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Lex Loci: A Survey of New Hampshire Supreme Court Decisions

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"The life of the law has not been logic: it has been experience." With this quotation from Oliver Wendell Holmes, Jr.'s classic essay The Common Law, the New Hampshire Supreme Court, speaking through Justice Batchelder in one of his last opinions, adopted "as part of our common law the tort of malicious defense." *Aranson v. Schroeder,* decided October 31, 1995.

In this unique case the plaintiffs were injured when they purchased property that did not have a certificate of occupancy. They sued the seller and received judgment, upon which, although pursued in Massachusetts, they had "not collected a farthing." They then sued the seller's attorney claiming that he, in defense of their action, had conjured up out of whole cloth a memorandum that falsely set forth the circumstances in connection with the real estate closing in which the plaintiffs were purchasers. Because the defendant attorney's action created false material evidence in the course of the case, the plaintiffs sought redress from the attorney and asked the court "to recognize a cause of action for the tort of malicious defense." Such a tort is not yet recognized by the Restatement (2d) of Torts, but it would create a mirror image of Section 674 of the Restatement that creates a remedy for **false claims**. Four members of the Supreme Court (Justice Thayer dissented because the "recognition of a tort of malicious defense is unwise as a matter of policy") extended our common law regarding this new cause of action. No other state has clearly adopted malicious defense as a cause of action.

Justice Batchelder, showing his early, general practitioner leanings, pointed out that "anyone who has been a litigant knows that the fact of litigation has a profound effect upon the quality of one's life that goes far beyond the mere entitlement to counsel fees" and wrote for the Court that our common law should "recognize that when a defense is commenced maliciously or is based upon false evidence or perjury or is raised for an improper purpose, the litigant is not made whole if the only remedy is reimbursement of counsel fees." The Court, adopting language of noted treatise writers, stated that when "a lawyer goes beyond the role of counselor and intentionally initiates defensive action that harasses the plaintiff and that the attorney knows or should know is without credible basis, then the attorney, no less than the client, should be liable." The Court then went on to adopt standards for the elements of malicious defense, adopting five elements that "essentially mirror those required to prove the tort of malicious prosecution."

In Manchester, cheerleading is an "alternative sport" for young women. As the father of a former Manchester Central high school cheerleader, the author knows first hand the danger of injury both to the cheerleader as a result of an accidental fall and to the parent whose hearing is adversely affected by attendance at cheerleading tournaments. Two recent cases involved injuries to Manchester high school cheerleaders. *Walton v. Manchester,* decided November 6, 1995, is a warning to trial counsel that "there must

be limits to pleas of pure passion and there must be restraints against blatant appeals to bias and prejudice" in closing arguments.

In the instant case, the plaintiff was injured as a result of an accident when she was a cheerleader at a Manchester junior high school. The cheerleading coach was a volunteer who had "no particular training or experience in this area" but who had agreed to coach the team because "no one else volunteered to do so," not an uncommon occurrence. The plaintiffs sued the city, claiming that the city was negligent in failing to hire a properly trained cheerleading coach. However, most significantly, the plaintiff did not sue the volunteer coach. Despite this significant fact, the city's defense counsel, in closing argument, made an impassioned defense in which she equated the lawsuit as being one against the volunteer teacher as the "true defendant." She quoted former President Bush for the proposition that "lawsuits in this country have become so widespread that *even ma and pa's are afraid* to *coach little league"* (are we columnists ever going to have another president so easy to quote for such inane statements?) and stated that if the jury found in favor of the plaintiff there would be "no more Sunday pickup basketball games in the high school gym" and "you would have 'no more Pop Warner' leagues." These statements were made despite several objections by the plaintiff, all of which were surprisingly overruled by the trial judge. The jury, not unexpectedly, decided in the defendant's favor.

However, a unanimous Supreme Court speaking through Chief Justice Brock, held that the argument went too far: a "counsel's remarks may be so prejudicial as to mandate reversal. We conclude mat the city's closing remarks, calculated as they were to encourage the jury to make a decision based on personal interest and bias rather than reason and the presented evidence, were 'so prejudicial as to require a new trial'" Volunteers of the world, arise, and throw off your chains!!

Desaulnier v. *Manchester School District,* dated October 27, 1995, is another cheerleading case where a former Manchester high school student brought an action against the defendant school district for injuries allegedly suffered while cheerleading for Manchester's West High School. The issue was an important one, whether the well-entrenched and hoary New Hampshire rule that an anion begins when the defendant completes and signs a writ continues to be operative, for statute of limitation purposes, where the writ is held by the attorney and served after the statute of limitations has run.

The Supreme Court was split on the issue. Justice Johnson, writing for the majority, held that in New Hampshire, the completion and signing of writ rule goes back to 1820 and held that a writ was sufficient if the writ is completed by counsel "with the intention to cause it to be served upon the defendant." The majority recognized that there were exceptions to the general rule, none of which applied in the case, because the superior court specifically found that "at the time [the plaintiff's] counsel prepared the writ in this case, she did so with the intention of having it served on the defendant." The city defended on the basis that the instant case fit one of the exceptions to the general rule because the defendant's stated intention to serve the writ later changed because of

the initiation of settlement negotiations in the case. The majority rejected that argument, saying that the plaintiff's intention is relevant when the writ is signed and is not affected by a later change of heart. The majority recognized that a plaintiff could not prepare a number of writs and hold them in reserve because he or she would "not have the requisite intention, at the time they are completed, to serve them."

However, Justices Thayer and Horton dissented. Justice Thayer would change our long standing rule and would substitute a new rule which would "require some oven act by the plaintiff to qualify as a commencement of a lawsuit, other than plaintiff's counsel completing and signing a writ," while Justice Horton would have found on the facts that the plaintiff's original intention, although originally to serve the writ, changed, and thus "a present intention, abandoned or made conditional, does not qualify as a time trigger for the commencement of the action, any more than does a completion of a writ that subsequently sees alteration." This case continues to leave a simple guide to trial practitioners: serve the writ upon the defendant before the expiration of the statute of limitations. Why take the chance of the expense and risk of the kind of appeal that resulted in this case?

State v. Westover, decided October 31,1995, is a case of first impression, both under the New Hampshire and United States Constitution. The issue raised in this case is whether a defendant convicted in a lower court of a class B misdemeanor carrying a penalty without the possibility of imprisonment is entitled to have a court-appointed counsel on appeal. In an well-crafted opinion by Chief Justice Brock, the Supreme Court held that under the due process and equal protection principles embodied in the New Hampshire Constitution, as well as the United States Constitution "because a defendant facing no loss of liberty does not have a right to appointed counsel at trial, he does not have such a right at the appellate level where the constitutional concerns are lessened." Since the United States Supreme Court has not directly considered whether indigent defendants, faced with no deprivation of liberty, are entitled *w* appointed counsel on appeal, it will be interesting whether the New Hampshire Court has correctly forecast what the United States Supreme Court will do in such circumstances. The author believes that the New Hampshire Court has chosen correctly.

Two municipal law cases can be noted in passing. *Trull v. Town of Conway,* decided December 28,1995, establishes the rule that a town cannot be held liable for the failure of a municipal police officer to warn of icy conditions of which the officer is aware on a state highway over which the town had no control and no duty to repair and maintain. In *Stillwater Condominium Association v. Town of Salem,* decided December 6, 1995, the Supreme Court established the rule that a town does not have a statutory or common law duty to provide municipal water to a condominium development. The condominium development argued that the subdivision had been approved by a town's planning board upon the condition that the lots would be serviced by municipal water, but the developer had failed to construct the municipal water line. The Supreme Court held that there was no common law or statutory duty on the pan of a municipality to provide municipal water service and that a municipality does not assume such a duty

"merely by virtue of having [subdivision] regulations."

How many times have you been stopped in traffic and a motorist in front of you signals for you to take some vehicular action, such as signaling you to make a turn in front of him or signaling you to pass him? Are there legal rules that govern these situations? Well, fear no more, we now have a new addition to our common law on the duty of highway "signalers" and "signalees," courtesy of a wonderfully lucid opinion by Justice Johnson. *Williams v. O'Brien,* dated December 29,1995. In this case, the plaintiff was travelling on a highway and was injured as a result of a collision that occurred when the defendant made a left-hand turn at an intersection into the path of the plaintiffs vehicle. The defendant had made the left-hand turn as a result of being signalled to do so by another defendant who was stopped in traffic at the same intersection. As a result of the accident, the plaintiff was severely injured and sued both defendants, alleging that the signaler had undertaken a duty of care when she signaled the other defendant to proceed and that she had breached that duty to the plaintiff by failing to make certain that the roadway was clear.

The Supreme Court held that

[t]he mere act of signaling does not, by itself, create a duty to insure the safety of other operators on the highway. However, if the signaling driver knows, or should know of special circumstances that create, or could reasonably create, a foreseeable risk of harm to third party operators on the roadway, then a legal duty to exercise reasonable care exists.

The Court held that such a special circumstance may occur when "the signaler knows, or in the exercise of reasonable care should know, that the signalee's visibility of other motorists is obstructed." If the signaler breaches that duty, the signaler can be held liable, not only to the signalee driver but to any other motorist, such as the plaintiff in this case, injured by his negligence.

Appeal of Emissaries of Divine Light, decided December 27, 1995, is an excellent examination of the right of a religious community to a real estate tax exemption under RSA 72:23, III. The taxpayer plaintiff is a religious organization owning a number of parcels of real estate (referred to collectively as Green Pastures) in the Town of Epping (do some towns more than others attract the fringe element?). The property consisted of a chapel, classrooms, offices, a parsonage, multiunit residential buildings, a dining hall, dormitories, agricultural land, wooded lots and vacant land. The Supreme Court upheld the Board of Tax and Land Appeals that had allowed only a partial exemption for the Emissaries for only that land and buildings directly used and occupied for religious purposes but not for others.

The Emissaries objected that a partial exemption or apportionment was illegal and that their First Amendment rights under the federal Constitution were violated. The Court quickly disposed of the partial exemption issue, reciting that the New Hampshire courts had a long history of recognizing under the statute an exemption for charitable and

religious organizations for only that portion of the property, actually used for religious or charitable purposes.

In response to the Emissaries' claims under the federal Constitution's First Amendment which provides that government "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," the Court held that a long line of United States Supreme Court cases has recognized the validity of such real estate tax exemptions without violation of the First Amendment. The Emissaries next claimed that the exemption statute was not applied neutrally because the Board had "unfairly compared [the Emissaries] to mainstream religions, thereby helping to '*es*tablish' the religions that the board viewed more favorably." The Court found that there was no evidence on the record that the Board applied the exemption statute in a biased manner in favor of one religion over another.

Nor many New Hampshire cases make their way to the United States Supreme Court, but a recent decision of the United States Supreme Court denied Ford Motor Company's appeal of the September, 1995, decision of the New Hampshire Court in *Tebbetts v. Ford Motor Company,* decided September 19,1995. See the author's comments on the New Hampshire Supreme Court opinion at 36 New Hampshire Bar Journal, No.4, Page 65. The question in the *Tebbetts Case* was whether the federal Safety Act preempted state common law principals of negligence. The United States Supreme Court denied certiorari and left standing the New Hampshire decision that there was no preemption. 1995 WL 668748 (US.N.H.). This allows the plaintiffs action against the defendant automobile manufacturer (which alleges a defective design because the automobile did nor contain an air-bag on the driver's side) to proceed in the New Hampshire courts. The United States Supreme Court's action made the national television networks and was touted as "an affirmance" of the New Hampshire decision.

If a poll were taken of New Hampshire lawyers, how many would be able to answer the question, what does "PELRB" stand for? The author believes that fewer than five percent of attorneys would be able to answer correctly. Although a specialized area of the law, the decisions of the New Hampshire Public Employee Labor Relations Board (PELRB) are important and affect a lot of citizens, in particular, unionized municipal employees and citizens of municipalities having such employees. However, the author has never meet a PELRB appellate decision that doesn't put him to sleep immediately. Perhaps it is the length of these opinions that are the cause.

An example is *Appeal of Town of Newport,* decided October 27,1995, where the Supreme Court reversed the decision of the PELRB to include certain employees within a new bargaining unit (consisting of all full-time employees) as proposed by the municipal employee union. The case was before the Supreme Court on appeal by the Town of Newport and the case was making its second appearance before the Court, the Court had previously remanded the case, after oral argument, to the PELRB to make findings to support its decision in the case. No further hearing was held by the PELRB but it issued a supplemental decision that included findings of fact and conclusions of

law supporting its original decision. On the second round, the Supreme Court found that the PELRB's decision to include in the bargaining unit, a departmental secretary, the town's water and sewer superintendent, the waste water treatment plant superintendent, the cemetery and grounds superintendent, three fire lieutenants and the deputy fire chief was unreasonable since there was no sufficient community of interest exhibited by these employees with the employees in the basic bargaining unit.

In another PELRB appeal, *Appeal of* the *City of* Portsmouth, decided November 15,1995, the Supreme Court reversed a decision of the PELRB which had held that a fire commissioner's comments as reported in a local newspaper was an unfair labor practice. The city Fire Commission argued that the comments made by a fire commissioner were an exercise of free speech protected by the state and federal constitutions and the Supreme Court agreed. The fire commissioner had commented to the press upon the unauthorized release by the union of an alcoholic rehabilitation agreement between the City's fire department and a particular union member. Upon hearing that the release had *come* from the union leadership (apparently in retaliation against the particular union member's charge against the union of failure of assistance in his troubles), the particular fire commissioner in question hit the roof, making several angry statements against the union leadership and its release of the material, stating that "[t]o me it is low. It's below classless," that she believed "the union has been led astray by its leadership" and that she questioned "whether [the union members] had chosen the best [leaders] they could." The PELRB found that the fire commissioner had committed an unfair labor practice in attacking the union leadership but the Supreme Court disagreed stating that under both New Hampshire and federal law, the fire commissioner's comments were not coercive and did not amount to interference with the administration of the union.

Based upon many years experience, the author's rule in reviewing PELRB appeals is to put them beside his bed for late night reading, as they work better than a sleeping pill.

Endnotes

1. The Author's firm represented a party to the action and, therefore, the author's view may be colored.