

NEWS and VIEWS

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The Trenches: Superior Court Decisions Nilsson Revisited - Allocation of Liability

The case of *Dow v. New Hampshire Electric Cooperative* is one of the progeny of the *Nilsson* decision. *Nilsson* was a landmark case in New Hampshire which held that the jury in a multiple party case was required to assess the degree of fault against a party involved who was not a named defendant at trial. The defendant in question had settled out prior to trial. For the details, see our News & Views of December, 2004, which is still on our website at www.bestnhlaw.com, for a detailed analysis on *Nilsson* showing how a plaintiff can collect more than 100% of the damages and how a defendant may be better off getting more than 50% fault assessed against it.

The fallout from *Nilsson* has been significant. The *Dow* case was the first written Superior

Court opinion to extend *Nilsson* in a very significant way. *Dow* involved a plaintiff who suffered serious injuries when he was electrocuted in the course of his employment with Hayward Construction. He brought suit against the Cooperative, claiming that it negligently hired Hayward. The issue arose because the Cooperative moved to join Hayward as a defendant. The claim of fault against Hayward had a sound basis because OSHA had cited it for safety violations.



Because of a section in New Hampshire's contribution statute which says that contribution does not apply to a defendant who is otherwise immune from suit, a plaintiff's employer has not heretofore been able to be brought into the underlying suit. However, the judge in this case basically separated the *right to obtain contribution* from the *right to allocate against a defendant causally at fault* under *Nilsson*. They really are different concepts. That is, the plaintiff's employer is still immune from suit and won't have to pay anything, but the jury is allowed to allocate fault against it. If the employer has a subrogation claim to recover its worker's compensation benefits paid, its inclusion in the suit can affect its claim.

The Court cited the contribution statute that *in all*

actions¹ the Court must instruct the jury to allocate fault among all defendants, which *Nilsson* had extended to mean those who were not named defendants but who were at fault. The Court cited another Supreme Court opinion which had, under the contribution statute, allowed the jury to find fault against an insolvent defendant even though that party would pay nothing. This was done in the context of the statute which allows a reallocation of an insolvent party's fault to the remaining defendants. Nevertheless, it was indeed an allocation against a party who could not pay. Here, the Superior Court judge held that it was proper to allocate fault to a party who could not pay (the immune worker's employer).

The fascinating part of the case is that the defendant was allowed to bring in the absent defendant employer for the purposes of allocation of fault. Frankly, this case simplifies and makes more fair the *Nilsson* doctrine because without the defendant being in the case with an interest (subrogation) in the outcome, the other defendant would try to push all liability on a culpable party who was without representation at the trial. Since all parties can be

brought into the case, the "empty chair" defense may be a thing of the past. All in all, the *Nilsson* decision is very much in favor of the defendant because it improves the odds of the jury finding the present defendant less than 50% at fault, in which case that defendant is only liable for its percentage share. This decision helps with the mechanical procedure of proving the allocation of fault.

Yet another *Nilsson* case has only recently come out of the Superior Court. *Lennon v. Laconia* involved two plaintiffs who were injured when a drunk motorcyclist hit them as they were leaving an event sponsored by the defendants. The defendants filed a motion to join the motorcycle driver as a necessary and indispensable party in the pending case. As you may be aware, Bike Week is an annual summer event that attracts motorcycle enthusiasts far and wide. It draws thousands of people, so much so that many of the main roads are closed to normal traffic so that pedestrians are forced to park large distances away and walk on designated paths to the festivities.

Plaintiffs were injured while they were on a designated walkway on a street when they were struck from behind by the motorcycle.

Plaintiffs objected to the motion and cited a statute that requires that a defendant must obtain plaintiffs' assent before filing a contribution action which is to be consolidated with the

pending action. The Court used the *Nilsson* case to bring in the motorcyclist, who had settled with the Plaintiffs before suit was filed (*Nilsson* involved a party who settled after suit was filed). The Superior Court ruled that even though the motorcyclist was never a "party" in the law suit, for purposes of an allocation of liability, a "party" would include one who settled before suit was filed. The bar against contribution actions cited by Plaintiffs was not applicable because the Defendants were not seeking contribution but rather only apportionment of liability for the negligence which injured the Plaintiffs. Here, the motorcyclist had *already* paid, whereas in the *Dow* case the employer wouldn't have to pay due to immunity. The rationale is the same in both cases; the comparative negligence statute requires the jury to allocate among all negligent entities.

As had been predicted, the *Nilsson* decision has been broadened considerably. We predict that it will be further broadened to include any entity arguably negligent even if the Plaintiff has never so claimed or has refused to sue, such as a spouse involved in the accident. All of these cases separate the issue of whether an absent party should pay from the duty to of the jury to allocate among all parties liable in the same tort. Further, the defendant(s) can bring the absent party into the same litigation so that the jury will have the evidence to allocate among all parties. Note, however, that there

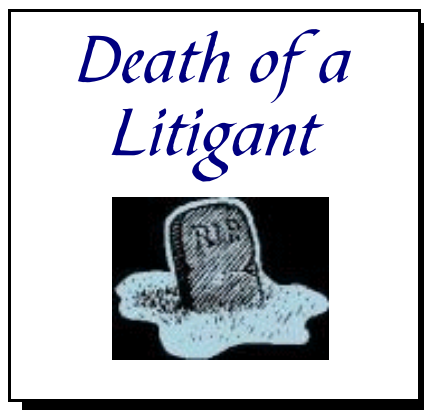
¹ Ken Bouchard authored the first draft of the contribution statute, and in negotiations insisted on the phrase "in all actions," not because he was anticipating *Nilsson*, but rather that he wanted to make sure it applied to contractual insurance claims such as UM, as well as tort.

is a significant downside to *Nilsson* and its progeny, assuming the Supreme Court goes along. As we have already seen, it is now much more difficult for a party to settle out separately because they may well be dragged back into the case, as the hapless motorcyclist in *Lennon*. Although this will not affect an insured's exposure for indemnification, it may very well result in an additional duty to defend an insured who has been brought back into litigation.

Another Superior Court decision is also significant. In the case of *Hanscomb v. O'Connell*, the judge allowed a claim of enhanced compensatory damages to go forward in a motor vehicle accident in which the Defendant was intoxicated. The Court cited two prior Supreme Court opinions to the contrary. However, the Superior Court judge did an analysis of other jurisdictions and found that 27 states had permitted punitive damages in such situations, while only New Hampshire had ruled otherwise (apparently the other states had not addressed the issue).

I disagree with the judge for two reasons. First, we are talking about enhanced compensatory damages in New Hampshire, and the case law in other jurisdictions speak about punitive damages. Enhanced damages involve adding a premium to compensatory damages, and are permitted in New Hampshire if the defendant's behavior is wanton, oppressive or malicious. Punitive damages are to punish a

defendant, and are typically much greater in amount. In New Hampshire, there is a statute which prohibits punitive damages except those set forth in a statute, such as the Consumer Protection Act. Therefore, I do not believe the laws of other states are all that relevant. Secondly, the Supreme Court of New Hampshire has already ruled twice that enhanced compensatory damages may not be awarded in a drunk driving case. Finally, there was a New Hampshire statute on punitive damages involving drunk driving which had been repealed, which one of the Supreme Court opinions pointed out. We predict that the Supreme Court will not allow such actions.



Although not an everyday occurrence, parties to ongoing litigation do sometimes die while their lawsuit is pending. Fortunately, New Hampshire law is not silent on what to do when one of the parties dies during litigation. New Hampshire's statutory law provides procedural guidance on what each party must do to keep the lawsuit going and, surprisingly, that statute treats plaintiffs and defendants

differently.

RSA 556:10 provides as follows:

"If such an action is pending at the time of the decease of one of the parties it shall abate and be forever barred, unless the administrator of the deceased party, if the deceased was plaintiff, shall appear and assume the prosecution of the action before the end of the second term after the decease of such party, or, if the deceased party was defendant, unless the plaintiff shall procure a *scire facias* to be issued to the administrator of the deceased party before the end of the second term after the original grant of administration upon his estate. Provided, that in the latter case, the administrator shall forthwith notify in writing the adverse party or his attorney of record of such death and grant of administration, and such action shall not be barred until the end of the second term after the giving of such notice. Such notice shall be by registered mail, return receipt requested, and such administrator shall file an affidavit in the probate court, showing compliance with the provisions thereof, provided further however, that any justice of the superior court shall for good cause shown grant leave from any of the foregoing provisions as justice may require."

In plain English, this law provides that upon the death of the plaintiff, the lawsuit in which the plaintiff was involved becomes an

asset of his or her estate. As such, the administrator of that estate must file an appearance on behalf of the estate to continue the lawsuit. If the administrator does not file an appearance by the end of the second term after the death of the plaintiff, the law suit is *abated and forever barred*. Abated and forever barred is very strong language. It has been construed by the Supreme Court as jurisdictional language. In other words, because the legislature saw fit to create a right that was not available at common law (survival of a personal action after the death of the person), the statute is strictly construed. If the administrator of the plaintiff's estate does not appear within the allotted time, the court no longer has the jurisdiction to hear the case, thus it is abated and forever barred.

If it should be the defendant who dies during the pending litigation, and the defendant's administrator does not voluntarily appear, the statute provides that the plaintiff must procure a writ of *scire facias* (pronounced sae-ree fay-shee-us) which leads us to the first history lesson of the day. *Scire facias* is a Latin term referring to a writ (and the legal process it starts) to revive some matter that has become dormant. It is still an active tool in New Hampshire and more commonly used to revive old judgments for purposes of execution. With respect to RSA 556:10, however, the purpose of the *scire facias* is to allow the plaintiff to pursue the cause of action he or she

previously had against the defendant by now bringing that suit against the defendant's administrator.

RSA 556:10 is fairly old. It was last amended in 1951 and has not been updated or amended since. As such, it still speaks of "terms", which leads to the second history lesson of the day. "Term" is the archaic reference to when a court was actually in session. Historically, courts were not in session full time; rather, they had designated dates (a/k/a terms) when the courts would convene and legal matters could be heard. Nowadays our courts are continuously in session and no longer broken into actual calendar terms. The word "term", however, is still used. The problem with the use of terms is that each county has been allowed to determine just how many terms they would hold each year. Historically the more populous counties (Rockingham and Hillsborough) would hold three terms per year, with other counties only holding two. The difference in terms became an issue in relation to this statute in that it allowed different times for filing an appearance in different counties. This issue was addressed by the Supreme Court in the matter of *Belkner v. Preston*, 115 N.H. 15 (1975). In that case, the Supreme Court held that different deadlines for different counties violated the equal protection clause of the New Hampshire Constitution. As a result, the Supreme Court determined that for the purposes of RSA 556:10, the phrase "two

terms" would equal one year in all counties.

The final portion of the statute provides the court with discretion to allow the plaintiff additional time to procure a *scire facias* as justice may require. Significantly, this discretion only allows extension of the time limit with respect to the plaintiff reviving the suit against the defendant's administrator and provides *no discretion* for the plaintiff's administrator to file a late appearance on the plaintiff's suit. So what clear-headed administrator is going to forget to revive his or her own suit? You would be surprised. In *Cosotoras v. Noel*, 100 N.H. 81 (1956), the New Hampshire Supreme Court decided this very issue and determined that if a plaintiff's administrator failed to file a timely appearance, the case was abated and forever barred. The statute gave the court no discretionary authority to extend the time frame for a plaintiff as the action only survived to the extent specified in the statute.

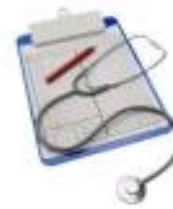
In a more recent case, *Bouchard, Kleinman & Wright, P.A.*, used this argument to block a loss of consortium claim. After the suit was filed, the plaintiff's husband died. The appearance on behalf of the husband's estate to preserve the loss of consortium claim was filed 366 days after his death – one day late. In this particular case the loss of consortium claim was significant; the husband was dying of cancer when his wife was injured in a

motor vehicle accident. As a result, she could no longer care for him in their home. While the wife's injuries were not overly significant, the sympathy that would be engendered by evidence concerning the death of her husband could be a significant factor with the jury. On behalf of the defendant we argued that the loss of consortium claim had abated and the court no longer had jurisdiction to hear it. The Court agreed that the appearance on behalf of the estate was filed one day late and that the Court had no discretion to allow a late appearance under the "good cause" clause. The loss of consortium case was dismissed and no evidence was presented pertaining to how the plaintiff's injuries interfered with the care she was providing for him in his final days. After jury trial the plaintiff received a verdict of \$2,000.00. The last demand had been \$30,000.00. If the loss of consortium claim had survived, the actual verdict would most likely have been far in excess of \$2,000.00.

While not an everyday occurrence, knowing what the proper procedure is when a party dies during a pending lawsuit can be a useful advantage. The greatest strength of the statute is as a defensive tool. Because the statute provides no discretion to revive suits against a defendant's administrator after the prescribed time frame, it can be as effective as a statute of limitations defense.

Nick Wright

New Hampshire Medical Records for Out-of-State Clients



For those clients who are out of state but who need medical or other information from someone living in New Hampshire, things have gotten considerably easier. For example, we have on many occasions been asked by Massachusetts counsel involved in a case with a New Hampshire plaintiff to subpoena medical records pursuant to a "Letter Rogatory" issued by a Mass. court. That is an arcane procedure, but other states have similar ones. Basically, it purports to appoint a justice of the peace in New Hampshire to issue the subpoena for the records from various medical facilities. However, on a number of occasions, the medical facility refuses to comply with what appears to be a Massachusetts court order over concerns of HIPAA and confidentiality. We are then required to bring a petition in a New Hampshire court to get another order. By the time that happens, the Letter of Rogatory has typically expired.

I decided this was a ridiculous situation. A New Hampshire statute, RSA 517:18, provides unequivocally that a foreign court can appoint a justice of the peace to issue subpoenas and take

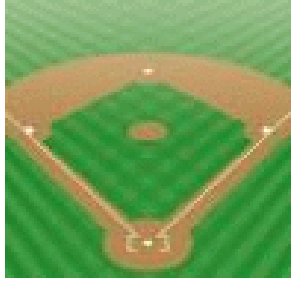
depositions (which are never in fact taken because they send the medical records to avoid a deposition). In addition, the U.S. Constitution requires Full Faith and Credit be given to an order in one state by another state. Incidentally, a justice of the peace designation is available to almost anyone of good character, like one of the secretaries in our office.

I then called one of the Superior Court Clerks, who was quite anxious to help because they regard these petitions as a real waste of time. We figured out which judge would likely consider this, and then I filed a petition reciting the refusal of the providers and the case law. I drafted an order for the judge to review and sign which applied not only to the case I had but to all future cases as well. Included in the order is the statement that a copy this order may be provided to medical providers in the future, and if they do not comply, they may be assessed with attorneys' fees and costs. Since that order was issued, no provider has hesitated to send us records. If you ever run into that situation, don't hesitate to contact us for those services.

Ken Bouchard

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BY PAUL KLEINMAN

TRAIL RIDE EXCLUSION UPHELD

The insureds owned and operated a dude ranch where they offered horseback riding and trail rides on an off their property. The trail rides were conducted on established trails and were led by wranglers employed by the ranch. A parent and child were horseback riding and had crossed onto a dirt road when an unattended dog from a nearby residence spooked the child's horse causing her to be thrown and injured. She was not provided with a helmet. The insurance policy at issue on the ranch provided that it excluded coverage for injury arising out of the use of any premises for trail rides.

The insured argued that the injury did not arise from the trail, but rather from the unattended dog and/or the failure to supply a helmet. The Court held that the term "arising from" and "arising out of" has routinely been given a broad and comprehensive interpretation meaning "originating from or growing out of or flowing from". Since there was a clear nexus between the activity of riding a horse on a trail and the child's injuries, the Court concluded that the incident

arose from a trail ride. Interestingly, the insured never made the argument that this incident occurred on a dirt road as opposed to an actual "trail", although there was evidence that the insured considered the dirt road as part of the trail. In response to the Court's grant of summary judgment in favor of the insured, the esteemed Rick Cote of Farm Family stated, "This is the first time I can recall getting summary judgment in my favor on a coverage case."

POLLUTION EXCLUSION CHALLENGED

The insureds were owners of a manufactured housing park, which was adjacent to a landfill containing leaking toxic substances. Residents of the park claimed that the owners knew or should have known of the leaking toxins, and this should have been disclosed prior to sale. The insurance policy at issue excluded coverage for personal injury "arising out of the actual, alleged, or threatened discharge, disposal, seepage, migration release or escape of pollutants at any time."

In this case, the Court did not address the "arising out of" language, and instead found that the case against the owners was comprised of mixed-case injuries. The Court noted that the claim against the owners was not to hold them responsible for the migrating toxins, but rather to hold them responsible for false representations and breach of quiet enjoyment and habitability relating to giving the landfill an easement onto the property. The Court concluded that since some of the claims do not "arise" from

pollution, but rather the owner's conduct, the insurer was responsible for defending the entire underlying claim citing *Titan Holdings Syndicate, Inc. v. City of Keene*, 898 F.2d 265, 269 (1990). An interlocutory appeal has been filed, which is pending.

FAILURE OF WORKMANSHIP

An action was brought against the insured for faulty workmanship in constructing a leach field. The damages sought were to pay for correcting the allegedly defective work. There was no claim that the defects had caused damage to any other property than the work product, nor was there any claim of damages to the work product other than the defective workmanship. In the similar case of *McCallister v. Peerless Insurance Company*, 24 NH 676 (1984), Justice Souter held that there was no "occurrence" because the fortuity implied by reference to "accident" or "exposure" is not what is commonly meant by a failure of workmanship. If the defective work causes damages other than damages for just correcting the deficient work, then this would presumably be covered. However, the completed operations exclusion should be reviewed as it may also exclude coverage for other damages. I presently have a pending declaratory judgment on the above issues, and hope to report back favorably in the near future.

