DEVELOPMENTS IN VERMONT LAW

THE VERMONT SUPREME COURT: "GUILTY" OF JUDICIAL LEGISLATING?

INTRODUCTION

In three recent cases, the Vermont Supreme Court has exceeded the legitimate bounds of statutory interpretation and thereby replaced unambiguous legislative intent with the court's own view of what the law should be. Together, *Peck v. The Counseling Service of Addison County, Inc.*,[1] *Langle v. Kurkul*,[2] and *Hay v. Medical Center Hospital of Vermont*[3] illustrate a pattern in which the court arguably chooses how deferential and judicial it will be according to the precise issue and the facts and circumstances before it. Such issue-oriented selectiveness strains the legitimate boundaries between the judiciary and the legislature, and threatens to disrupt the balance of power between the two branches. This note will first give a brief synopsis of what the judicial process generally is and then will contrast the defined judiciary role to the cited decisions, to determine if the Vermont Supreme Court has acted as a *judicial legislature* in these three instances.

I. THE JUDICIAL PROCESS AND APPROACH TO STATUTORY CONSTRUCTION

Very often judicial determinations are dependent on statutory interpretation. When interpreting a statute applicable to a specific case, the court's task is to discern the meaning that was present in the legislature's mind at the time of enactment (i.e., *legislative intent*).[4] However, judicial modification of or additions to legislative work may be warranted due to the legislature's difficulty in predicting all future "needs and circumstances" that may have an affect on a particular statute or statutory scheme.[5] Therefore, the "judicial gloss on a statute" often yields "judge-made creations

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1. 146 Vt. 61, 499 A.2d 422 (1985).
2. ___ Vt. ___, 510 A.2d 1301 (1986).
3. 145 Vt. 533, 496 A.2d 939 (1985).
4. BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 15 (1921).
5. Kaufman, *The Anatomy of Decisionmaking*, 53 FORDHAM L. REV. 1, 6 (1984).

. . . [that are] hybrids coupling language and intent with unforeseen and unacknowledged realities."[6] Nevertheless, as the Vermont Supreme Court has held: "[t]he most elemental rule of statutory construction is that the plain meaning of the statute controls. If confusion or ambiguity does not appear, then the statute is not construed but rather is enforced with its express terms."[7]

Courts will, nonetheless, often need to fill in "gaps" in the statutory law and clarify certain ambiguities and doubts as well.[8] A judge does not always have the opportunity or luxury of applying a statute literally to a particular fact situation and thereby announce the suitable remedy. Nevertheless, a basic framework committed to the principles of predictability and consistency must be created and subsequently employed.[9] Otherwise, a chaotic and unjust legal system could prevail, and individual citizens would be unable to look to the courts for guidance in determining appropriate future behavior. To ensure stability and equity, courts ought to apply the settled canon of interpretation that says "when language is clear and unambiguous it must be held to mean what it plainly expresses."[10]

Moreover, it is presumed that the legislature which enacted a particular statute was familiar with the applicable long-established policy of the common law.[11] In addition, "[t]here is no question as to the power of the states to legislate and change the rules of the common law . . . ."[12] This exemplifies that the common law is *not* superior to statutory law.[13] A fortiori, a legislature that codifies existing common law has provided a final word on the subject matter of the particular statute, unless the statute impairs substantive constitutional rights or violates some fundamental legal precept.[14] Unfortunately, the Vermont Supreme Court has failed to abide by these principles and its own precedent in the three aforementioned

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6. *Id.*

7. Heisse v. State, 143 Vt. 87, 89, 460 A.2d 444, 445 (1983) (citations omitted); *see also* Chittenden Trust Co. v. King, 143 Vt. 271, 273, 465 A.2d 1100, 1101 (1983) ("[W]hen a statute is unambiguous and susceptible of only one interpretation courts must enforce the statute according to its terms.") (citations omitted). *Id.*

8. B. CARDOZO, *supra* note 4, at 141.

9. Holmes, *The Path of The Law*, 10 HARV. L. REV. 467-68 (1897).

10. 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 46.01 (1973 & Supp. 1984); *see supra* note 7 and accompanying text.

11. Thompson v. Thompson, 218 U.S. 611, 618 (1910).

12. B & O Railroad v. Baugh, 149 U.S. 368, 378 (1893).

13. J. L. Whiting/J.J. Adams Co. v. Burrill, 258 U.S. 34, 39 (1922).

14. *Burrill*, 258 U.S. at 39.

cases and is therefore precariously close to creating a chaotic and unjust legal system.

II. The Cases: Acceptable Judicial Interpretation or Unacceptable Judicial Legislation?

The Vermont Supreme Court is not composed of legislators masked as justices. However, the court has demonstrated on at least three separate occasions an innovativeness that ignores legislative intent and arguably fills in gaps that do not exist.

In *Peck v. The Counseling Service of Addison County, Inc.*, the Vermont Supreme Court established a duty to warn exception to the physician-patient privilege stated in section 1612 of title 12.[15] The court ruled that a mental health professional[16] who knows or should have known that his or her patient posed a serious risk of danger to an identifiable victim has a duty to exercise reasonable care to protect that person from such danger.[17]

However, the statute states in pertinent part: "[u]nless the patient waives the privilege or unless the privilege is waived by an *express provision of law*, . . . a mental health professional . . . shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity . . . ."[18] Despite the defendant counseling service's contention that the legislature had already specified certain limited "public policy" exceptions to the physician-patient privilege,[19] the court apparently did not feel precluded from imposing its own exception,[20] and thus created the

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15. *Peck*, 146 Vt. at 67-68, 499 A.2d at 426-27. This duty arises, when the mental patient makes a threat of serious harm to an identified victim. *Id. Peck* involved an individual, John Peck, who was an outpatient of the Addison Counseling Service and was under the treatment of one of the defendant's counselor-psychotherapists. *Id.* at 63, 499 A.2d at 424. Because of an argument with his parents, Peck threatened to burn down his father's barn. *Id.* at 64, 499 A.2d at 424. Peck articulated this threat to his therapist who convinced Peck not to burn down the barn. *Id.* The therapist believed that Peck would not burn the barn and took no further action. Unfortunately, Peck carried out his threat. *Id.* These actions mysteriously transformed Peck's disclosure from privileged to public information.

16. Vt. Stat. Ann. tit. 18, § 7101(13) (Supp. 1986). The statute defines mental health professional as: "a person with professional training, experience, and demonstrated competence in the treatment of mental illness, who shall be a physician, psychologist, social worker, nurse or other qualified person designated by the Commissioner." *Id.*

17. *Peck*, 146 Vt. at 68, 499 A.2d at 427.

18. Vt. Stat. Ann. tit. 12, § 1612 (Supp. 1986) (emphasis added).

19. *Peck*, 146 Vt. at 67, 499 A.2d at 426.

20. *Id.* at 67-68, 499 A.2d at 426-27.

duty-to-warn rule.[21]

The *Peck* decision, read in the context of section 1612 of title 12 demonstrates that the court went far beyond the task of interpreting a statute and filling in ostensibly plausible gaps. Indeed, the court did not simply extend or broaden a recognized legislative exception; rather, it created an entirely new exception and engaged in what Chief Justice Billings deemed "judicial legislation."[22]

Intent of the legislature is most often cited as the criterion for the interpretation of statutes.[23] The *Peck* court, however, totally disregarded legislative intent, and injected its own perception of section 1612. Judges, of course, are not machines. A " 'personal element' " exists in the common law,[24] and jurists bring to the law their own intuitive sense of fairness,[25] as well as an individual sense of justice.[26] But a judge must be extremely careful not to decide cases solely according to his or her own predilections. This makes the law "unsettled."[27] In *Peck*, the court permitted individual biases to override judicial responsibility.

Moreover, the *Peck* decision is inconsistent with the court's previous posture toward section 1612(a) and its deferential approach to the legislative branch.[28] Additionally, the court ignored the legislature's willingness to invoke exceptions as public policy dictates. For example, the legislative branch qualified the physician-patient privilege by permitting disclosure of child abuse pursuant to sections 683-84 of title 33.[29] Such statutorily authorized

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21. *Id.* at 67, 499 A.2d at 426.

22. *Id.* at 70, 499 A.2d at 428. (Billings, C.J., dissenting).

23. C. SANDS, *supra* note 10, § 45.05, at 15.

24. Kaufman, *supra* note 5, at 15 (quoting Kaufman, *Chilling Judicial Independence*, 88 YALE L. J. 681, 714 (1979)).

25. Kaufman, *supra* note 5, at 13.

26. *Id.* at 16.

27. E. GRISWOLD, THE JUDICIAL PROCESS 23 (1973).

28. *See* State v. Hohman, 136 Vt. 340, 392 A.2d 935 (1978). In *Hohman*, the Vermont Supreme Court stressed the need for the psychiatric examination to be conducted in an atmosphere of complete candor to ensure full disclosure. *Id.* at 346, 392 A.2d at 938. Full disclosure was deemed integral to the psychiatric process and, without it, objective and independent judgments on the issue of one's sanity were impossible. *Id.* The court concluded that section 1612(c) of title 12 had been violated by the introduction of evidence obtained during a psychiatric examination, and the statutory privilege prohibited disclosure of any such information. *Id.*

29. Section 683(a) and 684 together require, upon one's having reasonable cause to believe, the mental health professional, among others, to report a case of child abuse to the commissioner of social and rehabilitative services or his or her designee.

disclosure was passed only a year prior to *Peck*.[30] The *Peck* court, nevertheless, decided that it, as well as the legislature, had the power and wisdom to alter the physician-patient privilege.[31] In short, the court imposed its own will, despite the clear legislative purpose to the contrary.

In *Langle v. Kurkul*, the Vermont Supreme Court exhibited the same indifference to legislative intent. In *Kurkul*, the court refused to interpret section 501 of title 7[32] so as to permit an intoxicated guest to sue a social host for injuries sustained while at the social host's party, where liquor was served.[33] The court ruled that section 501, also known as the Dram Shop Act, provides a cause of action to only third persons, not guests, who are injured by an intoxicated individual.[34] Additionally, the court refused to expand the common law to impose a duty on the social host toward an intoxicated adult guest under the theory of common law negligence.[35] Despite the court's resolution of these issues and the plain meaning of the applicable statute, the court's inquiry inexplicably did not cease with the actual situation before it.

Instead, the court proceeded to discuss whether or not a legal duty of care ought to be imposed on a social host in other *situations not before the court*.[36] As such, the court entered into what Justice Peck in his concurring opinion called a "digression into hypotheticals by holding that the Dram Shop Act . . . does not 'preempt a remedy under the common law in situations such as the one presented in this case.' "[37]

The court, however, did not simply entertain a series of hypotheticals. Rather, through dicta, the court created a companion statute to section 501 of title 7. Specifically, the court held that a

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30. VT. STAT. ANN. tit. 33, §§ 683-84 (1984 & Supp. 1986).

31. *Peck*, 146 Vt. at 70, 499 A.2d at 428 (Billings, C.J., dissenting).

32. VT. STAT. ANN. tit. 7, § 501 (1972). The statute provides in pertinent part: "[a] husband, wife, child, guardian, employer or other person who is injured in person, property or means of support by an intoxicated person, or in consequence of the intoxication of any person, shall have a right of action in his or her own name, jointly or severally, against a person or persons, who, by selling or furnishing intoxicating liquor unlawfully, have caused in whole or in part such intoxication . . . ." *Id.*

33. *Kurkul*, ___ Vt. at ___, 510 A.2d at 1303.

34. *Id.* at ___, 510 A.2d at 1303.

35. *Id.* at ___, 510 A.2d at 1304. The Court did not feel bound by other jurisdictions which had held that similar such Dram Shop statutes precluded common law negligence. *Id.*

36. *Id.* at ___, 510 A.2d at 1304-06.

37. *Id.* at ___, 510 A.2d at 1307. (Peck, J., concurring).

legal duty of care on a social host exists and will be imposed where: (1) the social host furnishes alcoholic beverages to one who is visibly intoxicated, and it is foreseeable to the host that the guest will thereafter drive an automobile; or (2) where the social host supplies alcoholic beverages to a minor.[38] The court further asserted it would not extend the social host's legal duty of care to the guest absent "compelling social policy reasons."[39]

In making these pronouncements, the court effectively ignored a comprehensive legislative scheme for control of the sale and the consumption of alcoholic beverages.[40] This "scheme" entails not only the Dram Shop Act but "a substantial body of law" that constitutes "continuing attention to the subject" by the legislature.[41] Moreover, the *Kurkul* opinion, by ignoring section 501 of title 7, represents a disguised performance and usurpation of the legislative function.[42] By relying primarily on personal convictions and failing to consider the legislative rationale for section 501's passage, the Vermont Supreme Court not only perpetrated this masquerade but arguably served to undermine the legal system.[43]

It is important to note that the House of Representatives did *not* ignore the ramifications of *Kurkul*. In a bill passed in its most recent session, the House proposed as an amendment to the Dram Shop Act a series of revisions including subsection (e) which states in pertinent part: "nothing in this section shall create a statutory cause of action against a social host for furnishing intoxicating liquor to any person without compensation or profit, provided the social host is not a licensee or required to be a licensee under this title."[44] Reacting apparently to *Kurkul*, the House made it clear that Vermont should not impose social host liability at this time. This clarification was made necessary because the Vermont Supreme Court unjustifiably acted as the voice of the public. In reality, the legislature had already "spoken in a clear voice" with respect to causes of action under section 501.

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38. *Id.* at ____, 510 A.2d at 1306.

39. *Id.*

40. *Id.*

41. *Id.* at ____, 510 A.2d at 1308. (Peck, J., concurring). *See, e.g.*, VT. STAT. ANN. tit. 7, §§ 502, 505, 562, 583, 657, and 667 (1972) and §§ 657-58 (Supp. 1986). These statutes constitute a portion of what Justice Peck refers to as a "legislative scheme" for controlling sale and distribution of alcohol.

42. *See* C.L. BLACK, DECISION ACCORDING TO LAW 34 (1981).

43. *Id.*

44. H.R. 608, 58th Biennial Leg., Adjourned Sess. 3 (1986).

The *Kurkul* court felt it had a duty to legislate in reference to recognition of "social need or demand."[45] This "duty," as pointed out by Justice Peck, constituted "an abuse of power."[46] The language of section 501 of title 7 is plain, unambiguous and uncontrolled or unaffected by other acts pertaining to the same subject matter. Hence, the *Kurkul* court was obligated *not* to give it a different meaning.[47] However, the court, by virtue of its dicta, improperly interpreted section 501 as being inconclusive and subject to further modification. Simply put, the court was again engaging in judicial legislation.

Finally, in *Hay v. Medical Center Hospital of Vermont*, the Vermont Supreme Court addressed the issue of whether or not a minor child could recover on the theory of loss of parental consortium.[48] Section 5431 of title 12 provides that: "[a]n action for loss of consortium may be brought *by either spouse.*"[49] Although the legislative intent and statutory meaning were clear, the *Hay* court concluded, nevertheless, that a minor child had a right to sue for damages for loss of parental consortium.[50]

In effect, the court redefined the judicial and legislative roles by permitting potential recovery under the theory of *parental* consortium, when the legislature had explicitly only allowed a cause of action under the theory of *spousal* consortium. In addition, the well-settled rule of statutory construction *expressio unius est exclusio alterius* (i.e., expression of one thing is the exclusion of another) was violated. Hence, notwithstanding the court's having purportedly acted "in the best interests of justice and of the citizens of the State of Vermont . . . ,"[51] a remedy was provided to an individual who had been conspicuously omitted by the applicable statute. Applying the generally stated proposition of one commentator to *Hay*, "the intention of the legislature [was] so apparent from the face of the statute that there [remained] no question as to its meaning . . . ."[52] The *Hay* court, nevertheless, interpreted the word "spouse" to include "child."

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45. *Kurkul*, ___ Vt. at ___, 510 A.2d at 1311. (Peck, J., concurring).

46. *Id.*

47. *See* Heisse v. State, 143 Vt. 87, 89, 460 A.2d 444, 445 (1983); *see also* C. SANDS, *supra* note 10, at 49.

48. 145 Vt. 533, 536, 496 A.2d 939, 941 (1985).

49. VT. STAT. ANN. tit. 12, § 5431 (Supp. 1986) (emphasis added).

50. *Hay*, 145 Vt. at 539-40, 496 A.2d at 943.

51. *Id.* at 545, 496 A.2d at 946.

52. *See* C. SANDS, *supra* note 10, at 48 (citations omitted).

Judicial assistance to a minor child in *Hay*, albeit laudable from a humanitarian perspective, conceivably signals (along with the other cases discussed) the Vermont Supreme Court's willingness to supplant the legislature's judgment in areas the court feels qualified to, itself, legislate. The *Hay* court felt it was not "obliged to await legislative recognition of [an appropriate] cause of action merely because it [is] novel."[53] Regardless of the reasons for such an assertion, the fact is that the statement itself implies judicial parity with the legislature in making law, even when the law itself is unambiguous.

CONCLUSION

The Vermont Supreme Court would not have been guilty of what Oliver Wendell Holmes called "blind imitation of the past"[54] had it simply enforced the various provisions of the statutes cited in this note. In other words, the court, in adhering to the statutes, would have been enforcing legislative policy that addresses the present and arguably the future needs of Vermont. Moreover, no judicial modification was necessary or warranted. Indeed, by adhering to the legislative branch's determination, the court would have acted consistently with the proper judicial role. Instead, the court deviated from the established legislative intent regarding circumstances previously contemplated and weighed before enactment of the statute.[55] Statutory interpretation is an attempt to "divin[e] the legislative will."[56] The *Peck, Kurkul*, and *Hay* decisions do not proceed from this legislative will; rather, they ignore it and impose duties and provide remedies that the legislative branch arguably did not warrant as proper or consistent with its intent.

In the cases of *Peck v. The Counseling Service of Addison County, Inc., Langle v. Kurkul*, and *Hay v. Medical Center Hospital of Vermont*, the Vermont Supreme Court exceeded its judiciary function. The court unfortunately, in at least three instances, played the role of a "knight-errant roaming at will in pursuit of [its] own ideal of . . . goodness."[57] In short, the court "innovated

53. *Hay*, 145 Vt. at 542, 496 A.2d at 944.
54. Holmes, *supra* note 9, at 469.
55. *See* Gordley, *Legal Reasoning: An Introduction*, 72 CALIF. L. REV. 138, 146 (1984).
56. Kaufman, *supra* note 5, at 6.
57. B. CARDOZO, *supra* note 4, at 141.

at pleasure"[58] and exhibited no deference to clearly applicable statutory law.[59]

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58. *Id.*

59. Recently, the Vermont Supreme Court in Payne v. Rozendall, No. 85-563, slip op. (Vt. Sept. 8, 1986) again acted in the capacity of a judicial legislature. *Payne* involved the issue of whether or not an employer, Nordic, Inc., had wrongfully discharged a number of older employees on the basis of their age. *Payne*, No. 85-563, slip op. at 2. The court either failed or simply refused to recognize and apply clearly applicable statutory law effective at the time the plaintiff-employees had been discharged. Section 495 of title 21 stated in pertinent part: "[i]t shall be unlawful employment practice, except where a bona fide occupational qualification requires persons of a particular race, color, religion, national origin, sex, or ancestry: (1) For any employer, employment agency or labor organization to discriminate against any individual because of his race, color, religion, ancestry, national origin, sex, or place of birth . . . ." VT. STAT. ANN. tit. 21, § 495 (1978). One year after the plaintiffs' discharge, the statute was amended to include age. Hence, although the defendant had acted lawfully by dismissing certain employees due to their age pursuant to existing statutory law, the Vermont Supreme Court held that the discharge was "in contravention of state law." *Payne*, No. 85-563, slip op. at 6. Justice Peck, in his dissent, pointed out that at the time the plaintiffs were discharged, the case was controlled by at least two statutes, sections 495 and 495c of title 21. *Payne*, No. 85-563, slip op. at 5. (Peck, J., dissenting). Section 495c states: "[t]his subchapter shall not be construed as limiting the rights of employers to hire and fire and of labor organizations to determine the membership as long as such rights are not exercised in violation of this subchapter." VT. STAT. ANN. tit. 21, § 495c (1978). Moreover, Justice Peck noted "[s]peaking figuratively, defendants went to bed knowing that they had fully complied with the law, both statutory and precedential, only to wake up the next morning to learn that as they slept, this Court had ignored both statutes and precedent, and held, *they*, the defendants, acted illegally." *Payne*, No. 85-563, slip op. at 2. (Peck, J., dissenting). In other words, as discussed throughout this note, the Vermont Supreme Court "unsettled settled law." Griswold, *supra* note 27, at 23. Justice Peck stated that it is "an egregious and inexcusable abuse of judicial power when . . . a court ignores or defies clear and specific legislative enactments which not only *control* the subject matter but *demonstrated* legislative preemption." *Payne*, No. 85-563, slip op. at 5. (Peck, J., dissenting).