SURVEY OF RECENT DEVELOPMENTS IN NEW JERSEY LAW

The legal picture in the State of New Jersey has undergone marked changes within the past year. Both the judiciary and the legislature have contributed to noted developments, particularly in such areas as Criminal Procedure, Education, and Family Law. In the interests of brevity and clarity, the Seton Hall Law Review *will attempt to present a convenient synopsis of some of these noteworthy developments. In so doing, we hope to aid and assist the legal community in keeping abreast of some of the more interesting changes in certain significant areas of practice.*

COMMITMENT—*State v. Fields*, 77 N.J. 282, 390 A.2d 574 (1978).

Hetra Fields was acquitted by reason of insanity for the murder of her boyfriend. A subsequent psychiatric evaluation determined that she constituted "a danger to herself and society." Therefore, her confinement was continued. Six months later the court made an identical determination with the exception that Fields could receive furloughs if authorized by the hospital staff. At the next six month review, the judge concluded that Fields' mental illness was incurable and ordered that her confinement be subject to review in one year.

While pending before the appellate division, the Supreme Court of New Jersey certified Fields' appeal. The court held that persons found not guilty by reason of insanity (NGI committee) were entitled to the same automatic review of their commitment as are civil committees. Additionally, the state shall bear the burden of proof, by a preponderance of the evidence, that the continued confinement can be justified under the same standards used for initially imposing the restraints.

In granting certification, the supreme court expressed a desire to examine questions left unanswered by its decision in State v. Krol, 68 N.J. 236, 344 A.2d 289 (1975). *Krol* had set forth the factors to be considered in deciding whether to tighten or relax commitment restraints, but held that the burden of proof should be borne by the party seeking the change in confinement status. For a detailed

analysis of *Krol*, see Note, *Standard for Commitment Following Acquittal by Reason of Insanity Made Uniform with that for Civil Commitment*, 7 SETON HALL L. REV. 412 (1976).

The current extension of automatic periodic review to NGI committees will not affect their right to seek modification of their confinement should their condition drastically improve, nor, will it affect the state's right to seek increased restraints should the NGI committee's condition deteriorate. However, if at any periodic review hearing the state should fail to justify the confinement, the reviewing judge must " 'mold' an appropriate order based upon his evaluation of the level of restraints dictated by the committee's present condition." 77 N.J. at 302, 390 A.2d at 584.

The possible import of *Fields* may not be as significant as a cursory reading might suggest. The failure of the state to justify the imposition of restraints at any of the review hearings does not necessarily mean the restraints will be relaxed to the extent the committee may desire. The determination will be made by the judge who must consider the well-being of the community, as well as that of the individual. If "the committee's condition shows marked improvement, only the most extraordinary case would justify modification in any manner other than by a gradual de-escalation of the restraints upon the committee's liberty." *Id.* at 303, 390 A.2d at 584. To release a patient because the state failed to meet its burden "would normally constitute a manifestly mistaken exercise of the reviewing court's discretion." *Id.* Furthermore, should the committee initiate a review of his confinement, he will bear the burden of proof with respect to his improved condition. Of course, defendants and counsel will carefully weigh these factors in deciding whether to plead insanity as a defense. While the number of insanity defenses might drastically increase, it is doubtful whether the number of committee releases will be as great. The court appears to be well aware that the relaxation of restraints must proceed at a gradual pace.

The most important ramification of *State v. Fields*, however, will be the continued contact that committees must have with the psychiatrists who provide reports to the reviewing court. This contact can only serve to improve the mental health of the patient. Since the patient's condition is most likely to improve during the first two years of commitment, hearings are frequently provided for during this period. Furthermore, the annual periodic review mandated by *Fields* will ensure that each committee receives continued evaluation of his mental condition. Hopefully, these procedures will obviate the tragic situation of an individual committed upon an initial review and never reviewed, nor heard from again.

CONSTITUTIONAL LAW—RIGHT OF PRIVACY—*State v. Saunders*, 75 N.J. 200, 381 A.2d 333 (1977).

Charles Saunders and a companion were driving through Newark in the early morning hours of July 23, 1973, when they picked up two women who were walking home from a nearby bar. Although disputed at trial, the facts apparently indicated that the women agreed to engage in sexual relations with Saunders and his companion, in exchange for marijuana cigarettes. Upon receiving the benefit of their part of the bargain, the men revealed that they had no marijuana. The beguiled women subsequently lodged complaints of rape with the police. At trial, the defendants were acquitted of rape and assault charges, but the trial judge, on his own initiative, instructed the jury that fornication was a lesser included offense of rape, whereupon the jury found defendants guilty on the fornication charge.

Upon Saunder's motion for acquittal, the trial court agreed to hear challenges to the constitutionality of New Jersey's fornication statute. While recognizing the difficulties in the limited enforcement of the statute, the court found there was an insufficient showing of selective and purposeful discrimination based on an arbitrary or invidious classification, a holding affirmed by the appellate division.

The New Jersey supreme court struck down the fornication statute as an unconstitutional infringement of the fundamental right to privacy, not justified by a compelling state interest. Justice Pashman's opinion was based upon a careful analysis of the constitutional right to privacy, freshly espoused by the United States Supreme Court. In reviewing the cases in which the right to privacy had been extended to certain matters involving fundamental personal choices, the *Saunders* court concluded that "governmental regulation of private personal behavior under the police power is sharply limited." 75 N.J. at 213, 381 A.2d at 339. This constitutional protection encompassed an individual's conduct related to child bearing and begetting. Thus, it was determined that private sexual activities between consenting adults are protected by the right to privacy, and governmental intrusion into these fundamental rights can be justified only by a compelling state interest.

The court found that the state's interests in preventing venereal disease and an increase in the number of illegitimate children, as well as its interests in protecting the marital relationship and public morals by preventing illicit sexual activity, were not compelling under the circumstances surrounding the statute. While the state's right to regulate matters of public morality was preserved, the fornication statute was viewed as an attempt to regulate private morality, affecting de-

sired lifestyles, social mores, and individual beliefs, and as such was not an appropriate exercise of the police power.

CRIMINAL PROCEDURE—*State v. Mingo*, 77 N.J. 576, 392 A.2d 590 (1978).

A young woman was lost in Paterson when a stranger assisted her by providing handwritten instructions to her destination. This stranger later raped and attempted to rob the woman. The defendant, Mingo, was then apprehended by the police and ordered to provide handwriting samples in the exact words of the instructions written by the rapist. Defendant's attorney requested and obtained the original note for the purpose of having it analyzed by a handwriting expert. The judge granted defense counsel's request on the condition that any reports received by the defendant from the expert must be furnished to the prosecutor.

The defendant's expert concluded that the person who wrote the note in question also wrote the three letters submitted by the defendant for comparison purposes. Accordingly, the defense attorney decided not to use the expert as a witness. Upon receiving a copy of the expert's report, however, the prosecutor subpoenaed the expert to testify on behalf of the state.

Over defense counsel's objections, the expert testified as to his procedures and results. The defendant, however, later alleged that the note furnished by the prosecution for analysis purposes was, in fact, one of the exemplars he was compelled to write for the police, and not the original instruction note. The jury did not find the defendant's testimony persuasive, and found him guilty. The appellate division unanimously affirmed the convictions. The New Jersey supreme court subsequently granted certification.

The salient issue addressed by the court was whether the state was justified in calling defendant's expert as a witness. Under N.J. CONST. art. I, para. 10, a defendant has the right to effective assistance of counsel. An important aspect of this right is a free hand in full investigative techniques by counsel without the risk of disclosure to the state of potentially damaging evidence. In State v. Kociolek, 23 N.J. 400, 129 A.2d 417 (1957), the court held that communication between an expert witness and the defendant was privileged since the expert was an agent of the attorney, and that this privilege was indispensable in protecting one's right against self-incrimination. A year later, the same court held that "the admissions made by the defendant to the doctors obtained by application of his counsel were as

privileged as if they had been made directly to his counsel." State v. Hunt, 25 N.J. 514, 533, 138 A.2d 1, 12 (1958). Recently, in State v. Melvins, 155 N.J. Super. 316, 382 A.2d 925 (App. Div. 1978), the appellate division noted that a combination of the principles of effective representation of counsel and attorney-client privilege dictated that a defense counsel must be free to make an informed judgment without the inhibition of creating a potential government witness.

In reversing the appellate division, the *Mingo* court held that information obtained from an expert should remain confidential under the attorney-client privilege in order to provide the defendant with effective assistance of counsel. Certain guidelines were enunciated by the court in the course of its holding. The principle of treating the communications between a defendant and an expert witness as being within the attorney-client privilege is only applicable to expert witnesses in criminal prosecutions. This privilege will be waived and discovery granted to the state if the defense utilizes the expert as a witness or introduces his report into evidence. Even when discovery is granted in the latter situation, the expert is still unavailable to the prosecution as a witness since he remains under the exclusive control of the defense. If the defense attorney wishes to change his position with respect to the expert witness, consent of the court is required.

The holding in this case was necessary to help ensure maximum productivity from a defendant's legal representative. To allow the prosecution the right to use expert witnesses procured and paid by the defendant is an obvious violation of the attorney-client privilege. More importantly, the ramifications of the *Mingo* holding extend to significant constitutional safeguards. If the state were allowed to call the defense's expert witness, in whom the defendant had confided under the direction of his counsel, the defendant could possibly become an unwilling victim of self-incrimination. In addition, the effective assistance of counsel would be severely hampered.

The holding in *Mingo* safeguards the constitutional rights of the accused, preserves the attorney-client privilege, and furthers the effective assistance of counsel.

EDUCATION—N.J. STAT. ANN. § 18A:71-47(a) (West 1968 & Cum. Supp. 1978-1979).

The amendments to the New Jersey Higher Education Tuition Aid Act of 1968, N.J. STAT. ANN. §§ 18A:71-41 to -49 (West 1968 & Cum. Supp. 1978-1979), greatly expand the class of students eligible for higher education grants. Students at state colleges, as well as stu-

dents attending out-of-state institutions, are now included, while previously only those in New Jersey institutions not supported by taxes were eligible. The disturbing aspect of this legislation concerns one of the provisions that has *not* been changed. The eligibility provisions promulgated in the original 1968 law included the present restriction that "[n]o student shall be eligible for a tuition aid grant who is enrolled in a course leading to a degree in theology or divinity." *Id.* § 18A:71-47(a).

An analysis of the statute reveals that the restriction may have no justification with regard to the establishment clause. The analysis chosen here is three-pronged. "First, the statute must have a secular legislative purpose." Lemon v. Kurtzman, 403 U.S. 602, 613 (1971). Apparently, this requirement is met since the purpose of the statute is to make grants available to all New Jersey college students based upon financial need and good character. N.J. STAT. ANN. § 18A:71-46(6)(b), (c). "[S]econd, its principal or primary effect must be one that neither advances nor inhibits religion." *Lemon*, 403 U.S. at 613. The principal effect of this legislation is not a religious one, considering the small percentage of college students who major in theology and divinity. "[F]inally, the statute must not foster 'an excessive governmental entanglement with religion.' " *Id.* This statute poses no recognizable entanglement problems. Religion is not taken into account in the awarding of the grants, and once awarded, there are no further governmental requirements, involvement, or surveillance. *Lemon*, 403 U.S. at 614, 620; *see* New York v. Cathedral Academy, 434 U.S. 125 (1977); Tilton v. Richardson, 403 U.S. 672, 687 (1971).

It seems, therefore, that there is no reason to deny state grants to theology and divinity majors under this legislation. The first amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary." Everson v. Board of Educ. of Ewing Twp., 330 U.S. 1, 18 (1947).

FAMILY LAW—*New Jersey Division of Youth & Family Services v. Wandell*, 155 N.J. Super. 302, 382 A.2d 711 (Juv. & Dom. Rel. Ct. 1978).

The New Jersey Division of Youth and Family Services (DYFS or Division) instituted actions against the defendants pursuant to N.J. STAT. ANN. §§ 30:4C-1 to -65 (West 1964 & Cum. Supp. 1978-1979), in the Juvenile and Domestic Relations Court of Cumberland County,

for the eventual termination of the defendants' parental rights with regard to three minor children. The amended complaint sought to place two of the children under the supervision and care of the Division, and to commit the third child to the guardianship of the Division. The parent, on behalf of the children, sought certain protective legal measures including the appointment by the court of independent legal counsel for the minor children.

The issue, one of first impression in the state, was whether indigent minors are entitled to independent legal counsel when they are the subject of proceedings under N.J. STAT. ANN. § 30:40-1. In arriving at its determination, the court looked to two cases for particular direction. In Crist v. New Jersey Division of Youth & Family Services, 128 N.J. Super. 402, 320 A.2d 203 (Law Div. 1974), *aff'd in part, rev'd in part,* 135 N.J. Super. 573, 343 A.2d 815 (App. Div. 1975), the court held that indigent parents who were subjected to dependency hearings were entitled to court-appointed counsel free of charge. This decision was based upon due process considerations. In Rodriguez v. Rosenblatt, 58 N.J. 281, 277 A.2d 216 (1971), the New Jersey supreme court extended an adult defendant's right of free counsel to "nonfelony criminal cases" when the defendant is "subjected to a conviction entailing imprisonment in fact or other consequence[s] of magnitude." 58 N.J. at 295, 277 A.2d at 223.

Since *Rodriguez,* the courts have consistently held that the destruction of the family unit is a consequence of great magnitude, and have thus appointed free counsel to needy defendants. Following this line of reasoning, the court in *Wandell* stated that "if due process required that a mature adult subjected to these proceedings requires the assistance of able counsel, no less should be required to protect the interests of a minor incapable of speaking for himself." 155 N.J. Super. at 304, 382 A.2d at 713. The right of a natural parent to have standing to assert such a constitutional right of her child is "firmly established by the case law of both the New Jersey and United States Supreme Courts." 155 N.J. Super. at 304, 382 A.2d at 712–13.

By requiring the juvenile and domestic relations court to appoint a private counsel for the minor defendant free of charge, the *Wandell* decision may be important in other domestic proceedings. For example, in child abuse hearings, the minor could now be represented by counsel other than the counsel of the parent or guardian. This eliminates any conflict of interest which may arise when both the parent and child have the same legal representation. The minor would have representation that could not be colored or compromised by a lawyer who, as in the past, was counsel to both parties.

Even if the holding in *Wandell* is confined to its facts, it still signifies the continuing trend in New Jersey to bestow upon minors constitutional rights which have long been enjoyed by the adult community.

FAMILY LAW—N.J. STAT. ANN. § 9:3-37 (West Cum. Supp. 1978-1979).

Stanley v. Illinois, 405 U.S. 645 (1972), succinctly declared that state adoption statutes which do not provide notice of parental right termination proceedings to parents who had maintained active contact with their children violate due process requirements. The recently enacted adoption statute, N.J. STAT. ANN. § 9:3-37 (West Cum. Supp. 1978-1979), fulfills the *Stanley* directive, closing a former void in New Jersey adoption law. Additionally, the legislation simplifies the mode of objection a parent need raise to the potential surrender of his or her child. Such objections need not be in the traditional legal form, but rather "may be communicated to the court by personal appearance or by letter." *Id.* § 9:3-46(a). The new legislation has also updated statutory definitional constructs in its incorporation of the Supreme Court of New Jersey's interpretation of "forsaken parental obligations" as contained in the case of In re Adoption by D., 61 N.J. 89 (1972). For an expanded discussion of this legislation, see Boskey & McCue, *Alternative Standards for the Termination of Parental Rights*, 9 SETON HALL L. REV. 1 (1978).

PHYSICIANS—RESTRICTIVE COVENANTS—*Karlin v. Weinberg*, 77 N.J. 408, 390 A.2d 1161 (1978).

In 1973, Dr. Joseph Karlin employed Dr. Harvey Weinberg upon the completion of Dr. Weinberg's internship and residency requirements. Dr. Karlin had established his practice of dermatology in Denville in 1966, while Dr. Weinberg had neither resided nor practiced medicine in New Jersey. The one-year employment contract contained a provision that upon the termination of Dr. Weinberg's employment, for a period of five years thereafter, Dr. Weinberg could not practice dermatology within a ten mile radius of Dr. Karlin's office. After the one-year contract expired, the two doctors practiced as partners. The partnership was dissolved on January 31, 1976. Dr. Karlin maintained his office, while Dr. Weinberg opened a new office just a few doors away.

Dr. Karlin brought an action seeking to enforce the restrictive covenant of the original contract. The trial court denied him such relief, holding that restrictive covenants between physicians are *per se* unreasonable and hence unenforceable. In so ruling, the trial court relied on Dwyer v. Jung, 133 N.J. Super. 343, 336 A.2d 498 (Ch. Div.), *aff'd*, 137 N.J. Super. 135, 348 A.2d 208 (App. Div. 1975), where it was held that restrictive covenants were *per se* unreasonable as applied to attorneys. The appellate division reversed and remanded, reasoning that the rule in *Dwyer* was inapplicable. They held that Dr. Karlin had a legitimate interest entitled to protection that was recognizable, absent a showing of detriment to the public.

The Supreme Court of New Jersey held that restrictive covenants between physicians are not *per se* unreasonable and unenforceable. However, if a factual determination is made that enforcement of the covenant will be injurious to the community, the covenant will not be enforced and the public interest will be protected.

In establishing the validity of the restrictive covenant, the supreme court directed the trial court to consider whether the covenant protects the legitimate interests of the doctor, imposes no undue hardship on the doctor-employee, and is not injurious to the public. This is the test set forth in Solari Industries, Inc. v. Malady, 55 N.J. 571, 264 A.2d 53 (1970). The court noted that in each case involving restrictive covenants, different factual settings will call for other relevant factors to be considered. Nevertheless, the ultimate analysis should look to the promisee's need for the covenant's protections and the effect of the covenant upon the covenantor and the public.

The holding that the "*per se* unreasonable" rule does not apply to restrictive covenants between physicians will benefit the medical profession, as well as, the entire public. Besides enabling physicians to protect themselves through the use of restrictive covenants, physicians will not be hesitant to take on young associates, who in turn will benefit from an established physician's knowledge and experience. In addition, physicians will not be discouraged from operating as partnerships, which are more economic, which in turn means lower fees for the public.

PUBLIC UTILITIES—N.J. ADMIN. CODE §§ 14:3-3.6, -7.1, -7.5, -7.12, -7.13, -7.14.

Prior to May 1, 1978, the regulations for the discontinuance of utility service made few distinctions between residential and non-residential services. Yet, one regulation did provide that "nonpayment for business service shall not be a reason for discontinuance of resi-

dence services." N.J. ADMIN. CODE § 14:3-3.6(a)(3)(i). The recent amendments to the regulations adopted by the Board of Public Utilities Commission (Board) reflect a clear policy change in favor of residential customers. Utility companies must now consider the public welfare before withdrawing residential services.

Discontinuance notices to residential customers must indicate "that the utility is subject to the jurisdiction of the Board of Public Utilities" and must state the Board's address and telephone number. N.J. ADMIN. CODE § 14:3-7.2(c)(1). Such notice must also inform residential customers that the utility company should be contacted in instances of inability to pay or of disputes with respect to billing. In addition, the notices must advise residential customers that a reasonable deferred payment schedule may be arranged. *Id.* § 14:3-7.2(c)(3).

If service is to be discontinued due to unpaid bills, it may not be terminated on weekends or holidays of the utility companies. Similarly, service may not be interrupted if doing so would aggravate a medical emergency and the customer "reasonably proves his inability to pay." *Id.* § 14:3-7.12(a)(2). In residential landlord-tenant situations, discontinuance can only occur if notice is posted in all common areas, if individual notice is given in all single and double family dwellings, and if individual service has been offered to each tenant where feasible. *Id.* § 14:3-7.14.

These new regulations have special significance in light of the Supreme Court decision in Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974). In *Jackson*, the Court, while holding that the State of Pennsylvania was not sufficiently connected with the utility company's termination of service so as to make such conduct attributable to the state for purposes of the fourteenth amendment, left undecided whether the "claim of the Amendment, or whether 'due process of law' would require a state taking similar action to accord petitioner the procedural rights for which she contends." *Id.* at 358–59.

The Board, through the promulgation of rules granting substantive rights to residential customers, has obviated this due process dilemma.

SCHOOLS AND SCHOOL DISTRICTS—DISCRIMINATION: SEX—*Gilchrist v. Board of Education of Haddonfield*, 155 N.J. Super. 358, 382 A.2d 946 (App. Div. 1978).

When plaintiff, a nontenured teacher in the Haddonfield school district, notified her superiors that she would be giving birth during

the upcoming fall school term, the Board of Education (Board) refused to renew her contract. While the Board claimed that it policy was to avoid any classroom activity disruption " 'whatever the reason,' " *id.* at 364, 382 A.2d at 949, plaintiff filed a complaint with the New Jersey Division on Civil Rights, alleging that the school district's action was discriminatory since it was based solely on her pregnant condition. Upon a finding of gender-based discrimination, the Board of Education appealed.

The appellate division, in an opinion rendered by Judge Ard, dismissed the plaintiff's complaint for failure to present probative evidence of disparate treatment. The plaintiff proffered no evidence to support the conclusion that pregnancy was the only temporary disability or absence singled out by the Board which would lead to nonrenewal of a nontenured teacher's contract or that any class was actually disadvantaged by the Board's policy. Judge Ard characterized the Board's policy of minimizing interruptions in the continuity of classroom instruction as both rational and admirable when applied equally and without selectivity. On this basis, the court held "the Board's policy not to renew the contract of any nontenured teacher, male or female, who gives the Board advance knowledge of an anticipated absence of substantial duration in the coming school year for any reason" to be nondiscriminatory treatment. *Id.*

The practical effect of the *Gilchrist* decision merits examination. The majority of teachers are female and pregnancy constitutes the primary temporary disability that one knows of in advance. Since the plaintiff here failed to present evidence of disparate treatment or impact, the court appears to have reached a proper result under the particular facts. The question remains, however, whether such evidence of disparate impact would render a school board policy like Haddonfield's discriminatory.

UNEMPLOYMENT—*Department of Labor & Industry v. Smalls*, 153 N.J. Super. 411, 379 A.2d 1283 (App. Div. 1977).

The issue of whether an employer may be required to refund unemployment compensation benefits withheld from a back pay award arose from the following set of undisputed facts. Smalls was given a mandatory leave of absence without pay by his employer, New Jersey Natural Gas Co. (Gas Company). When his grievance went to arbitration, the arbitrator determined that the Gas Company improperly discharged Smalls and awarded him back pay. Since Smalls had received unemployment compensation benefits of $2,040

for the twenty-four week period, the arbitrator allowed the Gas Company to deduct that amount from the gross amount due. The Department of Labor and Industry (Department), pursuant to N.J. STAT. ANN. § 43:21-5(b) (West 1962 & Cum. Supp. 1978-1979), demanded that either Smalls or the Gas Company return the amount which Smalls had received in unemployment compensation. Section 43:21-5(b) mandates that an individual who is "restored to employment with back pay shall return any benefits received under this chapter for any week of unemployment for which he is subsequently compensated by his employer." When neither Smalls nor the Gas Company responded to the Department's demand, suit was instituted.

The trial judge held in favor of the Gas Company, finding no statutory authority to require that it refund the money since such relief would necessitate an unauthorized revision of the arbitrator's award. Yet, the trial judge did not find Smalls liable for the refund since he had not received double compensation.

The appellate division, in an opinion written by Judge Kole, affirmed the trial court's finding with respect to Smalls' liability, but disagreed with the interpretation of the statute as applied to the employer. Although the issue of an employer refunding unemployment compensation was one of first impression in New Jersey, other jurisdictions have concluded that absent a statute the employer should be so compelled under the theory of unjust enrichment. *See, e.g.*, State v. Continental Baking Co., 72 Wash.2d 138, 431 P.2d 993 (1967); State v. Rucker, 211 Md. 153, 126 A.2d 846 (1956). The court found that although section 43:21-5(b) is limited in its terms to the employee, it is based upon the theory of unjust enrichment, be it of the employer or the employee. Furthermore, the court believed that this statutory remedy against an employee was not intended to be exclusive "where, as here, it is necessary, in order to effectuate the purpose of the act, to implement it by permitting recovery against an employer holding the monetary equivalent of such unemployment compensation benefits that rightfully belong to the State fund." 153 N.J. Super. at 417, 379 A.2d at 1287. The court found that the arbitrator's award had placed the Gas Company in the position of constructive trustee and the statute gave the Department the right to recover those funds for the "lawful beneficiary," the state.

Judge Kole also disagreed with the trial court on the binding effect of the arbitration award. He held that funds owed under the Unemployment Compensation Act cannot be bargained away. The Gas Company was, therefore, required to return the amount of $2,040 to the Department.

WORKERS' COMPENSATION—*Bush v. Johns-Manville Products Corp.*, 154 N.J. Super. 188, 381 A.2d 65 (App. Div.), *certif. denied*, 75 N.J. 605, 384 A.2d 835 (1977).

Petitioner Virginia Bush appealed from a decision of the Division of Workers' Compensation (Division), which had awarded her dependency death benefits following her husband's death. It was undisputed that the decedent's death from cancer was causally related to his exposure to asbestos some fifty years ago while in the employ of the respondent. The Division awarded the petitioner the minimum rate of $15 per week for 450 weeks and thereafter during the continuance of widowhood. In his determination of the award, the compensation judge held that the applicable rate must be based upon the wages that the decedent received from the respondent fifty years ago ($17.75 per week), despite the fact that at the time of his death, the decedent was earning $400 per week from another employer. The sole issue on appeal was the correct wage rate to be utilized in the computation of dependency benefits.

The occupational disease section of the Workers' Compensation Act was amended in 1974 to allow a party to file a claim for disability or death caused by an occupational disease within two years of the date he first discovers his disability and its relation to his employment. N.J. STAT. ANN. § 34:15-34 (West Cum. Supp. 1978-1979). Thus, due to the retroactive application of the amendment, it is now possible for a cause of action to arise where an employee's death and the employment which initially caused the disability are separated by more than fifty years.

Section 34:15-37, to which N.J. STAT. ANN. § 34:15-32, the occupational disease benefits provision, is keyed, states that the wages to be used as a basis for determining dependency benefits are those payable under the "contract of hiring in force at the time of the accident." The court held this to mean the contract of hiring with the employer who is to pay the compensation benefits. The court noted that any legislative intent to depart from this standard would have been expressed at the time of the 1974 amendments. Therefore, petitioner's argument that the legislature intended to utilize the wage rate in effect at the time the party first learned of his occupational disease was dismissed.

The court recognized the fact that in death cases the benefit rate to be applied is the rate in effect at the time of death, not the rate in effect at the time of exposure or accident. The court, however, stated that this "benefit rate" must be applied to the statutory definition of wages as contained in N.J. STAT. ANN. § 34:15-37. As aforemen-

tioned, this statute contemplates the basis for compensation payments to be the employment contract with the employer who is liable for the payments. Notwithstanding the seemingly harsh and inequitable result, the court does not possess the power to rewrite the statute. Therefore, the decision of the Division of Workers' Compensation was affirmed.

S.B.	P.W.C.	J.K.B.
C.O.C.	T.J.B.	M.F.C.
	M.L.B.	