

## **Lex Loci: A Survey Of New Hampshire Supreme Court Decisions**

by Charles A. DeGrandpre, Esquire

The author will make a bet with you. Close your eyes and explain the difference between abuse of process and malicious prosecution. If you can, you win and you are better than the author who tried the test himself. If you lost, read *Long v. Long*, decided July 23, 1992, where the Supreme Court, surprisingly for the first time, precisely defined the tort of abuse of process. The Court adopted the definition of the tort given in Section 682 of the Restatement (Second) of Torts: "One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process." Again quoting from the Restatement, the Court indicated that the "gravamen of the misconduct" under an abuse of process is the **misuse** of process. The Court distinguished the abuse of process tort from the tort of malicious prosecution, which are many times confused (at least in the author's mind). An action for malicious prosecution "is concerned with maliciously causing process to issue", while an action for abuse of process "is concerned with the improper use of process after it has been issued." A person claiming abuse of process must prove six elements: "( 1) a person used (2) legal process, whether criminal or civil, (3) against the party (4) primarily to accomplish a purpose for which it is not designed and (5) caused harm to the party (6) by the abuse of process." In the instant case, the Supreme Court, speaking through Justice Batchelder, held that the mere filing of a motion for contempt, which was never acted upon, "did not constitute 'process' for purposes of the plaintiff's abuse of process claim". The Court held out some relief to the plaintiff, however, indicating that a party in the position of the plaintiff "may seek to invoke the court's broad equity powers to penalize conduct such as that complained of here."

In *Hirst v. Dugan*, decided July 15, 1992, the Supreme Court held that the Uniform Act on Paternity (RSA chapter 168-A) does not create, in a child of a decedent, a right of support which is enforceable against the decedent's estate. Furthermore, the Court held that RSA 554: 19, V, which establishes the priority of the support and maintenance of infant children of a decedent, does nothing other than to create a priority for such support" and is not in itself the source of the obligations giving rise to the charges". Since there was no order of support or obligation existing against the defendant prior to his death, the Court held that the plaintiff's child is not entitled to support from the father's estate, regardless of whether the child is born in wedlock or out-of-wedlock.

Lawyers should note *Adkin Plumbing & Heating Supply Co., Inc. v. Tyler P. Harwell*, dated April 24, 1992. This case addresses the question whether or not a client has an unfettered right to discharge an attorney from a case without cause, where the attorney and client have a contingent fee agreement. The oral argument must have been a doozy, since the Court commented upon the defendant's presentation as being one of "a style, mercifully, rarely seen" by the Court. The Court, with Chief Justice Brock writing the opinion, ruled that a client "may terminate the relationship with his or her

attorney at any time and for any reason." Thus, the defendant's claim for breach of contract was properly dismissed. However, the majority held that a ruling "prohibiting a discharged attorney from recovering on the contract does not necessarily mean that the attorney services will go for naught." Citing a clear majority of the decisions in other states, the Court ruled that an attorney who has been discharged without cause may recover the reasonable value for his services in **quantum meruit**. The twist here is that the contract was a contingency agreement and the gut issue was whether or not the discharged attorney can sue immediately for the reasonable value of his services or must await the outcome of a final resolution of the case to see whether or not there was any recovery made by the client on the case. Acknowledging that it was a close issue, the majority of the Court held that the better rule was that a "cause of action accrues upon the termination of the attorney's services without cause, not upon the happening of the contingency." Justice Thayer, speaking in a sole minority would hold that the majority's ruling resulted in an anomalous situation where "clients must in effect pay to exercise their right to discharge their attorneys because the client is liable for fees to the discharged attorney regardless of whether or when the client recovers on the claim." Justice Thayer, in a colorful turn of phrase, goes on to point out that the majority had noted that there was a "possibility of the discharged attorney receiving no compensation because an incompetent successor attorney" might be unable to obtain a recovery on the claim, and stated that he (Justice Thayer) supported the rule that the discharged attorney was entitled to no compensation unless the client recovered on his claim, because "I prefer to presume competence, rather than incompetence, of another member of the bar."

There have been the usual dismaying number of attorney misconduct cases. They show the bent of this Court to deal toughly with attorneys who fail to meet their professional responsibilities. In *Otis' Case*<sup>1</sup>, decided June 2, 1992, the Supreme Court upheld the recommendation of its Committee on Professional Conduct to disbar the respondent attorney, whose inappropriate conduct centered on his improper behavior toward six female clients, including, in one case, making inappropriate sexual remarks, making overt sexual advances and finally making an actual physical sexual assault, all toward a former client and later employee of the respondent attorney. The attorney's defense was that he suffered from a "sexual misconduct disorder that causes him to" unpredictably change his behavior and to "lose complete control of his sexual conduct without being aware of what he is doing." The Supreme Court sternly rejected the attorney's arguments, stating that regardless of the cause of his problem, the attorney had an obligation to his clients to take whatever preventive measures were necessary to avoid causing them harm. As to disbarment instead of suspension, for which the attorney argued, the Supreme Court upheld the Conduct Committee's recommendation of disbarment, not "to punish the attorney, but to maintain appropriate standards of professional conduct for the protection of the public and the maintenance of public confidence in the bar." In *Boyle's Case*, decided July 23, 1992, the Supreme Court unanimously held that it was a violation of the Rules of Professional Conduct where an attorney represented a defendant in a criminal matter at the same time that he was acting as guardian ad litem for the children of the defendant in a divorce suit matter. The

---

<sup>1</sup> The author's firm represented a party to the action and, therefore, the author's view may be colored.

Court took an expansive view of the guardian at litem's duties stating that the guardian at litem's duty to represent the interest of the children did not cease upon the filing of the guardian at litem's report as claimed by the attorney. Indeed, the Court found that the conflict affected both the attorney's duty to the defendant as a criminal defendant and his continuing duty as a guardian at litem that continued after the filing of his report as guardian at litem.

A couple of evidence cases illustrate the problem a prosecutor can get into by pressing too far and failing to make the necessary link-up between the highly prejudicial evidence being offered and its probative value or relevancy. In *State v. Smith*, decided May 5, 1992 (another distressing allegation of child abuse by a stepfather of his stepdaughter in her own home), the prosecutor offered the victim's venereal infection as evidence of the defendant's commission of the alleged sexual act. However, the testimony of the State's own physician indicated that it was as likely that the child contracted the particular type of venereal infection involved as a result of transmission from her mother at birth as from transmission by sexual contact from a male. Indeed, there was no evidence that the defendant even had the type of venereal infection involved since he had never been tested. A unanimous Court, speaking through Justice Horton, reversed, ruling the evidence inadmissible since to prove "[t]hat the victim in this case is infected provides no credible nexus between the infection evidence and the incident at issue thus, it fails to corroborate that the alleged sexual assault took place. The admission of the evidence was an abuse of discretion because it was 'unreasonable to the prejudice of [the defendant's] case.'" In another evidence case, (*State v. Michaud*, decided July 10, 1992) the admission of prior bad acts of a criminal defendant under Rule 404(b) of the New Hampshire Rules of Evidence was before the Court. In a depressing case involving the physical abuse of an infant, the Court reversed the defendant's conviction which was based, in part, upon the admission of evidence of a prior bad act, because the Court found that it was unclear that the defendant had committed the bad act complained of and where it was as likely that other persons might have done it. Even though the defendant had clearly abused the infant, because "[e]vidence of prior bad acts is inherently prejudicial and carries substantial weight with the jury", the Court overturned the defendant's conviction.

*State v. Cook*, decided June 25, 1992 (the sensationalized case of the former Hampton police officer, who, with the assistance of his wife (the defendant), fatally shot-gunned his neighbor over a long-standing squabble between the two men) raises the interesting question whether the defendant husband's confession, which implicated the defendant wife, although admissible under an exception to the hearsay rule, nevertheless infringed upon the defendant wife's constitutional right to confront the witnesses against her under part I, article 15 of the New Hampshire constitution and the 6th amendment of the federal constitution. The Court, deciding the case under the New Hampshire constitution, because the federal constitutional provision "does not provide the defendant with greater protection in this area than she is entitled to under" the New Hampshire constitutional provision, held that the inculpatory confession of the defendant's husband was admissible if it possessed "particularized guarantees of trustworthiness." This standard requires the state to present the trial court with evidence

that the confession was "so trustworthy that adversarial testing would add little to [their] reliability." The Court found that the state had met its burden in this case.

Several cases can be noted briefly. In *In re Guardianship of Raymond E.*, decided June 25, 1992, the Supreme Court narrowly construed the guardianship statute to provide that only those entities specifically listed in RSA 463:6 may petition for the guardianship of a minor child. Therefore, the Court overturned a probate court's granting of guardianship over an infant to a volunteer at a local AID's response center who had helped the mother with the transportation of the infant, who had baby sat the child and who had provided extended care to the infant during a two year period. The Court's decision is somewhat surprising, having in mind that the probate judge found that the granting of the guardianship petition was "consonant with [the child's] best interest" and was consistent with earlier Supreme Court cases under the prior guardianship of minor statute. In *Centorr-Vacuum Industries, Inc. v. Lavoie*<sup>2</sup>, decided June 17, 1992, the Court changed its prior rulings on noncompetition agreements in an important fashion. The prior rule was that, a noncompetition agreement, as a contract in restraint of trade, was to be viewed with disfavor and should be construed narrowly. "However, where, as in this case, the noncompetition covenant was ancillary to the sale of a business, it may be interpreted more liberally. . . . Under such circumstances, the parties presumably bargain from positions of equal bargaining power. The covenantor is paid a premium as a consideration for agreeing not to compete with the buyer, and the proceeds from the sale assure that the covenant will not result in undue hardship." *Brosseau v. Green Acres Mobile Homes, Inc.*, decided June 17, 1992, reminds us all that it is unlawful to discriminate under New Hampshire statutes 205-A and 354-A to restrict housing sales or leases to buyers or lessees without children or persons under a certain age, except in certain retirement communities, which can restrict residency to persons over the age of forty-five years.

In the *Appeal of Bio Energy Corp*, decided May 5, 1992, a case of first impression dealing with the New Hampshire Whistleblower's Protection Act (RSA 275E), a divided Supreme Court expansively interpreted the Act to (1) rule that a report of a violation **to the employer** was sufficient; a report to a third party was not required, and (2) an award of back pay in the form of injunctive relief was allowed even though the Act does not specifically authorize the award of damages. The majority, speaking through an opinion by Justice Johnson, inked in what the legislation left out of the Act because the Court expressed the "wish to promote the dual purposes of the Act - - to encourage employees to come forward and report violations without fear of losing their jobs and to ensure that as many alleged violations as possible are resolved informally in the workplace." The minority (Justices Horton and Thayer) would hold that actionable whistle-blowing ("the telling of tales out of school") under the Act was triggered only if the employee first made a report to a third person. Since no report was made other than to the employer (who corrected the situation, but then fired the employee), the minority would hold that the whistle-blowing statute did not apply, although holding out that the employee might, under common law, recover damages for "retaliatory discharge"

What a thankless job the Division of Child and Youth Services has in the prevention of

child abuse. The Department is understaffed and undertrained. It's also woefully underfunded: it's part of the Welfare Department, isn't it? It is confronted with ambiguous statutes that make it difficult to determine just when a child has been physically or psychologically abused. It's damned if it does and it's damned if it don't: if it intervenes in a family situation because it thinks a child is being abused by his parents, it is accused of breaking up the family; if it fails to act, and the child is later seriously injured or even dies, it is chastised for failing to act. All of which leads to *In re Ethan H.*, decided June 25, 1992. This case involves the corporal punishment of a child by its mother, a physician, who, to punish her child who threw food at the dinner table, gave her seven year old son a "strapping" with an imitation leather belt with at least six strikings. The child was left with linear bruises on his buttocks and lower back and a bruise and scrape in his abdominal wall that were still visible after five days. The mother stated she had used corporal punishment in the past and would probably do so again. In two separate hearings, between which there was an appeal to the Supreme Court, two different trial judges found the defendant to be an "abused child" under the Child Protection Act, RSA 169-c. The mother's defense was that the members of her family were easily bruised and that it was not uncommon for she and her children to exhibit bruises from the slightest touching!! Despite the deference usually accorded trial court decisions in this area, the Supreme Court reversed, finding that the Division of Child and Youth Services had failed to prove that the strappings had physically injured the child. The Supreme Court, to this observer, placed an unusual and unwarranted emphasis on the failure of the Division to call as a witness a physician who first examined the child on its behalf and who presumably would have testified that the child wasn't abused. Not an unusual trial step for a party to take. The DCYS did offer the mother's own physician who thought that there was abuse, but that didn't seem to satisfy the Court. This is a wrong-headed decision that isn't going to make the life of the staff of the DCYS any easier, nor will it advance the cause of the prevention of child abuse one iota. The New Hampshire rule seems to be: a bruise or two never hurt a kid.

Lastly, *Lewis v. Powell*, decided May 1, 1992, is an example of a **pro se** defendant, hoisted on his own petard, and is reason enough why prosecutor's are hairless a result of their pulling it out in frustration. Here a defendant, in a serious criminal jury trial, insisted before two different judges on trying his own case, despite the admonitions of both judges to seriously consider whether he should do so. The defendant insisted, stating "if I foul up, sir, it's on my head, nobody else's." The prosecutor insisted that the Court go further and warn the defendant of the difficulties of trying such a serious case, and this was done, but to no avail: "Judge: Well its hard to claim ineffective counsel when you represent yourself. Defendant: That's right. I understand that." At a later hearing, before a different Judge, the same warnings were made, but the defendant insisted "I'd rather go [to trial] on my own." The prosecution again pointed out that the Court needed to "make sure that there is no issue of ineffective assistance or that the defendant is not aware of his rights to counselor that he should not have been allowed to go forward **pro se**." You know the rest of the story: after the defendant's conviction by a jury and his incarceration, he appealed his case to the Supreme Court and lost. He then filed a petition for writ of habeas corpus, maintaining that the trial court had unconstitutionally failed to obtain from him an express waiver of counsel and had failed

to warn him of the dangers and disadvantages of self-representation. [Surprised?]. The Supreme Court held that while the New Hampshire constitution, part I, article 15, requires a waiver of the right to counsel, there was more than enough evidence to show that the defendant had knowingly and intelligently waived his right to counsel. Ah, a twist on that old saw, "the defendant who represents himself has a fool for a client" certainly applies here.

2 The author's firm represented a party to the action and, therefore, the author's view may be colored.