SURVEY OF RECENT DEVELOPMENTS IN NEW JERSEY LAW

In this section, the Seton Hall Law Review *presents synopses of recent New Jersey cases of interest to practitioners. In so doing, we hope to assist the legal community in keeping abreast of some of the more interesting changes in significant areas of practice.*

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A volatile issue in many New Jersey school districts prior to 1982 was whether supplemental and compensatory education teachers (SCE teachers) were "teaching staff members" as defined by N.J. STAT. ANN. § 18A:1-1 (West 1968). The New Jersey Supreme Court resolved this issue in *Spiewak v. Board of Education*, 90 N.J. 63, 447 A.2d 140 (1982). In that case, the court held that these special education teachers were equivalent to other teaching staff members and should therefore be accorded the same tenure benefits. *Id.* at 84, 447 A.2d at 151. As a result, the *Spiewak* litigants were entitled to retroactive payment of accrued benefits that would have been paid had tenure status been properly awarded. *Id.* at 83 n.2, 447 A.2d at 150 n.2.

In the *Rutherford* case, the State Board of Education denied the tenure and compensation claims of SCE teachers from six different school districts. 99 N.J. at 14-20, 489 A.2d at 1151-54. All of these teachers filed their claims before June 23, 1982, the date of the *Spiewak* decision. *Id.* at 13, 489 A.2d at 1151. On appeal, the appellate division consolidated five of the suits in order to determine whether the *Spiewak* ruling should be applied retroactively to other SCE teachers who sued for tenure and benefits prior to the date of that decision. *Id.* at 14, 489 A.2d at 1151-52.

The appellate division denied all retroactive relief in the five consolidated cases and set June 23, 1982 as the starting point for calculations of compensatory relief and benefits. *Id.* at 14-20, 489 A.2d at 1151-54. In the sixth case, however, the appellate court reversed the State Board's refusal to award back pay for the period prior to June 23, 1982. *Id.* at 20, 489 A.2d at 1154. The teachers who were denied retroactive relief then appealed to the New Jersey Supreme Court, and the court granted their petition for certification. *Id.* at 19, 489 A.2d at 1154.

The supreme court affirmed in part and reversed in part. The court affirmed the appellate division's denial of retroactive tenure and remuneration to those SCE teachers who were terminated prior to *Spiewak*; however, it reversed the lower court's refusal to award retroactive benefits to SCE teachers who were employed at the time of the *Spiewak* decision and who had instituted a claim for relief prior to that time. *Id.*

Justice Garibaldi, writing for the court, stated that three factors should be considered in deciding whether to apply *Spiewak* retroactively: "(1) the purpose of the new rule and whether it would be advanced by retroactive application; (2) the reliance placed on the old rule by the parties and the community; and (3) the effect that retroactive application would have on the administration of justice." *Id.* at 22, 489 A.2d at 1155-56. She also noted that litigants responsible for a change in the law should ordinarily reap the benefit of their own effort and expense. *Id.* at 26, 489 A.2d at 1158. Thus, the court maintained that fundamental fairness would be the dominant factor in its decision. *See id.*

The court then applied these principles to the *Rutherford* case. Justice Garibaldi first pointed out that the school boards in question properly relied on prior law. She then noted that retroactive application of tenure and compensatory relief would produce a formidable financial burden on school boards that had failed to budget for the additional expense. In addition, she stated that retroactivity might adversely affect a community's tax structure and its ability to provide other basic services. *Id.* at 27-28, 489 A.2d at 1158-59. Nevertheless, the court held that the SCE teachers who filed their claims before the *Spiewak* decision were also entitled to retroactive application of the *Spiewak* rule. Thus, Justice Garibaldi refused to deprive the *Rutherford* litigants of the benefits of the *Spiewak* decision merely because of the happenstance order in which their cases came before the court. *Id.* at 29, 489 A.2d at 1159. The court attempted to alleviate the possible financial burden on school boards, however, by limiting retroactivity to those SCE teachers who were employed on the date *Spiewak* was decided and by restricting recovery of benefits to the six years prior to the *Rutherford* decision. *Id.* at 29-30, 489 A.2d at 1159-60.

The *Rutherford* court's attempt to balance the conflicting interests of all the parties in this case was commendable. The ramifications of the court's compromise, however, remain to be seen. Although the court recognized the financial impact of its holding, it may have overlooked the educational consequences of its ruling. As monies are used to defray the cost of SCE teachers' retroactive benefits, many academic programs will be jeopardized due to lack of funds.

The instructional quality of the remaining programs is also at risk. Supplemental teachers are generally unfamiliar with conventional classroom situations. Nevertheless, as a result of staff

reductions due to budgetary restraints, supplemental teachers may displace existing, nontenured teachers who possess conventional classroom skills and experience. Although the court's express goal was fairness, it failed to consider the interests of the most important beneficiaries of the state's educational system—the students.

Marjorie O. Smith

CIVIL SERVICE—SUSPENSION—SUSPENDED CITY EMPLOYEE MAY RECOVER BACK PAY FOR PERIOD AFTER SIX MONTHS' SUSPENSION ABSENT ANY EQUITABLE CONSIDERATIONS—*Steinel v. City of Jersey City*, 99 N.J. 1, 489 A.2d 1145 (1985).

On November 9, 1981, the city of Jersey City filed a preliminary notice of disciplinary action against a municipal employee, John J. Steinel. The notice charged Steinel with neglect of duty and incompetence. On the same day, the city suspended Steinel from his employment. Subsequently, the Assistant Business Administrator of Jersey City held a hearing and found Steinel guilty as charged. Because of a history of prior disciplinary violations, the penalty imposed upon Steinel was termination from his job, and a final notice confirming this decision was issued on April 19, 1982. 99 N.J. at 4, 489 A.2d at 1146 (O'Hern & Garibaldi, JJ., dissenting).

Steinel appealed this decision to the Civil Service Commission, and the Commission granted a hearing. *Id.* On March 21, 1983, the Commission entered its judgment. It agreed with the municipality's determination of Steinel's incompetence and neglect of duty. It reduced the penalty, however, from loss of employment to six months' suspension, effective on November 9, 1981. At the same time, it denied Steinel back wages for the period following the six months' suspension. *Id.* at 5, 489 A.2d at 1146 (O'Hern & Garibaldi, JJ., dissenting).

Steinel then appealed to the appellate division, challenging the Commission's denial of back pay. The appellate division reversed the Commission's determination on this issue and required the city to pay Steinel back wages for the period following the suspension, less any mitigation. *Id.*, 489 A.2d at 1146-47 (O'Hern & Garibaldi, JJ., dissenting). The New Jersey Supreme

Court affirmed the appellate court's decision. *Id.* at 2, 489 A.2d at 1145.

The supreme court held that N.J. STAT. ANN. § 11:15-6 (West 1976) prohibits a denial of more than six months' back pay to a suspended civil service employee. *Steinel*, 99 N.J. at 3, 489 A.2d at 1145-46. The court acknowledged the dissent's argument that the public would benefit if the Commission possessed the discretion to withhold back pay beyond the six-month period. The majority reasoned, however, that the explicit language of the provision in question and the extensive statutory regulation of the state civil service system precluded judicial expansion of the statute. *Id.* at 3-4, 489 A.2d at 1146.

The *Steinel* majority also noted that there was a split on the issue of back pay in appellate division decisions. The court adopted the reasoning of *Town of Belleville v. Coppla*, 187 N.J. Super. 147, 453 A.2d 1344 (App. Div. 1982), and *Millan v. Morris View*, 177 N.J. Super. 620, 427 A.2d 605 (App. Div. 1981). *Steinel*, 99 N.J. at 3, 489 A.2d at 1146. Both of those cases held that New Jersey's Civil Service Act prohibits the denial of back pay beyond the six-month suspension period absent special circumstances or equitable considerations, such as a delay of the appeal process caused by the employee. *See Coppla*, 187 N.J. Super. at 157-60, 453 A.2d at 1350-51; *Millan*, 177 N.J. Super. at 624-25, 427 A.2d at 607.

Justice O'Hern, joined by Justice Garibaldi, dissented from the majority's assessment that N.J. STAT. ANN. § 11:15-6 (West 1976) limited the discretion of the Commission to deny back pay. In their view, the statute merely prevented the Commission from suspending employees for more than six months. *Steinel*, 99 N.J. at 6, 489 A.2d at 1147 (O'Hern & Garibaldi, JJ., dissenting). Since a denial of back pay is different from a suspension, the dissent argued that it should not be subject to the same restrictions. *Id.* at 7, 489 A.2d at 1148 (O'Hern & Garibaldi, JJ., dissenting). In addition, the dissent stated that public policy would be better served by allowing the Commission the discretion to determine the appropriate back pay award. *Id.*

In *Steinel*, the supreme court effectively ruled that neither an employee's prior disciplinary record nor the conduct prompting a suspension is an equitable consideration justifying denial of back pay for more than six months. The question of what constitutes an equitable consideration, however, was not addressed and will continue to arise until it is adequately resolved.

Although the dissent's policy rationale that the guilty civil service employee should assume responsibility for the costs of his conduct is valid, N.J. STAT. ANN. § 11:15-6 (West 1976) indicates that suspension without back pay for more than six months is precluded. Therefore, allowing the Commission unfettered discretion to deny back pay would circumvent the limitations of the statute.

John D. Cromie

NEGLIGENCE—SPOUSE HAS NO DUTY TO WARN OF MATE'S POTENTIAL DANGER TO COMMUNITY—*Rozycki v. Peley*, 199 N.J. Super. 571, 489 A.2d 1272 (Law Div. 1984).

In 1977, Arthur Peley was arrested and charged with corrupting the morals of a minor. Accompanied by his wife, he underwent psychiatric treatment as a condition of a pretrial intervention program. Five years later, the parents of a group of infant boys living in the Peleys' neighborhood filed a complaint charging Mr. Peley with sexually assaulting their children. The complaint alleged that the sexual misconduct occurred during the period from May 17, 1981 through December 21, 1981. Following his arrest, Peley entered the Carrier Clinic, where he was diagnosed as a pedophiliac. 199 N.J. Super. at 573, 489 A.2d at 1273.

The parents' complaint also alleged that Catherine Peley, the wife of the defendant, knew of her husband's psychological problem and therefore had a duty to warn the plaintiffs of the possible danger to their children. *Id.* at 572, 489 A.2d at 1272. The plaintiffs contended that imposition of the duty to warn was required by public policy in order to protect children from sexual assault. *Id.* at 574, 489 A.2d at 1273. Catherine Peley moved for summary judgment, denying the existence of such a duty and claiming that even if there were such a duty, she had insufficient notice of her spouse's condition to warrant imposition of the duty to warn. The trial court granted the motion for summary judgment. *Id.* at 581, 489 A.2d at 1277.

Initially, Judge Meredith focused on whether the duty to warn could be applied to someone who was not a mental health professional. *See id.* at 574, 489 A.2d at 1273. A New Jersey

court had previously held that such a duty may be imposed upon a psychiatrist or a therapist when he determines, within the standards of his profession, that the intended victim of his patient may be in danger. *See McIntosh v. Milano*, 168 N.J. Super. 466, 403 A.2d 500 (Law Div. 1979). A psychiatric professional has a dual responsibility to protect both his patients and the community at large. *Id.* at 489-90, 403 A.2d at 511-12.

In *Rozycki*, Judge Meredith refused to impose such a high standard of care on a lay person. He observed that even professionals have difficulty predicting a patient's potential for danger. In addition, the court maintained that imposition of such a responsibility on a lay person would place new and unreasonable obligations upon someone not trained to handle them. *See Rozycki*, 199 N.J. Super. at 578-79, 489 A.2d at 1275-76.

Judge Meredith then examined the duty to warn within the context of the marital relationship. He rejected the plaintiffs' claim that Mrs. Peley should be liable because she had knowledge of her husband's dangerous condition. *Id.* at 579-80, 489 A.2d at 1276. Judge Meredith observed that public policy encourages a marital relationship founded on trust and loyalty. He pointed out that this policy is reflected in the evidentiary rules that protect confidential communications between spouses. *Id.* at 579, 489 A.2d at 1276. The judge maintained that imposing a duty to warn would undermine the marital relationship by forcing a spouse to betray marital confidences. *Id.* at 580, 489 A.2d at 1276.

Judge Meredith's reliance on spousal loyalty dilutes an otherwise compelling argument: lay persons untrained in the field of mental health do not have the expertise to predict probable criminal behavior. A dangerous consequence of reliance on lay opinion is that erroneous predictions may unfairly stigmatize an individual and thus penalize him for behavior that might never occur. The focus should not be on spousal loyalty, but on a spouse's lack of psychiatric skill. Nevertheless, the court's decision in this case strikes a necessary balance between the prevention of crime and the protection of individual rights.

Lisa M. Ferri

TOXIC TORTS—DAMAGES—TORT CLAIMS ACT ALLOWS DAMAGES ONLY FOR OBJECTIVE INJURIES—*Ayers v. Township of Jackson*, 202 N.J. Super. 106, 493 A.2d 1314 (App. Div. 1985).

The Legler area residents of Jackson Township unknowingly used contaminated well water from 1972 until late 1978. The water was contaminated by toxic pollutants leaking from a landfill operated by Jackson Township. On December 20, 1978, the Department of Environmental Protection declared a health emergency and ordered the municipality to advise residents to cease using the contaminated water. The declared emergency lasted until July of 1980. 202 N.J. Super. at 112, 493 A.2d at 1317.

During this period, the township's residents acquired water by several different methods. At first, residents carried water to their homes from tankers located throughout the area. Subsequently, the township delivered plastic water containers to the residents' homes. These containers were filled periodically by township water trucks. Finally, in July of 1980, the township completed a new public supply system and reestablished normal water service to the area's homes. *Id.*

Over three hundred residents of the area then filed a nuisance action against Jackson Township. The plaintiffs claimed that they were injured by the defendant's negligent maintenance of its landfill. *Id.* They also claimed that the wrongful contamination of the wells constituted a taking of property without just compensation in violation of 42 U.S.C. § 1983. The lower court dismissed the Federal claim before trial, however. *Id.* at 27, 493 A.2d at 1325.

A jury granted the plaintiffs an aggregate award of $15,892,303.97. This award included damages based on three theories: emotional distress resulting from use of the contaminated water, infringement on the quality of the plaintiffs' lives, and the need for future medical surveillance to monitor an increased risk of cancer and other diseases. *Id.* at 112-13, 493 A.2d at 1317. On appeal, the township challenged all three of the awards. *Id.* at 113, 493 A.2d at 1317. The appellate court allowed the award for infringement on the quality of life, but held that damages for emotional distress and medical surveillance were not recoverable. *Id.* at 116, 120, 122, 493 A.2d at 1319, 1321, 1323. The court also affirmed the trial judge's dismissal of the plaintiffs' Federal claim because the plaintiffs had an ade-

quate remedy under the New Jersey Tort Claims Act. *Id.* at 128-29, 493 A.2d at 1326.

The court first quoted the New Jersey Tort Claims Act: "No damages shall be awarded against a public entity. . .for pain and suffering." *Id.* at 114, 493 A.2d at 1318 (quoting N.J. STAT. ANN. § 59:9-2(d) (West 1982)). The court then determined that the plaintiffs' dismay and anxiety resulting from their consumption of contaminated water constituted pain and suffering. Consequently, the appellate court concluded that the Tort Claims Act precluded the plaintiffs' recovery for these emotional injuries. *Id.* at 116, 493 A.2d at 1319.

The court next distinguished subjective harm, such as pain and suffering, from harm that "objectively affect[s] quality of life." *Id.* at 118, 493 A.2d at 1320. While recovery for the former is precluded by the Tort Claims Act, recovery for the latter is not. *See id.* The court determined that the infringement on the lives of the Legler area residents was compensable because it was "objectified by actual events and deprivations." *Id.* at 119, 493 A.2d at 1321. Relying on the law of nuisance, the court held that damages for the interruption of the common convenience of water service should be equivalent to the value "placed upon its availability by ordinary people." *Id.*

The appellate court then turned its attention to the award of lifetime medical surveillance costs. The court noted that the claim was based on expert testimony that the plaintiffs had suffered a substantially increased risk of developing cancer and other illnesses. *Id.* at 121, 493 A.2d at 1321. The court pointed out, however, that the expert was unable to quantify any added risk. Furthermore, the court recognized that no plaintiff had suffered from an illness caused by the contaminated water. Consequently, the court refused to uphold the award of medical surveillance costs, declaring that it would "exercise restraint in the acceptance of novel causes of action against public entities." *Id.* at 122-23, 493 A.2d at 1323.

The court also rejected the plaintiffs' contention that their section 1983 claim should not have been dismissed. The plaintiffs pointed out that in a case involving the same parties, a Federal court had held that this claim could be submitted to a jury. Thus, the plaintiffs argued that the Federal ruling had become the "law of the case." *Id.* at 127, 493 A.2d at 1325. In response, the appellate court noted that the law of the case doctrine is discretionary; a trial judge is free to accept or reject another judge's ruling. In

any event, the court concluded that the plaintiffs' post-deprivation remedy under the Tort Claims Act satisfied due process. *Id.* at 128, 493 A.2d at 1325-26. Although the plaintiffs claimed that they might have been able to recover attorneys' fees under section 1983, the court maintained that the state remedy was adequate even though it was not as complete as the Federal remedy. *Id.* at 129, 493 A.2d at 1326 (citing *Parratt v. Taylor*, 451 U.S. 527, 544 (1981)). Therefore, the appellate division affirmed the trial judge's dismissal of the section 1983 action. *See id.*

The subject of toxic torts is a new and developing area of the law. The *Ayers* case provides a useful discussion of several of the theories currently advanced in a toxic tort action. It also illustrates a court's reluctance to accept these new theories of liability. In *Ayers*, this result was based largely on the fact that the defendant was a public entity. A court not faced with this constraint might have afforded a greater opportunity for recovery to persons exposed to toxic substances. In the future, courts should recognize that damages in toxic exposure cases are not as certain as in other areas of tort law. The judicial mechanism must be flexible in order to fashion appropriate remedies for the victims of toxic torts.

Michael A. Chagares

WORKERS' COMPENSATION—COMPENSATION RATE DETERMINED BY AGGREGATING SALARIES FROM THREE POSITIONS WORKED FOR A SINGLE EMPLOYER—*Stack v. Boonton Board of Education*, 199 N.J. Super. 121, 488 A.2d 1032 (App. Div. 1985).

John Stack responded to an advertisement placed by the Boonton Board of Education seeking a head football coach for Boonton High School. He was hired by the board as a mathematics teacher, head golf coach, and head football coach. These three positions were each governed by separate contracts in which their respective salaries were set forth. 199 N.J. Super. at 123, 488 A.2d at 1033.

On April 19, 1980, Stack's activities encompassed all aspects of his diverse employment, including overseeing a weightlifting program, teaching and tutoring mathematics, meeting with foot-

ball players, and coaching an interscholastic golf match. *Id.* at 123-24, 488 A.2d at 1033-34. After the golf match, Stack picked up the school's principal, and they drove to the Morris County Football Coaches' Association banquet. Although the principal denied recollection of their dinner conversation, Stack testified that they spoke about both the golf team and mathematics classes. Stack left the banquet alone and was later involved in an automobile accident, which left him permanently paraplegic. *Id.* at 124, 488 A.2d at 1034.

At a hearing before the Department of Labor, Division of Workers' Compensation, the compensation judge held that Stack worked under three separate contracts of employment and that "[h]is duties under each were separate and distinct from the others." *Id.* at 125, 488 A.2d at 1034. The judge concluded that the compensation rate should therefore be based solely upon the wage paid for the one job Stack was performing when he was injured—football coaching. *Id.* at 122, 488 A.2d at 1033. Stack appealed, asserting that his several jobs constituted a single employment or, alternatively, that his jobs represented a joint and concurrent employment. *Id.* at 124, 488 A.2d at 1034.

The appellate division reversed, finding no reason why separate job contracts for one employer should constitute separate employments. Writing for the court, Judge Fritz observed that because Stack needed teacher certification before being considered for the coaching position, the qualifications for one job were conditioned upon the qualifications for the other. *Id.* at 124, 488 A.2d at 1034. In contrast to the compensation judge, the court concluded that Stack's jobs were inescapably intermingled and overlapping; thus, making clear distinctions between job tasks was impossible. *Id.* at 124-25, 488 A.2d at 1034.

Judge Fritz noted that scholastics and athletics are integrated parts of the school curriculum. *Id.* at 126-27, 488 A.2d at 1035 (citing N.J. ADMIN. CODE tit. 6, § 29-6.3(a) (1984)). He pointed out that only certified teachers may organize public school pupils during the school day for purposes of coaching, physical education, or athletics. Judge Fritz also observed that in order to accomplish the remedial objectives of the Workers' Compensation Act, it must be construed in a light favorable to the injured worker. *Id.* at 127, 488 A.2d at 1035. Accordingly, the court remanded the case for entry of a judgment of compensation based upon an aggregation of the salaries for Stack's three positions. *Id.*, 488 A.2d at 1036.

The result achieved by the appellate division was fair and in harmony with the Workers' Compensation Act's goal of compensating a worker whose earning potential is limited by injuries incurred in the course of his employment. The *Stack* court demonstrated a reluctance to allow insufficient compensation awards because of spurious distinctions drawn between a worker's various jobs performed for the same employer. Thus, the court clearly manifested its desire to place employees in a financial position similar to that in which they were before being injured.

Alan W. Clark

CRIMINAL LAW—CONSPIRACY—CONSPIRACY MERGES UNLESS IT HAS CRIMINAL OBJECTIVES OTHER THAN SUBSTANTIVE OFFENSE PROVEN—*State v. Hardison*, 99 N.J. 379, 492 A.2d 1009 (1985).

In the early morning hours of November 20, 1980, the Edison police apprehended four men in connection with two incidents that had occurred a short time earlier. In the first incident, four men committed an armed robbery of the Lincoln Cafe in New Brunswick. In the second incident, two men robbed the Edison Motor Lodge at gunpoint and assaulted the night manager. 99 N.J. at 381, 492 A.2d at 1010.

Shortly after the second incident, the police noticed a car traveling on Route 1 with its lights off. After a high-speed chase, they arrested two suspects, Kenneth Hardison and Jerry Jackson. *Id.* at 381-82, 492 A.2d at 1010. Two other suspects were later apprehended, and the four were charged with four counts of robbery, conspiracy to commit robbery, possession of a gun, and aggravated assault. *Id.* at 382, 492 A.2d at 1010.

After the trial of the other two codefendants was severed, Hardison and Jackson were tried together. They were convicted of all the charges except the robbery of the Lincoln Cafe. Both Hardison and Jackson received separate, consecutive sentences for the conspiracy and robbery convictions. On appeal, the appellate division held that the conviction for conspiracy should have merged with the conviction for armed robbery. *Id.*, 492 A.2d at 1011. The appellate court reasoned that because the de-

fendants conspired to commit robbery and the jury convicted them of the motel robbery, the convictions for both offenses were precluded. The state petitioned for review, and the New Jersey Supreme Court granted certification. *Id.*

Resolution of the case hinged upon section 1-8 of the New Jersey Code of Criminal Justice, which provides that a defendant may not "be convicted of more than one offense if. . .[o]ne offense consists only of a conspiracy or other form of preparation to commit the other." N.J. STAT. ANN. § 2C:1-8(a)(2) (West 1982). The supreme court ruled that unless the conspiracy has criminal objectives other than the substantive offense proven, the offenses will merge. In an opinion authored by Justice O'Hern, the court found that the convictions of Hardison and Jackson for robbery did not establish that they also conspired to commit additional crimes. The court therefore affirmed the decision below, which merged the convictions of conspiracy and robbery. *Hardison*, 99 N.J. at 380, 492 A.2d at 1010.

Justice O'Hern first recounted the origins of the statutory provision at issue in *Hardison*. He noted that New Jersey traditionally regarded conspiracy and the completed substantive offense as separate crimes. Therefore, the offenses normally did not merge. *Id.* at 383, 492 A.2d at 1011. Justice O'Hern also pointed out that a charge of conspiracy gave a prosecutor several procedural advantages. *Id.* at 384, 492 A.2d at 1012. He explained that the existence of these advantages led to a fear that juries might convict defendants "for mere criminal intent" as well as for their overt criminal acts. *Id.* at 385, 492 A.2d at 1012. Consequently, when New Jersey adopted its new Code of Criminal Justice, it provided that a conviction for conspiracy would merge with a conviction for the completed substantive offense. Justice O'Hern emphasized, however, that when the conspiracy has additional criminal objectives, the convictions will not merge. *See id.* at 385-86, 492 A.2d at 1012-13.

The court then turned to the merits of the *Hardison* case. The state argued that the jury verdict established that Hardison and Jackson conspired to rob the Lincoln Cafe as well as the Edison Motor Lodge. The state emphasized one part of the jury charge, which suggested that unless there was a conspiracy to commit both robberies, the defendants should be acquitted of conspiracy. *Id.* at 387-88, 492 A.2d at 1013. The court relied on another section of the charge, however, which authorized the jury to find the defendants guilty of conspiracy even if they

planned only the robbery of the Edison Motor Lodge. *Id.* at 388, 492 A.2d at 1013-14. The court also pointed out that the prosecutor's response to Jackson's motion to set aside the conviction of conspiracy revealed that the prosecutor understood the jury verdict to encompass only the conspiracy to rob the Edison Motor Lodge. *Id.* at 390, 492 A.2d at 1015. Based upon the record before it, the court refused to conclude that the conspiracy had any criminal objectives beyond the completed robbery. *Id.* at 391, 492 A.2d at 1015.

In conclusion, Justice O'Hern noted that merger presents a difficult question because the Code of Criminal Justice provides that a conspiracy with multiple purposes is to be considered a single conspiracy. He added that the difficulty might be alleviated "if, only after a general verdict of guilt of criminal conspiracy involving multiple crimes, inquiry were made of the jury as to the substantive offenses embraced by their verdict." *Id.* at 391, 492 A.2d at 1015-16. He reiterated, however, that the court was satisfied that the conviction in the case at hand failed to establish multiple purposes. *Id.* at 392, 492 A.2d at 1016.

In *Hardison*, the supreme court arrived at the appropriate application of the conspiracy-merger rule. The crime of conspiracy is triggered when the likelihood of a criminal act is great enough to warrant the state's intervention. *See United States v. Feola*, 420 U.S. 671, 694 (1975). Therefore, the burden should be on the state to demonstrate beyond a reasonable doubt that a conspiracy has multiple purposes. If this strict standard is not met, it is only fair that the conspiracy conviction merge into the conviction for the completed offense. A defendant should not be stigmatized with an additional conviction based on mere suspicion. The *Hardison* opinion clearly indicates that the state failed to meet its burden in that case.

Jean L. Meyer