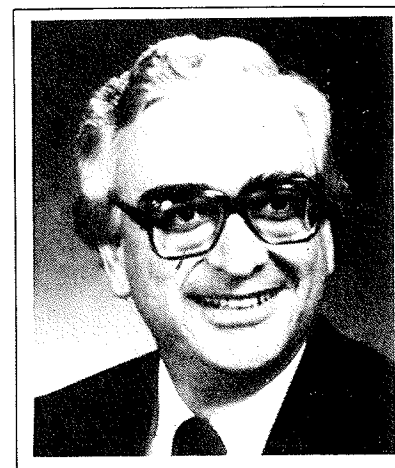

LEX LOCI: Recent New Hampshire Supreme Court Decisions

by Charles A. DeGrandpre
McLane, Graf, Raulerson
& Middleton, P.A.
Manchester, NH



Charles A. DeGrandpre

A recent decision of the Supreme Court, while leaving the matter undecided, set the stage for answering the increasingly asked question whether an insurance agent can be held liable for negligence for not recommending to a client that he purchase more than the minimum required amount of uninsured motorist coverage. *Dyer v. Herb Prout & Company, Inc.*, decided July 24, 1985. The Supreme Court had before it a case in which the defendant sold the plaintiff a \$500,000 automobile liability policy but, without specifically discussing the matter with his client, set the uninsured motorist coverage at only \$40,000. The plaintiff claimed that the defendant should have provided the plaintiff with an amount of uninsured motorist coverage equal to the liability coverage, alleging that the defendant "had negligently failed to advise [the plaintiff] of the cost and availability of additional uninsured motorist coverage up to the amount of the liability coverage." The Court remanded the case to the superior court for further hearings on other grounds and it is probable that, in the capable hands of the plaintiff's attorney, the issue will be before the Supreme Court in the near future.

The issue is an important one in the tort field. Uninsured motorist coverage is mandated at certain minimal levels by the New Hampshire legislature. However, coverage above the minimum is available and the cost of additional insurance above the mandated minimum is relatively cheap. Yet many insureds do not purchase the additional coverage, presumably because it is not in the interest of the insurance company and their salesmen to push or sell this additional coverage. The need for such insurance in a state like New Hampshire is greater than in other states since liability insurance is not required to be purchased by drivers here and even when purchased, liability insurance is often purchased in low coverage amounts. The question raised by the *Dyer Case* is whether it is negligent for an insurance agent not to advise their clients to purchase additional uninsured motorist coverage in view of these circumstances.

The insurance defense bar has been increasingly successful in recent years in obtaining defendants' verdicts by requesting the use of jury instructions on the theories of pure accident, emergency and instinctive action. Two recent cases of the Supreme Court bring that development to a screeching halt. In the first, *Dyer v. Herb Prout & Company, Inc.*, supra, the Supreme Court had before it a "pure accident" instruction, the substance of which informed the jury that "some things in life happen as pure accidents" and if the case before them was such, they should return a verdict in favor of the defendant. The Supreme Court in earlier cases had urged trial courts to use such an instruction sparingly, pointing out that the instruction is argumen-

tative, often sounds like a defense, and reflects nothing more than a denial by the defendant of negligence. In actuality, the pure accident instruction simply restates a principle that is inherent in the very idea of negligence. In *Dyer*, the Court adopted an absolute rule and held that it is reversible error for a trial judge to instruct a jury on pure or unavoidable accident. In *Gagnon v. Crane*, decided July 24, 1985, the Court had before it the propriety of the use of the emergency and instinctive action instructions, in a case in which a verdict was returned for a defendant who rear-ended a plaintiff. The Supreme Court, although not going so far as it had had in the pure accident decision, cautioned trial courts to be sparing in the use of the emergency doctrine. The Court found that the emergency doctrine was improperly used in this rear-end collision case, pointing out that "current road and traffic conditions dictate that motorists drive defensively, one aspect of which is the need to anticipate certain emergency situations such as the sudden appearance of obstacles or persons, darting children, crowded intersections and sudden stops." The Court held that the doctrine should be used "only when the evidence discloses that the situation claimed to be an emergency was 'sudden and unexpected,' and that it deprived the actor of 'reasonable opportunity for deliberation and considered decision.'" The Court went on to hold that the instinctive action doctrine should be used even less frequently. The Court candidly found that "no bright line distinguishes" the emergency doctrine from the instinctive action doctrine, but pointed out that the instinctive action doctrine should not be used unless "unforeseen or unexpected circumstances which the defendant should not have anticipated [give] rise to the emergency situation." It held that the use of such an instruction was prejudicial to the defendant in this type of rear-end collision case. Hopefully, the Court's decisions in these two cases will end permanently the trend toward the increasing use of these three types of instructions, often asked for by defendants in the hopes of snaring a favorable verdict from a confused jury.

The so-called "American rule" by which, absent a statutory mandate or an agreement between the parties each party must bear its own legal costs, has suffered further erosion in a recent case. *Leavitt v. Hamelin*, decided June 19, 1985. Previously, in a string of decisions in the late '70's and early '80's, the Court had recognized certain "judicially-created exceptions" to the rule. In the present case, the Court had before it a plaintiff who sought to recover his legal fees under the bad check statute, RSA 544-A. This statute provides that a successful plaintiff is entitled to "all reasonable costs of collection." The district court had denied the plaintiff's claim for legal fees but the Supreme Court reversed, holding that the statutory language, although not specifically referring to attorney's fees, must be construed to include attorney's fees as well as court costs.

Although the impact of an energy generating plant located in one town may affect neighboring municipalities, an entire region or, indeed, an entire state, under New Hampshire's archaic system of real estate taxation, the city or town in which a utility generating plant is located gets the tax benefit. The sometimes happenstance and fortuitous location of such plants has not prevented the towns or cities in which these plants are located from attempting to take maximum advantage of the goose that lays the golden egg. Thus, the town of Bow has benefited for many years by a low tax rate in large part due to the location of Public Service Company's Merrimack Station in that town. Doubly blessed is the town of Seabrook in which the two units of the Seabrook nuclear station are being constructed. In *Public Service Company of New Hampshire v. Seabrook*, decided July 3, 1985, the town successfully obtained the reversal in the Supreme Court of a tax abatement petition of the Public Service Company. The town had sought to impose real estate taxes on certain items of office equipment, spare parts, building materials and construction equipment located at the Seabrook nuclear plant. The Supreme Court held that this went too far, holding that while a computer essential to the nuclear plant's operation might be taxable, other office equipment, adding machines, computers, spare parts, building materials and construction equipment, clearly were not part of the real estate and were not taxable. However, the town was successful in overturning the Master's

decision that the cost of obtaining money for construction (AFUDC) was not a part of the taxable value of the plant for property tax purposes. The Supreme Court held that, even though the plant might never be put in operation, some portion of the "extremely large" cost of financing the project could properly be included in the plant's taxable value. The Court stated that the trial court "should have determined how much AFUDC a typical utility ... would reasonably expect to have accumulated ... when constructing a plant of the same size and type as Seabrook Station, with a builder of average efficiency. This amount, added to the other costs of construction, represents the price that a hypothetical buyer would expect to pay 'for building a new equivalent plant,'" which is the proper valuation method for the taxation of this type of utility plant. The Court also had before it the question of a discount from the assessed value of the plant to reflect the uncertainty of the eventual return of the owner's investment. Not surprisingly, the town's discount factor was very low and that offered by the Company was very high. The Master compromised the issue midway between the parties and the Court held that since there was "ample evidence of uncertainty about the Seabrook project," the Master's findings were not erroneous as a matter of law and would not be disturbed on appeal.

There are several cases that can be noted briefly. In *Appeal of Seacoast Anti-Pollution League*, decided July 24, 1985, the Supreme Court held that it was the Public Utility Commission or a majority of its members, and not the chairman acting individually as presiding officer, which had the power to determine whether or not certain parties had the right to intervene in proceedings. In *State v. Langone*, decided August 5, 1985, the Court held that for purposes of computing whether an unconstitutional delay had occurred in a prosecution for a traffic offense, the delays at the district court level and those at the superior court level must be evaluated separately for speedy trial purposes. In *State v. O'Flynn*, decided July 1, 1985, the Supreme Court upheld the extortion conviction of a former Hillsborough County sheriff who was found by a jury to have improperly solicited campaign contributions from presently employed deputies. The Court held that the extraction of money from a subordinate under a threat of a promotion denial is extortion, whether the threat is express or implied in words or conduct. In *Christy & Tessier, P.A. v. Witte*, decided July 1, 1985, the Supreme Court had before it the not infrequent practice by which parties agree to submit a case to a special master and agree that each shall compensate the master for his labors. The Court held that such a procedure "runs the risk of appearing to be an improper purchase of justice" and established a requirement that before a client could be held to such an agreement, the agreement must be in writing. Further, the agreement must clearly indicate that a client has the right to refuse to submit the case to a special master and his refusal will not in any way be noted in the records of the court or prejudice his case.

In *Clarke v. Clarke*, decided July 3, 1985, the Supreme Court held that under the Uniform Child Custody Jurisdiction Act (UCCJA), RSA 458-A, a New Hampshire court does not have jurisdiction to modify a child custody decree entered into in another jurisdiction although, if a child is located in New Hampshire, it has the power to assume initial jurisdiction to issue a custody order where none has been issued before. In *the Matter of Hitchcock Clinic, Inc.*, decided August 5, 1985, the Court had before it a corporate law issue as to the disposition of a corporation's assets upon dissolution under the Model Business Corporation Act. The Court took a very strict view of RSA 293-A:88, II and held that this statute provided that the shareholders of a corporation succeed to the assets of the corporation after the payment of all of the debts and obligations of the corporation. The Court upheld the right of a single shareholder to assert his right to his share of the assets, holding that the dissolution statute "applies by its terms to every formal corporate dissolution, regardless of the meaning of the provisions in the Articles of Agreement." In *State v. Walsh*, decided June 17, 1985, the Court approved the courtroom participation of a guardian ad litem of the victim minor in a felonious sexual assault criminal case. The Court held that since the victim is the real party in interest in a rape case and her interests may differ from those of the state, she should be entitled to appear through a

guardian ad litem, so long as the "role and purpose of the guardian during trial [is] explicitly outlined and delineated by the trial judge prior to trial in order to avoid interference with the proper conduct of the trial so as to avoid a mistrial." In *Jackson v. Ray*, decided July 24, 1985, the Court had before it the quaintly phrased question whether there was an "occasion" for the layout of a public road, as requested by the plaintiff. The Court held that the factors to be considered included the public need for the highway and the burden the highway would impose upon the town. The Court held that it would uphold the decision of the superior court in such cases since "a finding of public necessity, or the lack of such necessity, is discretionary and we are therefore hesitant to disturb such findings."

The trend toward post-verdict interviews of jurors by litigants as well as by the press has reached New Hampshire and has occasioned the Supreme Court to take action in connection with the matter. *Drop Anchor Realty Trust v. Hartford Fire Insurance Company*, decided July 1, 1985, and *Bunnell v. Lucas*, decided June 19, 1985, both involved post-verdict discussions between jury members and counsel for the parties, in one case counsel for the plaintiff and in the other counsel for the defendants. Both gave rise to motions to reconvene the jury to discuss the conduct disclosed by the jury member to counsel. In the *Bunnell* case, the charge was that the jury had reached its verdict by "chalking," a process by which the jury averages its individual quantitative positions with respect to percentages of fault. A divided Supreme Court held that such a process was not improper if after the chalking process, the entire jury agreed on the unanimous verdict reached by the chalking process. In the *Drop Anchor* case, a jury member revealed that the jury had included an amount of interest in its verdict for the plaintiff. The trial court reconvened the jury and upon finding that this had occurred, reduced the award by the amount of interest added by the jury. The Supreme Court approved the procedure followed by the trial court. However, the Supreme Court is clearly troubled by "the issue of post-verdict interviews of jurors by litigants, their agents and their counsel" and has asked the Bench and Bar to develop rules to govern such interviews.

Finally, recent decisions of the Supreme Court include two decisions which result in the overturning of decisions by the Department of Employment Security adverse to the unemployed claimants. *Appeal of Peterson*, decided June 17, 1985, and *Appeal of Eno*, decided June 19, 1985. In the first, the Court held that the Department of Employment Security had improperly denied the plaintiff's request for unemployment compensation benefits on the grounds that the plaintiff had terminated his prior employment voluntarily without good cause attributable to his employer. However, the facts showed that the plaintiff left his prior employment after an injury received in the course of his employment and pursuant to an agreement entered into at the suggestion of the Department of Labor, by the terms of which the employee agreed to leave employment and take a lump sum workmen's compensation benefit. The Supreme Court held that a denial of unemployment benefits in light of these circumstances was clearly improper. In the second case, the plaintiff lost a part time job, applied for unemployment compensation benefits and received such benefits for several weeks. However, the Department of Employment Security then found that the plaintiff was not making sufficient efforts to find work and cut off her benefits. The plaintiff appealed and the Supreme Court reversed holding the plaintiff claimant had been misled by the Department because it had improperly failed to advise her of the necessity to seek work while at the same time providing her benefits. The Court found that this was "fundamentally unfair and thus amounted to a denial of due process." Previously, in an attempt to make the Department of Employment Security more attentive to the rights of claimants, a restructuring of the Department was legislated by which the attorneys for the Department were brought within the jurisdiction of the Attorney General and made subject to his direction. This change was designed to prevent the continuation of the Department's clearly excessive concern with conserving its assets rather than responding to the needs of claimants. However, this does not seem to have been the result. *Plus ca change, plus c'est la meme chose.**

*The more it changes, the more it stays the same.