

Lex Loci: A Survey of New Hampshire Supreme Court Decisions

By Attorney Charles A DeGrandpre

The Supreme Court has been fearless in its defense of its constitutional rights. All lawyers can applaud the New Hampshire Court's recent opinion where the Court stalwartly defended its turf. In *Opinion of the Justices*, (prior Sexual Assault Evidence), decided January 24, 1997, the New Hampshire Senate had sent up to the Supreme Court a prickly nettle that raised the issue of the separation of powers between the legislature and the judiciary and which had the potential of being a most troublesome and divisive question. The Supreme Court handled the matter superbly. The question raised by the proposed legislation struck at the heart of the separation of powers: whether proposed legislation, which would have altered the Supreme Court's own evidentiary Rule 404(b) by establishing a rebuttable presumption that evidence of other sexual assaults committed by a defendant in a sex offense case was admissible and could be considered for any relevant purposes including proof of the defendant's motive and intent, was constitutional. Rule 404(b), as now formulated, is apposite, providing that evidence of other crimes or other acts is not admissible to prove the character of the defendant. Backing carefully into the issue of the separation of process, the Superior Court, citing back to the first volume of the New Hampshire Reports, carefully stated that as "a separate and coequal branch of government, the judiciary is constitutionally authorized to promulgate its own rules". Granting that the legislature could enact or effectuate substantive rules changes, but not procedure changes which lie in the Supreme Court's power, the Court distinguished between the two by defining "the rights and duties which people live by as substantive, whereas procedure defines the method by which those rights are enforced".

The Court held that the evidentiary rule in question was a procedural rule (it, said the Court, "goes to the heart of the judicial function") and, thus, within its sole province and that the proposed legislation as promulgated would be unconstitutional. To reach this result, the Court had to side-step several recent legislative actions in which it appeared that the legislature had "gone beyond its legislative function and crossed into areas that remain the exclusion of the judiciary" such as the limitation of parole evidence (RSA 356:4-e) and legislation providing that the manner of dress of a victim as admissible to show consent, RSA 632-A:6, IIIa. It did so by gracefully stating that while these enactments might arguably interfere with the judiciary's authority over procedural matters "we may apply them as a matter of comity when they are consistent with judicial functions and policies and when no constitutional challenge is made to them". Such felicitous language!! Signed by all of the Justices of the Court (as is typical in such opinions), the decision draws a bright line in the sand over which the legislature should not cross.

LeBlanc v. American Honda Motor Co., Inc., decided January 28, 1997, is a case where a plaintiff, in the Supreme Court, lost a jury verdict of almost \$2,000,000 where the conduct of the plaintiff's attorney in attempting to appeal to the sympathy, passion and prejudice of the jurors by remarks and actions which were found to be grounded in race or nationality resulted in a Supreme Court reversal. The plaintiff was severely injured when struck by an off-road vehicle manufactured by the defendant, Honda Motor Company. The plaintiff asserted a products liability claim against Honda and was successful in receiving a multi-million dollar jury award, but the defendant company claimed that the trial had been so tainted by the actions of plaintiff's counsel as to deprive it of a fair trial. The plaintiff's actions, through his attorney, were extraordinary. For example, in cross-examining an expert for the defendant, the plaintiff's attorney asked if the expert knew "the color of the Japanese flag?" Upon objection, the attorney said he was "merely curious" about how the allegedly defective machine had happened to be designed in a red, white and blue color.

Other such instances followed, culminating by the plaintiff's attorney's closing argument where he stated:

What's this case about? It's not about Honda making great automobiles or Sony making good Walkmans. But also it's not about Pearl Harbor or the Japanese prime minister saying Americans are lazy and stupid. What this case is about is not American xenophobia; it's about corporate greed.

At that point, the defense counsel went into orbit, and the trial court chastised the attorney and warned him against making further references *of that nature* which he did. However the Court did not strike the plaintiff's attorney's comments,¹ and only made general references in its charge to the jury about deciding the case without passion and prejudice and without sympathy.

This was not enough for a divided Supreme Court. The majority, speaking through Chief Justice Brock, held that the remarks appealed to prejudice and to the passions of the jurors. Even though the plaintiff's closing references were brief, Chief Justice Brock, quoting a First Circuit case, stated that "when an elephant has passed through the courtroom, one does not need a forceful reminder". The Court's majority stated that where a racial or ethnic appeal has been made, the trial court has the discretion to weigh the evidence and to make a decision as to whether the jury had been tainted, but in the present case, the Supreme Court held that the trial court had abused its discretion. Justice Batchelder, sitting by designation, concurred separately, indicating that he would adopt a *per se* rule of reversal because such arguments are offensive to the judge and to the judicial system. Justice Horton dissented joined by Justice Thayer, citing that the trial court had handled the question properly because the arguments,

although "completely uncalled for", were at best "a weak attempt to engender nationalistic (rather than racial) prejudice".

The author could write an "Ode To The Unsung Job Of A Superior Court Clerk" (perhaps he should and be rewarded with a "special assignment"), but the job of superior court clerks in relationship to jury selection has grown remarkably more difficult and complicated as a result of the decision of the Supreme Court in *State v. Martel*, decided January 31, 1997, where a convicted defendant complained about how the jury panel had been selected. What lawyer hasn't been approached at least 100 times by citizens called for jury duty who asks the attorney to try to get him/her off the jury panel? The author always refers such inquiring individuals to the clerk of court who, if the person has a good reason, usually excuses the juror from attending. The Supreme Court found that the act of the clerk, and specifically the jury clerk, in excusing jurors without specific judicial approval violated the specific statutory provisions of RSA Chapter 500-A which vested that power to a Judge only. Similarly, where jurors failed to return jury questionnaires, the act of the clerk in not following the provisions of the jury selection statute (RSA 500:A-7,1), which mandates that the clerk direct that the jurors who have failed to return the completed qualification forms to appear in court to complete the forms, did not comply with the statute. The Court held that the understandable actions of the clerk's office in such cases did not comply with the specific provisions of the statute, and thus concluded that there were several procedural irregularities in the impaneling procedure in the case at hand. However, the Court found that these irregularities do not affect the decision in this case because the defendant could show no prejudice (a case of: I won, but I lost). The Court admonished clerks of their "heavy responsibility in maintaining and assuring the integrity and substance of the Jury system", stating that "without strict adherence to the legislatively prescribed jury selection procedures, the purpose of the statute and a defendant's rights under our State and Federal Constitutions could be violated". Well, if you were a superior court clerk, would you tell the Supreme Court to stuff it, or would you, with your already limited resources try to comply?

Carrier v. McLlarky, decided April 16, 1997, demonstrates that there are no grains too fine for the millstones of the New Hampshire wheels of justice. This opinion results from an appeal of a small claims matter in Derry District Court where both parties appeared pro se, involving a very small amount of money. The issue concerned the return of a water heater by the defendant contractor who installed a replacement for the plaintiff. The contractor agreed to try to obtain warranty credit from the manufacturer against the cost of the new water heater, even though the water heater was supplied by a different manufacturer than the defendant handled. The defendant was unsuccessful and the trial court found for the plaintiff who sought the value of the original from the defendant. The Supreme Court reversed, relying on the principles of agency as stated in the Second

Restatement of Agency ruling that "an agent cannot be held liable to the principal simply 'because he failed to procure for him something to which the latter is not entitled'".

Application of T.J.S., decided April 3, 1997, is an infrequent look at the New Hampshire screening process of prospective attorneys conducted by the Supreme Court's committee on character and fitness. The committee voted to deny the petitioner's application for admission to the bar, even though he had successfully completed the bar examination, because the applicant had been convicted ten years earlier of six counts of felonious sexual assault for which he served a total of approximately four years in State prison. The Court upheld the committee, pointing out, however, that the committee's recommendation is advisory only. The Court reasoned that an applicant must possess "good moral character" (RSA 311:2) in order to be admitted to the bar. Quoting the Vermont Supreme Court, the Court pointed out that it was its "duty and power...to guard its portals against intrusion by men and women who are mentally and morally dishonest, unfit because of bad character, evidenced by their course of conduct, to participate in the [practice of] law", and held that although a prior felony conviction is not, per se, a bar to admission, a prior conviction of felonious sexual assault creates a presumption of unfitness. A person convicted of felonious sexual assault, the Court pointed out, could not be certified to teach in New Hampshire, obtain a liquor license, possess a firearm, or to engage employment or volunteer service involving minor children. The Court implied that to allow a similarly convicted person to practice law would be illogical. The Court concluded its analysis by addressing the applicant's claim that he had been rehabilitated since his convictions. The Court found that the rehabilitation evidence was insufficient to overcome the taint of his serious misconduct.

Smith v. New Hampshire Department of Revenue Administration,¹ decided April 3, 1997, is the long awaited decision on the much ballyhooed challenge to the New Hampshire interest and dividends tax as it stood prior to its amendment in 1995. Prior to oral argument, the State conceded that the law prior to 1995, which exempted from the tax interest from New Hampshire banking institutions, violated the commerce clause of the United States Constitution, but the question remained whether the exemption violated the New Hampshire constitutional provision against disproportionate or unequal taxes. The Court, in a unanimous opinion by Chief Justice Brock, concluded that the interest and dividends tax exemption was a valid classification under the New Hampshire constitution, justifying its decision on the grounds that the exemption was based on a valid property distinction because " [banks] are different".

Turning to the thorny issue of remedies (since the State had conceded that the tax had violated the commerce clause of the United States Constitution), the Court remanded the matter to the trial court, placing the burden on the petitioning taxpayers to prove "that the effect of the exemptions for New Hampshire bank interest and dividends was

to discriminate unlawfully against other sources of interest and dividend income, as opposed to discriminating solely against income earned on investments in out-of-state banks, as the State maintains". In the post decision hoopla over this case, the State has said this burden will be very difficult for the plaintiff taxpayers to meet while the plaintiff taxpayers have said the opposite. It will up to superior court Judge George Manias (is there a reason this particular superior court judge gets saddled with all the difficult cases such as this one and the Claremont school litigation case?) to decide the issue. The result so far is a typical New Hampshire one: citizens can be taxed unconstitutionally but the remedies for such an illegal act can be difficult for our citizens to obtain and are often illusory.

In a case that's a warning for all trial practitioners, the Supreme Court held in *Belcher v. Harrison*, decided March 17, 1997, that a party's failure to file a timely pretrial statement (something not ordinarily looked upon as imposing harsh penalties) can result in the dismissal of the party's case. Admittedly, in this case, the facts showed that the defendant's counsel had been warned over and over again that a failure to file a pretrial statement would result in his default, was aware of the deadline and had actually attempted to reach the plaintiff's attorney on the date of the deadline by telephone to gain an extension. However, this was not enough for the Court who pointed out that the defendant had the advantage of knowing the other party's pretrial statement at least a week before he filed his own statement, and that he had been sufficiently warned of the consequences of his failure to promptly act.

O'Brien v. O'Brien, decided November 15, 1996, involved the newly occurring issue of a grandparent's visitation rights to a grandchild. Under RSA 45S:17-d, a grandparent is given reasonable visitation rights "whenever a grandchild's nuclear family is the subject of 'divorce, death, relinquishment or termination of parental rights'" or "some other cause of the absence of a nuclear family". Here the defendant mother and father of the child had never married. The lower court held that the grandparent's visitation rights statute did not apply in this situation. However, the Supreme Court held that the provision "or other cause of the absence of a nuclear family" was sufficient to allow the grandparent to present evidence upon the question whether the defendant's status as an unwed parent might qualify, by itself, as a statutory circumstances resulting in the absence of a nuclear family.

The income tax difference between sale of assets versus a sale of stock is everyday grist for the mills of corporate tax lawyers. But the distinction also can be important in other situations. *New Hampshire Division of Human Services v. Allard*, decided March 17, 1997, is one such area. In this case, the Division of Human Services was attempting to recover depreciation payments made to a nursing home prior to its sale to a third party buyer by its owners. Under the statute, if the sale was a stock sale, the

depreciation recapture was not available to the Division but if it were an asset sale, the Division could recapture the depreciation payments (which were quite substantial). The buyer and the seller obviously were aware of the depreciation recapture provision as they completed the purchase in a closing that involved a "prodigious exchange of paperwork", in the words of Supreme Court Justice Broderick. It appeared that the majority of the paperwork involved a transfer by the buyer to the seller of all of the real estate and personal property owned by the corporate seller, and deeds of real estate and bills of sale of personal property were exchanged, as well as indemnity agreements, etc. A final document included a bill of sale of "all the authorized and issued shares of stock" of the seller. Arguing that this made the transaction a stock sale rather than an asset sale, the seller urged the Court to find that the depreciation recapture provisions did not apply. But the Supreme Court held otherwise, holding that the seller not only intended, but had agreed in the purchase and sale agreement to sell the nursing home assets and the transaction's nature as an asset sale was not changed by the transaction being later divided into smaller segments, including the sale of stock of the selling corporation.

Bragg v. Division of Motor Vehicles, decided March 17, 1997, is a classic example of a Catch 22 situation. The motor vehicle operating license of the defendant was automatically suspended under the law for 180 days because he refused to take a chemical test after his arrest for driving while intoxicated. A hearing was held by the Department of Motor Vehicles reviewing the suspension and the suspension was upheld. Under RSA 263:75, the defendant had a right to appeal to the superior court for a speedy review of the suspension process and he sought such a review, but the superior court scheduled a hearing for a date after the suspension period would have expired. Was this a denial of due process? The defendant thought so, and got a early hearing in the superior court asking for an immediate resumption of his license privileges, which the trial court granted. The Supreme Court reversed, however, stating that although it was lamentable that the hearing was not scheduled in a more timely manner, the defendant had "received the due process he was due in the circumstances of this case". Chief Justice Brock concurred specially pointing out that it was true that "the plaintiff would have served his entire suspension period before receiving a record review of that suspension", but the statute did not help him. The Chief Justice would hold that RSA 263:75 does not require that the record review occur within the suspension period, but what is required "is an effort by the court to schedule such review". Shades of that wonderful novel, *Catch 22*, by Joseph Heller, where the ultimate "catch" was that if a soldier asked to be excused from fighting in the front lines because he was mad, he could not be excused from doing so since he obviously had the mental capacity to understand that the front lines were dangerous.

The Public Utilities suffered an infrequent setback to its attempt to expand its jurisdiction in *Appeal of Zimmerman*, decided January 31, 1997. The PUC sought to extend its jurisdiction over the petitioner who the Commission held was operating a so-called STS system, by which he was providing telephone services to approximately fifty-six commercial and retail tenants occupying space in four separate buildings owned by the petitioner. It was clear that the petitioner was operating or managing equipment for the conveyance of telephone messages, but the question was, was that "for the public" as required by RSA 362:2, which grants jurisdiction to the Public Utilities Commission? The Supreme Court went back to a long line of its own cases and held that the STS systems do not come under the jurisdiction of the PUC because the petitioner enjoyed "an underlying relationship with those persons who use his services that is sufficiently discreet to differentiate them from other members of the relevant public".

State v. Henderson, decided March 7, 1997, is a skillfully crafted opinion by Justice Johnson on the issue of a defendant's right to effective counsel where the defendant's trial counsel admittedly, but inadvertently, submitted a jury instruction to the trial court that expanded the grand jury indictment in such a way as to negate the very defense presented by the defendant at trial. The trial court had denied the defendant's motion for a new trial, but the Supreme Court upheld the defendant's request, stating that "the superior court failed to recognize the devastating and unfair effect that trial counsel's error had on the outcome of the case". Here the defendant at trial conceded that he had committed a crime, (a Class B felony), but claimed that he did not commit the much more serious offense of a Class A felony. It's an unusual situation but it was enough, in the Court's view, to prejudice the defendant where his counsel offered a jury instruction that inadvertently allowed the jury to convict the defendant of the greater offense despite his defense to the contrary!

The run of recent Supreme Court opinions has produced a couple of decisions that will warm the cockles of a probate lawyer's heart. Unlike criminal law or trial work, a probate lawyer has to wait for years before a significant Supreme Court opinion in this area comes down from the bench. When one does, it becomes the rage of the small coterie of New Hampshire probate lawyers and is the principal subject of conversation at the many wakes and funerals *and postprandials* where trust and estate lawyers do their marketing. To have not one, but two, such decisions in the same month is unheard of. In *In Re Estate of Washburn*, decided March 12, 1997, is a testamentary capacity case. This important issue hasn't seen a Supreme Court decision in years. Before the Court was a classic probate issue [the author is already atwitter]: an earlier will made in October 1986 left most of the testator's property to her niece. In 1992, the testator executed another will leaving a \$5,000 bequest to her caregiver. Only three weeks later, the testator executed a third will giving the caregiver the bulk of her estate. The Supreme Court held that there was sufficient evidence to uphold the finding of the trial

court that the testator lacked testamentary capacity at the time of the third will, the Court pointing out that the evidence showed that the petitioner suffered from "confusion" and "forgetfulness" and that her intentions "were unclear and fluctuated". Other evidence showed that the testator had recently failed to recognize her niece and had asked to be billed for her sister's funeral although she had already paid the bill. There was also expert testimony offered by the will contestant that the testator suffered from some degree of Alzheimer's disease at the time of making the third will, and the testator's behavior could have been affected by the disease.

The Court, reaching back to the landmark decision of Judge Doe in 1866 in *Boardman v. Woodman*, 47 NH 120 [old law is the best law we probate practitioners feel], held that

Our reading of *Boardman* reveals two distinct inquiries: (1) whether the testatrix possessed testamentary capacity to execute a will; and (2) if the testatrix had such capacity, whether the will is the offspring of a delusion or was executed during a lucid interval. *Id.* The probate court was required to proceed to the second inquiry only if the testatrix possessed testamentary capacity.

Since the probate court determined the testatrix did not have the capacity to make a will, the trial court did not need to consider whether the testator was under a delusion.

A very interesting aspect of this new case is the Court's very straightforward discussion of the tricky and somewhat confusing question of who has the burden of proof in a will contest based on testamentary capacity. The caregiver argued that the family member contesting the will had the ultimate burden of proof. Justice Horton, for a unified Court, pointed out that although many other states place the burden of showing lack of capacity on those contesting the will in New Hampshire,

the proponent of the will has the burden of proving its due execution. The proponent is aided in this task by a presumption of capacity accorded the testatrix. A will proponent need not introduce any evidence upon the issue of the testatrix's capacity until a will contestant first rebuts the presumption by offering evidence of incapacity.... Even if the presumption is successfully rebutted, the proponent is not thereby required, as the respondent argues, to prove a negative -- that the testatrix did not lack capacity. Instead, once the presumption is rebutted, the proponent merely retains the initial burden of proving due execution. The proponent must persuade the trial Court, by a preponderance of all the evidence presented, that the testatrix possessed the requisite capacity to make the will.

In a second important probate case, *In Re Estate of Laura, Sr.*, decided March 7, 1997, the Court had before it issues of dependent relative revocation of a will, and

pretermitted children. Just a mere listing of the issues sends a thrill down the author's spine. In this case, the testator had made a will leaving all of his property to one of three children (one of whom [a daughter] was dead). The testator purposely disinherited his deceased daughter and living son, as well as his grandchildren by the deceased daughter. Two living great grandchildren through the deceased daughter's son were not named or referred to in the will but their parents were. Sometime later, the testator attempted to execute a codicil to his will which would have left the estate in three shares for each of his children or issue of children. The codicil was not properly witnessed and did not become effective and was never offered for probate. The Supreme Court first turned to the issue of revocation and held that in New Hampshire under the guiding statute (RSA 551: 13) a will can only be revoked by physical act or a properly executed codicil or other writing. Since neither of these had occurred, the Court found that the first will had not been revoked. At this, the proponents of the codicil turned to the doctrine of dependent relative revocation which in summary provides that where a portion of a will is changed with a view to a new disposition of the property but the proposed change fails, there is a presumption in favor that the will stands as originally framed. However, the Court held that there was no basis for the application of the doctrine here because "the doctrine [of relative revocation] only applies in cases in which there has been a valid revocation of an existing will", clearing up some confusion based on an earlier case where the Court seemed to have held otherwise. On this particular point, the author can't resist noting that the Court adopted the author's position in his Wills treatise that had questioned the reasoning of the earlier case.

Finally, on the issue of whether the great grandchildren were pretermitted heirs, the Court held that they were not pretermitted because the grandmother (the decedent's deceased daughter) of the great grandchildren had been named and "when a testator's child has been named, referred to, or is a devisee or legatee under the will, the child's issue cannot invoke the statute even if the issue are neither named, referred to, nor devisees or legatees under the will". Oh, how exquisite: two probate opinions in a month. The author feels like a pig in the proverbial do-do.

Endnotes

1. The author's firm represented a party to the action and, therefore, the author's views may be colored.
2. For the non probate lawyers, a postprandial is a luncheon following a funeral hosted by the decedent's family. The expenses of a postprandial are generally considered a deductible funeral expense on the federal estate tax return.