Chapter 3: Torts

James W. Smith

Follow this and additional works at: http://lawdigitalcommons.bc.edu/asml

Part of the Civil Law Commons

Recommended Citation
CHAPTER 3

Torts

JAMES W. SMITH

A. COURT DECISIONS

§3.1. Prenatal injuries. In 1884 the Massachusetts Supreme Judicial Court, in the case of Dietrich v. Inhabitants of Northampton, first formulated the rule that denied recovery to a child or the child's administrator for prenatal injuries. Prior to the last decade nearly all jurisdictions followed this rule whether the action was being maintained for physical injuries or wrongful death. Although the reasons given for such a restrictive rule varied in terminology, they rested principally upon two considerations — one highly theoretical, that the defendant could owe no duty to a person who was not in existence, and the other highly practical, that whether a prenatal injury was the cause of the death or condition of the child would be based upon mere conjecture and hence to permit recovery might give rise to fictitious claims. Both reasons have received the criticism due them.

Since 1949 most jurisdictions that have considered the problem have abandoned the rule in the Dietrich case. In 1960, in the case of

JAMES W. SMITH is Assistant Professor of Law at Boston College Law School. He is a member of the Massachusetts Bar.

The author wishes to acknowledge the research assistance of James A. King, Jr., and Robert F. Sylvia of the Board of Student Editors of the ANNUAL SURVEY.

§3.1. 138 Mass. 14 (1884). This seems to be the first decision on this point in England or America.


3 Stanford v. St. Louis-San Francisco Ry. Co., 214 Ala. 611, 108 So. 566 (1926) (Whether prenatal injury was cause of the death or condition of the child would be based upon conjecture); Allaire v. St. Lukes Hospital, 184 Ill. 359, 56 N.E. 638 (1900) (lack of precedent in that no case had permitted recovery); Dietrich v. Inhabitants of Northampton, 138 Mass. 14 (1884) (unborn child is a part of its mother; hence, no duty is owing to it; Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S.W.2d 944 (1935) (permitting recovery might give rise to fictitious claims).


Keyes v. Construction Service, Inc., Massachusetts joined the ranks of her dissenting offspring.

In the Keyes case, the plaintiff, the administratrix of a deceased child, appealed from an order of the Superior Court sustaining the defendant's demurrer to her declaration, which alleged that while her intestate was an existing viable child in his mother's womb, he received bodily injuries through the negligence of the defendant's servant in a collision of automobiles that caused him to be born prematurely and resulted in his death. The Supreme Judicial Court, after noting the numerous decisions in recent years contra to the rule of the Dietrich case, held that if the plaintiff amended her declaration to allege that the child had been born alive then the declaration would state a cause of action.

Particular note should be taken of the two conditions that the Supreme Judicial Court imposed in relaxing the rule of the Dietrich case. The declaration must allege that at the time of the receipt of the bodily injury the child was viable in the mother's womb, that is, that the foetus was so far formed and developed that if then born it would have been capable of living. Further, as noted previously, the child must be born alive. These limitations are quite common in the decisions of other jurisdictions permitting recovery for prenatal injuries, although there is support for allowing an action for previability injury if the child is born alive⁷ and for allowing an action although the child is not born alive if the injury occurs after the child is viable.⁸

The result reached by the Supreme Judicial Court in the Keyes case is a sound one. Although denial of recovery in the earlier prenatal injury cases may have been understandable on the basis of insufficient medical knowledge to connect the alleged injury causally with the harm, such an arbitrary rule today constitutes a blind adherence to stare decisis.¹¹ In fact, one may be reasonably critical of the limitations placed upon recovery by the Supreme Judicial Court and by other jurisdictions. The requirement that the child be viable at the time of the injury is bound to create very difficult questions of proof.¹⁰ Where satisfactory medical evidence of causation is available there appears to

---

⁸ Verkennes v. Corneia, 229 Minn. 365, 38 N.W.2d 838 (1949); Rainey v. Horn, 221 Miss. 269, 72 So. 2d 434 (1954). In each of these cases the injuries occurred during labor or delivery, but the opinions support recovery for injuries suffered any time after the child is viable.
⁹ Most of the recent cases adhering to the rule of the Dietrich case have done so on the basis of stare decisis, the pivotal problem being whether any change should have its impetus with the legislature or the judiciary.
¹⁰ See Prosser, Law of Torts 175, n.78 (2d ed. 1955). "Viability is a relative matter, depending upon many other factors as well as the age of the fetus. Greenhill, Principles and Practice of Obstetrics, 10th Ed. 1951, 391, 794. Infants have been born as early as the twenty-sixth week and survived. De Lee, Principles and Practice of Obstetrics, 7th Ed. 1938, 58. See Notes, 1950, 35 Corn. L.Q. 648; 1953, 14 U. of Pitts. L. Rev. 344."
be no sound reason for an arbitrary rule. The requirement that the child be born alive places a premium upon acts of such a serious nature that survival of the foetus is impossible and is particularly oppressive in malpractice cases.  

§3.2 Liability of service contractor: Res ipsa loquitur. Two aspects of the case of Carter v. Yardley & Co. 1 were examined by the Supreme Judicial Court in the recent decision of Banaghan v. Dewey: 2 may the doctrine of res ipsa loquitur be utilized when specific evidence of negligence has been introduced; and is the Yardley doctrine, dealing with the liability of a manufacturer, applicable to a contractor supplying services?

In the Banaghan case the plaintiff, a tenant in a business building owned by one of the defendants, was injured when the elevator in which he was riding plunged thirty feet to the pit. The plaintiff introduced expert evidence that the accident happened because one of the contact boxes became unfastened and fell into the pit, lodging in the mechanism and severing the cables. Further, the safety devices, an interlock system and a governor, were in an inoperative condition. Evidence was introduced that the other defendant, an elevator service company, had orally agreed to maintain the elevator in "A-1 safe condition." There was further evidence that the defective safety devices had been in an inoperative condition for a long period of time. Both defendants were adjudged liable and each appealed.

One of the objections raised by the defendant owner related to the judge's instruction that the jury might infer negligence under the doctrine of res ipsa loquitur. The defendant argued that since the evidence as to the specific cause of the accident was satisfactory and undisputed, and that since evidence as to the specific measures of care taken had been introduced, there ceased to be any basis for the application of the res ipsa doctrine. 3 On this point the Court took the position that since the jury was not required to accept the opinion evidence as to the cause of the accident, the plaintiff had the right to rely upon the doctrine of res ipsa loquitur. This position appears sound. When a fact finder may reject evidence of the specific cause of an accident, no sound reason supports a view that would preclude a plaintiff who introduces such evidence from relying upon an inference of negligence. The courts that accept such a view do so on the basis that the res ipsa doctrine is designed to aid plaintiffs who lack access to the facts; hence, when a plaintiff pleads specific items of negligence

11 See cases cited in note 8 supra.

§3.2. 1 319 Mass. 92, 64 N.E.2d 693 (1946).
3 The defendant further argued that the instruction permitting the jury to infer negligence under the res ipsa doctrine, removed from the jury's consideration any question as to the actual or apparent condition of the elevator at the time of the letting and thus imposed upon the defendant the same duty to the plaintiff that he would owe to a business invitee. The Supreme Judicial Court did not mention this highly theoretical argument in its opinion.
he thereby indicates that he has access to the facts. This is purely a non sequitur. By pleading specific items of negligence, while at the same time relying upon res ipsa loquitur, the most that the plaintiff indicates is that it is more likely than not that the accident occurred through the negligence of the defendant and that the plaintiff has evidence of certain items that are probably but not necessarily the cause of the accident. Should the fact finder reject these latter items as the cause of the accident it should then consider the strength of the inference.

The argument of the defendant elevator service company related principally to the terms of the oral contract rather than to the question of the correctness of extending the Yardley doctrine to a contractor supplying services. Since the contract terms involved a fact question, the Court held the defendant bound by the jury determination. The Court then held that the defendant's obligation is measured by the terms of its contract and "if thereby it was under a duty to maintain the elevator in a safe condition . . . it is liable to third persons not parties to the contract who are foreseeably exposed to danger and injured as a result of its negligent failure to carry out that obligation." (Emphasis supplied.) Of the many cases cited by the Supreme Judicial Court in support of this position, only two Massachusetts decisions appear, Carter v. Yardley & Co. and Kushner v. Dravo Corp. The former case deals with the liability of a manufacturer to a third person not in privity with the manufacturer, while the latter case is not clearly on point. Thus, it appears proper to state that the Supreme Judicial Court is equating the liability of a service contractor with the liability of a manufacturer under the Yardley rule.

Although there are no sound reasons for any distinction between the liability of one who contracts to supply a chattel and one who contracts to perform a service, the privity of contract requirement has remained more of an obstacle in the latter cases. The reasons have been partly historical and partly due to the courts' fear of burdening con

4 "The rule of presumptive negligence and the rule allowing the pleading of negligence, generally are rules which grow up out of necessity in cases of this character, and are exceptions to the general rules of pleading and proof. When plaintiff, by his petition, admits that there is no necessity, the reason for the rule, ex necessitate, fails, and with it the rule itself." Roscoe v. Metropolitan Street Ry., 202 Mo. 576, 587, 101 S.W. 32, 34 (1907). For other cases and criticism, see 2 Harper and James, The Law of Torts §19.10 (1956).

5 The defendants' brief indicated that no exception was made to the charge involving this point and therefore it was not open for review.

6 340 Mass. 73, 80, 162 N.E.2d 807, 812 (1959).
7 319 Mass. 92, 64 N.E.2d 693 (1946).
9 The case of Kushner v. Dravo Corp. involved an action brought by the owner of a dwelling house to recover for damage allegedly caused by the defendant's negligent blasting. The Supreme Judicial Court held that, although the specific safety requirements under the contract with the Metropolitan District Commission were not admissible to establish a duty to the plaintiff, they did furnish some evidence as to what was due care in the circumstances.

10 In the famous English case, Winterbottom v. Wright, 10 M. & W. 109, 11 L.J.
tractors with too great a responsibility. It is worthy of note that Massachusetts, which was one of the last jurisdictions to accept the doctrine of liability of manufacturers toward persons not in privity with the manufacturer, has applied this doctrine to service contractors without the fanfare and difficulties present in other jurisdictions.\footnote{3 Some jurisdictions draw a distinction in these cases between misfeasance and nonfeasance, holding the contractor liable only when misfeasance is involved. It is difficult to say whether the Banaghan case would involve misfeasance or nonfeasance. Nonfeasance may be called misfeasance where there has been some performance such as a partial inspection. See Hoppendietzel v. Wade, 66 Ga. App. 132, 17 S.E.2d 239 (1941).}

\subsection{3.3 Nuisance.} Although the expression “negligence is not necessary for a nuisance” is no doubt a legal truism, its constant repetition without proper qualification has led to the belief that a defendant may be liable for the unintended results of his acts despite the fact that the defendant’s conduct is neither negligent nor ultrahazardous. This conclusion has resulted in an unwarranted blending of the nuisance doctrine with the rule of \textit{Rylands v. Fletcher},\footnote{Ex. 415, 152 Eng. Rep. 492 (1842), the Court of Exchequer held that the breach of a contract to keep a mailcoach in repair after it was sold could give no cause of action to a passenger in the coach who was injured when it collapsed. “The misbegotten progeny of that case survive even today.” Prosser, Law of Torts 517 (2d ed. 1955). See Woodside Manor v. Rose Bros. Co., 83 A.2d 325 (D.C. Mun. App. 1951); Miller v. Davis & Averill, 137 N.J.L. 671, 61 A.2d 253 (1948).} involving the nonnatural use of land by a landowner and a consequent broadening of the limitations of that rule. Consequently, plaintiff’s attorneys have caused the courts some difficulty by indiscriminately declaring personal injury cases, when the alleged negligent conduct is less than obvious, under both a negligence and a nuisance theory. A classic example of the theoretical difficulties ensuing from such a practice is demonstrated by the recent decision of \textit{Delano v. Mother’s Super Market, Inc.}\footnote{2340 Mass. 293, 163 N.E.2d 920 (1960).}

In the \textit{Delano} case, the plaintiff, a business invitee, sustained injury when she slipped on ice while walking across the defendant’s parking lot early in the morning. "The area had been cleared on the day prior to the accident, but ice had formed that evening from rain and melting snow channeled from the drain of the defendant’s building to the parking lot. A light snow had then concealed the ice. The plaintiff’s principal argument, apart from her allegation of negligence, rested upon the theory that the presence of snow and ice on the defendant’s parking lot constituted a nuisance, thus, rendering the defendant liable irrespective of negligence. The plaintiff analogized the facts of her case to situations in which the Court has permitted recovery to pedestrians injured on public ways from accumulations of ice and snow emanating from a nonnatural drain on adjacent property,\footnote{3 Bullard v. Mattoon, 297 Mass. 182, 8 N.E.2d 348 (1937); Leahan v. Cochran, 178 Mass. 566, 60 N.E. 382 (1901); Smethurst v. Barton Square Independent Congregational Church, 148 Mass. 261, 19 N.E. 387 (1889); Shipley v. Fifty Associates, 106 Mass. 194 (1870). It is not at all clear that these cases indicate liability without...} sub-

\section*{§§3.3}

\textbf{TORTS} 35

Published by Digital Commons @ Boston College Law School, 1960

5
mitting that she should not be barred from recovery merely because she was injured as a business invitee on defendant's parking lot rather than as a pedestrian on the public way. The trial judge found that there was no negligence on the part of the defendant but rendered judgment for the plaintiff on the theory of nuisance. Upon the defendant's exceptions to the trial judge's rulings with reference to the nuisance count, the Supreme Judicial Court was faced directly with the question: may a defendant be held liable for personal injury upon the theory of nuisance for the creation of a dangerous condition existing solely within the confines of the defendant's own property and incidentally, but perhaps more significantly as a guide in future cases, may a defendant be held liable for the unintended results of his acts, on a theory of nuisance, despite the fact that the defendant's conduct is neither negligent nor ultrahazardous?

The Supreme Judicial Court, one justice dissenting, was unwilling to extend the doctrine of the pedestrian cases "if it exists apart from negligence" to the creation of a dangerous condition existing solely within the confines of the defendant's own property. This reasoning appears sound. Assuming liability under a nuisance theory could be established in the absence of negligence or an ultrahazardous activity, the pedestrian cases may be predicated upon a public nuisance. In the Delano case the nuisance would be neither public nor private. To permit recovery upon the plaintiff's theory would extend the duty of a storekeeper or other business invitee beyond that of exercising reasonable care to keep the premises in a safe condition.

For a majority of the Court, the disposition of the first question constituted sufficient basis to order judgment for the defendant. A Justice who dissented in part brought directly into focus the relevancy of the second question and the effect that an erroneous answer to it may have had on the trial judge. More specifically, since no intentional harm nor ultrahazardous activity was involved, and since the trial judge made a finding of no negligence, he must have held the view that the plaintiff could recover under a nuisance theory despite an absence of negligence or intentional or ultrahazardous conduct. This view may well have diminished in his mind the importance of the negligence issue. Under these circumstances, his finding of an absence of negligence might have referred only to specific negligence in the construction or maintenance of the building or in not having removed the ice or placed sand on it, and not with reference to whether the defendant exercised reasonable care in allowing water to be channeled over its parking area when he might reasonably have foreseen that it would freeze and cause a dangerous condition. Since there was suffi-
§3.4 Mental disturbance. With the exception of actions for assault, the courts for many years had refused to redress mental harm whether perpetrated intentionally or negligently. The reasoning behind such an arbitrary stand was a fear on the part of the judiciary of a flood of frivolous litigation. Gradually, however, the courts have moved toward recognition of a cause of action in this area, starting in the intentional tort field and extending into negligence. Initially, to substantiate the validity of his claim, the plaintiff, in an action for intentional mental disturbance, had to show some physical harm emanating from the mental disturbance. In a negligence action, the plaintiff was required to demonstrate some physical touching accompanying the mental harm. Eventually many jurisdictions abandoned these requirements, regarding more the severity of the mental harm accomplished than the evidence of physical harm or physical touching in establishing a cause of action.

Two recent cases dealt with the status of this area of the law in Massachusetts. In *Cohen v. Lion Products Co.*, the United States District Court for the District of Massachusetts, while indicating a complete absence of Massachusetts decisions covering the area, assumed that Massachusetts would recognize that it is a tort for a person, without a privilege to do so, intentionally to cause emotional distress to another, irrespective of whether this distress results in physical harm. In *Sul-*


§3.4. Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act causes that alone.” Lynch v. Knight, 9 H.L.C. 557, 598, 11 Eng. Rep. 854 (1861).

livan v. H.P. Hood & Sons, Inc.\(^6\) the Massachusetts Supreme Judicial Court indicated its unwillingness to overrule the case of Spade v. Lynn & Boston R.R. Co.,\(^7\) which enunciated the rule refusing recovery for fright, terror, alarm, anxiety or distress of mind resulting from negligence, unless accompanied by injury to the person from without, irrespective of any physical injuries caused solely by the mental disturbance. Nothing further will be said concerning the Cohen case. It is hoped that the Massachusetts Supreme Judicial Court will concur in the principle set out in that decision should a similar case come before it. A few comments should be made about the Sullivan case.

In the Sullivan case, the plaintiff suffered severe emotional shock as the result of discovering a dead mouse and fecal matter in the milk container from which she had consumed milk. For six weeks following the incident the plaintiff experienced periods of sweats, itching, and nausea, all of which caused her discomfort and loss of sleep. Several days following the incident the plaintiff broke out in a rash, which subsequently turned into sores. Although the facts found by the auditor are set out in a somewhat confusing manner, it appears that while the plaintiff did not suffer bodily harm from her consumption of the milk and fecal matter, she did suffer physical injury as a consequence of the emotional disturbance. The plaintiff did not request the Supreme Judicial Court to overrule the Spade case but rather argued that the swallowing of the fecal matter constituted a sufficient impact or touching from without to make the Spade case inapplicable. The Court properly rejected this argument. Whether one approves or disapproves of the rule of the Spade case, it should not be "watered down" by trivial distinctions. It is the complete arbitrariness of the rule of the Spade case, however, that requires conscientious attorneys to resort to trivial touchings to establish the validity of the plaintiff's claim. Recovery in these cases should depend upon the degree of severity of the emotional disturbance. The intelligence of the trial judge and the common experience of the members of the jury, combined with the review function of the appellate court, should provide more than adequate protection against frivolous claims. If such a position results in increased litigation, which is doubtful, and hence in increased expense to the Commonwealth, the additional outlay is well expended.\(^8\)

§3.5. Attractive nuisance. While many courts today avoid reference to the phrase "attractive nuisance" as a label that has exhausted any useful purpose it may have had at its inception, most jurisdictions recognize a distinction between the status of trespassing children and adult trespassers. In the recent decision of Smith v. Eagle Cornice and Skylight Works,\(^1\) by way of dicta, Massachusetts retained its posi-

---

\(^7\) 168 Mass. 285, 47 N.E. 88 (1897).
\(^8\) For a collection of authorities critical of the Massachusetts rule, see Orlo v. Connecticut Co., 129 Conn. 231, 21 A.2d 402 (1941).

tion as one of the seven American jurisdictions that continue to repudiate any distinction between trespassing children and adult trespassers.\(^2\)

While properly affirming the trial judge’s refusal to instruct the jury that the “doctrine of attractive nuisance is not recognized under Massachusetts law,” as a mere abstract proposition of law,\(^3\) the Supreme Judicial Court stated: “We assume that if the plaintiff came into contact with the axe by reason of a trespass or other wrongful act he could not recover in this action which is based on negligence.”\(^4\) The Court also approved the instruction to the jury that stated that if the plaintiff voluntarily “participates in the wrongful act of others, and is thereby injured, he cannot recover, through there may have been negligence on the part of the defendant which contributed to the injury.”\(^5\)

This position, which denies recovery to the infant trespasser, refuses to categorize the intermeddling of the child as a reasonable foreseeable risk upon which recovery in negligence may be predicated.\(^6\) The Supreme Judicial Court has, however, treated the intermeddling of a child as a foreseeable intervening cause when harm results to a third person not a party to the trespass.\(^7\) Since it is at least equally foreseeable that a trespassing child will injure himself rather than someone else, it is clearly not the defendant’s lack of reasonable foreseeability of the child’s trespass that is the basis of a denial of recovery in all of these cases. The situation parallels in many respects the defense of contributory negligence.\(^8\) However, in determining whether an infant plaintiff has himself been negligent, the age and experience of the child are considerations.\(^9\) The Supreme Judicial Court, in an appro-


\(^5\) Ibid.


\(^7\) Lane v. Atlantic Works, 111 Mass. 136 (1872).

\(^8\) Although the intervening negligence of a third party will not excuse the first wrongdoer if the negligent act ought to have been foreseen (Flaherty v. New York, New Haven & Hartford R.R., 337 Mass. 456, 462, 149 N.E.2d 670, 674 (1958)) such intervening negligent act on the part of the plaintiff will bar recovery.

\(^9\) See Bartley v. Almeida, 322 Mass. 104, 107, 76 N.E.2d 22, 24 (1947). “The plaintiff would not be barred from recovery if he exercised the care of a child of his age under like conditions.”
priate case,¹⁰ should adopt the position advocated by the Restatement of Torts.¹¹ This position has been adopted by a majority of courts in this country.

§3.6. Defamation: Excessive publication. A type of qualified privilege generally recognized by the courts in defamation cases is that which attaches to a publisher who is protecting his own legitimate interests.¹ Thus, one who utters defamatory statements in an attempt to prevent theft of his property is partially insulated against liability for a mistake of judgment. It has been quite universally held that malice on the part of the publisher will terminate the immunity.² Although the publisher may be careless in forming an inaccurate judgment of the facts without being required to respond in damages, the question arises as to whether this protection also extends when he is careless with reference to his audience. In Massachusetts decisions the matter of excessive publication has usually been discussed as an element of malice.³ In the recent decision of Galvin v. New York, New Haven and Hartford R.R.,⁴ the Supreme Judicial Court had for consideration the question of whether the privilege may be abused in the absence of malice on the basis of unnecessary, unreasonable, or excessive publication. The Court answered in the affirmative.

In the Galvin case, the plaintiff, a police guard in the employ of the defendant, was under suspicion of stealing from the defendant's ullage house to which he had been assigned. Two other of the defendant's guards, assigned by the defendant to observe the activities of the plaintiff, after seeing the plaintiff visit his automobile on several occasions,

¹⁰ Some authorities have speculated that it is a lack of proper cases in recent years that accounts for the adherence of some jurisdictions to the older rule. See Prosser, Trespassing Children, 47 Calif. L. Rev. 427, 435 (1959).

¹¹ Section 339 of the Restatement of Torts states: "A possessor of land is subject to liability for bodily harm to young children trespassing thereon caused by a structure or other artificial condition which he maintains upon the land, if
(a) the place where the condition is maintained is one upon which the possessor knows or should know that such children are likely to trespass, and
(b) the condition is one which the possessor knows or should know, and which he realizes or should realize as involving an unreasonable risk of death or serious bodily harm to such children, and
(c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling in it or in coming within the area made dangerous by it, and
(d) the utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein."

§3.6. ¹¹ For cases on the subject see 1 Harper and James, The Law of Torts §5.26 (1956); Prosser, Law of Torts, § 95 (2d ed. 1955).

² Coleman v. MacLennon, 78 Kan. 711, 98 Pac. 281 (1908); Doane v. Grew, 220 Mass. 171, 107 N.E. 620 (1915); Rosenberg v. Mason, 157 Va. 215, 160 S.E. 190 (1931); 3 Restatement of Torts §599.


§3.7

accused him in a loud tone in the presence of a large gathering of having taken some of the defendant’s property and demanded that he open his automobile. Upon the opening of the automobile, the defendant’s employees found only a few insignificant items that had been given to the plaintiff by several visitors to the clubage house.

The Court’s holding on abuse of qualified privilege is in accord with the view of most jurisdictions. The question does arise, however, as to what constitutes excessive or unreasonable publication. The privilege certainly extends to publication to one with a recognized interest in the situation. It would also apply in the situation in which the exigency of the occasion demands immediate action. “A storekeeper who cries out when a theft is apparently committed would act as most men would under the circumstances.” 5 It would further appear that the privilege should not be destroyed when the defamatory matter was incidentally overheard by disinterested persons despite reasonable care on the part of the defendant. When, however, the defendant has negligently allowed the statement to be overheard by a disinterested third party, should the question of the degree of the defendant’s negligence be raised? Seldom have the courts attempted to discuss this area of defamation so minutely. The Supreme Judicial Court in the Galvin case has wisely followed this course. Labels would tend toward confusion rather than enlightenment. The language used by the Court in the Galvin case, “... defendant’s publication of the accusations was in the circumstances so unreasonable as to constitute an abuse of the privilege” 6 (emphasis supplied), appears to provide a standard for jury charges more comprehensible than one that would embody gradations of negligence.

§3.7. Deceit: Measure of damages. A fundamental problem presented to the courts in deceit cases is the measure of damages to be awarded. Unlike the rule applied to most intentional wrongs, the plaintiff in a deceit action can recover only in event that he can show actual pecuniary harm. American courts are divided on the question of measurement of damages, a minority accepting a so-called “out-of-pocket” rule that permits the plaintiff to recover the pecuniary loss he has suffered as a proximate result of the defendant’s misrepresentation, while a majority adheres to the “benefit-of-the-bargain” rule, which allows the plaintiff to recover in damages the difference between what he actually received and what he would have received if the representations made by the defendant had been true. The former rule has been defended on the basis that it grants true tort damages. Further, it is contended that “out-of-pocket” damages are more susceptible of proof than “benefit-of-the-bargain” damages. The advocates of the other view take the position that the form of action is immaterial and that the deceitful defendant is not merely a fraudulent person but a war-

rantor of the truth. Thus, the relief granted in such a case should include damages for the false warranty. Further, the defendant in an “out-of-pocket” jurisdiction cannot “lose anything by his fraud, though he stands a chance of making a profit if he can get away with it.”

The Massachusetts decisions, in awarding damages in actions of deceit, have followed, at least in appropriate cases, the “benefit-of-the-bargain” rule.

In the recent decision of Rice v. Price, the defendants’ contention was that the plaintiffs were not entitled to recovery because they were unable to establish “benefit-of-the-bargain” damages. The plaintiffs took the position that they sought and received only “out-of-pocket” damages, and that it was not the Supreme Judicial Court’s intention in having a “benefit-of-the-bargain” rule of damages in deceit cases to foreclose recovery when the plaintiff seeks something less. The fraud alleged in the Rice case involved statements of material facts about the capabilities of an electrical heater manufactured by the defendants. In reliance upon these statements the plaintiffs terminated their employment and invested their time and money in a new corporation established to sell and distribute the defendants’ heaters. When the falsity of the defendants’ claims became apparent the corporation was forced to discontinue business. The “out-of-pocket” damages sustained by the plaintiffs included the loss on their investment and the loss of earnings from their prior employment and were not difficult to determine. The defendants argued that the plaintiffs, in order to recover at all, would have to prove the difference between the actual value of the new employment and what that value would have been had the representations been true, and that since the value of the latter item was purely conjectural, the plaintiffs were not entitled to recovery.

The Supreme Judicial Court in the Rice case affirmed the trial court’s judgment for the plaintiffs, granting what amounted to “out-of-pocket” damages, principally upon the basis that difficulties of proof of “benefit-of-the-bargain” damages (under a rule designed to be generous) “can hardly be permitted . . . to relieve the defendants of responsibility for losses which their representations have caused.”

This position is sound and is supported by the language of prior Massachusetts decisions. Rigid application of either an “out-of-pocket” rule or a “benefit-of-the-bargain” rule tends to prevent just recoveries.


4 340 Mass. at 508, 164 N.E.2d at 895.

5 See Kilgore v. Bruce, 166 Mass. 136, 139, 44 N.E. 108, 109 (1896) (“The rule of damages is to be such as will be just, under the circumstances of the particular case”); David v. Belmont, 291 Mass. 450, 453, 197 N.E. 85, 85 (1935) (“[T]he damages recoverable are those which naturally flow from the fraud”).
A reconciliation of the two rules appears in a leading Oregon decision,\(^6\) which was cited by the Court in the *Rice* case with approval. This decision, which has gained a following in other jurisdictions, reduces the matter to four rules:

1. If the defrauded party is content with the recovery of only the amount he has actually lost, his damages will always be measured under that rule.
2. If the fraudulent transaction also amounted to a warranty, he may recover for loss of the bargain, because a fraud accompanied by a broken promise should cost the wrongdoer as much as the breach of promise alone.
3. Where the circumstances disclosed by the proof are so vague as to cast virtually no light upon the value of the property had it conformed to the representations, damages will be awarded equal to the loss sustained, and
4. Where the damages under the benefit-of-bargain rule are proved with reasonable certainty, that rule will be employed.\(^7\)

### B. Legislation

\(\S\)3.8. Duty of care: Police officer. Chapter 20 of the Resolves of 1960 provides for an investigation by the Judicial Council relative to establishing a degree of care owed by a property owner to a police officer entering property in the performance of his duty. The present Massachusetts view, in accord with a majority of jurisdictions, categorizes a police officer who comes upon land in performance of his duty but without actual invitation as a licensee to whom the person in control of the premises “owes . . . no duty of care with respect to their condition.”\(^1\) The refusal by most courts to treat a police officer as other than a licensee stems from the consideration that police officers are likely to enter parts of premises not frequented by the ordinary business invitee and at unexpected times. A minority of jurisdictions, Massachusetts included,\(^2\) have permitted a police officer to recover for the negligence of a person in control of property when the officer entered by request upon a part of the premises ordinarily used by other members of the public.

A recent New York decision\(^3\) has taken the position that the duty owed to a police officer is “reasonable care to keep in safe condition those parts of the premises which are utilized as the ordinary means of access for all persons entering thereon . . .” and “if the owner knows of the presence on the premises of officially privileged persons, such as a . . . policeman, is cognizant of a dangerous condition thereon, and

---

has reason to believe that they are unaware of the danger, he has a
duty to warn them of the condition and of the risk involved. . . ." 4
The New York court further stated that “whether they [police officers]
have been summoned by the owner or enter of their own volition, the
duties owed them do not vary.” 5 This position would appear to pro­
vide a police officer with a reasonable degree of protection while not
placing an undue burden upon the property owner.

44 A.D.2d at 281, 164 N.Y.S.2d at 281.
5 4A.D.2d at 281, 164 N.Y.S.2d at 280.

http://lawdigitalcommons.bc.edu/asml/vol1960/iss1/6