

**LEX LOCI: A Survey of Recent New Hampshire Supreme Court Decisions**  
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Among the recent opinions of our Supreme Court there are several that deal with the Court's regulatory powers over the legal profession, decisions that directly affect all admitted to practice before the bar in New Hampshire. The most significant is the decision of the Court establishing a Public Protection Fund, as Supreme Court Rule 55. *In re The Proposed Public Protection Fund Rule*<sup>1</sup>, decided January 22, 1998. The Court posted its decision on the internet on that day, but the Chief Justice publicly announced the Court's unanimous decision during his annual luncheon address on that date to the assembled members of the New Hampshire Bar Association during its Mid-Winter Meeting.

The Court's decision was not unexpected given the fact that it had indicated to a legislative subcommittee that it would consider a response to a proposed mandatory bonding proposal for New Hampshire attorneys arising from the legislature's most recent round of hearings regarding the Fairbank's fiasco.

The Court was fully aware that members of the bar were divided on the issue (it appears that more memoranda were filed with the Court in opposition to the imposition of the Rule than for it), but recognized that its "obligation to protect the public is no less important when we supervise attorneys in this state than when we discipline them...Adoption of the Public Protection Fund Rule is a further and important step in our continuing efforts to protect the public".

With a nod to the Bar Association (petitioner), the Court imposed its Rule

mindful of the distinguished and honorable history of the New Hampshire Bar Association and [we] are appreciative of the considerable service and accomplishments of its membership. The overwhelming majority of New Hampshire lawyers have continually served the needs and interests of their clients and communities with competence, adherence to ethical principles, and respect for the rule of law. The creation of the PPF is made necessary by the unscrupulous conduct of a few and not from any concern for the conduct of the many. It is consistent with the high ethical and professional standards espoused by the Bar Association during its remarkable history.

There were many pleas for exemptions from the Rule from certain groups of the bar because the particular group did not handle clients' money, (for example, members of the attorney general's office, public defenders, law professors, judges, etc.). The Court avoided this slippery slope by requiring all members of the bar to contribute to the Fund,

stating that "[w]hile distinctions can be drawn among the varied membership of the organized bar, they are decidedly outweighed by the common obligation to ensure the profession's continued integrity and public confidence". The Court's unanimous decision in this respect follows that same approach to similar public protection funds recently established in Maine and Delaware.

The Bar Association itself, was divided, having previously taken conflicting positions on the issue. Opponents claimed that the Bar Association's advocacy before the Court in favor of the Rule exceeded the limits placed upon the association by the *Chapman Case*, 128 N.H. 24, (1986). In its first interpretation of *Chapman*, the Court held that the subject of the new Rule "clearly and directly concerns the integrity of the profession. Our analysis of *Chapman*, therefore, supports the right of the Bar Association to advocate before this court for the establishment of the fund we create today."

The Court went on to define the scope of the Rule and to impose conditions upon access to the Fund, including a maximum recovery cap per claimant of \$150,000. All practitioners should take the time out of their busy schedules to review the exact language of the Rule to understand the Rule's scope and its limitations.

A decision that can be classified as belonging in the area of improving the administration of justice in New Hampshire is *In Re Estate of Hemon*, decided January 20, 1998. This case tells the tale of the infamous efforts by a member of the New Hampshire House of Representatives to carry on a private vendetta against the Strafford County probate judge (he introduced in the legislature a bill to impeach the judge on three occasions!) and who has appealed the Strafford County probate court's decision in a case involving his own mother six previous times to the New Hampshire Supreme Court, once to the United States Supreme Court and who has filed an action in the same matter in the New Hampshire Federal Court which he appealed to the First Circuit. All to no avail.

The facts of the case are pretty simple. [Who said simple cases are simple to resolve?] The decedent, Olivette Hemon, had three living children and was the center of controversy in this matter. She was formerly a resident of Maine who, when her health began failing, was moved to Strafford County, New Hampshire, by her son, Roland Hemon (the New Hampshire General Court member in question), who had the care and control of his mother at that point in time. The first salvo in the case came in May of 1984 when Olivette Hemon's other children petitioned the Strafford County Probate Court seeking guardianship by them over their mother, claiming that she was in failing health "while in the care of her son, Roland, and because of the *de facto* control Roland exercised over her estate without providing an accounting". The probate court ruled that Olivette was incapacitated and in need of a guardian and eventually appointed the

Office of Public Guardian as her permanent guardian, rejecting the claims by all three children. Subsequently, the Office of Public Guardian filed a bill in equity in superior court seeking to recover certain of Olivette's assets from Roland, alleging that he had wrongfully converted them to his own use. After a jury verdict in favor of the Office of Public Guardian, the trial court ordered Roland to return the converted personal property and ordered him to reconvey his mother's real property located in Maine and Florida. Roland refused to comply with the order and this resulted in his temporary imprisonment at one point in this so far.

After Olivette's death in March of 1989, lo and behold, two wills appeared: a 1976 will which benefited all three children, and a 1983 will "drafted while she was in Roland's care [and of which] Roland was the sole beneficiary and executor". The present appeal by Roland [his seventh to the New Hampshire Supreme Court in this wacky matter] argued that the probate court had no jurisdiction under RSA 464-A:3 over the matter, even though the decedent was physically present in the State on the date of the original petition and died here. The Supreme Court denied the appeal, wielding the doctrines of *res judicata* and collateral estoppel, holding that Olivette's residency had been decided by the probate court on numerous occasions during the guardianship and estate proceedings. These decisions were final decisions and the Court found that "Roland's repeated challenges to the probate court's jurisdiction based on Olivette's New Hampshire residency, including the present appeal, lack merit". The Court's most recent decision should end this terrible misuse of judicial assets, but the author wouldn't bet on it.

Taking up its task of disciplining attorneys, the Court in its recent decisions confirmed again its very strong and well-known attitude with respect to attorney misconduct. In *Nardi's Case*, decided February 24, 1998, the Court had before it an attorney accused of wrongdoing involving two different matters. In the first, it appeared that the respondent attorney, in a real estate contract situation where he represented the seller, had breached the escrow agreement under which he was serving as escrow agent by paying to an officer of the seller whom he represented the monies deposited with him as escrow agent by the buyers. In the second instance, the attorney was found to have misled one of two clients who had business relations with each other, misleading one by stating that he had certain funds in his possession from the other client when that was untrue.

The referee recommended suspension, the Committee on Professional Conduct recommended disbarment, and the attorney urged a brief period of suspension. The Supreme Court imposed a disbarment period of five years. The Court particularly was harsh in its analysis when the attorney claimed that he had no prior disciplinary record, a factor that the referee had taken into account in recommending suspension. Whatever

could the attorney have been thinking? In fact, as the Court pointed out, the attorney had had three prior complaints against him over a period of some nineteen years which had not involved public discipline, but which had involved (1) a finding of misconduct, (2) a letter of caution, and (3) a private reprimand.

It is with great sadness that the author reads cases such as this: Somehow, a well educated lawyer, even though warned and who should know better, ignores his professional responsibilities big time and, as an expectable consequence, is disbarred. The author is at a loss to explain an attorney's conduct in such situations. Is there a synapse lapse that occurs? Doesn't the lawyer get it? Apparently not is the author's rueful conclusion. And then we ask why a Public Protection Fund is necessary? In *Nardi's Case*, if a third party had not made good the missing escrowed funds, we would have had another case of a New Hampshire attorney tortiously converting funds entrusted to him by another.

Turning to decisions about the law (as opposed to the practice of law), an important case for trial lawyers is *Meaney v. Rubega*, decided December 31, 1997. It involves a fairly common defense encountered in traffic collision cases: "It's not my fault--my brakes failed." The factual situation arose when the plaintiff in this personal injury action, a state trooper, was injured when hit by his own parked police cruiser at a construction site when a vehicle operated by the defendant struck the cruiser which then struck the trooper. The defendant denied liability on the basis of the sudden failure of his brakes and the issue at trial was whether such a denial was an affirmative defense that would require the defendant to prove by a preponderance of the evidence that the brakes had failed. The trial court held that it was not and the jury returned a verdict in favor of the defendant.

A four member majority of the Court, surprisingly to the author, held that the trial court was correct in refusing to give a jury instruction requested by the plaintiff that the brake failure was an affirmative defense which required the defendant "to prove by a preponderance of the evidence that brake failure was the cause of the accident". The lone dissenter, Justice Johnson, reviewed the law in other jurisdictions and concluded that

A defendant should not be permitted to merely allege that his or her brakes suddenly failed and then rest on the allegation while requiring the plaintiff to disprove it. This is especially true where defendants generally have control of evidence that will prove or disprove their defense to conduct that, on its face, gives rise to a finding of liability.

To the author, this reasoning seems sound since if sudden brake failure doesn't have to be pled and there's no pretrial discovery, a defendant can spring the defense on an

unsuspecting plaintiff at trial. The author foresees a whole raft of automobile collision cases where the defendant alleges "my brakes failed". Sounds like the old homework excuse: my dog ate my homework!

An interesting case of first impression is *Valenti v. Net Properties Management, Inc.*, decided March 5, 1998. Here the plaintiff fell in the entranceway of the defendant's store, as a result of water and snow build up inside the entranceway. The defendant denied liability because it had contracted to an independent contractor the design and the maintenance of the entranceway. The plaintiff claimed that this was a nondelegable duty and that the defendant was vicariously liable for the negligence of the independent contractor. The superior court agreed with the defendant, and instructed the jury that the defendant storeowner could delegate its responsibility. A defendant's verdict resulted and on appeal to the Supreme Court, the Court reversed the trial court holding adopting the *Restatement (Second) of Torts*, §425, which provides that "one who holds his premises open to the public for business purposes is liable for the negligence of an independent contractor he hires to maintain the premises." The Court found that New Hampshire law is consistent with the *Restatement* citing back to the early case of *Stevens v. Company*, found at 75 NH 159 (1905), where the Court in that earlier case essentially reasoned in similar fashion to §425 of the *Restatement*.

In another one of the very difficult termination of parental rights cases, *In Re William A.*, decided January 29, 1998, the Supreme Court overturned a probate court decision allowing the termination of a mother's rights upon the petition of the father of the child. The Court, speaking through Justice Broderick, reviewed at length the eccentric New Hampshire Rule holding that the family and the rights of parents over it are fundamentally protected constitutional rights noting that "[w]e place a greater emphasis than do many other States on preserving family relationships...To terminate the relationship between parent and child, a petitioner must not only prove a statutory ground for termination **beyond a reasonable doubt...but** also that termination of parental rights is in the best interests of the child" (emphasis added).

The Court seemed to distinguish cases in which strangers, such as foster parents to a child, seek termination of parental rights from one where, as here, the fight was between two parents. The Court ruled that the probate court's decision should be reversed because termination was not in the best interest of the child since the child could have been kept in a stable environment with his father and stepmother without terminating the mother's rights. The Court pointed out that here "[u]nlike situations where failure to terminate parental rights would leave a child adrift in the foster care system, William was to remain at home with his father and stepmother...[T]ermination of [the mother's] parental rights was not necessary to ensure William's stable and secure environment."

An interesting case that arose under the New Hampshire Whistleblowers' Protection Act (Chapter 275-E) which has had very little interpretation in New Hampshire since its passage in 1987, is *Appeal of Osram Sylvania, Inc.*, decided February 27, 1998. The appellant employee had on "more than one occasion" complained to his supervisor that the temperatures where he worked were excessive and reaching unhealthy and dangerous levels. After management had failed to remedy the heat problem, the employee informed his supervisor that he intended to file a claim under OSHA, and two days later filed such a claim. The employee was terminated nine days later, the employer alleging that the employee was terminated for filing a fraudulent workers' compensation claim a **year earlier**.

There were several issues before the Court. The Court first held that the employee was not required to go to the U.S. Department of Labor (NHDOL), but could proceed first to the New Hampshire Department of Labor. Secondly, the Court held that the employee has the burden of establishing discrimination under the Whistleblowers' Act at the hearing before the Department of Labor, and the Court found that the employee had met that burden. Furthermore, the Court held that the employer, having lost the case before the Department of Labor, was required as the appealing party to "show, by a preponderance of the evidence, that the ruling [of the NHDOL] was clearly unreasonable or unlawful."

Finally, the employer surprisingly argued that there was no evidence to support a finding that the employer had reasonable cause to believe that the employee was acting unlawfully when he filed his OSHA complaint. It turns out that the employee had a lot to complain about! The statute requires the employee to have "reasonable cause to believe" that there is a violation of law (RSA 275-E:2, I (a)). The Court held that the Whistleblowers' Act does not require an actual violation, but only that the employee have an "objectively reasonable" belief that the law was violated. The Court found that the record showed without a doubt that the employee reasonably believed that the heat in the plant was dangerously excessive in violation of OSHA standards.

If these weren't "sweat shop" conditions, the author doesn't know what a "sweat shop" would be. OSHA, in its subsequent investigation, found that although not violative of its standards, the conditions complained about were significant enough for OSHA to encourage the employer to reduce the employees' exposure. Mid day temperature readings at the plant compiled by OSHA ranged **from 110 to 170 degrees fahrenheit in one part of the plant!!** Indeed, the human resource manager of the appealing employer testified that after a supervisor had ventured to the second level of the plant, he stated that **"he didn't know how this [employee] could work up there" because of the heat.** At these temperatures, we're not talking about a "sweat shop"; we're talking about a hell on earth!

The author's first article for this column appeared 32 years ago in September, 1966. The author recently had an opportunity to read Richard Upton's enlightening *History of the New Hampshire Bar Association*, which is found at 15 N.H.B.J. 37 (1973). The author was surprised to find in this history Dick's section on New Hampshire legal humor and that brought to mind the idea of adding an occasional post-script to this column. The author thinks it would be appropriate to add, from time to time, an instructive, or perhaps simply humorous, story about practicing law in New Hampshire.

This first anecdote, in fact, deals with Richard Upton, an attorney the author much admired and respected. In a hotly contested motion hearing before Judge Charlie Contas of the Cheshire County Superior Court, the author, in his compulsion to drive home his point, on several occasions interrupted Dick's presentation, even though it was Dick's turn to speak. Dick said nothing until we were leaving and walking down the stairs of the court house together when he turned to me and quietly said "Charles, you must learn that it's impolite and uncivil to interrupt opposing counsel when it's opposing counsel's turn to make his point." Duly chastised, the author has tried to follow this advice to the present day, although the author must admit that his weakness shows occasionally and he fails to follow that good advice, particularly when he knows he's right!!

#### **ENDNOTES**

1. A partner of the author represented a party to the action and, therefore, the author's views may be colored.