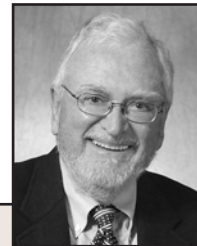


LEX LOCI: A Survey of New Hampshire Supreme Court Decisions



Author

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By Attorney Charles A. DeGrandpre¹

Opinion of the Justices (Voting Age in Primaries), opinion issued May 19, 2008, was the Supreme Court's advisory opinion response to the request of the House of Representatives for the Court's opinion on a proposed Senate bill which would allow 17 year olds to vote in a primary election if they would be 18 years of age at the time of the next general election. The Court considered whether the proposed bill violated two parts of the New Hampshire Constitution, namely, Part 1, Article 28-a prohibiting unfunded legislative mandates for programs operated by municipalities, and Part 1, Article 11 establishing the age for voting in New Hampshire at the age of 18.

The unanimous Court spent little time finding that the provision did not violate the unfunded mandate constitutional provision and devoted most of its opinion to the question of the constitutional age provision. It looked at the legislative history of the constitutional provision which dated back to 1784 and was most recently amended in 1976. The Court examined closely the language of the age provision which states that "every inhabitant of the state of 18 years of age and upwards shall have an equal right to vote in *any* election." (Emphasis added.) The Court found that this language was all inclusive and rejected the arguments of the Speaker of the New Hampshire House of Representatives and the President of the New Hampshire Senate to the contrary, finding that "the argument of the Speaker and Senate President would prevail only if a primary election is not an 'election' within the meaning of Part 1, Article 11." The Court concluded that "this [constitutional] phrase refers

to all elections, including primary elections." Despite all attempts to increase citizen participation in elections, to the author, this opinion follows the trend in many other states to make it harder, not easier, for a citizen to vote.

In a first degree murder case, *State v. Sullivan*, opinion issued April 18, 2008, the Court had before it the appeal of a teenage defendant who, with his abettor [the teenage daughter of the murder victim] had made four failed attempts to take the victim's life, finally succeeding the fifth time. The failed attempts on the mother (who opposed the continuation of her daughter's and the defendant's Internet-initiated romance) included poisoning her coffee cream and attempting to blow up her home by igniting its oil tank. They finally succeeded in doing her in by clubbing her with a baseball bat and then stabbing her to death. This was not only the proverbial gang who couldn't shoot straight, but they shot at each other, each separately confessing to the crime and implicating the other. They were not too swift, since each ended up individually confessing to the murder after voluntarily returning, within hours, to the scene of the crime while it was still under it's initial police investigation.

Despite the defendant's almost incomprehensible and certainly foolish post-crime behavior, he won reprieve from his jury conviction due to the trial court's (Justice Hicks before his elevation to the Supreme Court) error in replacing a juror during deliberations, over the defendant's objections. The decision offers a very good look at the delicate task that a trial judge has when there is an allegation of misconduct by a juror after jury deliberations have begun. There was a lot of cause for the trial court's impatience and ultimate removal of the juror, a retired state legislator who had been publicly reprimanded about his behavior while in office by the attorney general's office. The juror was troublesome from the start, when, after initial *voir dire* by the court, he came to the bench and inexplicably asked the judge whether he could serve as a juror as he was not a peer of the defendant because he did not know him. The trial judge explained to him that this was not what the phrase "jury of your peers" meant and seated the juror. There were also allegations that the juror slept on several occasions during the State's case. During the trial he asked several questions of the judge to be asked to the jury, which the judge refused

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to do. Then the prosecution [*not* the attorney general's office] learned of the juror's earlier brush with the attorney general's office. The juror also brought in a law dictionary to the jury deliberation room which was reported to the trial judge. The judge, upon questioning, found that the juror had brought the dictionary into the deliberation room to ascertain the meaning of the word "conspiracy" because he felt that the court's explanation was not clear enough. However, the juror had not had time to consult the legal tome before he was ratted out by the jury foreman. On the State's subsequent motion to have the juror removed from the panel, the trial judge, very troubled, took into consideration the cumulative effect of the juror's conduct as showing a proclivity to disobey the court's instructions. The Supreme Court reversed its own member on this point, setting a very high standard for the removal of a juror after jury deliberations have begun. Particularly, "where it is the defendant who opposes the discharge of a particular juror, disqualification for more general disobedience will likely amount to an unsustainable exercise of discretion and grounds for reversal." The prosecution must show in such a case that "a failure to follow the court's instructions constitutes a meritorious reason to disqualify a deliberating juror . . . only if it is more likely than not that the juror's disobedience will have a relevant demonstrable impact on the deliberative process."

A very significant case, involving a substantial amount of potential charitable dollars was before the court in *Foundation for Seacoast Health v. HCA Health Services of New Hampshire, Inc.*,¹ opinion issued July 15, 2008. The history of the dispute goes back to the purchase of the Portsmouth Regional Hospital, a public trust, in 1983 by a stockholder-owned, for-profit, corporation. Because of the charitable nature of the hospital, probate court approval was required for the sale and, as a result, a complicated asset purchase agreement was executed between the parties, which set aside several millions of dollars to provide future charitable health care to the seacoast region. In addition, the contract gave the charitable foundation, established to administer the charitable dollars, a right of first refusal (ROFR) of any sale or transfer of the hospital in the future which the foundation had previously exercised and as a result of which it had negotiated additional millions of dollars for charitable seacoast health care from the for-profit owner of the hospital.

In the instant case, the question was whether the right of first refusal extended to "a change of control situation, rather than an outright purchase and sale between independent parties." That issue was hard-fought, but the bench trial judge (McHugh, J.) ruled that the ROFR did not apply to the present situation, relying "upon the plain and unambiguous language of the ROFR provision, which unequivocally specifies the two actors that may trigger it." The trial court ruled that if neither of the main referenced parties is an actor in the transaction, the ROFR was not triggered, as was the case here.

However, wonder of wonders, during discovery the charitable foundation learned that, unbeknownst to it and without any notice to it, the owner of the hospital in 1999 had transferred its interest in the hospital to its own corporate parent. The foundation argued that this was a violation of the ROFR provision since the language of the provision provided only two entity exceptions from its application. Because the trial judge had not reached that portion of the case on the

merits, the case was remanded to the trial court for further findings. Significantly, however, the Supreme Court itself looked at the ROFR provision and held that:

Accordingly, we hold that under the terms of the ROFR provision, so long as either [hospital corporations] is the entity acting, a transfer of the hospital's assets may occur 'indirectly' by a merger, transfer of stock or other similar transaction sufficient to trigger the ROFR.

In the Seacoast, this is regarded as a significant step forward toward multiplying the monies available for charitable health care purposes in the area. However, the trial court will have to make its rulings and it is expected that there will be a further appeal to the Supreme Court before the matter is finally determined.

In a couple of recent Supreme Court opinions, questions of first impression raising substantial contract law issues were before the Court. In *McNeal v. Lebel*, opinion issued July 11, 2008, the Court was confronted with a claim for an anticipatory breach of contract. Interpreting the Uniform Commercial Code, the Court had before it whether "a right to demand adequate assurance" was applicable law in New Hampshire. In this case, the defendant contractor alleged that it had stopped performing its contract because of reasonable grounds to expect that payment to it would not be made. The Supreme Court held that:

[a]lthough a right to demand adequate assistance under general contract law has not previously been recognized in our case law, we conclude that the trial court correctly applied the doctrine here.

Since the record revealed that the contractor had sufficient grounds to seek adequate assurance of future performance, which the plaintiffs had not supplied, the contractor was relieved from further obligation under the contract.

In a second important contract law case, in the matter of *Lemieux v. Lemieux*, opinion issued June 13, 2008, the issue was whether a contract may be reformed, not only for a mutual mistake of fact *but also* for a mutual mistake of law. The Supreme Court unanimously held that in New Hampshire, as in many other jurisdictions, "when either type of mistake results in the parties' obvious failure to articulate their true and discoverable intent, reformation is available if justice and common sense require it,"² the Court noting that "[m]odern contract law does not distinguish between mistakes of fact and mistakes of law, but treats both alike for purposes of equitable relief."³ The Court's decision is a heartening reaffirmation of the growing trend in American law to allow reformations of contracts, even of wills, when there is clear and convincing evidence that mutual mistake of law or of fact has been made by the parties.⁴

In a very significant case involving the commonly used, contractual, liquidated damage provision, the Court broke new ground in a

real estate purchase and sale agreement law case, *Orr v. Goodwin*, opinion issued July 15, 2008. The plaintiffs, sellers of a home, had entered into a contract with the defendants which provided for a substantial down payment deposit [\$25,000] under a liquidated damage clause that provided as follows:

If the buyer shall default in the performance of their [sic] obligation under this agreement, the amount of the deposit may, at the option of the Seller, become the property of the Seller as reasonable.

The defendant buyers were unable to complete the purchase and the plaintiffs retained the cash deposit. Two years later the plaintiff's instituted the present suit to recover additional damages caused to it by the defendants' failure to consummate the agreement. To the author, the answer appeared obvious: the sellers were limited to the deposited amount as their damages. Wrong again. The resolution of the question was not that simple and the Court went on to explore in great expository detail the law about these commonly used contractual provisions, the most important of which was its ruling that

[T]he right to recover liquidated damages and the right to recover actual damages are mutually exclusive remedies. This conclusion comports with the general purpose of a liquidated damages provision to eliminate the right and responsibility of a plaintiff to prove actual damages. . . . Thus, although the clause does not specifically define liquidated damages as the plaintiffs' sole remedy, when the plaintiffs availed themselves of it, they foreclosed their pursuit of actual damages. To conclude otherwise would permit recovery of both liquidated and actual damages, a result contrary to the purpose of a liquidated damages clause.

One lesson to be taken from this decision is that where a buyer has defaulted upon a real estate contract, the seller must decide quickly whether to accept the deposited amount as its liquidated damages or pursue a claim for its actual damages, one or the other, but not both.

A very important estate planning case was before the court in *In re Guardianship of Luong*, opinion issued July 2, 2008. This case was an interpretation of RSA 464-A:26-a, which allows the probate court to approve an estate plan drafted by his or her guardian for an incapacitated individual who had never made a will.⁵ Here, the guardian prepared an estate plan for the ward and, pursuant to the statute, submitted it to the probate court for approval. The proposed estate plan was contested by other family members who would be adversely affected by the proposed plan. The probate court then appointed a referee, an independent attorney and an expert in the field of estate planning, to submit an estate plan for the ward. The probate court adopted the referee's plan but all parties objected and, upon appeal, the Supreme Court held that the statute did not allow the probate court to appoint someone else to provide a proposed estate plan, but must either accept or reject the guardian's proposed estate plan. The Supreme Court significantly pointed out that allowing an incapacitated person to die intestate was also a permissible choice:

RSA 464-A:26-a does not require that an estate plan be drafted for all incapacitated individuals and, assuming that one is not adopted in

this case, the legislature has already provided what it deems to be a complete and adequate remedy for dealing with such a situation in the intestacy statutes. See RSA 561:1, II(a) (2007) (providing that, in a case such as this, "the entire intestate estate . . . passes . . . [t]o the issue of the decedent").

In this modern day and age, it is sometimes easy to forget that the practice of law and the conduct of trials was more colorful in prior times. The author was recently given by fifty-year veteran attorney Robert Donovan of Exeter the following excerpt from the charge of superior court Judge Dudley to a jury in the early days of our statehood, as reported in *King v. Hopkins*, 57 N.H. 334 at page 337 (1874):

"You have heard, gentlemen of the jury, what has been said in this case by the lawyers – the rascals! But, no, I will not abuse them. It is their business to make a good case for their clients. They are paid for it, and they have done in this case well enough. But you and I, gentlemen, have something else to consider. They talk of law. Why, gentlemen, it is not law that we want, but justice. They would govern us by the common law of England. Trust me, gentlemen, common-sense is a much safer guide for us – common-sense of Raymond, Epping, Exeter, and the other towns which have sent us here to try this case between two of our neighbors. A clear head and an honest heart are worth more than all the law of the lawyers. There was one good thing said at the bar. It was from Shakespeare, an English player, I believe. No matter; it is good enough almost to be in the Bible. It is this: 'Be just, and fear not.' That, gentlemen, is law enough in this case, and law enough in any case. 'Be just, and fear not.' It is our business to do justice between the parties. Not by any quirk of the law out of Coke or Blackstone, books that I never read and never will, but by common-sense and common honesty, as between man and man. That is our business, and the curse of God is upon us if we neglect, or evade, or turn from it. And now, Mr. Sheriff, take out the jury; and you, Mr. Foreman, do not keep us waiting with idle talk, of which there has been too much already, about matters which have nothing to do with the case. Give us an honest verdict, of which, as plain common-sense men, you need not be ashamed."

Wow, how trial practice has changed!

As the old saying goes, what goes around comes around. In a case harkening back to the Indian summer days of the fall of 1959 in Ann Arbor, Michigan, the author would nod off as the professor of Property I explained the intricacies of a doctrine that the New Hampshire Supreme Court had before it recently in *Belhumeur v. Zilm*, opinion issued May 2, 2008. Before the Court in this case was that old, classic, bundle of property rights question "involving animals *ferae naturae*, a common law doctrine tracing its origins back to the Roman Empire whereby wild animals are presumed to be owned by no one specifically, but by the public generally." Here, the animals *ferae naturae* in question was not a fox, a deer, a school of fish, or a more exotic species, but a swarm of wild bees that had nested in a tree upon the defendant's property which abutted the plaintiff's property. The plaintiff claimed he was injured as a result of being attacked by the wild bees and sued the defendant abutting landowner, both in nuisance and

in negligence, for failure to prevent the bees from doing any harm to him. This serendipitously led the Supreme Court, speaking through Justice Hicks, into wonderfully nostalgic review of the history of the doctrine of animals *ferae naturae*. The Court rejected the idea that the doctrine had no, or only limited, applicability in our modern times, holding that the doctrine had its roots in "the unpredictability and uncontrollability of wild animals, concluding as follows:

We believe that the doctrine of animals *ferae naturae* . . . reasonably balances the interest of landowners and the interests of those who may be harmed by the actions of wild animals found on or emanating from the landowner's property. While we do not lightly dismiss "the social importance of protecting the plaintiff[s]' interest" in avoiding interest caused by wild bees, we find that interest outweighed by "the importance of immunizing the defendant[s] from extended liability."

Let's hear a loud hooray for the continued viability of our ancient common law principles!!

Finally, the author has been doing this for 40 years and it is time to pass the baton to a younger, more balanced and more serious author. This author's barbed wit and penchant for the nonsensical has gotten him into trouble from time to time, but he has consistently refused to learn his lesson. It seems that he never will, so it is a fitting time to retire his pen.

ENDNOTES

1. The author's firm represented a party to the action; therefore, the author's views may be colored.
2. Quoting 66 Am. Jur. 2d *Reformation of Instruments* § 15, at 239 (2001).
3. 27 R. Lord, *Williston on Contracts* § 70:125, at 615 (4th ed. 2003).
4. See, DeGrandpre & Zorn, N.H. Practice: Probate and Administration of Estates, Trusts & Guardianships, Chapter 33 (2008).
5. The author was a proponent of, and testified before the legislature on behalf of, this legislation in 2004.

REQUEST FOR PROPOSAL: LEX LOCI AUTHOR

Charles DeGrandpre, author of the Lex Loci quarterly review of selected NH Supreme Court decisions, has written his last column. The NH *Bar Journal* Editorial Advisory Board has decided to issue a "Request for Proposal" to Bar members who are interested in continuing this column.

The Board has decided that it will not run a Lex Loci column in the Winter issue of the *Bar Journal*, which will be devoted to a retrospective of the *Bar Journal* and a tribute to Charles DeGrandpre, author of Lex Loci for the past 40 years.

While many details remain to be worked out, the Board has sketched out a process for selecting a new Lex Loci author.

Brief Description: The Lex Loci column is a quarterly review of selected decisions of the New Hampshire Supreme Court. In the tradition of Charles DeGrandpre, the task should be approached with diligence and a dose of humor and some expression of personal style.

Requirements: The writer should be a member of the New Hampshire Bar Association, preferably on active status. The writer is expected to meet regular deadlines and to commit to the column for several years.

Format: The length and approach to the column are open to modification. Charles DeGrandpre's columns, in recent years, have ranged from about 2,600 words to 4,000 words, not counting

footnotes which generally number less than a dozen. One Lex Loci aspirant has suggested that the column be shared by two writers – one writing on civil cases and the other handling the many criminal cases reviewed by the Court.

Budget. Compensation for writing the column is the satisfaction and visibility of being among the foremost commentators on the development of common law in New Hampshire.

Submission deadline: Responses to this request for proposal should be sent via e-mail to dwise@nhbar.org. All responses will be forwarded to Michael Delucia, Chair; NH *Bar Journal* Editorial Advisory Board, and provided to the *Bar Journal* board. Writing samples will be considered. It is up to the responder whether to send a sample column or a piece of writing that provides an indication of his or her analytical ability and writing style. In a cover letter, a responder is welcome to suggest or propose changes in format that fulfill the current role of the column.

Selection Process: A small number of finalist candidates will be chosen by the *Bar Journal* Board and invited to write a column or columns for upcoming issues. After the finalists have each written sample columns that will be published in the *Bar Journal*, the Board will vote on the successor.

For more information: Contact Dan Wise, Communications Director, at dwise@nhbar.org.