

LEX LOCI: A Survey of Recent New Hampshire Supreme Court Decisions

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It's an easy task for the author to choose among the recent opinions of our Supreme Court for the most significant decision upon which to comment. Rising head and shoulders above all of the others and standing like a monolith is the astonishing decision of the New Hampshire Supreme Court in the school funding case, *Claremont School District v. Governor*¹, decided December 17, 1997. The Court's opinion came upon the New Hampshire political and civic community like a thunderbolt: unexpected, electrically charged and leveling all before it.

After the superior court's decision, upon remand from the first appeal in this case, *Claremont I*, 138NH 183 (1993), the lower court upheld the adequacy of the present system of funding public education, the author must confess that he lost track of the case and felt that no meaningful changes would be made in our educational system. Interestingly, both the majority opinion and the dissent had good words to say about the trial court's careful opinion, the majority calling it "detailed and thoughtful" while justice Horton said it was "mostly excellent".

The author, and our citizens generally, had not counted upon the steely resoluteness of our Supreme Court when confronted with this important issue. The Court well knew the hail of overwrought criticism it would receive if it overturned our century long school funding system². Undeterred, the Court recognized its "duty to uphold and implement the New Hampshire Constitution, and we have done so today"! It is a shining moment in the history of the Court.

And what an opinion it is. It's one for the history books. It's a stupendous decision, brilliantly written by Chief justice Brock with whom three other justices joined (including former justice Batchelder sitting in for Justice Thayer who recused himself) and losing only justice Horton. The language of the opinion sparkles, with bright flashes of colorful language and turns of phrase: the inequality in school taxation from one community to another was described as "precisely the kind of taxation and **fiscal mischief** from which the framers of our State Constitution took strong steps to protect our citizens."

The opinion stops at all of the touchstones of our New Hampshire jurisprudence way back to an advisory opinion found in 4 N.H. Reports and quotes Chief justice Doe on at least two occasions ("the equal protection of the laws recently inserted in the Federal Constitution has been a New Hampshire Doctrine [for] 110 years; and it has been maintained here in a breath of meaning and a scope of practical operation unknown elsewhere"). [Is an opinion without citing Doe, by definition, an unimportant decision?] The Court's bedrock finding was that the property tax raised by towns and cities to

support schools is a State tax rather than a local tax, because the school monies raised locally are required to support a constitutional mandate placed upon the State, i.e., to provide a constitutionally adequate public education. The Court then easily turned to the excellent factual analysis of the trial court wherein it was found, for example, that property owners in one town or city might be taxed "as much as four times the amount taxed to others similarly situated in other towns or cities." The Court concluded that the school tax was neither proportionate nor reasonable as required by part II, article 5, of our constitution.

Without pussy footing around, the Court placed its conclusion right in the opening paragraph of its opinion:

We hold that the present system of financing elementary and secondary public education in New Hampshire is unconstitutional. To hold otherwise would be to effectively conclude that it is reasonable, in discharging a State obligation, to tax property owners in one town or city as much as four times the amount taxed to others similarly situated in other towns or cities. This is precisely the kind of taxation and fiscal mischief from which the framers of our State Constitution took strong steps to protect our citizens.

The Court went on to skillfully sidestep the many potential mine fields strewn in its way. Having held "that in this state constitutionally adequate public education is a fundamental right", Chief Justice Brock made clear that this recognized right is "not a right to horizontal resource application from school to school and district to district." Thus, it was not necessary in order to meet this obligation that all schools have the same library resources, the same teacher/student ratios, the same computer hardware, etc. Rather, it was only necessary for the legislature to choose among the various funding avenues available to it (as conceded to be available by the State at oral argument) to give, within broad guidelines, substantive content and meaning to the word education.

The Chief Justice closed the majority opinion with a ruling that it would not consider remedies at this time, but would retain jurisdiction and stay all further proceedings until the end of the upcoming legislative session, stating that "[w]e are confident that the legislature and the Governor will act expeditiously to fulfill the State's duty to provide for a constitutionally adequate public education and to guarantee adequate funding in a manner that does not violate the State Constitution."

Justice Horton, in a maverick opinion, (he was part of the unanimous opinion in *Claremont I*), could not bring himself to join the majority although he seemed to be in agreement with many of the findings of the trial court and the Supreme Court's majority

opinion concerning the disproportionate tax burden of the present educational system. Justice Horton bluntly confessed that his "problem is that I was not appointed to establish educational policy, nor to determine the proper way to finance the implementation of this policy should not involve myself in social engineering, no matter how worthy the cause...My colleagues simply have a different view of the express constitutional mandate. I write separately to explain to the students and taxpayers of this state why I am unable to effect **needed reform**" (emphasis added).

Who would have predicted the decision of the Court? Surely not the author. One who so predicted, the attorney for the petitioner school districts, Andru H. Volinsky, deserves recognition for his fearless, steadfast and herculean effort to require the State to meet its constitutional duties to its own citizens.

New Hampshire! The 'reaction of a large proportion of the political body to this decision should not be surprising in a state where, although the State's interest and dividends tax was found to be unconstitutional by our Supreme Court, the State continues to withhold tax refunds from its own citizens found to be unconstitutionally taxed. In the school funding case, loudly being proposed at the time this article went to press was a proposed constitutional amendment which presumably would take away from its citizens (mainly our own children) the constitutional right found by our Supreme Court! What irony.

It's difficult to find a case of similar significance but *Union Leader Corporation v. New Hampshire Housing Finance Authority*, decided December 31, 1997, deserves Honorable Mention. A unanimous Supreme Court, in a fine opinion by Justice Johnson, dealt a strong blow in support of the public's right of access to governmental proceedings which is embedded in our New Hampshire Constitution under part I, article 8, which provides that "the public's right to access to governmental proceedings and records shall not be unreasonably restricted." New Hampshire's Right-To-Know law carries out this constitutional mandate by providing that "[e]very citizen...has the right to inspect all public records." RSA 91-A:4, I. In this case, the New Hampshire Housing Finance Authority, through the intervenor borrower, sought to shield from public disclosure over 5,000 pages of documents relating to a loan from the authority to the intervenor borrower. In the trial court, the intervenor made the mistake of refusing to comply with the trial court's order that it prepare a sufficiently detailed index of the documents so that the court could make a judgment upon each. As a result, the trial court summarily ordered summary disclosure of all documents except for a small group which the court reviewed *in camera* and, in the main, ordered non-disclosure of these items. On appeal to the Supreme Court, the case attracted an *amicus* brief from a free press organization. The result in the Supreme Court is such that the intervenor should have had a V-8: it would have been better not to have appealed since all of its

arguments were rejected and the Court ordered disclosed even those documents which the trial court had examined *in camera* and had ruled not be disclosed. The Supreme Court had several issues before it, and in a careful opinion by Justice Johnson, dealt with each with skill. First, the Court held that the Kew Hampshire Financing Authority was a State agency for purposes of disclosure under the Right To-Know law, even though it was an entity "that is not easily characterized as solely private or entirely public." Next, the Court disposed of the claim of the intervenor that the trial court should have examined each of the 5,000 pages of documents *in camera*, rather than ordering the preparation of "Vaughn index" of the documents. For those readers (like the author) not aficionados of freedom of information or right to know laws, a Vaughn index "is a procedure developed by the federal courts to effectuate the goal of broad disclosure of public documents and assist trial courts in cases involving a large number of documents", *Vaughn v. Rosen*, 84 Fed. 2d., 820 (D.C. Circuit 1973). In the instant case, the Supreme Court unequivocally ruled that in a multi-document case such as this, the trial court could properly order the utilization of a Vaughn index. The Supreme Court made clear that such an index, to be useful to the trial court and the party requesting disclosure, must be sufficiently descriptive to enable the petitioning party and the trial court to make reasonable judgments whether a document should be disclosed or not disclosed. The Court agreed with the trial court that the intervenor had utterly failed in meeting this obligation and the Supreme Court upheld the trial court's summary disclosure order. Finally, the Court reviewed one by one the documents reviewed by the trial court *in camera* and in each case ruled that although the documents included certain financial information or information relating to "personal or private affairs", the public interest in disclosure outweighs the intervenor's claim of privacy. The case is a lustrous example of our Court's historically strong support of the right of the public to freedom of access to public documents and records.

Chandler v. Bishop, decided November 14, 1997, is a case which touches upon an almost universally fractious issue, that of religion. The author is an agnostic and like Mohandis Ghandi, considers himself "a Hindu, Christian, Moslem, Jew, Buddhist, and Confucian"³, and who ends the day with the "Agnostic's Prayer: 'Oh God, if there is a God, save my soul, if I have a soul.'"⁴ The *Chandler Case* arose in the context of a custody fight between the plaintiff father, the unwed parent of a six year old child born of the defendant mother. The father acknowledged paternity of the child and assumed parental responsibilities, and as a result had a constitutional right to custody and visitation. The superior court master made a determination which provided that the defendant mother was to have sole legal custody as well as "have primary physical custody of the parties' minor child" although the father was granted specific periods of physical custody. The parties, with the assistance of a guardian ad litem, worked out a visitation schedule after which things seemed to go along smoothly until the father began to take the child to his Jehovah's Witness religious meetings. Several months

more elapsed after which the mother attempted to change an oral amendment between the parties to the court approved custody arrangement to prevent the father from taking the child to his religious meetings. The mother claimed that, after visiting with his father and attending services, the child had told her that "Halloween was the Devil's holiday," that "Santa Claus isn't real," that "Santa Claus are daddies," and "[t]he Easter bunny isn't real" [the author may be doomed to hell, if there is a hell, since he can't find much fault with these ideas!!].

The battle over visitation rights ended back up in the superior court where the marital master ruled that the original, court-approved, visitation arrangement be reinstated and held that the mother could prohibit the father from taking the child to the religious meetings. The master then went further, ruling "that the plaintiff [father] was not free to share his religious beliefs with his child or indoctrinate the child in his religion if doing so interfered with the [mother's] right to determine the child's religious upbringing."

On appeal to the Supreme Court, the Court upheld the master's determination that the original visitation rights should be reinstated, holding that the couple's oral mutual amendment of that right could be abrogated at any time by either party since it had never been approved by the Court. However, the Court found that the trial court had gone too far in approving the master's ruling concerning the religious aspects of the father's visitation rights. The Supreme Court, in a unanimous opinion by Justice Horton, found that in New Hampshire, a "legal custodian is entitled to make the major decisions regarding the health, education, and religious upbringing of a child," citing to Douglas' seminal N.H. treatise on Family Law. However, the Court distinguished itself from the minority of states that hold that the legal custodian of the child has the exclusive right to choose the religion of the child. Rather, the Court stated that New Hampshire falls into that group of states that "refuse to restrict the visitation rights of a non-custodial parent absent a showing of harm to the child from exposure to a different religious environment." The Court found that although the mother was disturbed and upset by her child's statements, among others, that "God said Christmas trees are bad," there was no evidence that "the child was adversely affected by these statements." The Court concluded that New Hampshire courts "cannot enjoin non-custodial parents from exposing their children to their faith during visitation periods absent an affirmative showing of harm to the children from such exposure." The Court was careful to point out that if a "non-custodial parent acts in any way that jeopardizes the welfare of the child, the trial court may issue orders in matters of custody and visitation to eliminate the jeopardy."

All of which reminds the author of Lord Halifax's observation that "[m]ost men's anger about religion is as if two men should quarrel for a lady they neither of them care for."⁵

ENDNOTES

1. The author's firm represented a party to the action and, therefore, the author's views may be colored.
2. For perspective on criticism of the Supreme Court, see the quotation from New Hampshire Senator William E. Chandler who, on April 20, 1893, wrote of the Court "[The recent decisions of the Court] have been bold and indecent assumptions of power in defiance of law, from the continuance of which usurpation there is no escape except by the exercise of the people's right to reconstruct a faithless and worthless bench of judges. This quote is taken from the late Richard R. Upton's history of the New Hampshire Bar and cited in Vol. 8, No. 16, New Hampshire Bar News, p. 12, (January 21, 1998).
3. L. Peter, *Peter's Quotations*, 428 (1977).
4. Ernest Renan, L. Peter, *Peter's Quotations*, 44 (1977).
5. L. Peter, *Peter's Quotations*, 428 (1977).