

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

By Attorney Charles A DeGrandpre

Is it conceivable that a victim, adult and competent, of an alleged sexual assault can be prevented from testifying in the very criminal case brought against her alleged attacker? The answer to that question appears to be a ringing yes where the victim intends to testify based upon a recovered repressed memory. *State v. Hungerford*, decided July 1, 1997. The decision in this case was monumental, running to over sixteen pages in the advanced sheets and eliciting several *amici curiae* briefs from national organizations. The unanimous opinion authored by Chief Justice Brock is a masterpiece. It delves extensively into the mysteries of the "phenomenon" [the Chief Justice uses this word at least 24 times in his lengthy opinion] of repressed memory.<sup>1</sup>

The facts were riveting: In the companion cases under consideration two women were alleging sexual abuse by their father and teacher, respectively, about which they had forgotten but about which their memory was recovered some years later while under therapy. In one case, the clinically depressed victim alleged, many years later, sexual abuse by her father. She had experienced sexual problems in her marriage and claimed that she presently remembered that her father had inserted a gun into her vagina, that he had penetrated her on several occasions digitally, both vaginally and anally, and that two days before her wedding he had entered her bedroom, ripped the covers off her bed, and raped her!! In the other case, the victim, suffering from suicidal ideation, depression, narcissism and bulimia, while under psychotherapy expressed negative feelings about her parents who had been divorced, expressed conflicted feelings about her grandfather, reported that her stepfather might have "done something to her", and remembered being raped by a teacher (the defendant) in the seventh grade, many years before!! Shades of the Salem witch hunts of the 17th century.<sup>2</sup>

The trial court, (Groff, J.), properly proceeded very carefully before deciding whether or not to admit the testimony of the complainants based upon their repressed but, under therapy, recovered memories. It held a two-week preliminary admissibility hearing at which the two complainants testified at length as well as seven psychological professionals. The trial court defined a repressed memory as "the complete absence of awareness or memory of a traumatic event from the time of its occurrence until a period of years thereafter" and ruled that, upon the evidence before it, the State had failed to meet its burden "proving that there was a general acceptance of the phenomenon of repressed memories in the psychological community, and, further, that the State had failed to demonstrate that the phenomenon was reliable." The trial court accordingly ruled that the testimony of the complainants was inadmissible and the State appealed to the Supreme Court.

The Supreme Court had previously ruled in *State v. Cressey*, 137 NH 402 (1993), that the testimony of experts in child abuse cases based upon recovered memory must reach a threshold of reliability in order to be admissible. Now the Court was confronted with the more difficult issue (the testimony of the victims themselves) and in a case of first impression in this jurisdiction, concluded "that, when challenged, testimony that relies on memories which previously have been partially or fully repressed must satisfy a pretrial reliability determination. "

The Court then turned to a lengthy discussion concerning the "phenomenon of repressing recollection of a traumatic event, and subsequently recovering it." The Court recognized that although "there are skeptics, it does seem to be accepted in the psychological community that people are capable of repressing or disassociating conscious recollection of all or part of certain traumatic events", but held that the proponent of such testimony bears the burden of presenting expert testimony supporting the reliability of the recovered memory. The Court looked to see what other jurisdictions were doing on this issue and decided upon "a case-by-case approach, tempered with skepticism", expressing its concern "with the influence of therapy on the recovery of memory." The Court's commendable approach reflects an "attempt to balance 'the legal and emotional needs of survivors of childhood sexual abuse'...with our duty to insure that defendants receive a fair trial and that individuals receive a reliable and fair adjudication of their disputes."

The Court went on to establish an eight factor test for "determining the reliability of a recovered memory,--that is, whether the recovered memory is likely to be as accurate as ordinary memory"

"(1) the level of peer review and publication on the phenomenon of repression and recovery of memories,... (2) whether the phenomenon has been generally accepted in the psychological community,... (3) whether the phenomenon may be and has been empirically tested,... (4) the potential or known rate of recovered memories that are false,... (5) the age of the witness at the time the event or events occurred,... (6) the length of time between the event and the recovery of the memory,... (7) the presence or absence of objective, verifiable corroborative evidence of the event,... and (8) the circumstances attendant to the witness's recovery of the memory, *i.e.*, whether the witness was engaged in therapy or some other process seeking to recover memories or likely to result in recovered memories."

The Court eventually came to the conclusion that the phenomenon of repressed memory after a traumatic event has a mixed acceptance in the scientific community and concluded that the memories in this case did not pass its test of reliability because the "phenomenon of recovery of repressed memories has not yet reached the point where

we may perceive these particular recovered memories as reliable." The Court stated, however, that there may be a day in the future when such a phenomenon will gain acceptance in the Court. At the present time, the Court ruled that the "indicia of reliability present in the particular memories in these cases do not rise to such a level that they overcome the divisive state of the scientific debate on the issue."

After this important decision, it is difficult for the author to select cases of comparable weight to discuss. As is frequently the case, there have been many criminal decisions handed down by the Court. It is stupefying to see the number of sexual assault cases. It's incomprehensible to the author why such reprehensible behavior seems so prevalent. Why can't fathers, stepfathers, teachers and others in *loco parentis* keep their fingers, tongues and other organs away from the very children over which they have responsibility? In one such case, *State v. Martin*, decided June 5, 1997, the trial court had prevented the defendant from taking a pretrial discovery deposition of the victim's treating physician who was listed as a witness in the case. RSA 517: 13 makes clear that in any felony case, either party may take a deposition discovery of any *expert* witness. However, the State claimed that the physician testified not as an expert, but testified as a lay witness to her personal or first hand knowledge of the case, *i.e.*, the medical condition in which she had found the four year old victim after the alleged assault. On appeal to the Supreme Court by the defendant, the upper court reversed the trial court and held that the admitted testimony was clearly beyond the ability of a lay witness to testify about:

"Her testimony began with a recitation of professional qualifications. She proceeded to explain the anatomical structure of female genitalia to the jury, using a medical chart to illustrate her discussion. She then described the conditions she had discovered during a physical examination of the victim, marking the chart to indicate their location. A review of the physician's testimony reveals that it was infused with specialized knowledge."

As a consequence, the Court held that the defendant was entitled under the statute to take the doctor's deposition and reversed the lower court.

*State v. Crosby*, decided July 1, 1997, is another one of the mind-numbing felonious sexual assault cases. The State claimed that the defendant had digitally penetrated the vagina and anus of the young victim (his girlfriend's child), no more than seven years old. The trial court allowed the victim to testify that the defendant had sexually assaulted her on several other occasions occurring prior to the occasions charged. The State claimed the bad acts evidence could be used to identify the defendant as the perpetrator of the charged crime or was relevant on the issue of explaining the medical testimony. The Supreme Court overturned the trial court's admission of the evidence stating that "proponent of bad acts evidence must articulate specific purpose for which

evidence is offered and how evidence tends to prove or disprove issue actually in dispute." The Court held that the State had failed to meet this test. Prosecutors, it appears to the author, are irresistibly drawn, like a moth to a flame, to use bad act evidence even though the Court has, on several occasions, reversed lower courts which have allowed prosecutors who have failed to meet the very narrow parameters for its admission. *State v. Carter*, 140 NH 1, (1995); *State v. McGlew*, 139 NH 505 (1995); *State v. Melchen*, 140 NH 823 (1996). The lure of assuring conviction through use of this evidence is leading prosecutors, in kamikaze fashion, to go down in flames with their cases.

Behavioral changes in cows (giving chocolate milk instead of white? Cazying up to another cow instead of the barnyard bull?) caused by "stray voltage" was before the Supreme Court in an insurance coverage case, *Hudson v. Farm Family Mutual Insurance Company*, decided July 7, 1997. The milkless plaintiff farmer appealed the decision of the court below to deny him coverage and, on appeal, the Supreme Court reversed. It appeared that the defendant's cows had been exposed for years to stray voltage. The Court found that may voltage "typically results when 'neutral-to-earth' voltage is present in elevated levels...A farm's milking equipment, fences, watering troughs, and other implements may become electrically charged by this energy...While stray voltage can be present on a farm for years without being detected by humans, prolonged exposure can lead to behavioral changes in cows who unwittingly become an integral part of an electric circuit and receive an electric shock each time they come in contact with a charged structureNot surprisingly, [surprising to some of us who know cows], the cows begin to avoid these structures, and, may for example, become reluctant to drink out of their watering troughs, resulting in dehydration and an inability to produce milk...Other health problems may also result from stray voltage, and the cows may ultimately become useless as dairy animals." This is what happened to the plaintiff's cows. Not to put too fine a point on it, the plaintiff's cows had become, literally, "juiced" up when they should have been "milked" up. When he tried to gain recovery for his damage under his "Special Farm Package 10" farm insurance policy, the lonesome and unlucky farmer was denied coverage because the insurance company claimed that the damage had not been sudden and accidental as required by the policy. The Supreme Court, speaking unanimously through Justice Broderick, took a broad interpretation of the word "sudden" and "accidental", finding at first the phrase to be ambiguous and, therefore, construing the phrase in such a way as to provide coverage to the insured. Even though the stray voltage may have affected the plaintiff's cows over a long period of time, the Court held that the term "accidental" could be read to include "unexpected events" and placed particular emphasis on the fact that the word "sudden" had been used with the word "accidental" and held that the terms "'sudden and accidental' is at least reasonably susceptible to an interpretation consistent with 'unexpected and unintended'."

Finally, *Appeal of Sutfin*, decided April 16, 1997, is a ringing affirmation of a citizen's right to commercial free speech. The case arose when the Board of Dental Examiners found that the respondent dentist had improperly advertised his services, the Board claiming, in summary, that the defendant held himself out to be the proverbial "Painless Parker". The defendant's ad claimed that he had a patented surgical method to make periodontal treatment "easier" for patients, since it was able to be performed with "less discomfort, inconvenience, and change in appearance, less tooth loss, and fewer appointments" for the patient, all of which could "be performed without therapists placing their hands within the patient[']s mouth and without cutting through the outer surface of the gum." The Board relied on RSA 317 -A: 17, II(h), which authorizes the Board of Dental Examiners to sanction a dentist's advertising where it is designed to deceive the public concerning dental services or dental techniques or suggests that the dentist can perform services in a painless manner. On appeal to the Supreme Court, the unanimous Court, speaking through Justice Broderick, held that the Board's sanction went far too far and transgressed upon the dentist's free speech rights, stating that it is "now well settled that the first and fourteenth amendments protect professional advertising." The Court found that the Board had given no consideration to the dentist's right to free commercial speech and overturned the Board's decision with a ringing affirmation of the right to free commercial speech: It is important for those who are empowered to regulate commercial speech to fully appreciate the cherished liberty of free expression. If the fundamental essence of the first amendment is to survive, we must guard against unsubstantiated and unwarranted restrictions aimed at all varieties of speech, regardless of popularity. While the privileges accorded free speech can certainly be abused, the power to regulate speech is also subject to abuse, and therefore must be carefully circumscribed.

The Court emphasized that "[n]othing in this opinion should be read to suggest that the board can never regulate dental advertising... It would be a rare case, however, in which the board could justify an outright ban of commercial speech which merely has the *potential* to mislead."

It is no surprise to the author that Justice Broderick feels strongly about free speech issues. However, in the past, the New Hampshire Supreme Court has had a less than illustrious history in protecting the rights granted to citizens under the Constitution's Bill of Rights. See, for example, the unfortunate series of cases sanctioning the communist witch hunts in New Hampshire in the 1950's as authorized by the legislature and led by the Attorney General. *Nelson v. Wyman*, 99 NH 33 (1954); *Wyman v. Sweezy*, 100 NH 103 (1956); *Kahn v. Wyman*, 100 NH 245 (1956); *Wyman v. Uphaus*, 100 NH 436 (1957); and *Wyman v. DeGregory*, 103 NH 214 (1960), reversed by the U.S. Supreme Court at 383 US 825 (1966).

### **Endnotes**

1. See the excellent articles on this subject by New Hampshire Attorney Linda Stout Saunders, *et al*, entitled "Psychophysiologic Testing for Post-Traumatic Stress Disorder", Trial 22, April, 1994 and "Providing Objective Proof of Mental Harm Through Psychophysiologic Testing for Post-Traumatic Stress Disorder", 15 Trial Bar News 72, Winter, 1993. See also New Hampshire Attorney Suzanne E. Groff's article in 35 NHBJ 51 (1994) entitled "Repressed Memory or False Memory: New Hampshire Courts Consider the Dispute."

2. The scary allegations in these cases remind the author of the controversial Massachusetts case, *State v. Amirault*, 424 Mass. 618 (1997), where a mother, daughter, and her son, operators of a children's school, have been incarcerated in Massachusetts prisons for years, based upon the fantasy-like testimony of young pupil-victims who remembered being sexually abused by clowns (only one occupation among that of several accused perpetrators and, of course, the defendant school owners and officials)!! Recently, a Massachusetts trial judge, upon review of the trial many years later, has found two of the convicted defendants to be innocent, but the Massachusetts Supreme Court overturned him and remanded the case, basing its controversial decision upon a need for "finality". Because of the judge's strong feelings of the defendants' innocence, on remand he has refused to sit in the case.

3. See Ambrose Bierce's definition of a dentist found in *The Devil's Dictionary*: "dentist, *n.* A prestidigitator who, putting metal into your mouth, pulls coins out of your pocket."