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EATON v. TOWN OF WELLS: A CRITICAL COMMENT

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When the highest court of any jurisdiction loses its courage or its compass, the larger interests of justice are seldom well served. This is precisely what happened here. The *Eaton*[1] case which began in late 1997 involved the claimed right of Mr. Eaton to ownership of some 2,200 linear feet of dry sand and intertidal land area adjacent to some 44 beachfront lots in the Town of Wells.[2] Arising from his asserted ownership of these areas, Mr. Eaton also sought to limit the public's use of these dry sand and intertidal land areas to those uses (fishing, fowling, and navigation) outlined a decade ago in the now famous Moody Beach cases.[3] The Town of Wells, however, also claimed to have record title to the areas in question and/or to have acquired title by adverse possession. The Town also argued that with respect to the question of public use rights the Moody Beach cases were not controlling—that, unlike Moody Beach, a broadened range of public use rights reaching back almost 100 years (including strolling, sunbathing, picnicking, swimming, and other recreational beachfront activities) could be shown to have existed here. The town was prepared to argue that this broadened range of public uses, on and within the particular

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1. *See* Eaton v. Town of Wells, 760 A.2d 232 (Me. 2000). The State of Maine, through the Office of the Attorney General, was an intervener in this case for the limited purpose of raising anew public trust issues decided adversely to the State's (and the public's) interest in Bell v. Town of Wells, 557 A.2d 168 (Me. 1989). *See* Eaton v. Town of Wells, 760 A.2d at 236.

2. *See* Eaton v. Town of Wells, 760 A.2d at 237. No competing claims with respect to any of the 44 beachfront lots were raised or decided in this case. *See id.*

3. *See* Bell v. Town of Wells, 510 A.2d 509 (Me. 1986) [hereinafter Bell I]; Bell v. Town of Wells, 557 A.2d 168 (Me. 1989) [hereinafter Bell II]. Issues surrounding these cases were addressed in a symposium issue of the Maine Law Review, 42 ME. L. REV. 1–158, (1990); *see also*, Alison Rieser, *Public Trust, Public Use, and Just Compensation*, 42 ME.L. REV. 5 (1990); Orlando Delogu, *Intellectual Indifference–Intellectual Dishonesty: The Colonial Ordinance, The Equal Footing Doctrine, and the Maine Law Court*, 42 ME. L. REV. 43 (1990).

areas in question, had long ago ripened into a right by prescription–a right held by the general public and the town.[4] The Superior Court in its October 20, 1999 Decision and Judgment expressly held that: "[t]he Town of Wells is an appropriate party to assert the public's right to [a prescriptive] easement over the property in question."[5]

After lengthy preliminary proceedings the lower court held a bifurcated trial in late 1999 that separated questions of title from questions concerning the scope of the public's use rights.[6] On the title issue, the lower court, in an Order dated September 20, 1999 and in Findings of Fact and Conclusions of Law dated September 26, 1999 found that Eaton's claim of title was superior to, and better founded than the claims of the town. The Maine Supreme Judicial Court sitting as the Law Court subsequently agreed. They concluded: "[T]he [lower] court did not err in its interpretation of the deeds and its conclusion that they conveyed the subject premises [to the Eaton's predecessor's in title]."[7] The town's theory of ownership was by no means frivolous, but both courts found that it was not as fully supported by the evidence as it needed to be in order to prevail.

As to the scope of the public's use rights in these dry sand and intertidal land areas, the lower court agreed with the town—the facts here were unlike those in Moody Beach. Moreover, the lower court did not feel itself bound by the Superior Court's findings in *Bell II*—not only were the underlying facts different, but the evidentiary showings with respect to prescriptive uses (and rights gained therefrom) were significantly different in the two cases; thus the two lower court holdings are not inconsistent with one another–they simply reach opposite results based on these different factual settings and evidentiary showings.[8] The lower court went on to hold that the town had amply demonstrated a pattern of use sufficient "[t]o establish on behalf of the general public and the Town of Wells a [prescriptive] right to use the subject premises, both the dry sand and the intertidal zone, for general recreational purposes, including but not limited to bathing, sunbathing, picnicking and walking, and beach maintenance."[9]

Regarding this aspect of the case, the Law Court agreed with the lower court on each of these points. They noted:

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4. *See* Eaton v. Town of Wells, RE-97-203 at 10 (Me. Super. Ct., York Cty., Oct. 20, 1999) (Kravchuk, C.J.).

5. *Id.* The Superior Court went on to cite several Maine Law Court cases supporting this view.

6. *See* Eaton v. Town of Wells, 760 A.2d at 236.

7. *Id.* at 242.

8. *See* Eaton v. Town of Wells, RE-97-203 at 7–9 & n.2.

9. *Id.* at 20.

> [A]lthough the trial court in the Moody Beach case may have reached a different conclusion based on the facts of that case, the trial court in this case is not bound by the trial court in another case. The determination is a factual issue and the court looks to the evidence presented in the case before it. Contrary to the Eatons' contention, the court had ample evidence in this case.[10]

The Law Court went on to note:

> [T]he [lower] court did not err in finding that the Town proved every element of a prescriptive easement. Because we affirm the court's judgment concerning the public's and the Town's right to use the property through prescriptive easement, we need not address the alternative theory of dedication . . . . [W]e need not reach the State's contention that we expand the public trust doctrine established in *Bell v. Town of Wells.*[11]

And with a simple "judgment affirmed" the Law Court majority concluded its opinion. A patient and skillful trial court was sustained in its disposition of both the property rights issues and the public use rights issues presented in this case. The property rights dimension of the case was and remains unremarkable. The lower court and the Law Court relied on settled cases, settled reasoning, as well as rules of law with respect to adverse possession and rules of deed construction of long standing. The better claim of title was ultimately sustained. But the public use rights dimension of this case was not resolved by recourse to the settled wisdom of the past. On the contrary, the town's theory of the case (with respect to this issue) and the lower court's legal reasoning was bound by and shaped by a single case, *Bell II*, a case barely ten years old handed down by a sharply divided Law Court, a case that many have come to believe is badly flawed, and incorrectly decided, the very case the *Eaton* majority (in a surfeit of judicial restraint) refused to reach or reexamine in its closing line of reasoning noted above.[12] Some might argue that the town's success on its prescriptive rights theory precluded the Law Court from addressing its prior holding in *Bell II*—this is little more than the elevation of form over substance, a dogged adherence to a general principle even when such adherence makes the rule of law and the Law Court look foolish (to say nothing of the future problems which *Bell II* will continue to create). Moreover, there are sound legal theories, theories embraced by this and predecessor Law Courts that

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10. Eaton v. Town of Wells, 760 A.2d at 244.
11. *Id.* at 246, 248.
12. *See* Eaton v. Town of Wells, 760 A.2d at 248.

would have allowed the larger questions raised in *Bell II* to be reexamined.[13] Everyone associated with this case, plaintiffs, defendants, the State as intervener, and the lower court knew that *Bell II* loomed over these proceedings like a 900 pound gorilla. The plaintiff's entire public use theory (limitation of public uses to fishing, fowling, and navigation) derives from *Bell II*. Every witness and every scrap of historical evidence, including defendant's whole approach to vindicating a broader range of public use rights, was driven by *Bell II* and the lower court knew it was without power to reexamine *Bell II*. It was bound by the principles of *stare decisis*—if public use rights in the foreshore were to be vindicated, defendant's alternative theory would have to be sustained. Given these facts, the Law Court's decision not to reach *Bell II* was unnecessary, unwise and unfortunate at best; it was an abdication of responsibility at worst.[14]

That the *Eaton* case turned out well from the standpoint of sustaining a broadened range of public use rights in this particular 2200 linear feet of foreshore must be regarded as little more than a fortuity—skillful lawyering by the town's attorney, a sympathetic lower court judge, a handful of ancients who lived long enough to offer favorable testimony, some unique historical data that was admitted into evidence, and some town actions attested to on the record that suggested a broadened range of public uses for a long enough period of time to ripen into a prescriptive right. Public use rights in the foreshore should not be made to turn on such a random alignment of fortuities. But because *Bell II* remains the law and dictates how towns and lower courts must proceed, that is precisely what will continue to happen. The public will have to continue fighting for a broadened range of use rights in foreshore areas in town after town, a thousand yards of beach here, a few hundred feet there. Essentially the same case will be tried over and over. Some will succeed where the evidence of a wider range of public uses sustaining a prescriptive right is compelling and/or where the trial court is sympathetic. Other cases will fail because records will be lost, the evidence will not be as strong, or a different trial court judge will demand a higher evidentiary standard. What a waste of time and resources; what a disservice to the bench, the bar, towns, the public, and shore owners alike. And what will we be left

13. *See* notes 15–23 *infra* and accompanying text.

14. In other societal settings we do not allow a limited success, the product of good fortune or a happy accident, to deflect us from coming to grips with larger underlying issues—for instance, the cancer patient who for the moment is spared does not deter us from continuing to look for a cure for the disease, and the fact that a victim of a drunk driver survives a horrendous crash does not deter us from insisting that drunk driving, the root problem, be dealt with.

with—a checkerboard rule of law with respect to public use rights from Kittery to Eastport.

All of this grows out of the fact that it is only the Law Court that can correct its own arguably incorrect prior pronouncements—it is only the Law Court that can reexamine *Bell II.* To say that it could have, and should have done so in the *Eaton* case, would in this writer's view be an understatement. But unfortunately, only one member of the Law Court, Justice Saufley, in a concurring opinion, would have reached this larger issue. She bluntly states: "I would overrule *Bell v. Town of Wells.*" (Citation omitted)[15] Quoting liberally from the dissenting opinion in that case and adding her own views that the majority reasoning in that case was "clearly flawed,"[16] she goes on to argue that the *Eaton* majority should not slavishly adhere to past precedents that are clearly wrong, particularly precedents that are of relatively recent origin and thus have not become settled law. Instead, such cases should be overruled, their debris and misinformation cleared away, and then, armed with a more correct rule of law (here presumably, a rule of law that would sustain state-wide the broadened range of foreshore public use rights found in *Eaton*), we would be in a far better position than the one we are in now to advance public interests and to sort out conflicts between shore owners and the public when they arise.[17]

This intelligent course urged by one member of the Law Court is not an abdication of the principles of *stare decisis* or judicial activism run wild. On the contrary, it is both "[c]ommon sense and sound judicial policy . . . ."[18] Moreover, as Justice Saufley points out, prior, and quite recent, Maine case law suggests the appropriateness of this very course of conduct. Justice Saufley cites to us three relatively recent Maine cases that have discussed settings in which *stare decisis*, or adherence to a prior holding of the court, can and should be abandoned. [19] *Myrick v. James* is perhaps the

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15. Eaton v. Town of Wells, 760 A.2d at 248.

16. *Id.* at 249.

17. *See id.* at 249–50.

18. *Id.* at 250.

19. *See id.* at 249–50, *citing* Adams v. Buffalo Forge Co., 443 A.2d 932 (Me. 1982) (revisiting and overturning prior holdings of the court with respect to privity in products liability cases); Myrick v. James, 444 A.2d 987 (Me. 1982) (revisiting and overturning prior holdings of the court with respect to when the statute of limitations commences to run in foreign object malpractice cases); Shaw v. Jendzejec, 717 A.2d 367 (Me. 1998) (revisiting and adhering to prior holdings of the court with respect to wrongful death actions brought by parents of a stillborn fetus, but doing so in a context that cites and fully subscribes to the rationale of the *Myrick* Court). *Adams* and *Myrick* both engage in a discussion of *stare decisis* that is well worth reading and seems fully applicable to the issues raised in *Eaton.* At one point the *Adams* court notes: "Whether the doctrine [of *stare decisis]* should be applied or avoided is a decision which rests in the discretion of the court. That discretion

most interesting and useful of these cases because the Law Court in that case attempts to lay out some guidelines as to when *stare decisis* should be abandoned. While acknowledging that other factors may also exist and come into play in particular settings, a five-factor set of guidelines is laid out,[20] which, if found to exist, would suggest the appropriateness of, perhaps even the need to abandon the prior precedent(s). Justice Saufley summarizes the five guidelines in a footnote of her concurring opinion,[21] but more importantly, she concludes that the five guidelines are met in the *Eaton* case. Moreover, she does not see the *Bell* or *Eaton* cases as unique; in her view "[s]uch disputes are not likely to be rare. Maine has approximately 3480 miles (5600 kilometers) of coastline . . . . The potential for multiple disputes, for continuing uncertainty, and for extensive litigation is obvious."[22] She goes on as follows: "[T]hus, we should acknowledge the problems created by our holding in *Bell* before landowners and the public are forced through years of uncertainty and unworkable restrictions founded upon a faulty legal analysis."[23]

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must be exercised with a view to whether adherence to past error or departure from precedent constitutes the greater evil to be suffered." Adams v. Buffalo Forge Co., 443 A.2d at 935 (citations omitted). In avoiding unjust results and undue hardships seemingly dictated by *stare decisis*, the *Myrick* court expresses a preference for distinguishing a prior precedent of the court, but "[w]here that technique cannot be invoked with integrity. . ." Myrick v. James, 444 A.2d at 1000, the court would abandon "[a] precedent that is no longer worthy of application . . . ." *Id.* at 1001.

20. *See* Myrick v. James, 444 A.2d at 1000.

21. *See* Eaton v. Town of Wells, 760 A.2d at 249-50 n.9: "There are a number of guiding principles that are called into play when the Court is deciding whether *stare decisis* should be applied or avoided. A prior decision may be overruled when: (1) the court is convinced that the rule of the prior decision operates harshly, unjustly and erratically to produce, in its case-by-case application, results that are not consonant with prevailing, well-established conceptions of fundamental fairness and rationally-based justice, (2) that conviction is buttressed by more than the commitment of the individual justices to their mere personal preferences, that is, by the substantial erosion of the concepts and authorities upon which the former rule is founded and that erosion is exemplified by disapproval of those conceptions and authorities in the better-considered recent cases and in authoritative scholarly writings, (3) the former rule is the creation of the court itself in the legitimate performance of its function in filling the interstices of statutory language by interpretation and construction of vague, indefinite and generic statutory terms, (4) the Legislature has not, subsequent to the court's articulation of the former rule, established by its own definitive and legitimate pronouncement either specific acceptance, rejection or revision of the former rule as articulated by the court, and (5) the court can avoid the most severe impact of an overruling decision upon reliance interests that may have come into being during the existence of the former rule by creatively shaping the temporal effect of the new rule articulated by the holding of the overruling case." *Id.*

22. *Id.* at 249.

23. *Id.*

What more can, or need, be said? The majority in *Eaton* did not accede to Justice Saufley's urging. An opportunity to revisit and almost certainly correct a relatively recent Law Court decision, *Bell II*, that at least three members of the present court have said was incorrectly decided[24] has been lost. Public use rights in the foreshore will continue to be circumscribed by the crabbed holding in *Bell II.* Towns and shoreland property owners as well as members of the public seeking to use the foreshore will proceed haltingly and uncertainly into the future wondering when, and if, the law in this area of shared rights will ever be clarified, and what form future clarifications may take. The irony of *Eaton* is complete when one recognizes that the majority opinion in this case was authored by Justice Wathen, the same Justice Wathen who barely eleven years ago in his dissenting opinion in *Bell II* gave us the sound reasoning that Justice Saufley (and one suspects a majority of the court had they taken the opportunity) would readily embrace today. But alas, the courage of the past has been replaced by the timidity of the present—Maine, our judicial system, and the rule of law is the poorer for it.

24. *See* Bell v. Town of Wells, 557 A.2d 168, 180 (Me. 1989) (Wathan, J. and Clifford, J., dissenting); Eaton v. Town of Wells, 760 A.2d at 249 (Saufley, J., concurring).