Abduction from the Seraglio" that "there were just too many notes," the Supreme Court found that the agreement was not enforceable because there were just too many words. It appeared that plaintiff was injured while on tour when she was kicked in the leg by her guide's horse and she sued the horse provider.

A three court majority, led by Justice Johnson, found that the exculpatory agreement, while containing clear language in one section releasing the defendant "FROM ANY AND ALL LIABILITY FROM DAMAGES AND PERSONAL INJURY TO MYSELF OR ANY PERSON OR PROPERTY RESULTING FROM THE NEGLIGENCE" of the defendant, its agents and employees, there were other portions of the agreement that appeared to limit exculpability only to injuries sustained from the horse ridden by the plaintiff. Since the exculpatory contract is to be construed against the defendant, the Court found the contract unenforceable because "the contract structure and organization obscured the exculpatory clauses."

This was too much for Justice Thayer with whom Justice Brock joined in dissent (are both adept horsemen?). Justice Thayer found that the majority's opinion twisted and contorted the language of the agreement and would find that the basic exculpatory

language of the agreement was clear and should be enforced. The author has two observations. The first is that the Court's recent approval of such exculpatory clauses beginning with *Barnes v. N.H. Karting* Assoc., 128 N.H. 102 (1986) is an unfortunate development and represents a throw-back to former days when injured parties were held to exculpatory agreements forced upon them by defendant business operators, who, for profit, entice plaintiffs into engaging in inherently dangerous acts. The author's second observation is to quote approvingly from the *English Book of Common Prayer* where it is observed that a "horse and mule...have no understanding [and] whose mouths must be held with bit and bridle, lest they fall upon thee."

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