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Lex Loci: A Survey of New Hampshire Supreme Court Decisions
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The recent opinions of the New Hampshire Supreme Court lend insight into the thinking of the most recent appointee to the Court, Justice Broderick. Readers of tea leaves and other diviners will want to read In Re: Angel N., decided July 2, 1996.

Termination of parental rights cases are some of the most difficult cases with which the court system grapples. In Angel N., the Supreme Court had before it a petition of the State Division for Children, Youth and Families (DCYF) to terminate the parental rights of two parents over their daughter. The probate court below had ordered termination. The parents independently appealed and the Supreme Court, in a split opinion, affirmed the termination. This case is a tragedy of Greek proportions. The facts of the case do not make pretty reading and it leads one to despair about the state of our families and children in the late Twentieth Century. Within two weeks of her birth, Angel (did someone invent this name as a satiric parody?) was the subject of a report to the DCYF from her mother that she and Angel's father were fighting and that Angel's father had forcefully dropped Angel into her bassinet. Next followed a period of years in which Angel was alternately placed with the DCYF and returned to the custody of her mother. Despite continuing assistance from the DCYF in the form of (1) visiting nurses, (2) social workers, (3) out-patient counseling, (4) parenting classes and (5) transportation, the parents continued to fight with each other and both at times physically struck Angel and caused her harm. Excessive drinking and violent altercations between the parents in the presence of Angel were common. At one point the mother was physically assaulted by her male roommate (not the father) in Angel's presence. On another occasion, Angel's mother stabbed the father with a steak knife in the home they provided for Angel. After a two-year separation period from her parents, Angel was returned to the parental household but continued to live in an atmosphere of chaos and violence. The DCYF continued to provide parenting classes and counseling to the mother but progress was tediously slow. Some five years after Angel's birth, the DCYF finally petitioned the probate court to terminate the parents' parental rights.

The Supreme Court was tom between the obvious fact of this extremely dysfunctional family on the one hand and, on the other, with the heartstring ties of parents for their children. In termination cases the Court has previously established the unfortunate and unnecessary, extra-high criminal law hurdle of proof beyond reasonable doubt, a hurdle that the probate court had found was jumped by the DCYF. In the Supreme Court, each parent argued for their rights in separate ways. Most pointedly, the mother pointed out that she had raised another child (although also subject to DCYF intervention and separation) and she argued "that one who can adequately parent one child is equally and automatically capable of parenting another." After much legal jousting, the majority of

the Court speaking through Justice Broderick, concluded that both parents had failed Angel in their obligation to provide parental support to her. The Court concluded by stating that

"although the law should not attempt to micromanage families, society does have a right to insist that children not be neglected. When neglect is due to a parent's unwillingness or reluctance to assume basic responsibilities, then society has a right to interfere to protect the innocent child."

In dissent, Justice Johnson, using biblical language, argued "that the relationship between parent and child is nearly inviolable, and should be tom asunder only on exceptional facts." Justice Johnson would find that although the father's parental rights should be terminated, the parental rights of the mother were not subject to termination. Arguing a mainly factual argument, Justice Johnson closed by concluding that "it is a tragedy to terminate (the mother's) parent-child relationship with Angel for all time." To the author, admittedly biased because he is a parent of two adopted children, the majority's decision was correct. To adopt the view of the dissent would leave one parent still having parental rights and, as a consequence, would leave Angel in purgatory (can Angels be sent there?) without hope of a permanent home. It continues to amaze the author that almost five years of neglect and active hostility to Angel occurred before any action was taken to provide a permanent home for her. What of the best interests of Angel? Where is the plan for Angel's future well being? From the time of her birth in 1989, seven years transpired before her fate was finally determined and before this young girl was given the chance of finding a permanent home that will give her an opportunity to realize her potential as a human being without the constant environment of hostility, stress, violence and parental neglect that this case shows is all too common in our society.

On a happier note, can an employee injured while playing for a company's softball team claim against an employer under the New Hampshire Worker's Compensation law for his injuries? *Appeal of Cooper1,* decided July 11, 1996, is a decision that caught the attention of press and lawyers alike, because the Supreme Court's surprising affirmative answer to this question seemed to depart from the Court's own prior cases involving employee softball *(Murphy v. Town of Atkinson,* 128 N.H. 641 (1986) and *Anheuser-Bush v. Pelletier,* 138 N.H. 456 (1994)). A unanimous Court, speaking through Justice Horton, distinguished the earlier cases that denied benefits to an employee injured while playing on a company softball team. Here, the Court pointed out, the employer had extensive involvement in the activities of the company's softball team. For example, the employee when interviewed for the job was questioned concerning playing on the company's softball team. A budget for team expenses was submitted each year to the employer and the employer paid nearly all of the team's expenses including league

fees, tournament fees, uniforms and equipment, airfare to and from tournaments throughout the United States, rental cars, hotel accommodations, meals and drinks after games, advertisements in game programs, and was involved in season-end awards dinners and ceremonies. The employer even paid overtime for workers who filled in for members of the team absent because of commitments to the league's schedule!! The Supreme Court overruled the Worker's Compensation Appeals Board and held that this case differed from its earlier cases, putting great weight on the company extensive involvement with the softball team:

"At the time of his injury the claimant was using the company's equipment. More importantly, however, adjustments were made to the claimant's work schedule to accommodate softball practices and games, and the claimant's pay was never docked for being away from his job because of softball, even when practices or games occurred during his regular work schedule. These facts, coupled with the company's extensive involvement with the team and the company's practice of paying overtime wages to those employees who filled in for players unable to work because of the team's schedule, set this case apart from *Murphy* and *Pelletier*. . . . As the [Workmen's Compensation Appeals Board] found in its initial decision, the team was part of the 'cultural climate and almost institutionalized as an established part of company life for well over 15 years.'"

Fleet Bank-NH v. Christy's Table, Inc., decided August 12, 1996, contains a good exposition of the law of surety or, in this case in particular, the obligation of a guarantor of a loan made to the primary maker or borrower. This has been a hot button issue since the real estate crash of 1989 and the Court's unanimous decision, by Justice Thayer, is must reading for bankers and lenders in general. In this case there was a first guaranty and a second guaranty (not uncommon in the go-go '80's) and the defendant guarantors of their co-defendant borrower claimed that there was never a meeting of minds concerning the guaranty contract, in particular with regard to the second guaranty. The Court expounded on the law of guaranty in New Hampshire as follows:

"Guaranties are governed by the general law of contracts. 'In order for a contract to be formed there must be a meeting of the minds as to the ten-ns thereof.' The parties must have the same understanding of the terms of the contract and must manifest an intention, supported by adequate consideration, to be bound by the contract…Mere mental assent is not sufficient; a 'meeting of the minds' requires that the agreement be manifest."

The guarantors claimed that the second guaranty was not valid because of alleged defects in the manner in which the guaranty was witnessed, dated and notarized. The Supreme Court upheld the trial court's upholding of the validity of the guaranty because

it was based on witness credibility, which "is a finding of fact and will not be overturned unless clearly erroneous or unsupported by the evidence."

The Beach Boys, from their earliest beginnings through the travails of the Reagan administration (who can recall the actions of Interior Secretary James Watt who wanted to ban their appearance in a Washington, D.C. forum, only to be overruled by the unexpected intervention of Nancy Reagan?), are a rock music group that has become an icon of our cultural society. In *Brother Records, Inc., v. HarperCollins Publishers,* our Supreme Court wrestled with issues of the reach of New Hampshire jurisdiction under our long arm statue, R.S.A. 510:4,1, in the context of the publication of an allegedly libelous autobiography by one of the founding members of the Beach Boys. A unanimous Supreme Court, reaffirming the extraordinarily long reach of the New Hampshire long arm jurisdiction statute upheld the jurisdiction of New Hampshire courts over the defendants which included the author of the autobiography who had no contacts with New Hampshire, who had written the work entirely in California, and which concerned people and events which did not involve New Hampshire. Nor, the Court found, could the defendant author have anticipated that any injury caused by his conduct would have occurred in New Hampshire. However, the Court found that the fair play and substantial justice requirements of the federal constitution as well as the New Hampshire law were met, pointing out that although the defendants "have no apparent connections to New Hampshire does not mean that the plaintiffs did not suffer injury in New Hampshire." It is sufficient to show, the Court said, that the defendants knew that the books would be distributed and sold nationally and that they stood to profit from the sales of the books nationally, including New Hampshire. The rule in these jurisdictional libel cases is: if you distribute in New Hampshire, you are subject to suit here.

In *State v. Fitanides,* decided September 30, 1996, the Supreme Court affirmed the conviction of the defendant for the crime of issuing a bad check, in violation of R.S.A. 638:4. The interesting issue in this case was whether the defendant could be convicted of issuing a bad check where he gave the defendant a postdated check upon which was typed on the back of the check "Please call before depositing." After the date of the check, and without calling, the holder deposited the check in his bank account and it was returned for insufficient funds. The Court, distinguishing cases in other jurisdictions which have held that the other states' worthless check laws were inapplicable to postdated checks, rejected those arguments and held that the following elements applied to the crime of passing a bad check:

(1) that the defendant issued or passed a check for payment;
(2) that the defendant knew or believed that the drawee bank would not pay the check; and
(3) payment was refused by the drawee bank, RSA 638:4, *N(b).* The State need not

prove that the defendant *never* intended to pay the amount owed.

Bohan v. Ritzo2, decided July 19, 1996, is an exposition of the law of dog "bite" in the State of New Hampshire. It turns out that New Hampshire's dog "bite" statute, as it is commonly referred to, is only a dog "bark" statute: it is not necessary for an owner's dog to bite a plaintiff in order for the plaintiff to recover for his damages from the owner. The facts showed that the defendant bicyclist was passing in front of the defendant's house when a dog ("Pee-Wee") came at him from his owner's driveway. As the plaintiff tried to ward the dog off, the plaintiff lost his balance, fell and was severely injured, suffering extensive permanent injury, although the incident only took a matter of seconds and Pee-Wee, to his credit, never bit or made physical contact with the plaintiff. The local newspapers had a field day with this amusing case. One newspaper's headline was: "Dog's Bark as Bad as His Bite." Another local newspaper (obviously attuned to the alliteration used by the recently departed, but unmourned, Spiro Agnew) announced that "Pee-Wee the Pooch Pounced At Passing Pedaller." Let's be clear here: we're not talking about a snarling, one hundred and twenty pound RottWeiler. Pee-Wee was an aptly named nine pound Cockapoo.

The plaintiff brought action under New Hampshire's dog bite statute, R.S.A. 466::19 as amended in 1995, which imposes "strict liability upon dog owners for damages occasioned by their dogs." The plaintiff survived a motion to dismiss and at trial, was awarded by the jury damages in the amount $190,000, which, after appeal, totaled almost $270,OCu. It seems that everyone except the defendant and his insurer enjoyed this case. At oral argument, the Chief Justice asked rhetorically if he should recuse himself because he had a dog! The Supreme Court's opinion by the Chief Justice made clear that the statute makes a dog owner strictly liable for harm caused by a dog's "vicious or mischievous acts" without any need for a bite. In answer to the defendant's arguments that the trial court's interpretation of the statute made the owner of a pet an insurer, The Court pointed out that the statute does not make every dog owner "an insurer" of every person who "walks or drives a bike past" an owner's property, and ruled that the legislature had made clear through the statute that "dog owners [are] responsible for keeping their dogs under control and, if they do not, [are] strictly liable for any damage which an injured person proves was occasioned by their dog's vicious or mischievous conduct."

One of the more interesting areas that the Supreme Court explored in the *Bohan Case* was the issue of comparative fault under R.S.A. 507:7-d, as it applies to the dog bite statute. The Court held that the comparative negligent statute applies to all tort actions including strict liability tort actions such as the dog bite statute, albeit applied slightly differently in a strict liability case. Although the trial court had ruled that the comparative negligence statute did not apply to cases under the dog bite statute, the Supreme Court

held that the error was inconsequential under the facts of the case. Ah dogs, men's best friends. Ambrose Bierce, in his *Devil's Dictionary,* defines a dog as follows:

"Dog, n. A kind of additional or subsidiary Deity designed to catch the overflow and surplus of the world's worship. This Divine Being in some of his smaller and silkier incarnations, takes, in the affection of Woman, the place to which there is no human male aspirant. The Dog is a survival - an anachronism. He toils not, neither does he spin, yet Solomon in all his glory never lay upon a doormat all day long, sun-soaked and fly-fed and fat, while his master worked for the means wherewith to purchase an idle wag of the Solomonic tail, 5ea."Oned with a look of tolerant recognition."3

Endnotes

1 . The author's firm represented a party to the action, and therefore, the author's view may be colored.
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3. Ambrose Bierce, *The Devil's Dictionary,* 36 (1991).