

Lex Loci: A Survey of Recent NH Supreme Court Decisions

By: **Charles A. DeGrandpre**

New Hampshire's sweeping wiretapping and eavesdropping act, RSA 570-A, makes it illegal to tape a telephone conversation with another person without that person's knowledge and consent. However, to the author's observation, illegal taping appears to be done much more frequently than formerly. Yet, few illegal tapers are prosecuted. The same holds true for the defendant former husband in the long-running custody fight described below, who, although his unauthorized taping was reported to the A.G.'s office by his ex-wife, was never prosecuted criminally.

The wiretapping escapade began following the 1961 divorce between the parties which continued to spew vitriol as reflected in a June 16, 1999 decision of the Supreme Court, *Fischer v. Hooper*. The factual situation showed that after the parties were divorced they were granted joint custody of their only child, their daughter, but the disputatious parties could not agree on the division of time that the child would spend between them and, as a consequence, both a guardian ad litem and a therapist were appointed to protect the child's interests. The GAL, because of contentious issues relating to telephone communications between the child and her parents, recommended that telephone calls between each of the parties and their daughter, as well as between the parties themselves, be recorded for the purpose of assisting the therapist in resolving the "communications problems that had arisen between the parties" [a judicial understatement if ever the author saw one]. The GAL, however, required both parties to agree. Though the plaintiff ex-wife did not agree, the defendant ex-husband secretly began to record telephone conversations between his former wife and their daughter and between themselves.

When she discovered her ex-husband's clandestine taping, the ex-wife sued the defendant both for the common law tort of an invasion of privacy and for a violation of RSA 570-A. A jury awarded the plaintiff damages in the amount of \$25,000, but the trial court ordered a remittitur and both parties appealed. The issues before the appellate court began with the *mens rea* necessary to found a violation of RSA 570-A:2, I. The defendant contended that the statute required the higher standard of *mens rea* of "knowingly," although the statute speaks only in terms of "willfully." The Supreme Court, in a unanimous opinion by Justice Horton, agreed, indicating that the legislative history of the act and its relationship to prior federal law upon which our statute is modeled required the higher standard of "knowingly." The Court ruled that "we believe that 'willfully' in RSA 570-A:2, I, means that the defendant must act with an intentional or reckless disregard for the lawfulness of his conduct. In other words, the defendant has not violated RSA 570-A:2, I, if he has 'a good faith' belief that [his] conduct was lawful." Since the trial court had instructed otherwise, the Supreme Court reversed.

The Court next turned to issues relating to the common law invasion of privacy claim. The first issue regarding this tort was whether the plaintiff had an expectation of privacy. The defendant's odd argument on this issue appears to boil down to the proposition that, because of the bellicose nature of the parties' relationship, the plaintiff should have had no reasonable expectation that her conversations with her daughter would remain

private, or, as the author would put it, the ex-wife should have known from her intimate knowledge of her ex-husband's character that he would stoop to sneakily taping her telephone conversations! However, the Supreme Court refused to buy this argument, stating that although the jury could consider that the plaintiff ex-wife's daughter might divulge the content of her conversations with her mother to her therapist or others, the jury "could reasonably have concluded that the plaintiff did not expect her actual words and voice to be captured on tape."

An additional issue in this combative case was the level of the burden of proof required by the plaintiff to prove damages in the invasion of privacy claim. The defendant argued that an invasion of privacy claim should be treated in the same manner as an intentional infliction of emotional distress claim requiring expert testimony to prove causation. The Supreme Court disagreed, relying on the Restatement (Second) of Torts, §652H. The Court held that proof of severe emotional distress or expert testimony is not required to prove an invasion of privacy claim.

Finally, the Court addressed the defendant's argument that he had been improperly required to invoke his Fifth Amendment right against self-incrimination in the presence of the jury [because he might be asked about his illegal secret taping]. The Supreme Court handed the defendant a victory on this issue. The Court discussed the different interests in criminal cases and civil cases involving the invocation of the privilege and acknowledged that the rule in other jurisdictions was that, in civil cases, a party may be required to invoke his Fifth Amendment right in court before a jury. Although the Court seemed to express some agreement with this view, Justice Horton pointed to the Rule 512 of the N.H. Rules of Evidence which prohibits the jury "in both civil and criminal cases from drawing negative inferences from the invocation of the right against self-incrimination." Therefore, the Court ruled that the N.H. evidentiary rule "requires that the privilege be invoked outside of the presence of the jury." The acrimony between the parties will not end soon since the Supreme Court reversed the trial court's handling of the alleged illegal wiretapping by the former husband of his ex-wife and ordered a new trial.

State v. Marti, decided June 21, 1999, is another revolting case involving allegations of felonious sexual assault by a father, consisting in this particular case of a series of some 106 alleged acts of anal intercourse with the defendant's own daughter, who was then between the ages of ten and sixteen years of age at the time. It's certainly hard to comprehend the defendant father's alleged heinous conduct but the invidious conduct of the prosecutor because of his misconduct which resulted in a *second* reversal of the defendant's jury convictions in the superior court is even harder to fathom. The Supreme Court had earlier reversed the convictions of the defendant on a string of three indictments because the trial court had improperly admitted evidence offered by the prosecutor of hundreds of prior sexual assaults. Upon remand, the *same* prosecutor who had prosecuted the defendant during the first trial stated, according to the defendant, that if the Supreme Court would not permit him to enter into evidence the uncharged conduct, he would charge it! He then *not proessed* one of the three indictments and in its place obtained 104 new indictments (for a total of 106 indictments) for aggravated felonious sexual assault each of which in nearly identical language to the first indictment alleged a single act of anal intercourse per week by the defendant of his daughter. The

jury again convicted the defendant on all charges. The defendant moved to dismiss because of prosecutorial vindictiveness but the trial court denied the motion.

The Supreme Court reversed the trial court, observing that a prosecutor is unconstitutionally prohibited from exercising his or her discretion to bring a criminal charge with the aim of punishing the lawful exercise of a defendant's right to appeal and found that "the prosecutor's decision to bring 104 additional indictments for aggravated felonious sexual assault after the defendant had exercised his right to appeal the original conviction on the three original indictments raises a presumption of vindictiveness." In response to the State's argument that a presumption of vindictiveness should not arise where the defendant did not receive a harsher sentence, the Court held that it was sufficient that "the prosecutor's charging decision had *subjected* the defendant to a significantly increased sentence" rather than whether or not he had, in fact, received a harsher sentence. On the critical question of whether the prosecutor overcame the presumption of vindictiveness, the Court ruled that he had not because the prosecutor "acknowledged that in charging the defendant with the additional 104 counts, he relied on information he had known prior to the first trial." As a result, the Court reversed and remanded for a third trial, holding that the facts of the case "demonstrated a realistic likelihood of vindictiveness." What a debacle! What a waste of judicial resources! There will be three trials required to convict this vile defendant, and all because of the shenanigans of a wrong-headed prosecutor.

Hughes v. DiSalvo, decided May 25, 1999, involved conflicting interpretations of the Consumer Protection Act, RSA 358-A. The issue was whether an isolated sale of real property by the owner was subject to the Consumer Protection Act. In this case, the plaintiff, the owner of property in New Hampton which she occupied as her primary residence, moved away from the property and began renting it to a succession of tenants under a lease and sales agreement. The present defendant tenant failed to pay rent and the plaintiff sued for recovery of the unpaid rent. The defendant filed a counterclaim, alleging that the plaintiff had violated the Consumer Protection Act. The defendant requested a jury trial and received judgment in his favor!! The Supreme Court reversed, noting that the Consumer Protection Act applies to the "conduct of any trade or commerce" and held that under the Act's definition of "trade" or "commerce", the plaintiff was not in the business of renting or selling residential property. The Court ruled that "isolated sales of property by an owner are not subject to the Consumer Protection Act," and it "[d]eclined to hold homeowners, such as the plaintiff, who personally sell their homes directly or through lease and sale agreement arrangements are liable under the Consumer Protection Act."

As zoning laws are adopted by most of our cities and towns and a longer history develops under zoning restrictions, the author prophesizes that the issue of the extent of the permissible expansion of non-conforming uses will become a growing subject of controversy. When a zoning ordinance is adopted or amended, leaving a non-permitted use in a zoning district zoned for different uses, an expectable tension arises between the interest of the owner in the continuation of the non-conforming use, on the one hand, and the interest of neighbors and abutters who often have diametrically opposed use expectations, on the other. In a very important non-conforming use case, *Hurley v. Hollis*, decided May 25, 1999, the Supreme Court split 3-2 over the issue before it. The

majority opinion, written by Justice Broderick, speaking for himself, Justice Johnson and Justice Thayer, established a very tight and restrictive rule which should substantially limit the expansion of non-conforming uses in our state. The majority held that in conducting a non-conforming use inquiry, the Court must consider: (1) the extent the use in question reflects the nature and purpose of the prevailing nonconforming use; (2) whether the use at issue is merely a different manner of utilizing the same use or constitutes a use different in character, nature, and kind; and (3) whether the use will have a substantially different effect on the neighborhood.

In the factual situation before it, the nonconforming use owner sought a special exception to relocate his non-conforming business from one tract of his land to another, across the road from the first. Although conducting the same business, he would triple the building's footprint and substantially increase the parking lot area. The zoning board granted the requested special exception but the trial court reversed that decision. The Supreme Court's majority affirmed the trial court's decision, pointing out that while it had previously approved increases in the volume of intensity or increase in the frequency of nonconforming uses, the Court had only "done so... within the confines of the existing structure." It had "never permitted an expansion of a nonconforming use that involved more than the internal expansion of a business within a pre-existing structure."

Justice Horton, with whom Chief Justice Brock concurred, dissented, holding that the special exception nature of the town's zoning ordinance here involved made the case different from a non-conforming use variance case. Because the plaintiff was applying for a special exception, the minority pointed out, the Court "should not apply the more stringent standard of review applicable to variance or nonconforming uses" cases. Because the local zoning board found that the landowner's new facility would not represent any change in the nature or purpose of the original use, the zoning board's decision that each of the conditions of the special exception had been met should be upheld. From the author's unique vantage point of a Monday morning quarterback, the author thinks that the majority got it right.

If there's any kind of litigation that raises the temperature of the American public and brings forth calls of "kill the lawyers," it is lawsuits by kids against school officials arising out of sports events. The next case may bring forth similar cries. *Hacking v. Town of Belmont*, decided May 14, 1999, involved a negligence action by the parents of a sixth grade child who was injured in an elementary school basketball game organized by the two defendant towns. The plaintiffs' claimed that the referees, coaches, instructors and employees of the two defendants permitted "the game to escalate out of control" as a consequence of which the opposing team players "twice knocked [the plaintiff's daughter] down and stepped on her leg. As a result, she suffered permanent injury to her left leg, underwent surgery and other medical treatment, and will require future medical care." The plaintiffs several negligence claims were strenuously opposed by the defendant towns [presumably on their behalf by their insurers] and the Supreme Court, speaking unanimously through Chief Justice Brock, reached a mixed, but courageous, result. The claims of the plaintiffs included claims that the defendants were negligent in organizing the games, in selecting the coaches and referees, and training them. The plaintiff also claimed that the game officials made improper decisions in the course of the game. The defendant, relying on municipal immunity, denied all charges and further

argued that the daughter voluntarily assumed the risk of accident or injury that is inherent in the game of basketball.

The trial court had denied the defendants' motion to dismiss and the Supreme Court carefully picked its way through the various claims, but left the substance of the plaintiff's claims for negligence still standing. The Court first turned to the issue of discretionary function immunity, whereby the defendant argued that all of the activities complained of by the plaintiffs were immune under the doctrine of discretionary function immunity. The Court found that to the extent that the plaintiffs challenged the defendants' decisions regarding the selection, training and supervision of the coaches and referees, the defendant towns were immune from liability. However, as to the plaintiffs' allegations that the coaches and referees in the course of the game had made improper decisions, the Court rejected the defendants' argument that the referees and coaches were entitled to discretionary function immunity, noting that the coaches' decisions "while perhaps involving some discretion in judgment, were not decisions that concerned municipal planning and public policy....These decisions did not involve the weighing of competing social, economic or political factors....Rather, the plaintiffs have alleged negligence on the part of the referees and coaches in the implementation of the school basketball program." [Don't you just love judicial legal reasoning?] To hold otherwise, the Court held that the exception would eat the heart out of its earlier ruling abolishing municipal immunity, *Merrill v. Manchester*.

Turning to the assumption of the risk argument, the Court pointed out that the assumption of the risk doctrine had been traditionally narrowly construed in New Hampshire and rejected the argument of the defendants that it ought to be revived in the instance of public school sponsored activities. The Court held that the plaintiffs' allegations that the referees lost control of the game (assuming that this allegation was true) were triable because even though the plaintiffs' child assumed an ordinary risk inherent within the game of basketball such as injuries resulting from play, it was not "an ordinary risk inherent within the game of basketball" that a child be confronted with referees who allegedly "lost control of the game," which was not a risk that the child "or her parents would have known and approved."

Finally, the Court addressed the defendants' argument that the referees and coaches were immune under the volunteer immunity statute, RSA 508:17, I, and that their immunity must be imputed to the defendant towns under the doctrine of *respondeat superior*. The Court held that it was incumbent upon the defendants to prove that the coaches and referees came under the definition of a "volunteer" under RSA 508:17, V(c), which specifically addresses volunteer athletic coaches or sports officials and requires that such volunteers "shall possess proper certification or validation of competence in the rules, procedures, practices, and programs of the athletic activity." The Court held that the defendants, as moving parties, were required to submit facts to prove its allegation and having failed to do so, rejected their defense.

Trovato v. Deveau, decided April 21, 1999, presented the important issue "[w]hether RSA 556:13, which caps at \$50,000.00 the damages recoverable in a wrongful death action, where the decedent was not survived by a spouse, child, parent or other dependant relative, violates the rights of the representative of the estate under the New

Hampshire or United States Constitution." The majority of a split New Hampshire Supreme Court found that the cap violated the New Hampshire Constitution, specifically, Part I, Article 14, which provides:

Every subject of this state is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property, or character; to obtain right and justice freely, without being obliged to purchase it; completely, and without any denial; promptly, and without delay, conformably to the laws.

Justice Broderick, speaking for the majority in a well-honed opinion, found that this provision requires that litigants similarly situated should be treated with like protection and without discrimination. The Court then turned its analysis to the plaintiff estate's two arguments, the first being that distinctions *within* the cap provision between decedents who are survived by dependant relatives and those who are not violated this constitutional provision. The Court agreed with the defendant on this issue, basing its decision in large part on the legislative history of the cap. The Court held that "maintaining a limitation on damages for estates without dependant relatives, while eliminating any cap for estates with dependant relatives, bears a fair and substantial relationship to the compensatory purposes of the statute."

Next, carefully addressing the argument of the plaintiff that the judicial remedy provision of the constitution was violated by "distinctions **outside** the cap provision" (RSA 556:9-:14) "(emphasis supplied) because there was an impermissible distinction between decedents whose death is causally related to a tort injury and decedents whose death is due to unrelated causes, the Court found that the statutory cap of RSA 556:13 "restricts only the damages available in an action where the decedent's death is causally related to the injury." "Based on our review, we conclude that the statutory cap does not satisfy [our] scrutiny because the distinction between decedents whose death is causally related and decedents whose death is unrelated to the injury is arbitrary and does not have a fair substantial relation to the object of the wrongful death statute." The Court reasoned that "the cap applies to the estate's recovery of both pre-death and post-death losses when the decedent's death is causally related to the injury, whereas no cap applies to pre-death losses where the decedent's death is unrelated to the injury" and found that "this distinction is not justified." The Court concluded "that the imposition of a cap on pre-death damages when a decedent's death is causally related to the injury but no cap when the decedent's death is unrelated to the injury violates the plaintiff's right to recover for personal injuries under Part I, Article 14 of the State Constitution."

Justice Horton dissented "because I perceive the majority's equal protection analysis to be flawed in several respects," pointing out that "[m]any laws effect certain groups unevenly." "Absent invidious discrimination...the mere existence of a classification does not justify this court in overturning the action of the elected legislature on equal protection grounds."

The esoteric issue of what is *take-out food created for consumption off premises* has reached our Supreme Court in *Holl v. Claremont Associates*, decided May 20, 1999. The precise question was whether a pizza joint, which sold take-out pizza only (and provided no seating for customers) could reasonably anticipate that the customer of a slice of

pizza (or, for that matter, a whole pizza as the Court pointed out) might consume the pizza in the parking lot of the mall where the pizza joint was located, in violation of a restriction against doing so.

It appeared that the plaintiff tenant operated a restaurant located in a strip shopping center owned by the defendant. The property of both the plaintiff and the defendant were subject to a frequently encountered type of cross-easement agreement which restricted the defendant shopping center owner from leasing to any other restaurant or public eating establishment "or place for the sale of food for consumption on the premises." The defendant mall owner leased space to the take-out pizza joint and, apparently, the pizza joint's customers would purchase pizza slices or a whole pizza and go out into the parking lot and eat it. [Heavens! What are American eating habits coming to? The author is Shocked. Shocked! Maybe a slice...but a whole pizza?] The plaintiff's restaurant claimed this was a very cheesy move by the shopping center owner and sought injunctive relief against it, claiming a breach of the restrictive easement agreement and the trial court agreed. A unanimous Supreme Court reversed, finding that the trial court's look to "the serving size of the prepared food to determine whether [the tenants] operation violated the agreement" was insufficient to support the trial court's conclusion that there was a violation of the easement restriction. The Supreme Court held the pizza joint tenant "could not reasonably control where its customers chose to consume their pizza, whether sold whole or in individual servings" and relied upon the trial court's finding that "very few" customers actually consumed their pizza purchases in the parking lot. [The author, an avid reader of Miss Manners, has had his faith in our citizens restored!]. As a result, the Court found that there was no basis for the injunction. The author offers no opinion on the outcome of this decision, leaving it for the readers to decide whether the Court was "out to lunch" in this case?