
By Attorney David Ruoff

This column was submitted in timely fashion last February but production of the issue delayed its publication. Since the retirement of Lex Loci's long-time contributor, Charles A. DeGrandpre, the Bar Journal Editorial Advisory Board has been soliciting suggestions for authors and for possible changes in format. This is attorney Ruoff's second Lex Loci column. His column covered the cases decided last fall.

Christopher Lally v. Lauren Flieder, decided October 30, 2009, involved a landlord-tenant dispute. The landlord (Flieder) rented an apartment to Mr. Lally (Lally) for a couple of years. The parties eventually agreed that the lease would terminate at the end of August, 2008. Lally apparently decided to stay. On September 2, 2008, Flieder commenced an eviction action and terminated Lally's (illegally connected) cable service. In response, Lally filed a petition under RSA 540-A and claimed that Flieder, by disconnecting his cable service, was carrying out a self-help eviction.

The Supreme Court agreed. RSA 540-A lists several utility services that, in the Court's words, "pertain to the habitability of a dwelling and a person's well-being." That list includes – but is not limited to – utilities such as water, heat, light, electricity, gas, and telephone services. A cable television service is not a utility service that is listed. Luckily for Lally, the Court reasoned that "many people access essential telephone service, the Internet, news information and entertainment" through cable services. The fact that Lally had illegally connected the cable television services was never discussed by the Court. Also absent from the Court's discussion is the fact that cable television services existed in 1979 when RSA 540-A was enacted, and the Legislature did not put it on the list. What was considered a luxury in 1979 – at least for many of us that grew up in rural New Hampshire – is now a protected utility service (even when obtained illegally).

In re Adam Muchmore and Amy Jaycox, decided December 4,

2009, involves the impermissible modification of a parenting plan. The parties filed a stipulated parenting plan when their child was born in 2006. The plan stated that it could be modified when the child was three to four years old. When their child was two years old, the father moved to amend the parenting plan under RSA 461-A:11. The father alleged multiple grounds for his request; key among them was that the mother had intentionally interfered with his parental responsibilities and that the modification "would be in the child's best interest." RSA 461-A:11, I(b). He also argued that the child's current environment as required by the parenting plan was harmful to her, RSA 461-A:11, I(c), and that the mother's conduct made the existing plan "unworkable," RSA 461-A:11, I(d).

However, at the evidentiary hearing on his request he failed to meet his burden of proof under RSA 461-A:11, I(b) or (c) – and he agreed that he failed to meet his burden on his RSA 461-A:11, I(d) claim. However, despite finding that the father had failed to sustain his burden of proof, the trial court found that modification was warranted and in the best interests of the child.

On appeal, the mother argued that the trial court lacked the authority to modify the parenting plan. She argued, logically, that the court's authority to amend an existing order was limited to those circumstances in which the petitioner carries his/her burden of proof in proving the special circumstances stated in RSA 461-A:11, I. By logical extension, the "flip side" of her argument was that the court could not amend an existing parenting plan solely because it concluded it was in the best interest of the child to do so.

She was right. The Court explained that it was within the province of the legislature to limit the court's ability to modify parenting plans – which themselves are creatures of statute – even if it is in the best interests of the child to do so. The Court called this problem "regrettable" and left it to the legislature to amend that statute as it disagreed with the Court's rationale.

Amy Barnet v. Warden, N.H. State Prison for Women, decided December 4, 2009, involves a petition for writ of *habeas corpus*. Such "habes" as these are rarely reported decisions and are worth discussing. This "habe" stems from the procedure that was used by the Adult

Parole Board (the Board) to revoke her parole. Barnet was on parole from the State Prison when she was investigated for, and ultimately charged with, shoplifting. She turned herself in to her parole officer after telling the parole officer that she “messed up” and “shoplifted”. She was arrested for violating several conditions of her parole. Under N.H. law, the Board was required to hold a hearing on her parole violation within 45 days of her arrest.

Her first hearing was scheduled within the 45-day time period. However, she filed a Motion to Remove Parole Violation Warrant. The Board continued the hearing *sua sponte* and rescheduled the hearing beyond the 45-day mark. The Board reasoned that by filing her pleading, she had waived the 45-day requirement. The Board failed to notify Barnet’s attorney of the hearing, who, in turn, did not notify Barnet. However, because she was in custody, the Board compelled her to appear by videoconference from the jail, without her attorney present. The Board continued the hearing on its own motion again.

Prior to the second hearing, she filed a petition for writ of *habeas corpus* in the superior court. She argued that the Board had violated her due process rights by failing to give her proper notice of the violations, and by failing to hold her hearing within the required 45 days. On appeal, the Court pointed that parolees have conditional liberty interests and in order to establish a due process violation in a “habe,” a petitioner must demonstrate actual prejudice. In this case, Barnet’s claim that her ongoing incarceration was prejudicial did not persuade the Court. The Court could not see a causal connection between the lack of proper notice, delay in her hearing before the Board, and her continued incarceration. The suppressed premise here is that even if she had valid notice and had the hearing within 45 days, she would have still been incarcerated.

Brentwood Volunteer Fireman’s Assoc. v. Daniel Musso, Sr., decided December 4, 2009, is an appeal of an equitable action to quiet title and the common law “mill privilege”. I have not heard of the “mill privilege” since studying for the bar exam.

In 1992, the respondent (Musso) started a motor vehicle repair business in Brentwood. In 1995 he purchased the land the business was located on. The deed conveyed to him the land “on the easterly side of [Crowley Falls Road] . . . bounded westerly by said road and easterly by [a property], the same being the mill yard and mill privilege situated on the Exeter River . . . and all land connected with said privilege on the River.” From the time Musso started running the business, the abutting petitioners allowed him to use the adjacent parcel (on the river) for customer parking and to store vehicles and firewood on the lot.

In time, Musso asserted a claim that he was the owner of the adjacent lot and the petitioners brought an action to quiet title. Musso argued that he was the owner of the lot by virtue of the mill privilege that was contained in his deed. The term “mill privilege” means the “land and water used with the mill, and on which it and its appendages stand.” When a mill privilege is conveyed without specifically expressing its boundary, the conveyance includes “so much land as was necessary, and customarily used with the mill.” In this case, Musso argued that, unless extinguished by adverse possession, the privilege

endured and created an ownership interest in the adjacent lot on the river.

It would have been interesting to see the Court discuss how a mill privilege could be (or could not be) extended to a vehicle repair shop, but it did not need to. The Court found that whatever mill privilege was conveyed had been abandoned – the mill at Crowley Falls had not been operational since 1934.

Petition of the State of New Hampshire (State v. Milner), decided December 4, 2009, is a State’s appeal in a criminal case. The State appealed a decision by a district court that found that Mr. Milner was not subject to a mandatory minimum jail sentence based on his conviction for operating a motor vehicle while his license was revoked.

In 1991, Milner was convicted of DWI and his license was revoked by the court. After his court-ordered suspension expired he did not seek reinstatement of his license from the Department of Safety (DMV). In 2008 – 17 years later – Milner was arrested, charged and convicted of operating while his license was revoked (based on the 1991 DWI conviction). The district court found that the mandatory minimum 7-day jail term for a violation of RSA 263:64 (operating after suspension/revocation) did not apply because court-imposed revocation period had lapsed (long ago).

The State appealed. At play in the appeal were two provisions of RSA 263:64. The first provision, subsection IV, states that anyone that drives a motor vehicle “during that period of suspension or revocation” based on a DWI conviction is subject to the mandatory minimum 7-day jail term. Subsection V defines “period of suspension or revocation” as “only suspension or revocation imposed by a Court of competent jurisdiction.” However, the last sentence of subsection V adds that the “period of suspension or revocation” includes “the period specifically designated [by Court] and until restoration of the person’s driver’s license or privilege to drive.” The last sentence was added in 2002.

The Court found that there were two reasonable interpretations of these two definitions of “period of suspension or revocation” and looked to the legislative history to break the tie. The tie went to the State (Milner was *pro se*, and filed no brief). In what appears to be a conflict to me, the Court explained that the first sentence in subsection V was enacted in 1987 to address cases exactly like Milner’s – it was the intention of the legislature to exempt cases like his from the mandatory minimum 7-day jail term. However, the Court explained, the last sentence of subsection V was added in 2002 to remove that exemption. This leaves us with an entire subsection that creates an exception to the seven-day mandatory minimum sentence in the first sentence, and then removes it in the second – according to the Court’s logic. This is a beguiling result.

State of New Hampshire v. Patrick Joyce, decided December 4, 2009, held that the Londonderry Police unlawfully seized and detained Joyce after receiving an unsubstantiated, anonymous “tip.” On the evening of November 2, 2007, the police received a tip that an unidentified woman was seen smoking marijuana outside of an apartment building. When the police got to the address – three officers in three different cruisers – they found the only occupied vehicle in the parking lot. It was Mr. Joyce’s. He was in his car with a woman, smoking

cigarettes. The police surrounded Joyce's car, questioned him and the passenger and called for a fourth officer to bring a narcotics-sniffing dog.

The trial court found that these facts did not rise to the level of a "seizure" for constitutional purposes. The Supreme Court disagreed. The Court found that not all encounters with law enforcement involve a "seizure" of the person. The Court held that all the circumstances surrounding the interaction should be examined in determining whether a person has been "seized." If, at the moment of the seizure, the police do not have reasonable suspicion that the person being detained has been (or is about to be) engaged in criminal behavior, then the seizure is unlawful. In this case, the Court went out of its way to note that neither the State nor the trial court pinpointed the point at which they believed the seizure of Joyce occurred. This is a rather crucial fact.

The Court determined that the seizure occurred when the police called for the drug-sniffing dog. At that point, the Court explained, Joyce could have reasonably felt like he was not free to leave. Also, at the point in time – it is important to pinpoint when a seizure occurs – the Court assessed what facts were known to the police and determined that the police lacked reasonable suspicion that Joyce was involved in criminal activity. Therefore, all the evidence gathered against him had to be suppressed.

State of New Hampshire v. Arthur Kousounadis, decided December 4, 2009, is a unique case that explains why a shotgun might not be a "deadly weapon" and when the appellate test of "harmless error" should not be applied in criminal cases. The defendant had been married to the victim for over 20 years. After they were divorced, the victim obtained a restraining order against him. To begin a series of bad decisions, the defendant decided to buy a shotgun and ammunition in Hooksett while still subject to the restraining order.¹ He then proceeded to go to the mall where his ex-wife worked and waited outside in the parking lot for her. As she left work that night and walked to her car, she saw the defendant's SUV parked near her car. He got out of his car and said that he wanted to talk with her. After she refused, the defendant took the shotgun – which was loaded – out of the SUV. At the sight of the gun, the ex-wife ran back to the mall. As she did so, she heard the defendant fire the shotgun. Police later found a shotgun shell casing in the parking lot, a hole in the wall of the mall, and a shotgun "slug" round inside the department store where she worked.

The defendant was charged with attempted murder, criminal threatening, and violation of the restraining order. While a bit unclear, it appears that his main defense at trial was that he only intended to scare the victim, and that he did not use the firearm as a "deadly weapon" as that term is defined in RSA 625:11.V.² Whether the defendant used a deadly weapon was one of the substantive and essential elements of the criminal threatening charge. When instructing the jury on the elements of the criminal threatening charge, the trial court said that the State had to prove that "[f]irst, the defendant attempted to place [the victim] in fear of imminent bodily injury; second, that the defendant did so through conduct[,] that is by removing a deadly weapon, a shotgun, from his car . . .". The defendant asked the trial

court to instruct the jury on the definition of "deadly weapon." The trial court refused, and assumed that a shotgun was a deadly weapon, *per se*.³ The defendant was ultimately convicted of criminal threatening and violation of the restraining order.

On appeal, the defendant raised several issues, but the most notable was this issue concerning whether a loaded shotgun is a "deadly weapon." Now, to most people, the obvious answer is "yes." However, the New Hampshire Supreme Court has always taken an "it depends" approach in determining whether an object is a deadly weapon. Most recently, in an opinion that drew quite a bit of media attention, the Court ruled that a bow and arrow (used to kill a skunk) was not necessarily a "deadly weapon" as defined by the statute.⁴

In analyzing this issue, the Court looked to the last phrase in RSA 625:11, V: "a deadly weapon means any firearm, knife, or other substance or thing which in the manner it is used, intended to be used, or threatened to be used, is known to be capable of producing death or serious bodily injury." Under this definition, a paper clip could be a deadly weapon (. . . death by a thousand cuts . . .). The Court looked to the origins of the deadly weapon definition contained in the Model Penal Code and was persuaded by the report of a commission that authored the definition: ". . . whether there is a deadly weapon involved [in an offense] is, therefore, made to turn on how the actor proposes to use the thing he wields." Therefore, a shotgun is not a deadly weapon as a matter of law, as the trial court instructed, and the defendant was entitled to have the jury instructed on the RSA 625:11 definition.

The Court then turned to the issue of whether the trial court's error was harmless error. The Court concluded that the harmless error analysis does not apply in cases where the error "partially or completely [deprives] the defendant of the right to the basic trial process". The Court reasoned that by erroneously instructing the jury that a shotgun was a deadly weapon, the trial court directed a verdict with respect to that element. Such an error is not subject to harmless error review.

Kevin Coco v. Doris Jaskunas, decided December 16, 2009, resolved the question of whether an award of attorney's fees is allowable in an indemnification case against someone who issues a warranty deed and who later refuses to defend a claim against the title of the land.

In 1986, the plaintiff's purchased a lot from the defendant. The defendant conveyed the lot by warranty deed, including the standard covenants pertaining to title and defense of claims against title. In 2002, the plaintiff's abutters sued them to quiet title to approximately half of their lot. The plaintiff's demanded the defendant to defend against the claim based on the warranties contained in the deed. The defendant refused to do so.

In time, the parties to the quiet title action reached a non-monetary settlement. They decided to divide the lot, and the court approved the settlement. The defendant – who was not a party in that suit – was aware of the settlement negotiations, but did not participate in them. After the settlement was finalized, the plaintiff filed for summary judgment against the defendant in this duty-to-defend case. The plaintiff requested, and the trial court awarded, over \$40,000 in costs and fees incurred in defense of the quiet title action.

The defendant argued, among other things, that she did not have to pay that amount because the attorney's fees and costs were not "damages." The Court found that claims for attorney's fees and costs in duty-to-defend cases are, not surprisingly, a claim for indemnity. The Court examined the common law of indemnification and concluded that attorney's fees and costs are allowable so long as the defendant received notice of the initial claim, and that the settlement of that claim was reasonable and in good faith. The Court was not bothered by the fact that RSA 477:27 (codifying the covenants in a warranty deed) does not contain a reference to "attorney's fees." It concluded that indemnification for reasonable costs of defense was an appropriate remedy for breach of the warranty (of title and promise to defend).

An interesting point in this case is that the trial court only awarded attorney's fees for the defense of the quiet title action, not the present action (or appeal). The Supreme Court was quick to notice this as well. By keeping their appellate claim to the fees associated with the cost of defense, the plaintiff's probably kept their request within the orbit of reasonableness – and prevailed.

South Willow Properties, LLC v. Burlington Coat Factory of New Hampshire, LLC, decided December 16, 2009, is a commercial landlord-tenant dispute over a leaky roof. After being in the property for about a year, the tenant defendant (BCF) undertook several renovations to the building that included the removal of an interior load-bearing wall and replacing several HVAC units, and building a new façade to the building. As a result of these renovations, the roof developed some severe leaks, resulting in a "waterfall" coming through the roof.

In 2004, in discussions with the plaintiff landlord (South Willow), BCF admitted that it was responsible for the leaky roof and agreed to have it fixed properly. However, by September 8, 2004, BCF had not resolved the issues. Eventually BCF claimed that fixing the roof was South Willow's responsibility, and that if South Willow would not fix the roof, the BCF would. South Willow's first shot across BCF's bow came when it warned BCF that it should not engage in any work on the roof without the landlord's written consent. BCF proceeded to send South Willow copies of contractor bids to fix the roof and South Willow reaffirmed that BCF was to take no action or risk being defaulted on the lease. One could hardly blame South Willow at this point, in light of BCF's previous negligent self-help repairs. BCF ultimately ignored South Willow's warnings and hired a contractor to replace the roof. South Willow filed for a writ of possession to evict BCF for default on the lease.

Among the issues raised in the case is whether South Willow waived its right to pursue and eviction under RSA 540 by continuing to collect rent during the time when the leaky roof problems were being resolved. BCF – in attempting to keep its new roof over its head – argued that by collecting rent after it claimed that BCF had defaulted on the lease, South Willow waived its right to pursue the eviction. There is some law to support that argument. However, in the cases in which a waiver takes place, it is usually because a new tenancy is somehow formed when the landlord agrees to waive the right, either explicitly or by conduct. The Court rejected this argument and found that there was no indication that South Willow ever intended to relinquish its right

to pursue an eviction, even though it continued to collect rent.

State v. Nadir Mohamed, decided December 31, 2009, is another case that holds that a firearm is not necessarily a "deadly weapon." This case is notable because it involves whether a mandatory minimum 3-year sentence should apply to the defendant's conviction. Mohamed was convicted of receiving stolen property. The stolen property that he possessed was a firearm. Under RSA 651:2, II-g, if a person is convicted of a felony, an element of which is the possession, use or attempted use of a deadly weapon, and the deadly weapon is a firearm, then he is subject to a mandatory minimum 3-year sentence at the New Hampshire State Prison. The trial court determined that because Mohamed was convicted of possession of a stolen firearm, that the element was that he possessed a deadly weapon. In keeping with its earlier, if not counterintuitive, precedents concerning the definition of "deadly weapon" in RSA 625:11, the Supreme Court held that a firearm is not a "deadly weapon" *per se*. The Court went on to suggest that the element that triggers the three-year mandatory minimum sentence - possession, use or attempted use of a deadly weapon – is not present in offense for which Mohamed was convicted. Therefore, the mandatory minimum did not apply to him.⁵

Georgia Tuttle v. N.H. Medical Malpractice Joint Underwriting Association (JUA),⁶ decided January 28, 2009, is the famous (or notorious) \$110 million case in which a quasi-class of plaintiffs challenged the constitutionality of House Bill 2 (the Act) that sought to transfer approximately \$110 million of surplus funds from the JUA account to the General Fund in order to assist in balancing the state's budget. Depending on which brief one reads, it is either \$110 million that belongs to the taxpayers or it is the state's attempt to confiscate money that belongs to private medical care providers.⁷ In a close 3-2 vote, the Court held that the Act violated the New Hampshire Constitution's "contract clause" found in Part I Article 23 and Opinion of the Justices (Furlough), 135 N.H. 635, 630 (1992).

While the reported opinion is quite lengthy and involved, the issues involved are fairly straightforward: the plaintiffs argued that they had vested beneficial rights in the surplus funds and that the Act was an impermissible taking. They also argued, among other things, that the Act substantially impaired their contractual rights with the JUA, and therefore violated the state's Contract Clause.

The state responded by arguing that the plaintiff's did not have vested property rights in the JUA surplus, and, therefore, could not assert claims under the contract clause. Alternatively, the state argued that the Act was constitutionally permissible under the common-law balancing test that required the court to examine whether the Act was "reasonable and necessary to serve and important public purpose." The Court concluded that the Act was retrospective and that it impaired vested contractual rights between the plaintiffs and the JUA. The Court explained the contracts at issue in the case – insurance policies – created vested rights in the plaintiffs to participate in the distribution of any earnings or surplus from the JUA. The Court found that the Act substantially impaired those rights, essentially, because it sought to seize all of the surplus funds – leaving nothing left of the plaintiffs' vested interests, and leaving the JUA financially vulnerable without

a surplus.

In assessing the “reasonableness and necessity” of the Act under the common-law balancing test applied in contract clause cases, the Court noted that there was no evidence in the record that the Act was “precipitated by an emergency” or that “other avenues of funding, which do not substantially interfere with policyholder’s contracts, have been exhausted or even considered.” Based on those observations that Court could not conclude that the means chosen to accomplish the Act’s stated purpose were reasonable and necessary.

Southern New Hampshire Medical Center v. Anthony Haynes, decided February 11, 2010, discusses the ancient doctrine of necessities – an archaic doctrine that makes a husband liable for the debts of his wife. In colonial and feudal times, if a husband failed to provide his wife with “necessities” and they were provided by a third party, the husband was liable to the third party for that debt. Necessities included “food, drink, physic, instruction, and suitable place of residence, with such necessary furniture as is suitable to her condition.”⁸ The doctrine finds its origins in the sad fact that women were lacked the capacity to contract, sue, or be sued individually – they lacked all jural standing. Scroll forward 200 years to Mr. Haynes’ case and the doctrine remains viable in New Hampshire’s common law.⁹

Anthony Haynes’ wife received medical treatment and accrued approximately \$85,000 in debt. The Haynes’ were subsequently divorced, each assuming liability for their own, uninsured medical debts. Karen Haynes passed away, and Southern New Hampshire Medical Center (SNHMC) sued Anthony Haynes based on the doctrine of necessities. At the trial court level, Haynes argued that he should not be liable for his ex-wife’s debts because, although not divorced, they were not living together when the debts were incurred.¹⁰ SNHMC moved to preclude this evidence and the trial court granted the request.

On appeal, the Court reaffirmed that the common law doctrine, now gender-neutral, remains viable in New Hampshire. In order to prevail in such a claim, a would-be plaintiff (creditor) must show that services or goods were provided to a spouse, they were necessary for the health and well-being of the receiving spouse, they were married at the time the goods or services were provided, and payment for the necessities had not been made. In cases where the spouses have since been divorced, as in this case SNHMC would have to also show that the receiving spouse does not have the ability to pay the debt.

In his concurrence, Justice Hicks called for the abolition of the doctrine. In his opinion, the doctrine has long out-lived its usefulness, is impractical in present-day society, and no longer serves its original purpose – which was to prevent spousal neglect.¹¹ I think he is right.

ENDNOTES

1. To do so he had to lie on the ATF application form to obtain the firearm.
2. Apparently the defense worked to a degree, as he was acquitted of the attempted murder charge.
3. On appeal, the Court took it a step further and read the trial court’s instruction as informing the jury that a shotgun is a deadly weapon as a matter of law.
4. See *State v. Pratte*, 158 N.H. 45 (2008).
5. It is worth noting that the theft offense for which Mohamed was convicted is a class A felony, punishable by up to 15 years in prison. Therefore, on remand, he could still receive the exact same sentence.
6. In the spirit of full disclosure, this author was an attorney at Nixon Peabody during the time when this matter was initially filed in the trial court.
7. The plaintiff’s brief came just short of suggesting that it was legislative theft.
8. *Ray v. Adden*, 50 N.H. 82 (1870).
9. Although it is gender-neutral in its present state.
10. At common law, this exception to the doctrine of necessities was called “elopement.”
11. Justice Hicks concurred, as opposed to dissented, because neither party raised the issue of whether the doctrine of necessities should be abolished.



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