Chapter 3: Torts

James W. Smith
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Torts

JAMES W. SMITH

A. COURT DECISIONS

§3.1. Liability of parents: Negligence. The common law, unlike the civil law,¹ has never recognized vicarious liability arising out of the parent-child relationship. Parents, however, have been adjudged liable under the common law for harm inflicted by their children when the parents' negligence in not controlling their children was deemed a proximate cause of the harm.² Liability in such instance is based upon the parents' own wrong. Cases in this area have generally involved situations where the parents either negligently allowed a child to use a dangerous instrumentality or failed to take corrective measures to restrain a child from committing certain harmful conduct, when such parents knew or should have known of the child's propensity for such conduct.³ The Supreme Judicial Court has on several occasions upheld liability in the former situation.⁴ In the 1962 case, Caldwell v. Zaher,⁵ the Supreme Judicial Court was presented for the first time with the question of the parents' liability in the latter instance.

In the Caldwell case the declaration alleged that the defendants were warned and knew that their minor son had a tendency toward assaulting young children and failed to restrain such conduct, as the result of which the minor son assaulted and injured the plaintiff's minor child. Count one of the declaration was for personal injuries and count two was for consequential damages. The trial court sustained a demurrer to the declaration and the plaintiff appealed. The Supreme Judicial Court, while holding the first count defective, in that the action for personal injuries should have been brought in the name of the minor

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

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§3.1. ¹ Louisiana by statute holds parents liable for the torts of their children. See Annotation, 155 A.L.R. 85 (1945); Note, 6 La. L. Rev. 478 (1945).
² See cases collected in Annotation, 155 A.L.R. 85 (1945).
by her next friend, overruled the order sustaining the demurrer on the basis that the second count stated a good cause of action. Further the Court held that the first count would state a good cause of action after the allowance of a proper amendment substituting the name of the minor as party plaintiff. In so holding the Court took the position that the principle of the Massachusetts' decisions allowing recovery where the parent was negligent with respect to their child's possession of a dangerous weapon was equally applicable to a case where the parents' negligence was based upon their failure to restrain harmful conduct on the part of their child where they knew or should have known of the child's propensities toward such conduct. The decision is in accord with the cases in other jurisdictions dealing with this matter.

The decision in the *Caldwell* case, while undoubtedly correct, is not without its accompanying problems. When a parent's liability is based upon negligence with respect to his child's possession and use of a dangerous instrumentality, the unreasonable conduct is fairly definable. That is, the parent was unreasonable in either entrusting the dangerous instrumentality to the child or in not removing it from the child. When, however, the alleged negligence consists in not properly restraining a child with propensities toward a certain type of harmful conduct, the question arises as to what steps constitute proper parental discipline under the circumstances. Total confinement of the child would not seem warranted in most cases.

A further problem presented by the *Caldwell* case is that of distinguishing between a mischievous temperament and a proclivity toward a certain type of harmful conduct. Since the standard of liability is negligence, the conduct on the part of the child must be such that the harm that occurred was a reasonably foreseeable consequence of the failure on the part of the parents properly to supervise the child.

An argument can be advanced for holding parents strictly liable for at least the intentional torts of their children under their control. A child's commission of an intentional wrong often springs not from the failure of his parents to control him with reference to some particular type of conduct but rather to the general failure on the part of his parents to discipline him properly from his early youth. As between the parents of the victim of the intentional wrong and the parents of the undisciplined wrongdoer, it would not seem unjust to cast the financial burden resulting from the wrong on the latter.

§3.2. **Strict liability: Dogs.** General Laws, c. 140, §155, provides:

> If any dog shall do any damage to either the body or property of any person, the owner or keeper shall be liable for such damage, unless such damage shall have been occasioned to the body or

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6 A demurrer to a declaration as a whole must be overruled if either count is good. *Burke v. Firestone Tire & Rubber Co.*, 319 Mass. 972, 973, 65 N.E.2d 917 (1946).

7 See cases cited in note 4 *supra*.

8 See cases collected in Annotation, 155 A.L.R. 85 (1945).
property of a person who, at the time such damage was sustained, was committing a trespass or other tort, or was teasing, tormenting or abusing such dog. [Emphasis supplied.]

Under this statute the owner or keeper of the dog is liable without proof of negligence, but it is incumbent upon the plaintiff to plead and prove that at the time of the injury he was not committing a trespass or other tort and that he was not teasing, tormenting or abusing the dog. The 1962 Survey year decision, Rossi v. Del Duca, raises the question as to the intent of the legislature with reference to the meaning of the words "committing a trespass."

In the Rossi case the plaintiff, a minor, was injured when bitten by two dogs owned by the defendant while the plaintiff was on land controlled by the defendant. The plaintiff had entered the defendant's land to avoid a third dog, not owned by the defendant, which had chased her down a dead-end street.

The defendant argued that since the plaintiff was trespassing on the defendant's property when injured she was barred from recovery under the statute. The plaintiff argued that since she was privileged to enter the defendant's property to protect her person she was not committing a trespass under the statute. The Supreme Judicial Court, while assuming "a legislative recognition of the right of a possessor of land to keep a dog for protection against trespassers," upheld a recovery by the plaintiff under the statute on the basis that the entry by the plaintiff on the land of the defendant was privileged and therefore, at the time of the injury, she was not committing a trespass within the meaning of the statute.

From a literal reading of the statute, the conclusion reached by the Supreme Judicial Court in the Rossi case is buttressed by the language in the statute, "or other tort." The use of the word "other" would seem to indicate that when using the word "trespass" the legislature was referring to a tortious entry. Clearly a privileged entry on the land of another, as occurred in the Rossi case, is not tortious.

On the other hand, since the statute in question imposes liability not recognized by the common law under these circumstances, it should be strictly construed. While accepting the rule that a privileged entry upon the land of another is not a trespass, this rule has its principal application with reference to insulating the person making the voluntary entry from liability to the possessor of the land and destroying the possessor's immunity from liability in resisting the intruder. It does not necessarily follow that in using the word "trespass" the legis-

7 See Ploof v. Putnam, 81 Vt. 471, 71 Atl. 188 (1908).
lature was referring solely to a tortious entry. By exculpating the owner in the case of a trespasser, the legislature recognized a right on the part of the possessor of land to keep a dog for the protection of the owner's property interests. This right may be of great importance to a person, as to the defendant in the Rossi case, who stores valuable equipment on the property.\(^8\) While granting such a right, the legislature has placed upon the owner the risk that the dogs would attack someone other than a trespasser. But the owner of the land can in most cases greatly diminish this risk by confining the dog on a part of his land not frequented by invited or anticipated persons. It is conceivable, therefore, that the legislature, not wishing to place an intolerable burden on the landowner, used the language "committing a trespass" as including any unpermitted and unanticipated entry against which the landowner is completely unable to protect himself.

§3.3. Nuisance: Vibrations. In a 1943 case, United Electric Co. v. Deliso Construction Co.,\(^1\) the defendant, in constructing an underground tunnel, used compressed air to force cement into the earth for the purpose of forming the roof of the tunnel. Some of the cement found its way into the plaintiff's manholes and conduits resulting in expensive repairs. The plaintiff's declaration contained counts in negligence, nuisance, escape of a dangerous instrumentality and trespass. The trial judge directed a verdict for the defendant on the last three counts, and the jury returned a verdict for the defendant on the negligence count. The Supreme Judicial Court reversed the trial judge, sustaining the counts in trespass and nuisance on the basis that the use of the land by the defendant was unreasonable. Since the defendant's conduct was neither intentional nor negligent, this decision amounted to the imposition of strict liability even though the defendant's conduct was not ultrahazardous.\(^2\)

Recently the Supreme Judicial Court, in several cases not closely analogous to the facts of the United Electric Co. case, hinted vaguely at dissatisfaction with the United Electric Co. decision.\(^3\) In these cases, however, the Court was able to distinguish rather than overrule the United Electric Co. decision. In a 1961 decision, Ted's Master Service, Inc. v. Farina Brothers Co.,\(^4\) the Supreme Judicial Court had before it a case quite analogous to the United Electric Co. case.

In the Ted's Master Service, Inc. case, the defendant, while constructing a tunnel, used a compressed air pile hammer to drive steel beams

\(^8\) In the Rossi case, the defendant had stored on the property bulldozers, graders and other equipment.

\(^3\) For a criticism of the United Electric Co. case see Seavey, Nuisance, Contributory Negligence and Other Mysteries, 65 Harv. L. Rev. 984, 987, 988 (1952).

into the ground. Vibrations from this operation caused cracks to appear in the plaintiff's stucco building, which was located on filled land approximately seventy feet from the activity and on the opposite side of the street. The plaintiff's declaration contained a count for negligence and a count for nuisance. The trial judge directed a verdict for the defendant on both counts and the plaintiff appealed. The Supreme Judicial Court, without citing the United Electric Co. decision, affirmed the action of the trial judge. With respect to the nuisance count the Court cited two cases which had expressed dissatisfaction with the concept of nuisance as a distinct strict liability theory of recovery.

While the United Electric Co. case was not expressly overruled in the Ted's Master Service, Inc. case, it would seem to have been overruled sub silentio. In rejecting the nuisance count as a distinct theory of strict liability in the Ted's Master Service, Inc. case, the Court adopted the view of the Restatement of Torts that liability in a nuisance count must be based upon a determination that the interference is intentional and unreasonable, or results from conduct which is negligent, reckless or ultrahazardous. Since the interference in the United Electric Co. case was not intentional in the sense that the defendant was aware of the invasion to the plaintiff's interest, was neither negligent, reckless nor involved ultrahazardous conduct, it is unlikely that the United Electric Co. case would be followed today even in a case involving the same fact situation.

§3.4. Unfair competition: Appropriation of another's vocal delivery. One of the most troublesome areas emerging in the law of torts in recent years is the question of granting relief for the unfair appropriation by a competitor of another's creative work which is not the proper subject for a patent or copyright. Most of the cases dealing with this problem have drawn a distinction between imitation of another's ideas, styles, designs, etc. and passing off the product or service of the defendant as being sold or provided by the plaintiff. In the former situation it is generally held that there is no common law patent or copyright. Several reasons have been given for the denial of a common law remedy in this situation. Relief has been denied on the basis that since the general subject matter has been confided to the


6 Restatement of Torts §822.

7 Section 825 of the Restatement of Torts defines an intentional invasion as follows: "An invasion of another's interest in the use and enjoyment of land is intentional when the actor

"(a) acts for the purpose of causing it; or

"(b) knows that it is resulting or is substantially certain to result from his conduct."

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Legislature, an omission in the resulting legislation must be taken as having been deliberate so that judicial relief supplementing the legislation would be tantamount to an amendment. Also, in attempting to deal with the subject matter, courts would be faced with such problems as whether the particular idea was really new and required invention and for how long a period of time the judicial safeguard should prevail. Further, underlying the entire problem is the public policy issue of encouraging competition and avoiding monopolistic situations. As long as the consumer is not misled, imitation produces competition which in turn theoretically results in a better product at a reasonable price. Standing on the other side of the ledger is the laudable if not universal legal principle that one person should not be allowed to appropriate to himself the fruits of another's labors. The 1962 Court of Appeals case, *Lahr v. Adell Chemical Co.*, raises problems with reference to the applicability of the distinction between imitation and passing off to the appropriation of a unique style of vocal delivery.

In the *Lahr* case the plaintiff, a well-known professional entertainer, complained that the defendant, in advertising its product "Les­ toile" on television, used as a commercial a cartoon film of a duck and, without the plaintiff's consent, "as the voice of the aforesaid duck, an actor who specialized in imitating the vocal sounds of the plaintiff." It was further alleged that the public believed that the words spoken and the comic sounds were supplied and made by the plaintiff, all to his damage and to the economic benefit of the defendant. The plaintiff claimed damages for invasion of privacy, defamation and unfair competition. The trial judge granted the defendant's motion to dismiss the complaint on the ground that it failed to state a claim upon which relief could be granted. The plaintiff appealed.

The Court of Appeals of the First Circuit, applying the law of Massachusetts and New York, upheld the dismissal of the claim for invasion of privacy but remanded the case on the claims for defamation and unfair competition. On the defamation issue the court held that a charge that an entertainer has stooped to perform below his class may be found to damage his reputation and the fact that the plaintiff was not identified by name is not material to the action. On the claim for unfair competition the court, accepting the distinction mentioned above between imitation and passing off, held that the plaintiff's complaint was not that the defendant had imitated

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2 Cheney Bros. v. Doris Silk Corp., 35 F.2d 279, 281 (2d Cir. 1929).
3 300 F.2d 256 (1st Cir. 1962).
4 300 F.2d at 257.
7 The court, however, rejected the plaintiff's further argument on the defamation claim that the imitation, being of inferior quality, damaged his reputation in that the public would believe that the plaintiff was "slipping," stating: "If what was attributed to the plaintiff was so manifestly inferior as to constitute actionable defamation . . . he must be able to point to some identification with himself more specific than the remaining similarities." 300 F.2d 256, 259 (1st Cir. 1962).
the plaintiff but rather that it had caused a mistake in identity, which mistake accrued to the financial detriment of the plaintiff.8 To the defendant's argument that the plaintiff and the defendant are not in competition with one another, the court held that it could well be found that the defendant's conduct saturated the plaintiff's audience to the point of curtailing his market. In that sense the plaintiff may have been harmed competitively.

While the distinction between imitation and passing off may have a valid public policy basis in situations dealing with the marketing of goods and services, it tends to become somewhat artificial when applied to the appropriation of an entertainer's unique style. In the area of goods and services there is the genuine problem that judicial protection of new ideas, indefinite as to limitation in time, would tend to create and sustain monopolies. Such a public policy problem is not present to the same degree when the imitation is of an entertainer's style. This is not to say that an entertainer should have a protected property interest in every characteristic which he has developed. Perhaps the degree of imitation rather than solely the question of passing off should be the standard applied in these cases. Such a test would provide relief not only in the passing off situations but also in the cases where the defendant has imitated the plaintiff to such a degree that he has in effect usurped the plaintiff's personality while at the same time taking steps to disclaim identification between the plaintiff and himself.

§3.5. Deceit: Sale of houses. The aftermath of the 1960 Massachusetts decision, Pietrazak v. McDermott,1 continues to present difficulties. In the Pietrazak case the Supreme Judicial Court upheld an action for deceit on the basis of statements made by the defendant to the plaintiff that he, the defendant, built a good house and that there would be no water in the cellar. The Court reasoned that the statement made could reasonably have been understood to mean that the construction of the house was such as to preclude the entrance of water and therefore constituted a statement of fact as of the defendant's own knowledge rather than an opinion. In the same year in the case of Yerid v. Mason,2 the Supreme Judicial Court reversed a judgment for the plaintiff in a deceit action where the defendant had stated to the plaintiff that a drain which he was constructing together with a sump pump would keep the floor of the cellar dry and that he, the plaintiff, would have no further trouble with water. In the Yerid case, the Court held that the statements referred to conditions to exist in the future and amounted to nothing more than an expression of strong belief, thus opinion rather than fact.


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In distinguishing the Yerid case from the Pietrazak case, the Court pointed out that in the Pietrazak case the statements were made with reference to “a completed building which . . . seems to have no pending water problem.” ³ Presumably this language referred to two distinctions: (1) in the Yerid case the statements were made prior to completion of the would-be corrective devices and thus tended to be promissory in nature, while in the Pietrazak case, the statements were made after completion; (2) in the Yerid case, the house was built in an area which had a serious water problem, principally because there was no drainage in the street. Very few houses in the immediate areas had cellars. Thus there appeared to be a problem of reasonable reliance on the statement as one of fact rather than opinion. The 1962 Survey year case, Fogarty v. Van Loan,⁴ presents a serious question as to the vitality of the Pietrazak decision.

In the Fogarty case the defendant, the builder of a house, stated to the plaintiff, a potential purchaser, that it had “a good concrete floor, good foundation walls” and was a “nice well built house.” When water appeared in the cellar prior to the conveyance, the defendant told the plaintiff “not to be concerned, [that] any new house will have water in the cellar, [and] that it will disappear when the earth around the foundation becomes firm.” When water continued to appear in the cellar, the plaintiff brought an action in deceit. After a jury verdict for the plaintiff, the trial judge entered a verdict for the defendant, subject to the plaintiff’s exception. On appeal the plaintiff argued the similarity of the facts of the case to the Pietrazak decision. The language used by the defendant in the Fogarty case was very similar to that used in the Pietrazak case and, unless one considers the settling of the earth around the foundation as necessary for the completion of the house, the Fogarty case appears distinguishable from the Yerid case on the issue of completion. In upholding the action of the trial judge, the Supreme Judicial Court held that the statements of the defendant constituted opinions rather than facts. In so holding the Court stated: “The Pietrazak case goes to the verge and we are not disposed to extend it.” ⁵ The Court, however, made no attempt to distinguish the facts of the Fogarty case from those of the Pietrazak decision. While recognizing that the distinction between fact and opinion is one of degree, thus making the distinction between cases difficult to express, the general vagueness of the Court in the Fogarty case leaves somewhat dubious the value of the Pietrazak case as precedent. While the opinion in the Fogarty case does not mention the issue, it is possible that there was less of an element of reasonable reliance in the Fogarty case than in the Pietrazak case. The plaintiff in the Fogarty case lived in the house under a rental agreement for two weeks prior to the signing of the purchase and sale agreement and approximately three months prior to the conveyance. If this factor

⁴ 1962 Mass. Adv. Sh. 1013, 183 N.E.2d 111, also noted in §1.4 supra.

http://lawdigitalcommons.bc.edu/asml/vol1962/iss1/6
militated against a favorable result for the plaintiff then perhaps the Pietrazak case is still alive. If, however, this factor did not contribute substantially to the result in the Fogarty case, it is doubtful that the Pietrazak case will be applied in the future.

B. LEGISLATION

§3.6. Wrongful death. The frequently amended Massachusetts wrongful death statute has again been amended.1 This most recent change increases the minimum and maximum amounts of recovery for death from $2000 and $20,000 respectively to $3000 and $30,000 respectively. Unfortunately culpability remains the standard for the assessment of damages.

It is difficult to determine whether the many amendments to the Massachusetts wrongful death statute constitute a recognition of the total inadequacy of the statute or merely the recognition of inflation. The inadequacy of the Massachusetts wrongful death statute stems from the fact that it is punitive rather than compensatory and has a maximum recovery provision. No other jurisdiction has a wrongful death statute with both of these characteristics.2

The principal purpose of the law of torts is to restore economically the status quo to a person who has been harmed by the wrongdoing of another. When early common law cases,3 for reasons not now applicable,4 refused to recognize death as a compensable loss, England

2 Alabama is the only other state which uses culpability as the standard for the assessment of damages.

3 In the 1808 English nisi prius case, Baker v. Bolton, 1 Campb. 498, 493, 10 Eng. Rep. 1033 (1808), Lord Ellenborough, without reason or citation of authority, denied a common law recovery for wrongful death. This case was blindly followed by most of the early American cases. The first Massachusetts decision in this area, Carey v. Berkshire R. Co., 1 Cush. 475 (Mass. 1848), denied recovery for the negligent death of the plaintiff's husband, without mentioning any reasons for the result except that it was so held in the case of Baker v. Bolton.

4 Some of the explanations advanced for the denial of a common law recovery for wrongful death are:

(a) Merger of the civil remedy in the felony. This view is subject to criticism by some authorities on the basis that a doctrine of absolute merger never existed at common law but rather that there was merely a suspension of a civil action until the wrongdoer had been prosecuted. Further, this view fails to distinguish the situation where the commission of a felony leads to harm other than death.

(b) Early English law of forfeiture. Since in a homicide case, whether intentional or negligent, all of the felon's goods were forfeited to the crown, it would be useless or unwise to maintain a civil action. This view is subject to the criticism that by 1808 (the year of the Baker v. Bolton decision) homicide per infortunium was no longer a crime.

(c) Actio personalis moritur cum persona. The right of action dies with the person who was a party to the action. This view has been criticized as failing to take cognizance of the fact that the party to the action was not the decedent or his representative.

(d) Public policy. This view is based upon a public policy which would preclude a court and jury from being entrusted with the function of estimating damages for an injury of incalculable extent and upon a policy which would preclude a multitude of suits.
and most American jurisdictions enacted legislation which was consistent with the theory of tort recovery, to remedy this common law defect. The quasi-criminal nature of the Massachusetts statute clearly fails to effectuate this compensatory function.

The maximum recovery provision of the Massachusetts statute is also vulnerable to criticism. Presumably the purpose of this provision is to prevent excessive recoveries from being awarded by overly sympathetic juries. If this is the purpose of such a provision, the problem which it seeks to remedy is created by the punitive nature of the statute. If the test for the assessment of damages was pecuniary harm suffered, the trial judge would be in a position to limit the award of damages to actual pecuniary loss suffered, which is measurable.

A continual process of increasing the minimum and maximum provisions of the Massachusetts wrongful death statute is not the remedy for the deficiencies of the statute. Until the statute is completely revised, it will remain inadequate and its provisions will be ignored more and more by other jurisdictions in applying their rules of conflict of laws.5

§3.7. Physicians: Exemption from civil liability. Massachusetts, in conformity with the traditional common law rule, does not legally impose upon its citizens the role of the “good Samaritan.”1 When, however, one voluntarily undertakes such a role, the law requires that he exercise due care.2 Because of increased malpractice litigation in certain areas in recent years some doubt has been expressed as to the propriety of applying the so-called “good Samaritan” rule to doctors providing emergency treatment at the scene of an accident. Actually the difficulties have been presented less by the rule than an abuse of the rule. Requiring a doctor to exercise reasonable care under the circumstances3 is not too onerous a burden. On the other hand subjecting doctors to frivolous malpractice suits, with their accompanying publicity, can be extremely burdensome. Fear of malpractice suits resulting from emergency treatments has led various doctors to take the position that they would not render such emergency treatment.

A minority of states have considered the matter of sufficient importance to warrant legislation exculpating doctors for negligence in treat-
ing a victim at the scene of an accident. Massachusetts has recently enacted similar legislation.\textsuperscript{5} The Massachusetts statute is similar to the legislation of other jurisdictions in that it is applicable to licensed physicians who in good faith render emergency treatment at the scene of an accident. While good faith is not defined, presumably it does not include conduct which is willful or wanton. The Massachusetts statute differs from those of most jurisdictions in that it limits the protection afforded to emergency treatment of persons injured on the highway as the result of a motor vehicle accident.\textsuperscript{6} Thus presumably it would not cover such situations as a doctor rendering emergency treatment to a workman injured at the site of a job unless the injury happened on the highway as the result of a motor vehicle accident. If the purpose of the statute is to encourage physicians to render emergency treatments at accidents, the reasons for the above limitation are not too clear.

\textsection{3.8. Contribution among joint tort-feasors.} Chapter 730 of the Acts of 1962 constitutes one of the most significant legislative developments in recent years in the area of Massachusetts tort law. Chapter 730 amends the General Laws by inserting a new Chapter 231B, entitled Contribution Among Joint Tortfeasors.\textsuperscript{1} The general effect of the act is to revise the common law radically in two troublesome areas.

The common law rule which denied contribution among joint tort-feasors developed early in this country. While some states distinguished between intentional or willful conduct and negligence, most American jurisdictions, including Massachusetts,\textsuperscript{2} refused to recognize a right of contribution among joint tort-feasors irrespective of the character of the conduct of the defendants. Chapter 730 abrogates this common law rule by recognizing the right of contribution among joint tort-feasors.\textsuperscript{3} A summary of the provision of the statute is as follows:

1. The right of contribution is granted in favor of a joint tort-feasor who has paid more than his pro rata share of the common liability.

2. This right will extend to a joint tort-feasor who has entered into a settlement with a claimant but not as to an amount which is in excess of what is a reasonable settlement.

3. A liability insurer who pays a claim of a joint tort-feasor is subrogated to the tort-feasor's right of contribution.

\textsuperscript{4} States having such a statute are California, Maine, Nebraska, North Dakota, Oklahoma, Utah, Virginia and Wyoming.
\textsuperscript{5} Acts of 1962, c. 217.
\textsuperscript{6} Only one other state, Virginia, has a similar limitation.

\textsection{3.8. This act took effect on January 1, 1963, and applies only with reference to torts occurring on or after said date.

\textsuperscript{3} By Chapter 730 Massachusetts joins a growing number of states which have statutes providing in some form for contribution among joint tort-feasors. Approximately one half of the states have such a statute.
4. The act does not in any way impair the right of indemnity under existing law.

5. In determining the pro rata shares of tort-feasors in the entire liability:
   (a) relative degrees of fault will not be considered;
   (b) if equity requires, the collective liability of some as a group will constitute a single share; and
   (c) principles of equity applicable to contribution generally will apply.

Another rule of the common law, closely connected with the prohibition of contribution among joint tort-feasors, is that the release of one joint tort-feasor releases all, regardless of the intention of the parties, the cause of action being thought of as one and indivisible. The Massachusetts courts have long adhered to this rule.\(^4\) This rule has also been abrogated by Chapter 730.\(^5\)

Except for some rather interesting deletions, Chapter 730 is very similar to the Uniform Contribution Among Joint Tortfeasors Act. Section 1(a) of the uniform act states: "... where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death ..." Section 1(a) of the Massachusetts act deletes not only the words "or severally" but also the words "or for the same wrongful death." It is difficult to say whether the legislature was intending to exclude wrongful death actions from the ambit of the statute or merely considered the language as already included in the words "injury to person." This deletion is likely to present a problem for the judiciary in the near future.

Section 1(c) of the uniform act provides that there "is no right of contribution in favor of any tortfeasor who has intentionally caused or contributed to the injury or wrongful death." No mention is made in the Massachusetts act of either intentional or willful and wanton tort-feasors. This would seem to indicate an intent on the part of the legislature not to exclude such tort-feasors from the provisions of the act.

§3.9. Proposed legislation: Operator-guest passenger relationship. Chapter 2 of the Resolves of 1962 provides for an investigation by the Judicial Council of the subject matter contained in Senate Document No. 33, relative to permitting all passengers in or on a motor vehicle to recover against the operator of the vehicle for ordinary negligence.


\(^5\) Section 4 of Chapter 730 provides: "When a release or covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury:

(a) It shall not discharge any of the other tortfeasors from liability for the injury unless its terms so provide; but it shall reduce the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and

(b) It shall discharge the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor."
Under existing Massachusetts law the operator of a motor vehicle is liable to a guest passenger only for gross negligence.\(^1\)

\section*{§3.10. Proposed legislation: Imputed negligence.} Under existing Massachusetts law the negligence of the operator of a motor vehicle in which the owner is traveling is chargeable to the owner if, at the time of the collision, the owner had the right to control the operator.\(^1\) Actual control is not necessary.\(^2\) In order for the owner to avoid the fiction of imputed negligence, he must come forward with evidence that he had surrendered or abandoned control to the operator. Under this doctrine the negligence of the operator constitutes a bar to recovery by the owner-passenger on the basis of contributory negligence. Chapter 3 of the Resolves of 1962 provides for an investigation by the Judicial Council of the subject matter contained in Senate Document No. 41. Under this proposed legislation the owner of a motor vehicle, who is a passenger in the motor vehicle, will not be barred from recovery by reason of the negligence of the operator. This proposed legislation has merit.\(^3\)


\(^3\) For a discussion of the doctrine of imputed negligence as it pertains to the owner of an automobile who is a passenger, see 1961 Ann. Surv. Mass. Law §3.5.