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Chapter 11: Torts

James W. Smith

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CHAPTER 11

Torts

JAMES W. SMITH

A. JUDICIAL DECISIONS

§11.1. Introduction. The 1973 judicial year was highly productive in the area of tort law. Under the decisions of the Supreme Judicial Court and the Appeals Court: owners and occupiers of property were charged with a duty of ordinary care to all lawful visitors on the premises, although no change was made in the lesser duty of care owed to trespassers; loss of consortium was recognized as a compensable harm; liability for medical malpractice on a breach of warranty theory was recognized under exceptional circumstances; the state immunity doctrine was slightly eroded with the Supreme Judicial Court also suggesting legislative abolition of the doctrine of state and municipal immunity; the liability of occupiers of premises to plaintiffs slipping on foreign substances was clarified, as was the liability of owners or possessors of automobiles who allow the automobile to be driven by an unlicensed or unfit operator; the responsibility of a master for the intentional torts

* JAMES W. SMITH is a Professor of Law at Boston College Law School.


2 In a 1974 decision, Pridgen v. Boston Housing Authority, 1974 Mass. Adv. Sh. 245, 308 N.E.2d 467, the court carved out an exception to the general rule regarding trespassers (duty to avoid wilful and wanton conduct) holding that where a known trespasser is physically entrapped in a position of peril, the owner or possessor of the property involved owes a duty to exercise reasonable care to prevent injury or further injury to him and this includes, if necessary, the duty to take reasonably affirmative action. A complete discussion of the Pridgen case will appear in the 1974 Annual Survey of Massachusetts Law.


of his servant was also clarified; owners or occupiers of premises were held not obligated to take special precautions to avoid interfering with an adjoining landowner's peculiar use of his property; and a husband was barred from recovering from a negligent third party his wife's medical expenses which he had paid since his negligence had contributed to the injury.

§11.2. Immunity: Commonwealth of Massachusetts. Until recently, the Commonwealth of Massachusetts enjoyed complete immunity from tort liability except to the extent permitted by statute. In Putnam Furniture Building, Inc. v. Commonwealth, the court stated: "It is axiomatic that the Commonwealth can be answerable in its own courts only to the precise extent and in the precise manner to and in which it has submitted itself to their jurisdiction by statute." Further, there is no comprehensive legislation imposing tort liability on the state government similar to the Federal Tort Claims Act at the federal level.

In a 1973 decision, Morash & Sons, Inc. v. Commonwealth, the Supreme Judicial Court created the first exception to this common law rule by holding that the Commonwealth of Massachusetts is liable in damages for creating or maintaining a private nuisance which causes injury to the real property of another.

Morash is significant not only for its holding but for certain observations made by the court in the opinion relative to the doctrine of governmental immunity generally and its likely future abolition. The court, while pointing out that there are persuasive reasons for the abolition of state and municipal immunity, stated that such a sweeping change can be better accomplished by the Legislature than the court.

There are several reasons why legislation is the preferable way to abolish governmental immunity. As a casual reading of the Federal Torts Claims Act discloses, many considerations are involved in the exposure of government to tort liability. Exceptions and limitations on

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liability, based upon considerations of justice and public policy, can best be expressed in a comprehensive plan, a mode not available to the court. The Legislature also has the machinery for giving all interested parties the opportunity to raise their particular and perhaps unique problems; the court hears only those claims and points of view voiced by the attorneys for the litigants with only occasional assistance of an amicus brief. Finally, the prospective effect of legislation working such a sweeping change is to be preferred over retroactive judicial law.

Some parallel may be perceived between the court's opinion in Morash and events leading up to the recent legislative exposure of charities to tort liability. Unlike the opinion in Colby v. Carney Hospital, the court in Morash does not overrule prospectively the governmental immunity doctrine; reminiscent of the court in Colby, however, it does use language which can reasonably be read only as an indication to the Legislature that it has the first opportunity to make this change.

§11.3. Slip and fall cases: Foreign substances. The facts of the 1973 case of Oliveri v. Massachusetts Transportation Authority involved a plaintiff who fell down a flight of stairs on the defendant's premises when she stepped on a foreign substance on the stairs. A companion of the plaintiff testified that the substance was dirty and that when she tried to remove it by kicking it with her foot, the substance did not move. All of the other steps appeared clean. Neither the substance nor its identity was introduced in evidence. The Supreme Judicial Court sustained the defendant's exceptions to the denial of its motion for a directed verdict and ordered judgment entered for the defendant.

A plaintiff who is injured as the result of slipping on a foreign substance on the defendant's premises must establish that the defendant or his servants either knew of the presence of the substance or that the substance was there for a sufficient period that he or his servants should have known of its presence. In the latter situation where the nature of the foreign substance is known, proof of the time element may be

6 See G.L. c. 231, §85K providing that charitable organizations may be liable in tort up to $20,000.
9 "We believe the Legislature should be afforded an opportunity to do this by a comprehensive statute." 1973 Mass. Adv. Sh. at 795, 926 N.E.2d at 468. "We have no doubt as to the advisability of abolishing the rule of governmental immunity as applied to the Commonwealth and its political subdivisions, and we have no doubt as to our power to abolish that doctrine. We refrain at this time, not merely because we have accepted the doctrine for many years, but because the comprehensive approach available to the Legislature is the preferable course." Id. at 796, 296 N.E.2d at 468.

established by inference in some cases by proof that the substance was in a decayed state and that it was in a place where the defendant's employees should have seen it. Where, however, the nature of the substance is not known, and there is thus no way of knowing the effect of time on its appearance, no inference is warranted that the substance was on the floor long enough for the defendant or his servants to have seen it. For this reason the court also pointed out that the mere stickiness or adherence of the substance to the step is not such a quality as, in common knowledge, establishes the time element.

Oliveri is noteworthy principally because the court wrote a comprehensive opinion, discussing and categorizing numerous Massachusetts decisions involving the liability of owners or occupiers of premises to persons slipping on foreign substances. The opinion should be very helpful to attorneys and judges in future "foreign substance" cases.

§11.4. Automobiles: Negligent entrustment. G.L. c. 90, §12 provides in part that:

No person shall allow a motor vehicle owned by him or under his control to be operated by any person who has no legal right so to do, or in violation of this chapter.

In Fitiles v. Umlah, the Supreme Judicial Court held that allowing an unlicensed person to drive one's automobile is a violation of this statute even though the owner or person in control of the automobile is unaware that the operator is unlicensed. Violation of this statute is evidence of negligence. In a 1973 case, Leone v. Doran, the plaintiff claimed that the defendant allowed a motor vehicle under his control to be operated by a person who had a reputation for driving recklessly and for driving after drinking. The plaintiff's declaration alleged negligence on the basis of a claimed violation of G.L. c. 90, §12, on the theory that allowing a person with such a reputation to operate one's motor vehicle constituted

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6 1973 Mass. Adv. Sh. at 324, 292 N.E.2d at 867. On the particular facts of Oliveri, this latter point is at least debatable. The evidence indicated that the plaintiff fell several hours after the steps had been swept by defendant's cleaning man; the weather was damp and so was the stairway; a companion of plaintiff described the substance on which plaintiff fell as hard, dirty, muddy, and about two or three inches long, two inches wide and one-half inch high. It did not move when kicked. Considering the short time interval between the sweeping of the stairs and the plaintiff's fall together with the rigid adherence of the substance to a damp surface, a jury could reasonably conclude that the substance was present on the stairway when swept and was ignored by the cleaning man.

§11.4. 1 322 Mass. 325, 77 N.E.2d 212 (1948).
allowance of the motor vehicle to be driven in violation of "this chapter," i.e., of chapter 90.

The court, rejecting the applicability of G.L. c. 90, §12 to the plaintiff's evidence, indicated that, apart from the unlicensed operator situation, criminal responsibility under the statute can attach to the owner or person in control of a motor vehicle only if the evidence warrants the conclusion that, at the time he permitted the use of the automobile, he was aware of circumstances which made it inevitable that the automobile would be operated in violation of chapter 90.8 An example of such a situation would be present, where the owner or person in control of the motor vehicle allows it to be operated by an intoxicated person, whom he knew to be intoxicated. On the issue of defendant's knowledge, the court held that where plaintiff shows only that the operator's reputation made a violation of G.L. c. 90 conceivable or even probable, a finding of a violation of G.L. c. 90, §12 is not warranted.

While holding G.L. c. 90, §12 inapplicable to the plaintiff's evidence, the court allowed a new trial which would include the issue of common law negligence, provided the declaration was appropriately amended. In the Leone opinion, the court had pointed out that the owner or one in control of a motor vehicle could be held liable, even apart from G.L. c. 90, §12, on a theory of negligent entrustment. Such a person, for example, could be held liable for common law negligence for permitting the vehicle to be driven by a visibly intoxicated person or by a person whom he knows to be suffering from lack of sleep or whom he knows to be inexperienced or otherwise unfit to operate the vehicle.4 This view has been taken by many other jurisdictions.5

Incompetence or unfitness of the operator may be established by prior incidents involving the operator, such as proof of prior criminal convictions for violations of the motor vehicle laws.6 Knowledge by the defendant-owner of such incompetence or unfitness may be established by direct evidence or by inference, including in some limited instances evidence of the operator's reputation.7

§11.5. Respondeat superior: Liability of master for intentional tort of servant. Cases in Massachusetts have long held that a master under some circumstances may be held liable for his servant's intentional tort.

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8 Id. at 147, 292 N.E.2d at 27.
4 Id. at 150, 292 N.E.2d at 28.
5 For a listing of such cases, see W. Prosser, Law of Torts §104, at 678 (4th ed. 1971).
7 As the court explained:
   It is possible that the reputation of the operator could be shown to be of such a specific nature, and known in such a particular segment of the community, as to constitute some evidence that the defendant owner had knowledge of the operator's incompetence at the time of the entrustment of the vehicle.
   Id. at 151, 292 N.E.2d at 29.
For example, where the servant is hired to perform services which are commonly accompanied by the use of force, the master is liable if the servant uses force where no privilege exists,\(^1\) or where he uses unreasonable force in a privileged situation. Liability of a master for a servant’s intentional tort is not, however, limited to such situations. Liability has been imposed where the act of the servant was done in the course of his doing the master’s work and for the purpose of accomplishing it.\(^2\) A recent decision of the Supreme Judicial Court, *Miller v. Federated Department Stores, Inc.*\(^3\) has refined that test somewhat. Simply stated, the issue in *Miller* was whether the master is liable for an assault and battery committed by his servant solely on the basis that at the time of the tort the servant was engaged in performing his master’s business and that the commission of the tort was related to such performance. The Supreme Judicial Court held that such a showing alone was insufficient to establish liability.

In *Miller*, the plaintiff, a customer in defendant’s store, had earlier been bumped by a servant’s receptacle cart. At a later time, the plaintiff and servant met again and had an argument during which the servant assaulted the plaintiff. It was injuries resulting from this assault that underlay plaintiff’s claim. Reasoning that the servant’s assault was not in response to conduct of plaintiff which was *presently* interfering with the servant’s ability to successfully perform his duties, the court held the defendant not liable. According to the court, the test of a master’s liability for his servant’s intentional tort is *not* a purely subjective one of whether the servant at the time of the assault intended to further, and believed he was furthering, his master’s business. More important than the question of the servant’s subjective intent is whether the assault was committed as in response to the plaintiff’s conduct, *which at the time of the assault* was interfering with the servant's ability to satisfactorily do his job.\(^4\) This interference may be in the form of an affirmative attempt to prevent the servant from carrying out his assignment\(^5\) or in the failure

\(^{\text{§11.5}}\)


\(^4\) Id. at 1507, 304 N.E.2d at 580.

\(^5\) See Levi v. Brooks, 121 Mass. 501 (1877) (defendant’s servants striking the plaintiffs, delinquent debtors, when the plaintiffs attempted to prevent them from repossessing furniture which their master had instructed them to remove); Rego v. Thomas Bros. Corp., 340 Mass. 334, 164 N.E.2d 144 (1960) (see note 2 supra).
§11.6 TORTS

§11.6. Nuisance: Priority of occupation: Peculiar use of property. When the conduct of a defendant in a nuisance action is neither negligent, reckless, nor ultrahazardous, liability will be determined on the basis of whether his conduct was "reasonable." The word "reasonable" as used in this context does not mean the same as "absence of negligence." Rather, it has reference to a balancing of interests: the nature, extent, and frequency of harm is weighed against such factors as the character of the area wherein the defendant is engaged in the complained-of activity, the time of day or night that such activity is taking place, and the utility and social value of the activity. As regards the character of the surrounding area, a recent Massachusetts decision makes it clear that in the absence of any wrongful motive, an occupier of property is under no obligation to take special precautions to avoid interfering with an adjoining landowner's peculiar use of his property, despite the fact that the adjoining landowner commenced his activity many years prior to the defendant's use and even at a time when the defendant's use might not have been consistent with the character of the surrounding area.

In *Lynn Open Air Theatre, Inc. v. Sea Crest Cadillac-Pontiac, Inc.* the plaintiff sought to enjoin the defendant's use of flood lights around its automobile sales area which were interfering with the quality of the screen projection at the plaintiff's open air drive-in theatre. The master found that when the plaintiff located its drive-in theatre many years


§11.6. 1 Actionable nuisance has been defined as an invasion of a person's interest in use and enjoyment of land which is either "(a) intentional and unreasonable, or (b) unintentional and otherwise actionable under the principles controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities." Restatement (Second) of Torts §822 at 22 (Tent. Draft No. 17, 1971). The unreasonableness of unintentional behavior (clause (a) supra) derives from the degree by which the gravity of harm caused by the behavior outweighs its social utility. See Restatement (Second) of Torts §822, comment k, at 2, and §826, at 3-4 (Tent. Draft No. 18, 1972).
3 Considerable noise taking place in the early morning may be actionable (Shea v. National Ice Cream Co., 280 Mass. 206, 182 N.E. 303 (1932)), while noise of the same intensity taking place during normal working hours may not be actionable (Tortorella v. H. Traiser & Co., 284 Mass. 497, 188 N.E. 254 (1933)).
before, it was the only occupier and user within many hundreds of feet, but that the neighborhood had become a highly developed commercial area located on a heavily traveled public way. He also found that the other occupiers of this area were mainly commercial in nature and were well lighted at night and that the use of lights in the evening was normal in the defendant's business and was only harmful to the plaintiff's business because of a drive-in theatre's unique high sensitivity to light. The superior court dismissed the plaintiff's bill of complaint and the plaintiff appealed.

In affirming the dismissal of the bill of complaint, the Massachusetts Appeals Court held that injury to a particular user of specially sensitive characteristics does not render the lights an actionable nuisance. Citing Prosser, the court stated: "The plaintiff cannot, by devoting his land to an unusually sensitive use, such as a drive-in motion picture theatre easily affected by light, make a nuisance out of conduct of the adjoining defendant which would otherwise be harmless."

The position taken in Lynn Open Air Theatre follows the general rule of other jurisdictions. It is also consistent with a 1971 decision of the Supreme Judicial Court, Richmond Brothers, Inc. v. Hagemann, although no reference is made in the opinion to that decision. In Richmond Brothers, the court held that where there was no showing of spite or duress or use without benefit to defendants in erecting structures on their land adjacent to plaintiff's radio broadcasting station, plaintiff could not claim a nuisance on the basis that such structures interfered with its broadcasting signal beamed over the defendant's premises. A contrary result would amount to a condemnation of the defendant's premises to a servitude in favor of the plaintiff.

§11.7. Consequential damages: Wife's medical expenses. In the case of injury to a married woman, future medical expenses are not recoverable by the husband, even though he has a legal obligation to pay them; they are recoverable solely by the wife. This is because a recovery by the husband would provide no assurance that the funds would be used for the wife's medical expenses. He would not hold them in trust; they would be part of his estate at his death available to his creditors. The past, as distinguished from the future, medical expenses of a married woman are recoverable by the spouse who paid them or incurred the obligation

5 Id. at 474, 294 N.E.2d 474.

2 Id. at 59, 168 N.E. at 170.
§11.7

TORTS

to pay them. However, when either the husband's or the wife's own negligence has contributed to the wife's injury, further problems arise. Clearly, the wife's contributory negligence affects recovery irrespective of which spouse is the suing party. A recent case, *Dane v. Cormier*, presents the situation where the husband's negligence contributed to the wife's injury.

In *Dane*, the husband and the defendant were the drivers of automobiles involved in a collision; both drivers were negligent and the wife, a passenger in her husband's automobile, was injured. The Supreme Judicial Court, reversing the trial court, held that the negligent husband was barred from recovering his wife's past medical expenses, which he had paid. Apparently, had the wife paid these expenses, or bound herself to pay them, she would have recovered in full. In summary then, under present Massachusetts law, a married woman's negligence will always bar or limit recovery for her past medical expenses no matter who pays and then seeks to recover them; her husband's negligence will do so only when he, rather than she, attempts recovery. Consequently, well-advised plaintiffs in the *Dane* situation will arrange to have the wife, rather than the husband, pay for past medical expenses.

Recently, the New Jersey Supreme Court, in the well known case of *Patusco v. Prince Macaroni, Inc.*, reached a result directly contra to *Dane*. The *Patusco* court held that the wife may recover the expenses of her own medical treatment, without regard to whether she or the husband incurred the expenses. Payment by the husband is treated as a collateral source, having no effect on recovery by the wife. By dicta, the New Jersey Supreme Court further intimated that a husband's negligence should not bar or diminish even his recovery of damages for medical expenses paid by him for his wife's injury. To bar recovery, the court said, would "penalize the wife, for . . . her overall experience depends on her husband's exchequer." The Massachusetts Supreme Judicial Court in *Dane* squarely rejected these intimations.

Nevertheless, it can be argued that the result reached in *Dane* has its merits in the present state of Massachusetts tort law. Full recovery by the negligent husband seems unfair. The *Dane* approach when combined with the subsequently enacted comparative negligence statute still

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6 The facts of *Dane* occurred prior to the enactment of the original Massachusetts comparative negligence statute, G.L. c. 231, §85.
8 50 N.J. at 373, 235 A.2d at 469.
9 Id.
10 G.L. c. 231, §85.
allows up to a fifty percent recovery by a negligent husband. To reject Dane is to place the entire burden upon a defendant who, because of interspousal immunity, probably cannot even recover contribution from the husband in a third party action.11

Dane however puts an unwarranted premium on a matter which can easily be arranged: all a family need do to avoid the effects of a husband's negligence which contributed to his wife's injury is to have the wife pay her own medical bills. Only the ill-informed need suffer from the husband's negligence. Dane has a further weakness due to the interspousal immunity doctrine. Since that doctrine precludes the husband's liability insurance policy from covering his wife's injury, some or all of the medical expenses have to be paid out of the family finances unless medical insurance is present. The non-negligent wife as well as her negligent husband suffers. If the husband happens to pay the wife's medical bills and was more negligent than the third party, the negligent third party's insurer escapes liability entirely.

Ultimately, the most desirable solution is to abolish the doctrine of interspousal immunity. The injured wife will then join her husband and the third party in a negligence action. If the wife sued only the third party, the third party could implead12 the husband for contribution.13 Absent such a change in the law, the Patusco result, it is submitted, is more equitable than that reached in Dane. Recovery for a married woman's past and future medical expenses should be by the wife alone. If the husband pays the past medical expenses, such payment ought to be treated as a collateral source, having no effect on the wife's right to recovery.14

B. LEGISLATION

§11.8. Introduction. Legislation significantly changed Massachusetts tort law in 1973 both in the procedural and substantive spheres. Procedurally, chapter 1114 of the Acts of 1973 facilitated the adoption of new rules of civil, trial and appellate procedure. The Rules will simplify the disposition of tort cases in many respects. For example, the motion for

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11 This exact point has not yet been decided by the Supreme Judicial Court. However the Massachusetts contribution statute (G.L. c. 231B, §1(a)) allows contribution "where two or more persons become jointly liable in tort for the same injury . . . ." The immunity doctrine precludes a husband from being liable in tort to his wife. In an earlier case, O'Mara v. H.P. Hood & Sons, Inc., 1971 Mass. Adv. Sh. 553, 268 N.E.2d 685, the court raised the issue of the effect of intrafamily immunity on contribution but declined to answer the question.

12 See the recently adopted Mass. R. Civ. P. 14 for impleader procedure.

13 See G.L. c. 231B.

§11.9 TORTS

summary judgment,¹ previously limited to certain contract cases, is now available in tort actions; discovery has been expanded to include the existence and contents of liability insurance policies;² and pleadings have been simplified to serve a notice function rather than the function of reducing the number of issues for trial.³

In the substantive realm, public school teachers, principals and nurses have been granted immunity from liability arising from acts or omissions while rendering good faith emergency first aid or providing transportation to an injured or incapacitated student;⁴ the tort statute of limitations has been increased from two to three years;⁵ a compensatory wrongful death statute has supplanted the punitive statute;⁶ a new comparative negligence statute, correcting the deficiencies of its predecessor, has been enacted;⁷ the defense of assumption of risk in negligence cases has been abolished;⁸ the right to privacy has been granted legislative recognition;⁹ the arbitrary notice requirement in snow and ice accidents has been sensibly modified;¹⁰ and the lessor of goods has joined the manufacturer, seller and supplier as a person potentially liable for injury to consumers and third persons from defective products on a warranty theory, despite the absence of privity.¹¹

§11.9. Immunity for public school employees: Rendering emergency aid to students. Over the past several years, Massachusetts has enacted various statutes establishing immunity for certain classes of individuals rendering emergency treatment provided they act in good faith. Initially, doctors rendering emergency treatment were protected;¹ nurses were then included.² In 1970, a statute was enacted which granted immunity to ski patrol members for good faith emergency treatment.³ Legislation enacted in 1973 extended immunity from civil liability to include acts or omissions of a public school teacher, principal, or nurse, who, in good faith, renders emergency first aid or provides transportation to a student who has become injured or incapacitated in a public school building or on the school grounds.⁴

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§11.10. Statute of limitations: Tort. For over two decades, the limitations period for most tort actions and actions of contract to recover for personal injury has been two years. Effective as to causes of action arising on or after January 1, 1974, the limitations period for these actions has been extended to three years. The wrongful death statute was also amended so as to have the three year statute of limitations period.

§11.11. Wrongful death: A new "compensatory" statute. In 1848 the Massachusetts Supreme Judicial Court denied the existence of a common law action for wrongful death; this result was followed in most other states. The legislatures of most states responded by enacting compensatory wrongful death statutes. The Massachusetts Legislature, in contrast, chose to treat wrongful death legislation as quasi-criminal in nature, measuring the recoverable damages by a punitive standard with a maximum.
recovery provision which has been increased over the years. This punitive standard, inappropriate in an insurance-oriented society, has been criticized in numerous writings and by the courts of sister states, some of which have refused to apply the Massachusetts statute where the states' then prevailing conflict of laws rule would have called for its application.

Chapter 699 of the Acts of 1973 completely revamped the Massachusetts Wrongful Death Statute. The new statute incorporates the following changes:

1. It eliminates the "degree of culpability" standard for the assessment of damages and substitutes a compensatory standard based upon "the fair monetary value of the decedent to the persons entitled to receive the damages recovered . . . including but not limited to compensation for the loss of the reasonably expected net income, services, protection, care, assistance, society, companionship, comfort, guidance, counsel, and advice . . . ."

2. It eliminates the minimum and maximum recovery provision.

3. It provides for the recovery of damages for funeral and burial expenses.

4. It provides for the recovery of punitive damages in an amount of not less than $5,000 where the decedent's death was caused by the malicious, wilful, wanton or reckless conduct of the defendant or by the gross negligence of the defendant.

5. It expressly provides that recovery will be allowed under the statute where the decedent's death was caused by injuries which resulted from the defendant's breach of warranty arising under Article 2 of G.L. c. 106; prior law did not allow recovery for wrongful death on a breach of warranty theory.4

This statute took effect on January 1, 1974 and applies to causes of action arising on or after that date. Since a cause of action for wrongful death does not arise until death occurs, presumably the new statute applies where death occurs on or after January 1, 1974 even though the injury which caused the death occurred before that date.

The conversion to a compensatory wrongful death statute may change the law set out in cases decided in whole or in part on the punitive theory of the old statute. For example, the rule that joint liability did not exist in an action for wrongful death was based upon the concept that each defendant was liable for damages based upon his culpability, irrespective of the culpability of other defendants in the case.6 Under a compensatory

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6 "The statute, following a pattern familiar in criminal and penal provisions, limits the penalty that can be imposed upon one person for causing one death. It does not
statute joint liability exists, with rights of contribution among the defendants, just as in a personal injury case. Another issue, the earlier resolution of which was based upon the punitive theory of the old statute, is whether a release of the personal injury claim executed by the decedent bars a subsequent wrongful death action. In *Wall v. Massachusetts Northeastern Street Railway Co.*, the Supreme Judicial Court held that such a release did not bar recovery under the old Massachusetts statute principally because recovery under the statute was penal whereas the release related to a claim for compensation. Elements of recovery under a compensatory death statute might overlap with elements of damages of a personal injury claim; for example, loss of support, which can be recovered in a death claim, is merely the permanent version of loss of earning capacity, which can be recovered in a personal injury claim. Further, it may be argued that the language of the death statute itself as amended ("under such circumstances that the deceased could have recovered damages for personal injuries if his death had not resulted, ...") precludes recovery if the deceased had previously executed a release for personal injuries; other jurisdictions have disagreed on the effect of similar language.

The changes in the Massachusetts Wrongful Death Statute should have no effect on two other death-related areas involved in recent case-law: the holding that recovery for wrongful death is a common law right and that therefore the statute of limitations expressed in the Wrongful Death Statute bars only the remedy and not the right; the decision that recovery for wrongful death is proper even where the negligence and injury occurred prior to the birth of the decedent (in fact even before viability),

limit the amount that can be collected from a number of wrongdoers for one death. Logically, as in criminal law, each wrongdoer may be made to suffer the maximum penalty no matter how many are guilty." Arnold v. Jacobs, 316 Mass. 81, 84, 54 N.E.2d 922, 923 (1944).

7 229 Mass. 506, 118 N.E. 864 (1918).

8 In Montellier v. United States, 315 F.2d 180 (2d Cir. 1963), the United States Court of Appeals followed *Wall* even though punitive damages cannot be recovered under the Federal Tort Claims Act. The Court held that since the release was ineffective under Massachusetts law, it was ineffective in a death action under the Federal Tort Claims Act as the result of an accident occurring in Massachusetts. See 1967 Ann. Surv. Mass. Law §6.6, at 84.

9 See Southern Bell Tel. & Tel. Co. v. Cassin, 111 Ga. 575, 36 S.E. 881 (1900) (action barred); Rowe v. Richards, 35 S.D. 201, 151 N.W. 1001 (1915) (action allowed). The principal argument advanced for allowing the action despite the derivative language of the wrongful death statute is that such language refers only to the existence of wrongful conduct toward the decedent (e.g., battery, negligence, etc.) and to substantive defenses (e.g., contributory negligence), not to the cause of action itself.

10 Gaudette v. Webb, 1972 Mass. Adv. Sh. 1151, 294 N.E.2d 222. In so holding in *Gaudette*, the court allowed the general tolling provisions, which heretofore had been held inapplicable to the statute of limitations set out in the wrongful death statute, to operate on such statute of limitations.
§11.12 Torts

provided the child was born alive.\(^{11}\) Neither of these cases relied upon the punitive concept of the old statute.

The conversion of the Massachusetts Death Statute to a compensatory-type statute does create a problem encountered in other states, namely, how to instruct a jury on the assessment of compensatory damages for the wrongful death of a child.\(^ {12}\)

§11.12. Comparative negligence: Recent amendments. The original Massachusetts comparative negligence statute took effect on January 1, 1971.\(^ {1}\) It abolished the long-standing rule that the defense of contributory negligence always operated as a complete bar to recovery in a negligence action; it allowed in many cases a limited recovery to the negligent plaintiff. While the comparative negligence statute has appeared to work well in practice, several deficiencies existed in the statute.\(^ {2}\) These have been corrected by a recent amendment.\(^ {3}\)

The changes in the statute are as follows:

Under the original statute, the jury was required to return a special verdict stating (1) the amount of damage which would have been recoverable if there had been no contributory negligence; and (2) the degree of negligence of each party expressed as a percentage. This mandatory special verdict has been eliminated. Obviously, as in other cases, the trial judge may require the jury to return a special verdict; this is in accord with Rule 49(a) of the new Massachusetts Rules of Civil Procedure, which are effective July 1, 1974.

Under the original statute, no damages were recoverable by the plaintiff unless his negligence was not as great as the negligence of the person against whom recovery was sought. Under the amendment, the plaintiff will be completely barred from recovery only where his negligence is greater than the negligence of the person or persons against whom recovery is sought. Thus, under the amended version the plaintiff may be fifty percent negligent and still recover; such was not the case under the original version.

Under the original version of the statute, several questions were left unanswered which arose in situations where the plaintiff was suing joint tortfeasors. It was not clear, for example, whether the plaintiff could recover from a joint tortfeasor whose negligence was less than the plaintiff’s negligence, although the plaintiff’s negligence was less than the combined negligence of all the defendants (for example, the plaintiff might be


\(^{12}\) For two out-of-state cases discussing the problem, see Wycko v. Gnotke, 361 Mich. 331, 105 N.W.2d 118 (1960); Lockhart v. Besel, 71 Wash. 2d 112, 426 P.2d 605 (1967).

\(^{1}\) See G.L. c. 231, §85, as amended by Acts of 1969, c. 761.


forty percent negligent while each of two defendants were thirty percent so). The amended version of the statute provides that the plaintiff's contributory negligence will not operate as an absolute bar to recovery:

if such negligence was not greater than the total amount of negligence attributable to the person or persons against whom recovery is sought . . . in determining by what amount the plaintiff's damages shall be diminished . . . the negligence of each plaintiff shall be compared to the total negligence of all persons against whom recovery is sought. The combined total of the plaintiff's negligence taken together with all of the negligence of all defendants shall equal one hundred percent.

It appears reasonably clear under the amended version of the comparative negligence statute that in an action against joint tortfeasors, as long as the plaintiff's negligence does not exceed 50% of the negligence of himself and all defendants combined, he may recover his damages diminished in proportion to the amount of negligence attributable to him despite the fact that the plaintiff's negligence exceeds the negligence of one or more of the joint defendants considered separately. Thus, if the plaintiff's damages are $100,000 and his negligence is 40% and the negligence of each of the two defendants is 30%, the plaintiff will be entitled to $60,000 in damages.

Perhaps the most significant change brought about by the amended statute is the abolition of the defense of assumption of risk in negligence cases. This change is discussed in the next section.4

The amended version of the statute makes it clear that while the violation of a criminal statute, ordinance, or regulation by a plaintiff which contributed to the injury, death or damages, shall be considered as evidence of negligence on the part of the plaintiff, such violation shall not, as a matter of law and for that reason alone, serve to bar a plaintiff from recovery.

The amended version of the statute makes it clear that the burden of alleging and proving negligence which serves either to diminish a plaintiff's damages or bar recovery under the statute shall be upon the person who seeks to establish such negligence, and the plaintiff shall be presumed to be in the exercise of due care. The amended statute took effect on January 1, 1974 and applies to all causes of actions occurring on or after said date.

Consideration might be given to further amendment of the comparative negligence statute so as to make it operate, where otherwise applicable, in breach of warranty actions.5 While the Supreme Judicial Court

4 See §11.13 infra.
§11.13  
TORTS  

321

has not yet had occasion to rule on the issue whether contributory negligence is a defense in a breach of warranty action, other states have allowed certain types of contributory negligence to operate as defenses in warranty actions. Thus, where the plaintiff, with knowledge of the defect in the product, unreasonably continues to use it, the defense of contributory negligence is generally available. Since a warranty action does not require a showing of negligence on the part of the defendant, application of the principle of comparative negligence to warranty actions will require a change in the title to the statute.

§11.13. Assumption of risk: Recent statutory abolition thereof. One of the most anomalous doctrines of tort law is the defense of assumption of risk. In essence it denies recovery to the plaintiff who voluntarily exposes himself to a known and appreciated risk. While the application of the doctrine has in many cases rendered "unnecessary an analysis which might determine whether the ultimate ground of denial of recovery is absence of duty or breach of duty, want of proximate causal relation, or contributory negligence," it does operate as a defense independently of contributory negligence. Under this defense, a plaintiff may be denied recovery for his injuries solely on the basis that he voluntarily exposed himself to the known and appreciated risk which was created by the defendant’s negligent conduct despite the fact that his exposure may have been reasonable under the circumstances. Several states have recently rejected the doctrine in certain situations.

The lack of logic or justice inherent in the defense of assumption of risk was cast in stark relief by the enactment in Massachusetts of a comparative negligence statute. Since the comparative negligence statute

6 The general approach in other jurisdictions in products liability cases (whether denominated as breach of warranty or strict liability in tort) is to bar recovery only where the plaintiff has either misused the product, which fact contributed proximately to his injury, or where the plaintiff discovers the defect, and with knowledge of the danger involved, proceeds unreasonably to make use of the product. See Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 261 N.E.2d 305 (1970). Such conduct has been referred to as an unreasonable assumption of risk. On the other hand, mere failure on the part of the plaintiff to discover the defect, or to guard against the possibility of its existence does not affect the plaintiff’s recovery. Id., citing Restatement (Second) of Torts, §402A, comment n and other cases. See generally, W. Prosser, Law of Torts §102 (4th ed. 1971).

5 For a discussion of the Massachusetts comparative negligence statute, see §11.12 supra.
only compared the defendant's negligence with the plaintiff's contributory negligence, assumption of risk remained a complete defense.\(^6\)

Chapter 1123 of the Acts of 1973, which amended the Massachusetts comparative negligence statute,\(^7\) abolished the defense of assumption of risk in negligence cases. The change is an excellent one. Henceforth, when the plaintiff's voluntary assumption of the risk created by the defendant's negligence is reasonable, he will be entitled to a full recovery; when it is unreasonable, it will constitute contributory negligence and will be governed by the comparative negligence statute.

§11.14. Invasion of the right of privacy: A new cause of action. While the action for invasion of the right of privacy has received wide national judicial recognition, no recovery of damages has yet been had in Massachusetts based upon this tort. In *Frick v. Boyd,\(^1\)* the Supreme Judicial Court, while rejecting the plaintiff's claim for invasion of privacy on the particular facts of the case, stated that it would deal with the difficult questions presented by the assertion of such a right "when and if we are confronted with some substantial, serious, or indecent intrusion upon the private life of another."\(^2\)

In *Commonwealth v. Wiseman,\(^3\)* the Supreme Judicial Court enjoined the showing of the film entitled "Titticut Follies" to general audiences in Massachusetts. The film was made at the Massachusetts Correctional Institution at Bridgewater, an institution to which insane persons charged with crime and defective delinquents may be committed. The film showed the inmates, including their faces, in humiliating conditions and circumstances; many of the scenes showed the inmates in a state of nudity. The court refused to order the destruction of the film and held that it could be shown to audiences of a specialized or professional character (e.g., social workers, sociologists, psychiatrists, legislators, etc.) for whom the film would be instructive in dealing with the problems of custodial care and mental infirmity. While the court in *Wiseman* indicated, with citation to *Frick v. Boyd,*\(^4\) that it need not discuss to what extent in Massachusetts violation of privacy gives rise to tort liability, it did appear to recognize a right to privacy at least for purposes of injunctive relief.

Chapter 941 of the Acts of 1973, amending G.L. c. 214 by the addition of section 1B, provides that a person shall have a right against unreasonable, substantial or serious interferences with his privacy.\(^5\) It also

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\(^7\) See §11.12 supra.


\(^2\) Id. at 264, 214 N.E.2d at 464.


\(^5\) G.L. c. 214 §1B was amended by chapter 195 of the Acts of 1974, making the effective date of the statute July 1, 1974.
§11.14

TORTS

provides that the superior court shall have jurisdiction to enforce such right by equitable relief and by the award of damages.

The action for invasion of privacy actually encompasses four distinct wrongs. These have been categorized in the following manner:
1. Intrusion upon the plaintiff's physical solitude.
2. Publication of private matters violating ordinary decencies.
3. Putting the plaintiff in a false position in the public eye as by signing his name to a letter attributing to him views that he does not hold.
4. Appropriation of some element of plaintiff's personality for commercial use.

The first category recognizes that in an industrial and densely populated society, some intrusions into one's private sphere are inevitable; it thus proscribes gravely offensive intrusions unsupported by palpable social or economic excuse or justification. Many of the cases in this area will involve the question of the propriety of a defendant's investigatory techniques.

The second category listed above involves principally the issue of whether the matter that has been published is private or is newsworthy. In Kelley v. Post Publishing Co., the court upheld the dismissal of the plaintiff's claim where the complaint alleged an invasion of privacy as the result of a picture appearing in the defendant's newspaper showing the body of the plaintiff's daughter in a deformed and hideous manner. In an earlier case, Thermo v. New England Newspaper Publishing Co., the court had held that if the right of privacy exists in Massachusetts, it does not extend to the protection of one from having his name or his likeness appear in a newspaper where there is a legitimate public interest in his existence, his experiences, his words, or his acts.

The third category listed above, putting the plaintiff in a false position, is similar to the tort of defamation. Unlike defamation however, the false position need not be of a defamatory nature.

The fourth category listed above is the subject matter of a Massachusetts statute, enacted in 1970, which prohibits the unpermitted appropriation of a person's name or likeness for commercial purposes. G.L. c. 214, §3A, with a few exceptions, provides that any person whose name, portrait or picture is used within the Commonwealth for advertising or trade purposes without his written consent may maintain an action in the superior court to prevent such use and to recover damages sustained by such use. If the defendant knowingly uses such person's name, portrait

or picture in such manner as is prohibited or unlawful, the court in its discretion may award the plaintiff treble the amount of damages sustained by him.

The new Massachusetts statute, G.L. c. 214, §1B, appears sufficiently broad to deal with the four above listed categories. It is however so general in its language that the precise scope of the tort of invasion of privacy in Massachusetts is today, as it was before the statute, largely a matter of judicial law.

§11.15. Snow or ice accidents: Notice. G.L. c. 84, §18 requires that a person injured as the result of a defect upon the public way shall within thirty days thereafter, give to the county, city, town, or person by law obliged to keep said way in repair, written notice of the name and place of residence of the person injured, and the time, place and cause of said injury or damage. While a county, city or town is not liable for injury or damage sustained upon a public way by reason of snow or ice, if the place of the accident was otherwise reasonably safe, said county, city or town may be liable where the injury or damage resulted from a defect upon the public way even though the presence of ice or snow on the public way was a contributing factor in causing the injury or damage.

The thirty day notice requirement established by G.L. c. 84, §18 was incorporated by reference into G.L. c. 84, §21 relating to actions against private persons for injury or damage resulting from the defective condition of their premises or of adjoining ways, when caused by or consisting in part of snow or ice resulting from rain or snow and weather conditions.

The thirty day notice requirement has been strictly applied. Thus, in Souza v. Torphy, the Supreme Judicial Court held that a cause of action for personal injury against the owner of certain premises based on an accumulation of ice never came into existence where the notice was not given and thus allegations of waiver or estoppel were meaningless. In Smith v. Hiatt, the court held that the failure to give the required notice barred the action even where the defendant was present when the accident occurred and thus knew of it.

G.L. c. 84, §18 has been amended so as to add the following sentence: “Failure to give such notice for such injury or damage sustained by reason of snow or ice shall not be a defense under this section unless

11 G.L. c. 214, §3A, dealing with the unpermitted appropriation of a person's name or likeness for commercial purposes, was unaffected by the enactment of G.L. c. 214, §1B, and thus still controls where applicable.

§11.15. 1 G.L. c. 84, §17.
the defendant proves that he was prejudiced thereby." 8 While the amendatory language uses the words "under this section" it appears reasonably clear that G.L. c. 84, §21 incorporates the language of this amendment. No reason appears, relative to this provision, for distinguishing between accidents occurring on the public ways and accidents occurring on private premises or adjoining ways. To make this point clear, however, similar language should perhaps be added to section 21.

§11.16. Liability of lessor of goods: Warranty despite absence of privity. Chapter 670 of the Acts of 1971 amended G.L. c. 106, §2-318 so as to provide that lack of privity between a plaintiff and a defendant shall be no defense in any action brought against the manufacturer, seller or supplier of goods to recover damages for breach of warranty, expressed or implied or for negligence, although the plaintiff did not purchase the goods from the defendant, if the plaintiff was a person whom the manufacturer, seller or supplier might reasonably have expected to use, consume or be affected by the goods. A manufacturer, seller or supplier cannot exclude or limit the operation of the section. G.L. c. 106, §2-318 was further amended in 1973 1 so as to make the statute expressly applicable to lessors of goods and to provide that the plaintiff's failure to give notice shall not bar recovery under the statute unless the manufacturer, seller, supplier or lessor of the goods proves that he was prejudiced by the lack of notice. G.L. c. 106, §2-318 was again amended in 1974 so as to extend the statute of limitations period from two years to three years "next after the date the injury or damage occurs." 2 This change makes the statute of limitations period under G.L. c. 106, §2-318 consistent with the general three year period for tort actions and actions of contract to recover for personal injury. 8

STUDENT COMMENTS

§11.17. Tort liability of occupiers of land: Duty of reasonable care established for lawful entrants: Mounsey v. Ellard. 1 On June 6, 1973, the Supreme Judicial Court, in an opinion written by Chief Justice Tauro, abandoned its adherence to the traditional common law distinction in


negligence cases between invitees and licensees and established in its place a general duty of reasonable care owed by a land occupier to all lawful visitors.\textsuperscript{2}

The case involved a negligence action brought by a Concord police officer who fell on ice while leaving the defendant's premises after delivering a criminal summons for a parking violation. The Supreme Judicial Court ruled that the trial court had correctly directed verdicts for the defendants as to the several counts of the complaint which had alleged gross negligence and willful, wanton or reckless conduct by the co-owners of the premises, because the plaintiff's opening statement had failed to include any facts which could substantiate such a finding.\textsuperscript{8} However, in a highly significant move, the Supreme Judicial Court overruled the trial court's directed verdicts as to the plaintiff's two counts alleging ordinary negligence.\textsuperscript{4} The trial court had based these latter directed verdicts on the traditional common law rules that a policeman is considered to be a licensee and that a land occupier owes the licensee only the duty of refraining from wilful, wanton or reckless conduct. Ordinary negligence on the part of the occupier is not sufficient to warrant recovery by a licensee, according to traditional common law rules.\textsuperscript{11}

The court conceded that it could have based its decision on a finding that the plaintiff, a police officer, was an implied invitee\textsuperscript{6} or a member of a sui generis category.\textsuperscript{7} However, such a narrowing of focus by the court, while it would have resolved the case at hand, would have perpetuated the myth that the common law distinction between invitees

\textsuperscript{2} Id. Throughout this note, the term "land occupier" refers to a person who owns or controls real estate.
\textsuperscript{3} Id. at 872, 297 N.E.2d at 44.
\textsuperscript{4} Id. at 888, 297 N.E.2d at 53.
\textsuperscript{5} Id. at 872, 297 N.E.2d at 44.
\textsuperscript{6} Since the plaintiff was a police officer, the court could have based its decision on narrow grounds by holding that a police officer in the pursuit of his duty is an "implied invitee" to whom the occupier owes a duty of reasonable care to keep safe the route of access to the premises. Id. at 876-78, 297 N.E.2d at 46-47. But the court rejected this approach, which would have changed the boundaries of the invitee category, calling it an "illogical legal fiction." Id. at 879, 297 N.E.2d at 48. The court preferred to view the police officer's entry as it was in reality: "[Police officers] are not invitees because the occupier or owner does not have the freedom of choice to admit or exclude them which is ordinarily considered an essential element of the invitee classification." Id. at 880, 297 N.E.2d at 48.
\textsuperscript{7} Another option which the court considered and finally rejected was to treat policemen (and firemen) as sui generis. Id. at 880-81, 297 N.E.2d at 49. In essence that would mean creating a fourth category, limited to policemen and firemen; and the land occupier would have the duty of reasonable care to the members of that category. Such a solution would circumvent the conceptual problem inherent in classifying as an "invitee" the plaintiff in this case, who was present on the land to deliver a criminal summons. However, as the court notes, this approach tacitly admits the validity and viability of the traditional classification system, and the Mounsey court was not ready to concede that validity and viability. Id. at 881, 297 N.E.2d at 49.
§11.17

TORTS

and licensees in negligence actions is still a workable judicial tool. Instead, the court chose to sweep away the traditional mechanical system of categorization and therefore HELD: "[W]e no longer follow the common law distinction between licensees and invitees and, instead, create a common duty of reasonable care which the occupier owes to all lawful visitors." The principal result of the decision is to make the criterion for judging negligence actions brought against land occupiers by lawful visitors the same as the generally applied criterion in negligence cases, that of ordinary care. By this decision, Massachusetts no longer grants a privileged position in the law of negligence to the land occupier vis-à-vis his lawful visitor.

This note will discuss the significance of the Mounsey decision by examining in detail the common law distinctions which the court in Mounsey largely repudiated and by establishing the exact parameters of the decision itself. Because so much of the court's holding is dependent upon historical analysis, the history of the invitee-licensee-trespasser distinction in the law of negligence will be discussed at some length. Various qualifications and modifications which have been employed to temper the harshness of the traditional classifications will then be considered, together with the ever-increasing volume of criticism, from the bench and in scholarly publications, of the whole system of simplistic categories. Finally, the statutes and judicial decisions in other jurisdictions which wholly or partially reject the traditional system will be examined and compared with the holding of the Supreme Judicial Court in Mounsey v. Ellard.

The common law system was a deceptively simple one according to which the degree of care owed to any entrant upon the land was relative to what legal type of visitor he was. The land occupier owed to the trespasser (i.e., "a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise") only the duty of refraining from wilful, wanton or reckless conduct. Similarly the land occupier owed the licensee (i.e.,

8 Id. at 885, 297 N.E.2d at 51. It should be noted that this language avoids extending the duty of reasonable care to trespassers, who by definition are not lawful visitors. Id. at 885 n.7, 297 N.E.2d at 51 n.7.
9 Restatement (Second) of Torts §329 (1965).
10 This is the rule in Massachusetts. See, e.g., Chronopoulos v. Gil Wyner Co., 334 Mass. 591, 137 N.E.2d 667 (1956).

Numerous exceptions and qualifications of this general rule concerning liability to the trespasser have developed in several jurisdictions; these exceptions and qualifications involve, for example, frequent trespassers on a limited area, dangerous activities conducted by the occupier, the discovered trespasser, and the attractive nuisance doctrine. See W. Prosser, Handbook of the Law of Torts §§58, 59 (4th ed. 1971). It should be noted that the "attractive nuisance" doctrine has not been recognized in Massachusetts. Smith v. Eagle Cornice & Skylight Works, 341 Mass. 139, 167 N.E.2d 637 (1960).

On liability to trespassers generally, see Hughes, Duties to Trespassers: A Com-
"a person who is privileged to enter or remain on land only by virtue of the possessor's consent" only the duty of refraining from wilful, wanton or reckless conduct. Because a social guest has traditionally been classified as a licensee, regardless of how cordial the invitation, the consequences of this rule of law, in terms of protecting land occupiers from negligence actions, have been far-reaching. No less a man and jurist than Justice Holmes once summarized the rights of the bare licensee in words which, although written without satirical intent, strike the modern reader as almost a caricature of a distorted system of justice: "No doubt a bare licensee has some rights. The landowner cannot shoot him." Finally, according to the traditional approach, the land occupier owed the invitee (i.e., a person who enters or remains on land as a consequence of a public invitation or who is a business visitor) the duty of ordinary care. The duty is an affirmative one: the land occupier must protect the invitee from dangers of which he (the occupier) is aware and from those which he can discover through the exercise of reasonable care. As a result, it has been crucial in most negligence actions for the plaintiff-entrant to prove that he was an invitee. Various

parative Survey and Revaluation, 68 Yale L.J. 683 (1959); James, Tort Liability of Occupiers of Land: Duties Owed to Trespassers, 65 Yale L.J. 144 (1955); Eldredge, Tort Liability to Trespassers, 12 Temp. L.Q. 32 (1937).

11 Restatement (Second) of Torts §330 (1965).


15 (1) An invitee is either a public invitee or a business visitor.

(2) A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public.

(3) A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land.

Restatement (Second) of Torts §332 (1965).


17 The term "business invitee" is used in some jurisdictions. In Massachusetts, as in most jurisdictions, a social guest is treated as a licensee, even though "invited" by the land occupier. In Massachusetts, until the instant decision, a land occupier owed his social guest only the duty of refraining from gross negligence (except in wrongful death actions). See, e.g., Palter v. Zarinsky, 338 Mass. 256, 155 N.E.2d 158 (1959); Holiday v. First Parish Church, 339 Mass. 692, 162 N.E.2d 48 (1959).
“tests” have been proposed by scholars and adopted by the judiciary for the purpose of determining who was and who was not an invitee.\textsuperscript{18}

During the waning years of the feudal epoch, when the common law's basic principles were being established, the social and political position of the landowner was especially privileged.\textsuperscript{19} The power of the Crown was far from absolute even over the lands technically beneath its sway; like the medieval barons, the landowners in post-medieval times retained a real, albeit limited, sovereignty over their land. This socially sanctioned, privileged position of the land occupier was still very much a reality in the latter part of the nineteenth century, when the fundamental axioms of our modern law of negligence were first formulated. As a result, there developed a series of remarkable immunities which, by substantially limiting the degree of care owed by the land occupier to certain classes of visitors, shielded him in large measure from the duty of reasonable-care-under-the-circumstances which the law of negligence imposed on most of the rest of society. Professor Bohlen has well described the process whereby the privileged status of the land occupier came to be the great anomaly in the law of negligence:

The King's law stopped at the boundary of the owner's sovereign territory except in felonies and in trespass actions . . . . When the comparatively modern law of negligence reached the relations of landowners to persons entering his property, it found the field occupied by this concept of the owner's right as sovereign to do what he pleased on or with his own property. The history of this subject is one of conflict between the general principles of the law of negligence and the traditional immunity of landowners.\textsuperscript{20}

It is important to emphasize the historical circumstances in which the immunities of the land occupier developed, because the basic \textit{ratio

\begin{footnotesize}
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\item \textsuperscript{18} See text at notes 39-47 infra.
\item \textsuperscript{19} Concerning the privileged position of the land occupier in the common law and the influence of that socially sanctioned privilege on the establishment of the invitee, licensee and trespasser categories, see Bohlen, Fifty Years of Torts, 50 Harv. L. Rev. 725, 735-40 (1937). Bohlen's article is cited twice by the Supreme Judicial Court in the instant case. 1971 Mass. Adv. Sh. at 873, 879, 297 N.E.2d at 45, 48. The use made by the \textit{Mounsey} court of the work of Bohlen and other scholars represents a good example of the role of historical research in jurisprudence. The court's opinion does not deny that the licensee-invitee distinction \textit{may once} have been a judicially and socially valid approach. The court says only that it is not \textit{now} valid, because it simply does not make adequate provision for the complexities of modern society. Id. at 884, 297 N.E.2d at 51. Although the court does not discuss the point, perhaps it could be observed that not only has the organization of society evolved from an earlier, simpler model, but society's perceptions as to what constitutes "justice" have evolved as well. See also Note, 25 Vand. L. Rev. 623, 623-26 (1972); Note, 13 St. Louis U.L.J. 449, 450-51 (1969); Comment, 4 Vill. L. Rev. 256, 257-58 (1958-59). See generally Marsh, supra note 12.
\item \textsuperscript{20} F. Bohlen, Studies in the Law of Torts 163 (1926).
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decidendi of Mounsey is that the circumstances are no longer the same. The values of our society are not exactly the same as those of England or America of one hundred years ago.\textsuperscript{21} Society's perceptions change, and its values as reflected in its laws vary accordingly. The "almost religious emphasis on property rights" has yielded to a growing awareness that everyone, including the land occupier, has a duty of reasonable care towards his "legal neighbors."\textsuperscript{22} Chief Justice Tauro's opinion in Mounsey reflects this relativistic\textsuperscript{28} and evolutionary view of the common law:

Perhaps, in a rural society with sparse land settlement and large estates, it would have been unduly burdensome to obligate the owner to inspect and maintain distant holdings for a class of entrants who were using the property "for their own convenience" . . . but the special immunity which the licensee rule affords landowners cannot be justified in an urban industrial society.\textsuperscript{24}

It should be emphasized that the leading English and American cases which established the immunities of the land occupier and the entrant classification system were chronologically prior to the advent of negligence as the principal theory of liability for unintentional torts.\textsuperscript{25} The cases which introduced the crucial distinction between the invitee and other lawful entrants are Parnaby v. Lancaster Canal Co.,\textsuperscript{20} decided in 1839.

\textsuperscript{21} See, e.g., Long, Land Occupant's Liability to Invitees, Licensees, and Trespassers, 31 Tenn. L. Rev. 485, 486 (1964):

The rule of immunity [of the land occupant] developed in a day when the landowning class, because of its great wealth, power, and prestige was able to impose an almost religious emphasis on property rights and the protection of the successful.

\textsuperscript{22} See Lord Atkin's definition in Donoghue v. Stevenson, [1932] A.C. 562 (Scot.), quoted in note 30 infra.

\textsuperscript{23} "Relativistic" is used here to characterize the awareness that a judicial holding, however correct and just it may be on the day the case is decided, will not necessarily remain valid for all time. As circumstances change and as society's values and expectations change, the rules of law should be expected to change accordingly. As Justice Holmes cogently put it: "[C]ertainty generally is illusion, and repose is not the destiny of man. . . . We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind." Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 466 (1897).


\textsuperscript{26} 113 Eng. Rep. 400 (Ex. 1839). Parnaby established the principle that a duty of ordinary care is owed to the business invitee. See Prosser, Business Visitors and Invitees, 26 Minn. L. Rev. 573, 576 (1942).
§11.17 Torts

1839; Southcote v. Stanley, 27 decided in 1856; Indermaur v. Dames, 28 decided in 1866; and, in the United States, Sweeny v. Old Colony & Newport R.R., 29 decided in 1865. It was not until 1883 that the basic principles which still govern modern theories of negligence were enunciated in the English case of Heaven v. Pender. 30

Whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger. 31

Rather than follow the full implications of the Heaven v. Pender formula, which would abrogate any special immunities for the land occupier and would obviate the theoretical basis of what one judge has termed "the invitee-licensee-trespasser trinity," 32 the English and American courts preferred to accommodate the law of negligence to the landed class's expectation of special immunities. The tripartite classification scheme (invitee-licensee-trespasser) was the means whereby extensive immunities from negligence actions were conferred upon land occupiers. As a result, the principal issue in negligence actions against a land occupier was the legal status (invitee, licensee or trespasser) of the entrant-

27 1 H. & N. 247, 156 Eng. Rep. 1195 (Ex. 1856). Southcote held that a social guest was not to be considered an invitee at law. See Prosser, supra note 26, at 577; Comment, 22 Mo. L. Rev. 186, 187-89 (1957).
28 1 L.J.C.P. 272, aff'd, 2 L.J.C.P. 311 (Ex. 1867). This leading case held that an occupier has a duty towards his business invitees to protect them from dangers of which he is aware or which he might discover with reasonable care. See Prosser, supra note 26, at 579.
Another very influential case for the development of concepts of negligence and of the scope of duty owed is Donoghue v. Stevenson, in which Lord Atkin proposed a definition of one's legal neighbor:
Who, then, in law is my neighbor? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.
[1932] A.C. 562, 580 (Scot.).
32 This sardonic expression is Judge Bazelon's. See Daisey v. Colonial Parking, Inc., 331 F.2d 777, 779 (D.C. Cir. 1963).
plaintiff rather than the degree of care exercised by the land occupier in the circumstances. *Mounsey* represents a movement away from this tradition of determining liability on the basis of the visitor's status and the introduction into land occupier-entrant relations of the general standard of reasonable care, as it was originally enunciated in the landmark case of *Heaven v. Pender*. The decision is a good example of the judiciary's examining the common law to eliminate anomalies, which, even if justifiable at an earlier point in history, are neither relevant nor defensible in the conditions of modern society. Seen from this historical perspective, *Mounsey* is not an out-of-hand rejection of tradition, but an example of the vitality of the common law as manifested by its capacity to alter some of its rules as the rules become no longer adequate for a society in evolution.

As one might suspect, the land occupiers' immunities and the "invitee-licensee-trespasser trinity" were developed and preserved not merely because of an historical accident, but, in addition, because the English and American judiciary quite consciously wished to shield the land occupier from the vexation of negligence suits. Bohlen's influential article emphasizes the historical and sociological context in which the tripartite classification and the attendant immunities developed:

The English common law from which our American law is derived was part and parcel of a social system of which the landholders were the backbone. The judges were drawn from the landowning classes or hoped to found a landowning family. It was inevitable that in such an atmosphere supreme importance should be attached to proprietary interests.

By means of the tripartite classification system, the courts were able to shield land occupiers from the vast majority of negligence suits. Unless the plaintiff-entrant fell into the restricted invitee class, he could not benefit from the duty-of-ordinary-care standard which had been established as the general norm in negligence cases. By thus focusing attention on the status of the entrant, the key question became not whether the land occupier had exercised the ordinary care of a reasonable man, but whether the entrant was or was not an "invitee." It frequently was the judge who would determine as a matter of law the category to which the plaintiff belonged. But even if that determination was left to the jury, the focus of attention was still on the plaintiff's legal status, rather than on the defendant's acts or omissions. In effect, then, except for the limited class of invitees, the jury was prevented from performing its normal role of evaluating the alleged negligence in the light of contemporary community standards. The assumption which underlies this

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complex system is, of course, that juries would tend be plaintiff-oriented in negligence actions against land occupiers. In the course of his thorough historical study, Marsh observed:

Even if the judges had been mentally prepared to assess the liability of the landowner towards visitors simply by reference to the conduct of the reasonable man, they would not have been willing to leave the landowner to the verdict of a jury belonging, as a general rule, to the class of potential visitors to property rather than to that of landowners. One would not expect to find this very often or explicitly stated; it must be largely a matter of inference from the social history of the time.84

The traditional classification system is an example of what might be termed "mechanical jurisprudence." Once the plaintiff's status is determined, the duty of care owed him is then measured by consulting the pre-existing rules—the rules serve the function of legal logarithmic tables: to each status category there corresponds a quantum of care owed.

The "invitee-licensee-trespasser trinity" came to be viewed as an almost metaphysically necessary statement of the nature of things. It possessed the advantage of symmetry; it protected the interests of the propertied classes; and it made for judicial efficiency by obviating the necessity of examining the specific circumstantial facts in many negligence actions involving land occupiers. Perhaps the most enthusiastic recorded endorsement of the traditional categories is that of Lord Dunedin, who observed:

What I particularly wish to emphasize is that there are the three different classes—invitees, licensees, trespassers . . . .

Now the line that separates each of these three classes is an absolutely rigid line. There is no half-way house, no no-man's land between adjacent territories.85


The negligence formula of reasonable care was slow in taking form; it was vague at best. When applied to the infinite situations of the landowner towards persons coming on his land, it seemed to place far more power in the hands of a jury than the judges of the middle 1800's were willing to pass over to them. . . .

In this formative period of negligence theory judges found that by classifying the persons into various classes they could more effectively control the power of the jury.


Contrast this attitude with the view of the Land Reform Committee, the group which England's Lord High Chancellor charged with the task of examining the common law concerning occupier-entrant liability and whose studies eventually led to the Occupiers' Liability Act. The Committee stated:

There is a certain air of reasonableness in the conventional distinction [between invitee and licensee] when applied to the two simple "stock" examples of a cus-
Such a system does allow for the facile disposition of many negligence cases; however, as a growing number of courts have come to realize, the facile disposition of cases cannot always be equated with the just disposition of cases. The courts became aware that the classic trichotomy was not a perfectly adequate or just tool in all circumstances. While not rejecting the trichotomy itself, they developed numerous qualifications and exceptions in an attempt to soften the rigors of the status system. Thus, for example, many jurisdictions came to require that the land-occupier who is conducting “active operations” on his land must exercise reasonable care for the protection of his licensees, and in many jurisdictions he is held responsible to make himself aware of the licensee’s presence. Moreover, the favored invitee class has been artificially widened in many jurisdictions through the adoption of liberal tests to determine who is an invitee at law.

An example of the complexity which resulted from adherence to the basic trichotomy is furnished by the dispute between the partisans of the economic benefit theory of defining the invitee class and the proponents of the invitation theory. The economic benefit theory maintains that the basic test for distinguishing between an invitee and a licensee is whether the visitor is present on the land to confer an economic benefit on the land occupier; if the visitor is there for the occupier’s real or potential economic benefit, then he is a business invitee and the land occupier owes him the duty of reasonable care.

The invitation test, on the other hand, is based on the premise that when a land occupier invites the public to enter upon his property there is an implied assurance on his part that he has exercised reasonable care to see to it that the premises will be suitable for the purposes for which the invitation is extended. According to this view, to determine who is an invitee, there is no need to inquire as to whether or not the visitor...
was conferring an economic benefit on the occupier; it is necessary only to establish whether or not the premises were opened to the public.\textsuperscript{41}

The first Restatement of Torts followed the economic benefit test and was widely criticized as a result.\textsuperscript{42} The second Restatement in essence adopted the public invitation theory.\textsuperscript{43}

Massachusetts, although it at one time adhered to the public invitation theory,\textsuperscript{44} has since 1892 used economic benefit as the basic criterion for distinguishing between invitee and licensee.\textsuperscript{45} Further, prior to the decision in \textit{Mounsey}, Massachusetts applied the economic benefit test rather strictly.\textsuperscript{46} "There must be a real or apparent intent on the part of the invitor to benefit in a business or commercial sense . . . ."\textsuperscript{47}

These numerous exceptions, tests, and subcategories produced a highly complex, yet still clearly artificial, system. The subcategories and the technical verbiage did represent attempts by the courts to free themselves from the bondage of an outmoded system, but they were reforms \textit{within} the framework of the common law categories, rather than a bold rejection of the categories themselves as inherently unworkable and unjust in a modern society. In an important decision, \textit{Kermarec v. Compagnie Generale Transatlantique},\textsuperscript{48} in which the United States Supreme Court declined to introduce the invitee-licensee distinction into maritime law, Justice Stewart portrayed the complexities and subtleties of the entrant classification system in these words:

The distinctions which the common law draws between licensee and invitee were inherited from a culture deeply rooted to the land, a culture which traced many of its standards to a heritage of feudalism. In an effort to do justice to an industrialized urban society, with its complex economic and individual relationships, modern common-law courts have found it necessary to formulate increasingly subtle verbal refinements, to create subclassifications among tradi-

\textsuperscript{41} However, the social guest is usually classified as a licensee, even in jurisdictions which follow the invitation theory. The rationale for this is apparently the lack of an implied assurance to the social guest as to the safety of the premises. See W. Prosser, supra note 10, §60, at 378-79; Comment, 7 Wm. & Mary L. Rev. 313 (1966).
\textsuperscript{42} Prosser, supra note 26, at 573-74, citing Restatement of Torts §332 (1932).
\textsuperscript{43} See Comment, 7 Wm. & Mary L. Rev. 313, 316-17 (1966), citing Restatement (Second) of Torts §332 (1958).
\textsuperscript{44} Sweeny v. Old Colony & Newport R.R., 92 Mass. (10 Allen) 568, 574 (1865).
\textsuperscript{46} In Burns v. Turner Constr. Co., 402 F.2d 332, 335 (1968), the United States Court of Appeals for the First Circuit noted the strictness of the Massachusetts standard for determining the status of an invitee.
\textsuperscript{48} 358 U.S. 625 (1959).
tional common-law categories, and to delineate fine gradations in the standards of care which the landowner owes to each . . . . Through this semantic morass the common-law has moved, unevenly and with hesitation, towards “imposing on owners and occupiers a single duty of reasonable care in all the circumstances.”

But, apart from the “semantic morass” which they produced, the various attempts to mollify the harshness of the common law system were fated to prove unsatisfactory, because they represented tacit reaffirmation of the essential validity of the classification system itself. The inescapable defect of that system was its attempt to force vital reality into predetermined molds. Chief Justice Tauro, in *Mounsey*, speaks of “procrustean efforts to fit the circumstances of contemporary life into this archaic and rigid classification system.” As laudable as were these attempts to make the classification system less harsh, they all avoided calling into question the system itself.

The frequently absurd or tragic results which the traditional system produced were warning signs of the system’s inappropriateness to the conditions of modern life. For example, the same individual could pass from one status to another in the course of a single visit to another’s property. In a 1963 case, the Court of Appeals for the Ninth Circuit, following the traditional theory, was forced to conclude that a customer in a restaurant (and as such an invitee) was transformed into a licensee when she left her seat to play the piano, with permission, and subsequently fell while leaving the bandstand. A more amusing example of the bizarre metamorphosis which a visitor could undergo in the course of a single visit to another’s property is provided by *Braun v. Vallade*, a California case, in which the plaintiff had been injured by falling through a trapdoor in a saloon. He had entered the saloon to use its toilet facilities, and at that point was a mere licensee. However, upon leaving the toilet, “not wishing . . . to use the convenience of any place without some return,” the plaintiff ordered a beer; at that point, the former licensee was transformed without further ado into a business invitee to whom the defendants owed the duty of ordinary care. As a result, the plaintiff, who was injured after becoming an invitee, had only to prove a breach of that duty on the part of the defendants, whereas if he had fallen a short time before . . .

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49 Id. at 630-31, quoting Kermarec v. Compagnie Generale Transatlantique, 245 F.2d 175, 180 (2d Cir. 1957) (dissenting opinion).
51 West v. Tan, 322 F.2d 924 (9th Cir. 1963). The disadvantage of a result like this one lies not in that the restaurant should have been presumptively considered liable, but in that, by the mechanical operation of the categorization system, the jury was not allowed to consider all the facts of the case in the light of the reasonable-care-under-the-circumstances criterion. See Comment, 44 N.Y.U.L. Rev. 426, 430 n.35 (1969).
52 33 Cal. App. 279, 164 P. 904 (1st App. Dist. 1917).
53 Id. at 280, 164 P. at 905.
earlier in the very same place, his task would have been much greater.

Lord Denning has commented ironically on this kind of legal conceptual­
ism:

A canvasser who comes on your premises without your consent is a
trespasser. Once he has your consent, he is a licensee. Not until you
do business with him is he an invitee. Even when you have done
business with him, it seems rather strange that your duty towards
him should be different when he comes up to your door from what
it is when he goes away. Does he change his colour in the middle of
the conversation? What is the position when you discuss business
with him and it comes to nothing? No confident answer can be given
to these questions. Such is the morass into which the law has foun­
dered in trying to distinguish between licensees and invitees.84

That there has long existed a trend away from the common law cate­
gories and towards the application of the standard of reasonable-care­
under-the-circumstances, even in the area of land occupier liability, has
often been noted.85 As early as 1937, a commentator described in pic­
turesque terms the slow struggle of the reasonable-care-under-the-circum­
stances criterion to assert itself against the traditional privileges of land
occupiers:

During the last half of the nineteenth century and down to the
present a developing law of negligence has battered continually at
the gates guarding the immunities of possessors of land. Compromise
after compromise has been effected between the social value of human
life and the social value of the unrestricted use of land.86

The battering at the gates of which Eldredge spoke has been carried on
both by the courts of several jurisdictions and by legal writers. Of the
judicial criticism of the traditional approach, none is more telling nor
more felicitously worded than that of the United States Supreme Court
in Kermarec v. Compagnie Generale Transatlantique, quoted at length
above.87 But the Supreme Court has not been the only tribunal to voice
dissatisfaction with the classification system. Courts in several jurisdictions
came to realize that the category approach, even with extensive modifica­
tions and exceptions, failed to produce just results in many instances,
and several judges have criticized the traditional system and its apparent
symmetry.88

85 See F. Harper & F. James, supra note 30, §27.1; Hughes, supra note 10, at 633, 634;
James, supra note 10, at 146; Note, 47 Cornell L.Q. 119, 126 (1961); Comment, 13 St.
86 Eldredge, supra note 10, at 34.
87 See text at note 49 supra. See also Jones v. United States, 362 U.S. 257, 266 (1959).
88 See, e.g., Wolfson v. Chelist, 284 S.W.2d 447 (Mo. 1955), where the court, although
However, the surest indication of judicial discontent with the traditional trichotomy is the complicated system of subclassifications, exceptions, qualifications and refinements which various courts have superimposed on the pristine symmetry of the original three categories. The Mounsey court mentions as one of the bases for its holding these endless attempts to harmonize the categories with a reality that is by definition resistant to categorization:

Instead of challenging the efficacy of a classification that establishes immunities from liability which no longer comport with modern accepted values and common experience, many courts have carved out special exceptions to the licensee rule or made procrustean efforts to fit the circumstances of contemporary life into this archaic and rigid classification system.\(^{69}\)

Even more acerbic than the judicial criticism of the entrant-classification scheme has been the massive assault by scholarly writers on both the theoretical foundation and the practical application of the traditional system.\(^{60}\) The following statement is representative of the views expressed in numerous law review articles and treatises:

It is submitted that the true test of the possessor's liability should be based on foreseeability of harm to others without regard to the terms, "trespasser," "licensee" or "invitee." They tend only to add exceptions and confusions to the law . . . . It is time to abolish these outdated classifications, and to allow the general principles of negligence law to determine the liability of possessors of land on an objective case-to-case basis.\(^{61}\)

The critics are in general agreement that the tripartite classification system is a relic of an era whose social organization and values were radically different from our own. Although there are divergent views as to the relevance and utility of the trespasser category, there is virtual unanimity among the scholars that the licensee-invitee distinction is counterproductive in that it frequently prevents the reasonable care standard from being applied in cases of alleged negligence.

maintaining the traditional rule that a social guest is to be treated as a licensee, noted nonetheless that it does not view the traditional system as "so inflexible as to preclude recovery where the facts merit an exception." Id. at 451. See also Fernandez v. Consolidated Fisheries, Inc., 98 Cal. App. 2d 91, 219 P.2d 73 (1950), where the traditional approach is described as "unrealistic, arbitrary and inelastic." Id. at 96, 219 P.2d at 76.


\(^{60}\) See, e.g., Hughes, supra note 10; McDonald & Leigh, The Law of Occupiers' Liability and the Need for Reform in Canada, 16 U. Toronto L.J. 55 (1965); Comment, 25 Vand. L. Rev. 623 (1972); Comment, 13 St. Louis U.L.J. 449 (1969); Comment, 4 Vill. L. Rev. 256 (1958-59); Note, 12 Rutgers L. Rev. 599 (1958); Comment, 22 Mo. L. Rev. 186 (1957).

However, not until the late 1950's did the first breakthrough occur. In England, as a result of growing dissatisfaction with judicial decisions based on the traditional distinctions, the Law Reform Committee was charged with studying the whole question of the land occupier's liability to a visitor to his property. The Committee concluded that the licensee-invitee distinction was counterproductive and should be abolished: "[The categories of licensee and invitee] tend to embarrass justice by requiring what is essentially a question of fact to be determined by reference to an artificial and irrelevant rule of law." As a result of the Committee's report, Parliament enacted, in 1957, the Occupiers' Liability Act, the most essential provisions of which state:

(1) An occupier of premises owes the same duty, the "common duty of care", to all his visitors . . . .

(2) The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.

The effect of the statute was to abolish the common law distinction between licensees and invitees, at least insofar as those categories were automatically determinative of the degree of care owed the entrant.

The fact that the social guest has been considered a licensee has been the most criticized aspect of the invitee-licensee, either-or approach to negligence. However, in this country only one state has chosen to change the status of the social guest through legislation. In 1963, Connecticut enacted the following statute: "The standard of care owed to a social invitee shall be the same as the standard of care owed to a business invitee." One wonders why other state legislatures have not enacted similar, or even more sweeping, measures to obviate the great problems occasioned by the common law classification scheme. Whatever may be the explanation for this legislative inactivity, in the United States it has been the courts of several jurisdictions, and not their legislatures, which

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64 5 & 6 Eliz. 2, c. 31, ¶ 2 (1957).
65 The Occupiers' Liability Act has had an influence on several American jurisdictions. It is cited, for example, in Rowland v. Christian, 69 Cal. 2d 108, 118, 443 P.2d 561, 568, 70 Cal. Rptr. 97, 104 (1968); and in Mounsey, 1973 Mass. Adv. Sh. at 885-86 n.8, 297 N.E.2d at 52 n.8.
67 By virtue of a judicial holding rather than a statute, Louisiana in 1957 determined that social guests are owed the same duty of care as are business invitees. Alexander v. General Fire & Life Assurance Corp., 98 So. 2d 790 (La. 1st Cir. Ct. App. 1957).
have "battered continually at the gates guarding the immunities of possessors of land." 87

Although it is an admiralty case and without precedential value for the law of negligence of the several states, the United States Supreme Court's decision in Kermarec v. Compagnie Generale Transatlantique 88 has served as an important catalyst in the movement away from the common law distinctions; it is almost invariably cited in the decisions abrogating those distinctions. 89 Kermarec was a negligence action brought by the social guest of a crew member aboard a vessel berthed in New York City. The guest fell on one of the ship's stairways and alleged in his complaint that his fall and resultant injuries were caused by a defect in the stairway. 70 Applying the substantive law of New York, the District Court for the Southern District of New York instructed the jury that Kermarec was a gratuitous licensee and that he could recover only if he proved the defendant had prior actual knowledge of the defect and had failed to warn the plaintiff thereof. The jury found for the plaintiff, but the trial judge set aside the verdict and dismissed the complaint on the grounds that there was no proof of prior knowledge by the defendant of the dangerous condition. The Court of Appeals affirmed. The Supreme Court ruled that the case would be decided by the standards of maritime law and that the licensee-invitee distinction of the common law should not be imported into maritime law. Rather, the standard should be one of due care under the circumstances. 71 Accordingly, the Court remanded the case to the District Court with instructions to reinstate the jury's verdict for the plaintiff. Kermarec can be said to have sounded the death knell for the traditional immunities of the land occupier.

In 1968, the Supreme Court of Washington, while specifically avoiding the general question of whether or not to abolish the traditional categories-approach, held that an occupier has a duty of reasonable care to avoid injuring one on the land with the occupier's permission and of whose presence the occupier is (or should be) aware. 72 That case involved a social guest of the occupier-defendant who was injured by a golf club swung by the defendant. 73 The trial court had found a lack of ordinary

87 Eldredge, Tort Liability to Trespassers, 12 Temp. L.Q. 82, 34 (1937).
70 The plaintiff also alleged unseaworthiness of the vessel, but the dismissal of this claim by the district court was upheld by the Supreme Court, although on different grounds. 358 U.S. at 629.
71 Id. at 622.
73 Id. at 778, 384 P.2d at 826.
care on the part of the defendant but had held for the defendant none-theless, since, according to the common law rules, the occupier has no obligation to exercise reasonable care towards the licensee.\textsuperscript{74}

Then, in 1968, a progressive American court, that of California, manifesting dissatisfaction with the half-hearted compromises of so many other courts, decided to revise radically the norms governing this part of the law of negligence. In \textit{Rowland v. Christian},\textsuperscript{75} the Supreme Court of California rejected the traditional requirement that the status of the plaintiff be determined before any evaluation of his allegations of negligence:

We decline to follow and perpetuate such rigid classifications. The proper test to be applied to the liability of the possessor of land . . . is whether in the management of his property he has acted as a reasonable man in view of the probability of injury to others, and, although the plaintiff’s status as a trespasser, licensee, or invitee may in the light of the facts giving rise to such status have some bearing on the question of liability, the status is not determinative.\textsuperscript{76}

The plaintiff in \textit{Rowland} was a social guest of the defendant; it was alleged that the plaintiff was injured by a defective faucet handle in the defendant’s apartment, and that the defendant was aware of the defect. The trial court had granted a summary judgment for the defendant on the basis of the old rule that a social guest is a licensee. The state supreme court reversed, on two grounds, one statutory,\textsuperscript{77} and the other judicial.\textsuperscript{78}

Although the action in \textit{Rowland} was brought by a social guest, the

\textsuperscript{74} Id.


\textsuperscript{76} 69 Cal. 2d at 119, 443 P.2d at 568, 70 Cal. Rptr. at 104.

\textsuperscript{77} The statutory grounds were the provisions of Cal. Civil Code §1714 (West 1978): Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person except so far as the latter has willfully or by want of ordinary care, brought the injury upon himself . . .

Because of the existence of this old but long ignored statute in California, it might be argued that the result in \textit{Rowland v. Christian} could not have been obtained in a jurisdiction which had no similar statute. However, a close reading of \textit{Rowland} reveals that the court based its holding on §1714 \textit{and} on its judgment that the common law classifications had become socially disfunctional; in other words, it is probable that the California court would have reached the same result even without §1714. See Comment, 44 N.Y.U.L. Rev. 426, 432 (1969).

\textsuperscript{78} The decision criticizes the great number of complex distinctions and exceptions, which have made the traditional system highly unwieldy, and it maintains that the common law distinctions are irrelevant and counterproductive in modern society. 69 Cal. 2d at 117, 443 P.2d at 567, 70 Cal. Rptr. at 103.
decision did not limit itself to abolishing the licensee-invitee distinction, but also declared that the land occupier shall have no special immunity in an action for negligence brought by a trespasser. In every instance, status may help to determine whether the defendant has complied with the reasonable man standard, but status will not be automatically determinative of the quantum of care owed. In essence, Rowland calls for a case-by-case evaluation of all the relevant factors in every negligence action brought against a land occupier.

Since 1968, several other American jurisdictions have followed the lead of Rowland v. Christian and have either wholly or partially abrogated the common law classification scheme. The year after Rowland v. Christian, the Supreme Court of Hawaii in Pickard v. City & County of Honolulu reached a similar conclusion as to the irrelevancy of the common law categories in modern society. In a brief decision, the court expressed its belief that "the common law distinctions between classes of persons have no logical relationship to the exercise of reasonable care for the safety of others" and held that the occupier owes a duty of reasonable care to "all persons reasonably anticipated to be upon the premises, regardless of the legal status of the individual." The plaintiff in Pickard, who had been injured while using a restroom in a courthouse with permission, was at least a licensee according to the traditional system; but the language of the court in Pickard would seem to suggest the abolition of all the common law categories. However, a later decision of the Supreme Court of Hawaii implies that the Pickard decision abolished only the licensee-invitee distinction.

Colorado is another jurisdiction where "[a] person's status as a trespasser, licensee or invitee may . . . have some bearing on the question of

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79 Id. at 119, 443 P.2d at 568, 70 Cal. Rptr. at 104. Since the plaintiff in Rowland was clearly a social guest, the court's abolition of the trespasser category is dictum. It is dictum, however, which indicates the mind of the majority of the justices of the California Supreme Court in 1968; whether a future court will one day abolish the trespasser category in negligence, as a specific holding, remains to be seen. Ironically, if the Rowland decision had been less sweeping, the court might well have been presented with a negligence case involving a trespasser and would have been able to hold that a duty of ordinary care under the circumstances is owed the trespasser. The effect of the dictum in Rowland is to make it unlikely that such a case will present itself as long as the majority in Rowland continues to constitute a majority of the court. See Note, 49 B.U.L. Rev. 198, 204-05 (1969).

80 In addition to status, the Rowland court lists the following as some of the potentially relevant factors in determining liability: "the closeness of the connection between the injury and the defendant's conduct, the moral blame attached to the defendant's conduct, the policy of preventing future harm, and the prevalence and availability of insurance . . . ." 69 Cal. 2d at 117, 443 P.2d at 567, 70 Cal. Rptr. at 103.


82 Id. at 455, 452 P.2d at 446.

83 Id.

liability, but it is only a factor—not conclusive." The supreme court's opinion in *Mile High* clearly indicated that the plaintiff's legal status was not *irrelevant* in the determination of liability, but at the same time it stressed that status was not to be conclusively *determinative*.

In *Peterson v. Balach*, the Supreme Court of Minnesota held that the plaintiff's status as an invitee or licensee is not determinative of the occupier's liability, but is one factor among others to be considered in determining whether the occupier exercised reasonable care under the circumstances. The court reversed the trial court's directed verdict for the defendant, because the directed verdict was based on a finding that the plaintiff's decedent had been a social guest (and, therefore, a licensee) to whom the defendant owed no duty of inspection or of care to make the premises safe.

In 1972 the Court of Appeals for the District of Columbia decided the case of *Smith v. Arbaugh's Restaurant, Inc.*, and thereby abolished the common law classification system in its entirety. The case involved injuries sustained by a Health Inspector when he allegedly fell on slippery metal steps while inspecting the defendant's restaurant in the course of his official duties. Rather than decide whether the plaintiff should properly be classified as a business invitee or as a licensee, the court decided to follow what it termed "the modern trend" and held:

Rather than continue to predicate liability on the status of the entrant, we have decided . . . to apply ordinary principles of negligence to govern a landowner's conduct: A landowner must act as a reasonable man in maintaining his property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk.

The decision abolished the special immunities which depend on the entrant's status. The court does require that "the circumstances of the visitor's entry have some relation to the question of landowner liability," especially because of its relation to foreseeability. However, it is the holding in *Smith* that "the status of an entrant onto the property is not solely determinative of the duty of care owed him."

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86 *294 Minn. 161, 199 N.W.2d 689 (1972).*
87 The *Peterson* court specifically declined to rule on the viability of the trespasser category because of its conception of judicial restraint and its desire that such a decision be made only in an adversary context. Id. at 164, 199 N.W.2d at 642.
88 Id. at 167, 173-75, 199 N.W.2d at 643-44, 647-48.
89 *469 F.2d 97 (D.C. Cir. 1972).*
90 Id. at 100.
91 Id. at 106.
92 Id. (emphasis added).
Mounsey v. Ellard is a less sweeping decision than those of the courts of California and the District of Columbia in that it mandates a duty of reasonable care on the part of the land occupier only towards lawful visitors. The court made it clear that it wished to leave undisturbed the category of trespasser and the concomitant duty of the land occupier to refrain only from wilful, wanton or reckless conduct with respect to unlawful visitors:

We feel that there is significant difference in the legal status of one who trespasses on another's land as opposed to one who is on the land under some color of right—such as a licensee or invitee. For this reason, among others, we do not believe they should be placed in the same legal category. For example, one who jumps over a six foot fence to make use of his neighbor's swimming pool in his absence does not logically belong in the same legal classification as a licensee or invitee.

The Massachusetts court, by preserving the trespasser classification, is precluding the application of the reasonable-care-under-the-circumstances standard to cases where the plaintiff is a trespasser; in those cases the old mechanical rules will still be operative. But one may conjecture that the legal reasoning which underlies the decision in Mounsey will one day be somewhat mitigated, at least in some circumstances: “The possible difference in classes of trespassers is miniscule compared to the others. These differences can be considered when they arise in future cases.”
day lead to a realization that a trespasser should not be automatically
denied recovery (except in the event of wilful, wanton or reckless con-
duct) simply because he is a trespasser, but rather that all the relevant
facts of each case should be scrutinized—including, of course, the fact
that the plaintiff's presence on the land was or was not reasonably
foreseeable by the land occupier.  
Justice Kaplan's concurring opinion in Mounsey voices the belief that the court's preservation of the tres-
passer category "seems unfaithful to the rest of the opinion." He con-
tends that the trespasser category, like the two categories which are
abolished in Mounsey, frequently serves to prevent an evaluation by the
trier of fact of the actual circumstances of each individual case. "[I]t is
sometimes just as hard to distinguish trespassers from licensees or invitees,
as to distinguish licensees from invitees .... The very effort at dry classifi-
cation and differentiation puts the emphasis at the wrong places."  

On the other hand, since the plaintiff in Mounsey was certainly not
a trespasser, if the court had abolished the trespasser category along
with the other two, that aspect of its decision would arguably have been
mere dictum. In any event, the court makes it clear in footnote 7 of its
decision that the present court is not prepared to hold that a trespasser
is owed the duty of ordinary care under the circumstances.

The Mounsey decision will doubtless provoke debate as to whether
it reflects a proper exercise of the judicial function. In this regard, two
questions must be considered: first, should not such fundamental changes
in the common law be reserved to the legislative branch; and second, was
so sweeping a ruling necessary and appropriate in this case. Chief Justice
Tauro's opinion carefully points out that the decision in no sense
represents an arbitrary ukase on the part of the Supreme Judicial Court. In
addition to citing statutory and judicial modifications of the common
law distinctions in other jurisdictions, the opinion underlines the

whether the defendant has acted reasonably in the light of all the circumstances
in the particular case.

1973 Mass. Adv. Sh. at 885, 297 N.E.2d at 51. There does not appear to be any inherent
reason why considerations of this nature should not apply with equal cogency to the
situation of the trespasser.

Chief Judge Bazelon, in Smith v. Arbaugh's Restaurant, Inc., has noted how
artificial the "trespasser" label frequently is:
With urbanized society comes closer living conditions and a more gregarious popula-
tion. The trespasser who steps from a public sidewalk onto a private parking lot
today is not the "outlaw" or "poacher" whose entry was both unanticipated and re-
sented in the nineteenth century. It is contrary to reason to accept as a settled
principle of law that a parking lot owner actually varies his conduct according to
the status of those who walk across his boundaries.

469 F.2d at 102-03.

101 Id., 297 N.E.2d at 51-53.
rational basis for the significant change in the law of negligence which it is effecting. It emphasizes that the invitee-licensee distinction must be seen against an evolving historical and sociological background; while the distinction may have been appropriate in an earlier and very different society, the court says, it "cannot be justified in an urban industrial society." In so deciding, the court is not usurping the Legislature's function. The Legislature of the Commonwealth could have enacted a statute to change the former common law classification system, and the Legislature remains free to alter, if it chooses, what the court has done in Mounsey v. Ellard. All that the court has done in the instant case is to correct what it perceives to be a grievous defect in the common law of negligence, and the common law is by its very nature of judicial origin.

The second question was in fact posed and responded to, in the negative, in the partially dissenting opinion of Justice Quirico (with whom Justice Reardon joined). The dissenters would have held that a land occupier owes a public official who must use the access routes to the occupier's house in the performance of his official duties the duty of keeping those access routes in reasonably safe condition; in this perspective the public official is treated as an implied invitee of the occupier. On these narrow grounds, they would have granted the plaintiff in the instant case a new trial, since the plaintiff-police officer had been classified as a licensee by the trial court. Since, as the court's opinion concedes, the case could have been decided simply by holding that the plaintiff was an implied invitee to whom was owed the duty of ordinary care, the dissenters maintained that it should have been decided on those narrow grounds; they contended that the court's opinion exceeded the necessities of the case at bar, and that therefore its abolition of the invitee-licensee distinction is mere dictum. The majority opinion, however, anticipated objections of this nature, saying that the real issue presented by the Mounsey case was the plaintiff's status and that therefore the court was not exceeding the necessities of the case in its holding that status was no longer to be the sole determinant of the degree of care owed by the land occupier: "We are not here dealing with 'general expressions.' On the contrary, we are deciding the sole issue raised, namely, the legal

102 Id. at 884, 297 N.E.2d at 51.
103 See Peck, The Role of the Courts and Legislatures in the Reform of Tort Law, 48 Minn. L. Rev. 265 (1963). This is a good discussion of the criteria for determining whether a given problem area is best remedied by legislative or by judicial intervention. The author specifically indicates that the reform of the law relative to occupier liability is appropriate for judicial action, and he adds that the courts have been "woefully inadequate" in responding to the call for reform in this area. Id. at 309. See also Sideman v. Guttman, 38 App. Div. 2d 420, 430, 330 N.Y.S.2d 263, 272-73 (1972); Friedmann, Legal Philosophy and Judicial Lawmaking, 61 Colum. L. Rev. 821 (1961).
105 Id. at 889-91, 297 N.E.2d at 54-55.
status of the plaintiff. We do this by abolishing the distinction between licensees and invitees . . . 

The court's opinion said that to resolve the case by simply classifying this plaintiff as an invitee would by that very fact perpetuate the myth that the invitee-licensee distinction is a valid and just judicial tool, whereas the court has come to view it as outmoded and unnecessarily harsh, unworthy of an enlightened legal system.

It may be objected that in abrogating the former strict standards for classification as an invitee and by greatly extending the group to whom a duty of reasonable care is owed, the court's decision will induce many people to arrange collusive suits, in order to profit from insurance coverage. There may indeed be an increase in the number of fraudulent claims as a result of the *Mounsey* decision. However, it is suggested that such a possibility should not prevent the judiciary from making a judgment which it considers just and necessary; the judiciary may properly look to the law enforcement agencies of government to combat abuses of this sort. Moreover, the old system was by no means insulated from collusion and mendacity. As the Supreme Court of Minnesota observed, with a judicial smile: "In states following the financial benefit theory [for determining invitee status], the percentage of people injured in a depot restroom who had ‘intended to buy a magazine’ is phenomenal."

The *Mounsey* decision specifically disclaims an intention to make landowners and occupiers the insurers of their property against injuries incurred by visitors. However, it seems probable that the availability of insurance in contemporary society has removed a major obstacle from the path of those who favor abolishing the traditional immunities and replacing them with a duty of reasonable care.

It is difficult to predict just what will be the ultimate effect of the *Mounsey* decision. Certainly, it will give greater prominence to the jury's role in the resolution of negligence cases; there will no longer be directed verdicts based simply on the plaintiff's status (with the significant

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106 Id. at 886 n.9, 297 N.E.2d at 52 n.9.
107 Id. at 878-81, 297 N.E.2d at 47-49.
110 See Hughes, Duties to Trespassers: A Comparative Survey and Reevaluation, 68 Yale L.J. 633, 690-91 (1959), and the numerous references cited there; see also W. Friedmann, Law in a Changing Society 126-64 (1959).
111 Although directed primarily at the question of duties owed to the trespasser, Hughes’ comments about the jury’s function in negligence cases are of wider relevance: No amount of cautionary tales can ultimately obscure the realization that we must either trust the jury or get rid of it. One cannot afford to sympathize for long with the view that a legal system must carry the burden of fictitious and obscurantist doctrine in order to keep vital issues away from that tribunal which was constituted to decide them.
Hughes, supra note 110, at 700 (footnote omitted). See also Comment, 44 N.Y.U.L. Rev. 426, 430-81 (1969).
exception of trespassers, for whom the law is as yet unchanged in Massachusetts). It will be for the jury to apply contemporary community standards to the facts of each individual case.

We believe that the reasonable care standard will give the jury the flexibility they need to assess the burden of liability on the facts of each case and in accordance with community standards as to what constitutes acceptable behavior on the occupier's part.\footnote{112}{1978 Mass. Adv. Sh. at 887-88, 297 N.E.2d at 53.}

The \textit{Mounsey} decision will not leave the jury without any norms by which to determine whether the defendant has exercised reasonable care under the circumstances; it merely eliminates the former mechanical system according to which the land occupier's duty was determined \textit{uniquely} on the basis of the entrant's status. To some extent status will still be relevant in the determination of liability, even if the magic words of "licensee" and "invitee" are no longer used.

Our decision merely prevents the plaintiff's status as a licensee or invitee from being the sole determinative factor in assessing the occupier's liability. However, the foreseeability of the visitor's presence and the time, manner, place and surrounding circumstances of his entry remain relevant factors which will determine "in part the likelihood of injury to him, and the extent of the interest which must be sacrificed to avoid the risk of injury."\footnote{113}{Id. at 887, 297 N.E.2d at 52-53, citing Smith v. Arbaugh's Restaurant, Inc., 469 F.2d at 106.}

In the light of this language, it is clear that the visitor's status has not become an irrelevant factor in determining liability. It is no longer determinative, \textit{per se}, of the degree of duty owed, but it remains one of the elements which must be considered in a determination of what constitutes reasonable care under the circumstances.

The basic jurisprudential significance of \textit{Mounsey v. Ellard} is that it represents a vigorous judicial reaction to mechanical rules of jurisprudence. The common law tradition has always shown readiness to confront reality and to consider the unique characteristics of each case that presents itself for resolution. The common law has traditionally avoided sweeping, abstract generalizations and preferred instead a more concrete, case-by-case approach. Seen in this light, \textit{Mounsey} is a re-affirmation of this basic characteristic of the common law. As the court suggests, the entrant classifications and the land occupier immunities may have been justified in an earlier day and in a simpler society, but they "cannot be justified in an urban industrial society."\footnote{114}{1978 Mass. Adv. Sh. at 884, 297 N.E.2d at 51. Cf. Marsh, The History & Comparative Law of Invites, Licensees and Trespassers, 69 L.Q. Rev. 182, 198 (1953): Even if in the nineteenth century it was held on particular facts that in the absence

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\item\footnote{112}{1978 Mass. Adv. Sh. at 887-88, 297 N.E.2d at 53.}
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§11.18 TORTS

premise that as social conditions change, the law must change accordingly or risk becoming mechanistic, harsh, and irrelevant. *Mounsey v. Ellard* represents a significant effort by an important American court to free itself from the domination of intellectual abstractions in the form of legal categories and to focus instead on the real facts of each individual case.115

Perhaps the best concluding comment on *Mounsey v. Ellard* and the evolutionary view of the common law which the Supreme Judicial Court adopted in that opinion is provided by an observation of Judge Bazelon in the *Arbaugh's Restaurant* case:

> It is the genius of the common law that it recognizes changes in our social, economic, and moral life. Legal classifications . . . are judicial creations which should be cast aside when they are no longer useful as controlling tools for the jury. The principle of stare decisis was not meant to keep a stranglehold on developments which are responsive to new values, experiences, and circumstances.116

> WILLIAM P. ROBINSON III

§11.18. Governmental immunity from tort liability: Private nuisance actions: *Morash & Sons, Inc. v. Commonwealth.*1 A landowner, Morash & Sons, Inc. (Morash), filed a petition in superior court seeking to enjoin the Commonwealth from storing road salt at a Department of Public Works (DPW) storage depot, and seeking to recover damages resulting from contamination of the corporation's water supply.2 Petitioner's land abuts three parcels maintained by the Commonwealth on which the DPW has stored salt for nearly fifty years.3 Morash alleged that the road salt from the depot had infiltrated the subsoil so as to pollute its water supply and damage its plumbing systems.4 The DPW refused to acknowledge responsibility and failed to take corrective action.5

of an act of commission there was no liability, a duty may nevertheless arise in the very different social and economic conditions of a century later.

116 Criticizing the tendency of legal systems to let quarrels about labels replace serious analytical examination of the complexities of the real world, Leon Green has observed:

> Word ritual under one guise or another has always been one of the primary methods of law administration, and the development of the uses made of words is one of the most puzzling of studies. We can scarcely realize the part which sacred words, taboo words, magic words, continue to play in our law.


2 Id. at 785, 296 N.E.2d at 462.
3 Id. at 785-86, 296 N.E.2d at 462.
4 Id. at 786, 296 N.E.2d at 462.
5 Id.
Morash contended that the Commonwealth's use of the land constituted a private nuisance and that the Commonwealth should consequently be held liable in tort. The argument was based on three separate theories: (1) that the Commonwealth had abrogated its sovereign immunity in tort as well as in contract by the provisions of section 1 of chapter 258 of the General Laws; (2) that municipalities in the Commonwealth are liable for maintaining private nuisances and there is no logical reason why the Commonwealth should not, similarly, be held liable for its nuisances; and (3) that as a matter of sound public policy, the common law doctrine of sovereign immunity from tort liability should be abolished in Massachusetts. The Commonwealth raised the affirmative defense of sovereign immunity, and it further asserted that sovereign immunity could be abrogated only by statute and that section 1 of chapter 258 of the General Laws did not allow a tort, as distinguished from a contract, claim against the Commonwealth. The trial court ruled as a matter of law that the doctrine of sovereign immunity was an absolute defense in answer to the Morash complaint. Morash appealed and the Supreme Judicial Court reversed.

The court adhered to the traditional construction of the statute under which Morash brought its action and consequently denied the petitioner's contention that the statute waived the Commonwealth's sovereign im-

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§ 11.18

6 The Morash case is strictly an attack on the sovereign immunity of the Commonwealth. The court, however, focused its attention on the merit of governmental immunity—sovereign immunity of the state and municipal immunity—since the two are inextricably related. See Murdock Parlor Grate Co. v. Commonwealth, 152 Mass. 28, 111, 24 N.E. 854, 856 (1890). For purposes of this note, "municipal immunity" will refer to the immunity conferred upon a political subdivision of the state, "sovereign immunity" will refer to the immunity of a state or federal government, and "governmental immunity" will encompass both municipal and sovereign immunity.

7 1973 Mass. Adv. Sh. at 786, 296 N.E.2d at 462. G.L. c. 258, §1 provides:

The superior court, except as otherwise expressly provided, shall have jurisdiction of all claims at law or in equity against the commonwealth. Such claims may be enforced by petition stating clearly and concisely the nature of the claim and the damages demanded...

Whether this statute is merely jurisdictional or whether it incorporates a limited waiver of sovereign immunity is irrelevant, since the providing of a forum to hear claims against the Commonwealth would be a meaningless gesture unless it assumed that the Commonwealth is not immune in at least some suits. 1973 Mass. Adv. Sh. at 787, 296 N.E.2d at 463.


9 Id., 296 N.E.2d at 462-63.

10 Id., 296 N.E.2d at 463. The Commonwealth based its defense on earlier decisions which had construed G.L. c. 258, §1 as permitting only contract actions to be brought against the state. See text at note 99 infra and cases cited in note 45 infra for examples of these earlier decisions.


12 Id. at 796, 296 N.E.2d at 468.
TORTS

§11.18

munity in tort as well as in contract. However, in a bold step, the court discarded an assumption, which had pervaded Massachusetts common law dating back to 1879, that the Commonwealth's consent to be sued must be obtained from the Legislature; the court then asserted that it had the power to abolish the doctrine of sovereign immunity. Most importantly, the court found persuasive the petitioner's argument that since there was no logical reason to hold a municipality liable for private nuisances maintained on its land and not to hold the Commonwealth liable for nuisances maintained on state lands, an exception ought to be created to the rule of sovereign immunity. It was therefore HELD: since the court has the power to limit or abolish the doctrine of sovereign immunity, it has decided to create an exception to the rule of sovereign immunity, which renders the Commonwealth liable in tort if it maintains a private nuisance which causes injury to the real property of another.

Finally, it should be noted that the Supreme Judicial Court, asserting that it preferred that the Legislature accomplish reform of the governmental immunity doctrine by a comprehensive statute, chose to carve out an exception to the sovereign immunity rule only in cases such as the case at bar—that is, cases in which the complained-of action of the Commonwealth can be classified as a private nuisance.

The Morash decision is significant because the court, for the first time, created a judicial exception to the rule of sovereign immunity in Massachusetts. In addition, the court sounded the death-knell of sovereign immunity by vigorously condemning the doctrine, and calling for its total abrogation by the Legislature.

Initially, this note will examine governmental immunity in Massachusetts, looking first at the development of sovereign immunity, that is, the immunity of the state, and then at the history of municipal immunity. With this development of governmental immunity as a backdrop, the

13 Id. at 788, 296 N.E.2d at 463.
14 Troy & Greenfield R.R. v. Commonwealth, 127 Mass. 43 (1879). For a discussion of this case, see text at note 21 infra.
16 Id. at 788, 296 N.E.2d at 464.
17 Id. at 786, 296 N.E.2d at 463.
18 Id. at 791, 796, 296 N.E.2d at 465, 468.
19 Id. at 791, 796, 296 N.E.2d at 465, 468.
18 Id. at 795, 296 N.E.2d at 465-66. In addition, the court stated:

The judge made exceptions [to the sovereign immunity doctrine] reflect a partial and piecemeal adjustment by the courts of a doctrine that, if applied in all cases indiscriminately, would bring about some unjust results. We have shown that the exceptions . . . are not based upon sound legal principles or sound public policy.

Id. at 795, 296 N.E.2d at 467-68.
20 Id. at 795-96, 296 N.E.2d at 468.
action of the Morash court, in carving out an exception to the immunity doctrine and, next, in deferring to the Legislature as to the work of further reform of governmental immunity, will be analyzed. Finally, this note will conclude by proposing that the court, by prospectively overruling the doctrine of governmental immunity, would have enhanced the possibility of achieving a timely and comprehensive reform of that doctrine.

While the concept of sovereign immunity is of uncertain origin\(^{21}\) it certainly had become a vital doctrine in England by medieval times.\(^{22}\) The idea underlying the doctrine seems to have its roots both in the theory that "the King can do no wrong,"\(^{23}\) and in the feeling that it is a contradiction in terms to allow a sovereign to be sued as a matter of right in his own courts.\(^{24}\) Clearly, the immunity of the King from jurisdiction in his own courts was purely personal. Consequently, sovereign immunity would seem incompatible with a democratic system of government where sovereignty rests in the people. Despite the difficulties in reconciling this royal prerogative with a democratic system of government,\(^{25}\) the immunity notion was adopted from the English crown by the American states.\(^{26}\)

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\(^{21}\) See Parker, The King Does No Wrong—Liability for Misadministration, 5 Vand. L. Rev. 167 (1952).

\(^{22}\) See Borchard, Governmental Responsibility in Tort, VI, 36 Yale L.J. 1, 17 (1926).

\(^{23}\) 1 W. Blackstone, Commentaries 245-46 (T. Cooley 3d ed. 1884).

\(^{24}\) See Borchard, supra note 22, at 38; Holdsworth, The History of Remedies Against the Crown, 58 L.Q. Rev. 141, 142 (1922).

\(^{25}\) It has been suggested that the unstable financial position of the states following the Revolutionary War was a factor in the adoption of sovereign immunity by the states. Gellhorn & Schenck, Tort Actions Against the Federal Government, 47 Colum. L. Rev. 722 (1947).

\(^{26}\) The United States Supreme Court led the American states in the adoption of sovereign immunity by recognizing that the concept was implicit in the Eleventh Amendment. The Eleventh Amendment was ratified in 1798 in reaction to the controversial Supreme Court decision in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793). In Chisholm, a citizen of South Carolina brought a contract action in the United States Supreme Court against the state of Georgia to recover a debt. The Court, confronted with the issue of whether such a suit would lie against a state, construed Art. III, §2 of the United States Constitution (which provides that the "Judicial Power shall extend to . . . Controversies . . . between a State and Citizens of another State . . . .") so as to allow the suit. 2 U.S. (2 Dall.) at 420. Widespread dissatisfaction with this decision prompted the ratification of the Eleventh Amendment, which limited the judicial power of the United States by prohibiting suits by citizens of one state against another state, U.S. Const. amend. XI. Although the amendment was confined to action in federal courts and to suits by citizens of one state against another state, its effect seems to have been to establish the sovereign immunity of the states. See Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 380 (1821). The Court throughout the nineteenth century upheld the immunity of sovereignty from suit when the suit was brought against the United States. See, e.g., Hill v. United States, 50 U.S. (9 How.) 386, 389 (1850). Similarly, the Court upheld claims of sovereign immunity when actions were brought against individual states. See, e.g., Beers v. Arkansas, 61 U.S. (20 How.) 527, 529 (1858).
The idea of the immunity of the Commonwealth of Massachusetts first appeared in the case of *Sewall v. Lee*, decided in 1812. There a widow had brought an action against a grantee of the Commonwealth to recover her dower interest in her husband's property, which had been confiscated by the state under a conspiracy law. Without expressly referring to the concept of sovereign immunity, the court suggested that the widow had no remedy at law against the Commonwealth, since the state was immune from suit. The first explicit reference to the sovereign immunity enjoyed by the Commonwealth came later, in 1865, in the case of *Briggs v. Light-Boat Upper Cedar Point*. In *Briggs*, the court was confronted with the asserted immunity of the federal government when it was asked to enforce a lien upon a vessel of the United States to recover the cost of labor and materials used in its construction. Dismissing the petition, the court made the following statement, technically dictum:

In the United States, it has always been held an essential attribute of sovereignty in a state not to be liable to be sued without its own consent; and that consent has not usually been given except in special cases. The law of this commonwealth affords sufficient examples. The general principle that the state cannot be sued, at law or in equity, is perfectly well settled.

The notion of sovereign immunity was authoritatively confirmed in 1879 by Chief Justice Gray in *Troy & Greenfield Railroad v. Commonwealth*. The Commonwealth lent the railroad $2,000,000 to enable it to construct a tunnel and required the railroad to mortgage its system to secure payment of the loan. Later, at the request of the Commonwealth, the railroad surrendered the property to the state, so that the state could complete the urgently needed tunnel. This surrender was qualified by the railroad's retention of a "right to redemption" in its property. Upon completion of the tunnel, the railroad sought to redeem its property by

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Influence of the Eleventh Amendment on the establishment of sovereign immunity was rhetorically expressed by Justice Bradley in 1890:

Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a State to sue their own state in the federal courts, whilst the idea of suits by citizens of other states . . . was indignantly repelled?

*Hans v. Louisiana*, 194 U.S. 1, 15 (1890).

27 *9 Mass. 365* (1812).

28 *Id.* at 364. The property was confiscated under the provisions of an act which authorized the confiscation of the property of several named persons (including the husband of the plaintiff in *Sewall*) because of conspiratorial acts committed by them in connection with the Revolutionary War.

29 *Id.* at 369-70.


31 *Id.* at 174.

32 *127 Mass. 43* (1879).
bringing a bill for an accounting of the debt owed by the railroad to the state, and offered to pay such a sum. Declaring that “[i]t is a fundamental principle of our jurisprudence, that the Commonwealth cannot be impaled in its own courts, except by its own consent clearly manifested by act of the Legislature . . . ,” the court dismissed the bill.\textsuperscript{83} This statement has been cited over a period extending nearly a century for the view that sovereign immunity is surrendered only by an expression of legislative consent.\textsuperscript{84}

Subsequent to the finding of sovereign immunity in the \textit{Troy \& Greenfield R.R.} decision, there have been legislative enactments whose effect has been to impose liability upon the Commonwealth under specified circumstances. In 1893 an enactment was passed which allowed recovery against the state for injuries sustained as a result of certain highway defects.\textsuperscript{85} Earlier, in 1879, the Legislature passed a bill that imposed liability upon the state for claims “founded on contract for payment of money.”\textsuperscript{86} Following passage of this act, disputes arose over the construction of the statute, in which the breadth of the requirement, “contract for payment of money,” was tested.\textsuperscript{37} The court refused to allow claims for damages against the state where the claim did not arise out of an actual contract for the payment of money. Consequently the statute was amended in 1887 (which amendment will hereinafter be referred to as the 1887 Amendment) to provide that “[t]he superior court shall have jurisdiction of all claims against the Commonwealth, whether at law or in equity . . . .”\textsuperscript{88} The latitude of this amendment was soon established.

In 1890 the court decided \textit{Murdock Parlor Grate Co. v. Commonwealth},\textsuperscript{89} a tort action against the Commonwealth brought pursuant to the 1887 Amendment. An agency of the Commonwealth had leased a storage room situated directly above plaintiff’s place of business. The weight of the

\textsuperscript{33} Id. at 46, 50.
\textsuperscript{35} Acts of 1893, c. 476, §13 (now G.L. c. 81, §18).
\textsuperscript{36} Acts of 1879, c. 255, §1.
\textsuperscript{37} In Wesson v. Commonwealth, 144 Mass. 60, 10 N.E. 762 (1887), the Commonwealth had contracted to provide pauper labor, supervision and a work area at an almshouse. After the house was destroyed by fire, the Commonwealth did not replace the facility, and plaintiff sued on the contract. The court held that the contract, not being for the “payment of money,” did not fall under the coverage of the statute. Id. at 62, 10 N.E. at 765. Later, a town brought an action under c. 255, §1 seeking to recover for the support of a state pauper. The court refused to construe the statute as supporting a claim founded on a statutory duty. Inhabitants of Milford v. Commonwealth, 144 Mass. 64, 65-66, 10 N.E. 516, 517 (1887).
\textsuperscript{38} Acts of 1887, c. 246 (now G.L. c. 258, §1).
\textsuperscript{39} 152 Mass. 28, 24 N.E. 854 (1890).
items stored in the room caused the floor to settle, and plastering on plaintiff's ceiling to fall, resulting in damage to his goods and an interruption of business.\textsuperscript{40} The court decided that the statute, despite its apparently comprehensive language, did not permit the institution of an action in tort against the Commonwealth upon the rationale that if the Legislature had intended to extend the Commonwealth's liability to tort claims it would have done so in express terms.\textsuperscript{41} Rather, the \textit{Murdock} court held that the 1887 Amendment, conferring jurisdiction on the superior court for claims against the Commonwealth, applied only to contractual claims.\textsuperscript{42}

In summary, the \textit{Troy} and \textit{Murdock} decisions became the cornerstones of the doctrine of sovereign immunity as established in Massachusetts. For eighty-three years they were continually followed in the Commonwealth as precedent for denying recovery. The \textit{Troy} decision has been recognized for the proposition that sovereign immunity bars recovery against the Commonwealth, unless the Legislature has consented to suit.\textsuperscript{48} Correspondingly, the \textit{Murdock} result—that, aside from highway defect legislation,\textsuperscript{44} the Legislature has consented only to contract actions brought against the state—has been consistently followed.\textsuperscript{411}

A parallel study of the development of municipal, as distinguished from sovereign, immunity from tort liability reveals a judge-made rule that originated in an early English case, \textit{Russell v. Men of Devon}.\textsuperscript{46} In \textit{Russell} an action was brought against the inhabitants of the county at large for damage which was done to a wagon of the plaintiff due to a county bridge being out of repair. The court held that the action would not lie because: (1) the legislature had not organized defendants into a corporation; (2) even if the defendants are considered a corporation, there is no fund out of which to satisfy the claim; and (3) although there is a legal principle which permits a remedy for every injury resulting from the neglect of another, a more applicable principle is that it is better that an individual should sustain an injury than that the public should suffer an inconvenience.\textsuperscript{47}

\textsuperscript{40} Id. at 28, 24 N.E. at 855.
\textsuperscript{41} Id. at 32, 24 N.E. at 856.
\textsuperscript{42} Id. at 31, 24 N.E. at 855.
\textsuperscript{44} See note 35 supra.
\textsuperscript{46} 100 Eng. Rep. 359 (K.B. 1788).
\textsuperscript{47} Id. at 362.
In 1810 municipal immunity from tort liability was introduced in Massachusetts in *Riddle v. Proprietors of the Locks & Canals on Merrimack River.*\(^{48}\) In that case, the court dealt with the question of whether an action of trespass could be brought against a privately owned corporation. In disposing of the case, the court distinguished in dictum the liabilities of "proper aggregate corporations" from those of municipalities, so-called "quasi-corporations," by relying upon the rationale of the *Russell* decision.\(^{49}\) It was suggested that no private action could be maintained against a municipality for breach of its corporate duty, unless authorized by statute, since the municipality had no corporate fund to satisfy any judgment rendered against it.\(^{50}\) Two years later an opportunity was presented to apply the doctrine of municipal immunity as suggested in the *Riddle* opinion. *Mower v. Inhabitants of Leicester*\(^{51}\) involved a tort action brought against the town for damages to the plaintiff's horse which were caused by a fall on a defective town bridge. Referring to the *Russell* case, the court ruled that it was well-settled that municipalities, created by the Legislature for public purposes, are not liable for their neglect unless recovery is legislatively sanctioned.\(^{52}\) The *Mower* court, by thus adopting the dictum from the *Riddle* decision, firmly established the concept of municipal immunity, though it suggested that the foundation for municipal immunity derived from the fulfillment of a legislative mandate.\(^{53}\)

The *Mower* rule of municipal immunity was applied and refined nearly fifty years later in *Bigelow v. Inhabitants of Randolph.*\(^{54}\) In this 1860 decision, the town was sued for negligence in maintaining a dangerous excavation in a school yard which resulted in injury to a pupil.\(^{55}\) The court, in finding no liability, distinguished municipal acts which are immune from liability for resulting harm from those which incur liability. Duties which are imposed on a municipality by the Legislature and which are exclusively for public purposes—"governmental" duties—were found to be immune from liability for the reasons given in the *Mower* decision.\(^{56}\)

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\(^{48}\) 7 Mass. 169 (1810).

\(^{49}\) Id. at 186-87.

\(^{50}\) Id. at 187.

\(^{51}\) 9 Mass. 247 (1812).

\(^{52}\) Id. at 249.

\(^{53}\) The reasoning behind the *Russell* decision was never applicable in Massachusetts. The defendant town in *Mower*, unlike that in *Russell*, was incorporated, had a corporate fund providing for raising of funds for town purposes and the means of enlarging it by taxation. See Fuller & Casner, Municipal Tort Liability In Operation, 54 Harv. L. Rev. 497, 498 (1941). One explanation for the language in *Mower* might be that municipalities had no funds that could legally be used to pay tort judgments since the expenditure of municipal funds is limited to legislatively sanctioned purposes. Cf. Coolidge v. Inhabitants of Brookline, 114 Mass. 592, 599 (1874).

\(^{54}\) 80 Mass. (14 Gray) 541 (1860).

\(^{55}\) Id at 541-42.

\(^{56}\) See text at note 52 supra.
§11.18

TORTS

On the other hand, duties which the municipality assumes for its own private benefit—later identified as "commercial" duties—were found to be subject to liability for resulting harm.\(^{57}\) While the test for determining what constitutes a governmental as opposed to a commercial duty has been modified over the past century, the distinction first enunciated in Bigelow remains as the basic criterion in determining municipal immunity or liability.\(^{58}\)

\(^{57}\) 80 Mass. (14 Gray) at 543.

\(^{58}\) The test for determining the governmental versus commercial character of a municipal function or act has, generally been modified over the past century by incorporating two additional elements into the test as set forth in Bigelow. In Hill v. City of Boston, 122 Mass. 344, 377 (1877), the court, in dicta, suggested that the pecuniary consequences of an act are important in determining whether the act is commercial or governmental in character. This criterion was refined in Bolster v. City of Lawrence, 225 Mass. 387, 114 N.E. 722 (1917), where the court, confronted with the question of whether a small fee charged at public baths changed their character to commercial, explained that the fact that a charge is made in connection with a public enterprise is not always conclusive that the enterprise is commercial. The question in each case is whether the monetary aspect changes the character of what would otherwise be a purely governmental function. Id. at 392, 114 N.E. at 724. A second modification to the Bigelow test was handed down in Tindley v. City of Salem, 187 Mass. 171 (1894). Until Tindley, municipal immunity was conditional on whether the Legislature had imposed a duty on the municipality. In Tindley the City had voluntarily undertaken a function with legislative approval. The court discarded the distinction between legislatively imposed acts and legislatively permitted acts and held the municipality immune. Id. at 175.

Thus the present test of municipal immunity from tort liability is whether the act was done in the performance of a public function, imposed or permitted by the Legislature, without the element of special corporate profit or pecuniary gain. Orlando v. City of Brockton, 295 Mass. 205, 207-08, 3 N.E.2d 794, 796 (1936).

Application of this test to the complex interrelationships of municipal functions has inevitably led to decisions grounded in factors relating to municipal management, finance and accounting, rather than on accepted principles of tort law. For instance, the municipal management of an officer may be determinative of liability in a tort action. A municipality escapes liability for the wrongful acts of its officers when it permits them to exercise their own judgment in executing their governmental powers. If, however, a municipality takes the work out of the hands of its public officers upon whom the duty is imposed by law, then the persons who are selected to do the work become agents of the municipality, and the municipality is liable for their torts. Ryder v. Town of Lexington, 303 Mass. 281, 289, 21 N.E.2d 382, 387 (1939). Liability for carrying on a particular enterprise can turn on the financial gain derived from it. An injured person may recover against a municipality because of the fortuitous circumstance that the injury was caused by the activities of the water department, which is operated for a profit, rather than the fire department, a non-profit activity. Compare D'Urso v. Town of Methuen, 388 Mass. 75, 153 N.E.2d 655 (1958), with Pettingell v. City of Chelsea, 161 Mass. 568, 580 (1894). Accounting factors have been found to be crucial in a determination of liability. If a single municipal officer, whose work is divided between performing the governmental functions and commercial functions of the town, injures someone, the liability of the municipality will depend on which hat the officer was wearing at the time of the injury. Ryder v. City of Taunton, 306 Mass. 154, 158, 27 N.E.2d 742, 745 (1940).

Determinations of liability upon these principles have created extreme difficulty in borderline cases in charging a tort to a particular activity, and have led to many ir-
Aside from the exception to the rule of municipal immunity pronounced by the Bigelow decision, both legislative and judicial exceptions have developed which have imposed liability on municipalities regardless of whether the complained-of municipal conduct was governmental or commercial in character. The Legislature has imposed liability on the municipality for damages caused by certain defects in streets and ways, for damage caused by riots and for unlawful exclusion from school; and there are several statutes permitting municipalities to indemnify certain officers or employees.

The courts, on the other hand, have created another basic exception to the doctrine of municipal immunity—that of private nuisance. The development of this exception began as early as 1855, when the Supreme Judicial Court allowed recovery against a municipality in Lawrence v. Inhabitants of Fairhaven. There the town had maintained a bridge and a dam across a stream bordering plaintiff's land in such a condition as to cause flooding of his property. Without discussing municipal tort immunity, the court found that the town had a duty to maintain its bridge and dam in a condition so as to allow free flow of the stream; the court imposed liability for failure to meet that duty. The nuisance exception to municipal immunity was again invoked in 1891 in Miles v. City of Worcester, where the court clarified the reasoning behind the nuisance


59 Acts of 1693-94, c. 6, §6 (now G.L. c. 84, §15, c. 229, §1).
60 Acts of 1839, c. 54, §§2-3 (now G.L. c. 269, §8).
61 Acts of 1845, c. 214 (now G.L. c. 76, §16).
62 A number of indemnity provisions have been passed by the Legislature which permit a municipality to indemnify its officers and employees upon whom liability might be imposed in their individual capacities, which would ordinarily—in the absence of municipal immunity—be imputed under the principle of respondeat superior to impose liability on the municipality. For instance, G.L. c. 40, §5(1) permits towns to purchase insurance policies to indemnify employees against loss from certain claims against them; G.L. c. 41, §§100A, 100D permit cities and towns to indemnify officers and employees against claims against them arising from their operation of municipal vehicles; G.L. c. 41, §100C permits cities and towns to indemnify school department employees against claims arising out of acts performed within the scope of their employment.

63 71 Mass. (5 Gray) 110 (1855).
64 154 Mass. 511, 28 N.E. 676 (1891).
exception. The city had built a restraining wall between a schoolhouse lot and plaintiff's property. Over the course of several years the wall encroached upon the plaintiff's land. Plaintiff sued the city on a nuisance theory.\(^6\) In *Miles* liability was imposed upon the city despite the fact that the wall had been built pursuant to performance of a governmental function and under the authority of the general laws.\(^6\) The court reasoned that the public use and general benefit will not justify the physical invasion of the property of another. If more land were needed it must be taken by eminent domain and compensation must be paid. But if a city unintentionally encroaches upon private property, the encroachment becomes a nuisance for which the city is liable in a private action.\(^6\)

This nuisance exception to the municipal immunity rule was created because the strong common law policy of protecting the use and enjoyment of privately owned property was thought to outweigh considerations underlying the general theory of municipal tort immunity.\(^6\) This case crystallized the nuisance exception to the municipal immunity rule. Thereafter municipalities were held liable for their nuisances regardless of whether they were created as a consequence of commercial or governmental acts.

The same legal arguments, though imposed on a different fact situation, were made in a recent nuisance case, *Kurtigian v. City of Worcester*.\(^6\) *Kurtigian* was a tort action brought on a nuisance and a negligence theory. The plaintiff, while working in his yard, was injured when struck by a limb blown from a tree on the adjoining premises.\(^7\) The City of Worcester was considered the owner of the premises, since it had taken that property for the nonpayment of taxes. The Supreme Judicial Court rejected the argument that the city could not be held liable since title to the property was held incidental to the city's governmental function of collecting taxes,\(^7\) on the grounds that:

> [P]ublic policy in a civilized community requires that there be someone to be held responsible for a private nuisance on each piece of real estate, and, particularly in an urban area, that there be no oases of nonliability where a private nuisance may be maintained with impunity.\(^7\)

As a result of the *Kurtigian* decision, the nuisance exception to municipal immunity retained its vitality, and the policy arguments espoused in

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\(^6\) Id. at 512, 28 N.E. at 676.
\(^6\) Id. at 513, 28 N.E. at 677.
\(^7\) Id.
\(^8\) See Fuller & Casner, supra note 53, at 443-44.
\(^10\) Id. at 285, 203 N.E.2d at 693.
\(^11\) Id. at 287-88, 203 N.E.2d at 694.
\(^12\) Id. at 291, 203 N.E.2d at 696.
Kurtigian in support of the exception loomed as an invitation for extension of the exception into the sovereign immunity area. As a consequence of this development, the reach of municipal immunity from tort liability extends only to those municipal acts which are governmental in character or are not subject to liability under a statutory provision or under the nuisance exception.

With this historical development of governmental tort immunity as a backdrop, the action of the Morash court will now be examined. The court, by drawing an analogy to municipal immunity, carved out an exception to the immunity of the Commonwealth from tort liability, and imposed liability on the Commonwealth for its private nuisances. In doing so, the court suggested that sovereign immunity might be further narrowed in the future by continued analogy to the doctrine of municipal immunity. Consequently, sovereign immunity might extend only to those actions of the Commonwealth which, if done by a municipality, would warrant municipal immunity. However, contrary to this suggestion, the Morash court limited its holding to the facts of the case and spoke disparagingly of the exceptions to the rule of municipal immunity, implying that the tortious acts of the Commonwealth, aside from nuisances, will continue to enjoy sovereign immunity. A third suggestion regarding the future of sovereign immunity in Massachusetts can also be inferred from the opinion. By first establishing its power to abolish the doctrine of governmental immunity, and then harshly criticizing governmental immunity and calling for its abolition by the Legislature, the court intimated that it might, itself, abolish the doctrine if the Legislature fails to do so in the near future. In summary, the Morash case registers a significant impact upon Massachusetts law. The court while recognizing the present vitality of sovereign immunity, established the power of the judiciary to abolish sovereign immunity and exercised that power in creating an exception to sovereign immunity which imposed liability on the Commonwealth for its private nuisances. In so doing, the Morash court left uncertain the future viability of the doctrine of sovereign immunity in Massachusetts.

74 The court declared that "governmental immunity ... can be discarded by the courts and we do so now to the limited extent of holding that the Commonwealth is not immune from liability if it creates or maintains a private nuisance ...." Id. at 791, 296 N.E.2d at 465.
75 Id. at 791, 296 N.E.2d at 466.
76 The court lays a foundation for the possibility of judicial overruling of governmental immunity in the future by announcing: "[W]e have no doubt as to our power to abolish that doctrine." Id. at 796, 296 N.E.2d at 468. Further, the court mentioned twice that "at this time" it should not abrogate the doctrine. Id. at 795-96, 296 N.E.2d at 468. As a further indication that it might later abolish sovereign immunity, the court stated that the legislature "should be afforded an opportunity" to abolish the doctrine. Id. at 795, 296 N.E.2d at 468.
§11.18 TORTS

An analysis of the Morash decision reveals that it can be criticized for its determination that the court may properly abolish sovereign immunity, without a legislative expression of consent. It might be argued that the legislative enactments waiving sovereign immunity in only certain types of actions embody a legislative intention to retain immunity in all other types of actions. The only legislative expression of consent to suit, apart from the statute which imposes liability for damages arising out of certain highway defects, is the 1887 Amendment which, as interpreted in the Murdock decision77 and affirmed in Morash,78 imposed liability on the Commonwealth only in contract actions. Thus, it would not be unfair to draw the conclusion that the 1887 Amendment embodied the policy of preserving the immunity of the Commonwealth from tort liability. Under such an analysis, the court's finding that it had the power to abolish sovereign immunity—which was based on the contention that sovereign immunity was a judicially created doctrine—would be mistaken. Further, the partial abrogation of sovereign immunity in Morash could be viewed as being in direct conflict with legislative intent and, accordingly, beyond the proper function of the judiciary.79

Closer analysis, however, indicates that Morash can be supported in its determination that the court might properly abolish sovereign immunity. Over the past two centuries the General Court has waived sovereign immunity in only two specific areas—contract claims and claims arising out of certain highway defects. The last of these pronouncements from the Legislature came over eighty years ago. This does not clearly present a situation where the Legislature has adopted a judicial interpretation, but simply a situation where two separate statutes, each operating in a distinct area of sovereign immunity, have dealt with facets of the doctrine. The statutes mean only what they say, that is, in the specific areas indicated the immunity of the Commonwealth is waived. Legislative intent, where discernible, should govern. But in the 1887 Amendment the Legislature expressed no intent about the basic doctrine of sovereign immunity. That legislative silence should not require that the effect of the statute be felt beyond its clear bounds.80 The Massachusetts legis-

77 See text at note 39 supra.
78 See text at note 15 supra.
79 The Florida Court of Appeals, in Buck v. McLean, 115 So.2d 764 (Fla. App. 1959), adhered to such a limited view of the role of the judiciary:
[A] proper administration of justice invites respect for the admonition of Alexander Hamilton, who once wrote that courts "must declare the sense of the law; and if they should be disposed to exercise Will instead of Judgment, the consequences would equally be the substitution of their pleasure to that of the legislative body." If, therefore, a change in the long established rule of immunity prevailing in this State is to be made, it must come . . . by constitutional amendment, or by enactment of appropriate legislation, or both.
Id. at 768.
lators were at no point confronted with approval or disapproval of the whole doctrine. The manner in which the Legislature dealt with a facet of sovereign immunity in the 1887 Amendment was entirely consistent with leaving the basic doctrine of sovereign immunity to the courts to resolve.\textsuperscript{81} Where the court acts without the benefit of discernible legislative intent, it does not usurp legislative power. If courts could not so act, the common law would stagnate. The court was, therefore, acting within its prerogatives in restricting the defense of sovereign immunity. It is therefore submitted that the court's determination that it was empowered to abolish sovereign immunity was justifiable.

Next, the decision of the court to deny the affirmative defense of sovereign immunity to the state in a private nuisance action might be attacked substantively on the strength of the historical arguments in support of sovereign immunity. The earliest argument employed as a defense of the immunity doctrine rests on the theory that when the individual sovereign was replaced by the broader conception of a state government in the United States, the immunity idea persisted under the rationale that to allow a suit against a ruling government without its consent was inconsistent with sovereign power.\textsuperscript{82} Under this reasoning no court can have jurisdiction over the sovereign, since jurisdiction implies superiority of power. The Morash decision may therefore be criticized for impinging upon the Commonwealth's sovereignty by subjecting the state to the control of the courts. However, this argument is without merit. To blindly ascribe to a democratic government the prerogatives of medieval monarchs disregards the very nature of a democratic system of government. If the notion of sovereign immunity ever had a place in the Commonwealth, it certainly has none today. In general, courts have criticized the idea that "the King can do no wrong" as an anachronism in a modern democracy.\textsuperscript{88}

\textsuperscript{81} The Supreme Judicial Court has recognized that municipal immunity is simply an exercise of sovereign immunity by the municipalities as agents of the state. Murdock Parlor Grate Co. v. Commonwealth, 152 Mass. 28, 31, 24 N.E. 854, 856 (1890). Legislation restricting the immunity of municipalities has been enacted a number of times. See notes 59-62 supra and accompanying text. Concurrently, the judiciary has created many exceptions to the rule of municipal immunity, and has even imposed liability for acts arising out of governmental functions of a municipality. See note 58 supra and text at notes 64-72 supra. That in the field of municipal immunity—which is analytically an arm of sovereign immunity—the court has worked alongside the Legislature in creating exceptions to the immunity doctrine is persuasive in determining that in the field of sovereign immunity, the Legislature, by limiting certain phases of sovereign immunity, did not intend to close the doors of the court to judicial reform of the doctrine.

\textsuperscript{82} See text at note 25 supra. See also Kawananakoa v. Polyblank, 205 U.S. 1149, 1151 (1907), for a discussion of Justice Holmes' view of the sources of sovereign immunity.

\textsuperscript{88} See, e.g., Hargrove v. Town of Cocoa Beach, 96 So. 2d 130, 132 (Fla. 1957); Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 216, 359 P.2d 457, 460, 11 Cal. Rptr. 89, 92 (1961).
A second traditional support of governmental immunity is the notion that it is better that scattered individuals suffer an injury than that the public in general be inconvenienced. Implicit in this argument are the corollaries that there is no fund designated or available out of which claims against the state can be paid; that all funds to which the state has access have been earmarked and collected for specific purposes; and, consequently, that if funds could be diverted for the payment of damage claims, the important work of the government for the public benefit would be seriously impaired. Under this argument, the Morash decision can be attacked to the extent that it imposes financial burdens on the Commonwealth.

Nevertheless, the idea that the loss should remain on the party suffering the injury so as not to impair the allocation of government funds has lost its persuasiveness. Certainly, a modern state government can obtain insurance or establish a fund to insure itself from such liabilities so as to avoid fiscal disruption of governmental activities. Moreover, this argument—that the loss should rest on the harmed individual—runs contrary to the policy of shifting loss inherent in tort law, and, a fortiori, the more

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84 See text following note 46 supra. In addition to the historical grounds on which sovereign immunity cases have been decided, at least one court has decided such a case on constitutional grounds. In Krause v. State, 28 Ohio App. 2d 1, 274 N.E.2d 321 (Cuyohoga County Ct. 1971), a wrongful death action was brought against the state of Ohio by the administrator of the estate of a victim of the Kent State killings. The court denied the defense of sovereign immunity to the state on equal protection grounds, holding that the distinction between individuals who were injured by private persons and those injured by agents of the state was a classification which violated the equal protection clause of the Fourteenth Amendment.


86 The United States Supreme Court subscribed to this view over a century ago, as it justified governmental immunity: "It is obvious that the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen . . . ." The Siren, 74 U.S. (7 Wall.) 152, 154 (1868).

87 The purpose of the law of torts is to shift losses sustained by one person arising out of the tortious conduct of another. See W. Prosser, Handbook of the Law of Torts 6 (4th ed. 1971). Historically, there have been a number of exceptions to this loss-shifting premise, but in recent years many of these exceptions have been either limited or abandoned. For example, the General Court, in 1971, acted to allow recovery of damages against an operator of a motor vehicle by a guest on a showing of ordinary negligence. G.L. c. 231, §§85L (Supp., 1972). In 1973, the Supreme Judicial Court enhanced the likelihood of a guest recovering from a negligent occupier of land by extending to the guest the right to a duty of ordinary care. Moulsey v. Ellard, 1973 Mass. Adv. Sh. 871, 297 N.E.2d 43. Furthermore, other jurisdictions have indicated that the same right may soon be extended to trespassers. See, e.g., Pickard v. City of Honolulu, 51 Haw. 134, 452 P.2d 445 (1969), Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1966). The doctrine of interspousal immunity has buckled under heavy attack in recent years. See W. Prosser, supra at 864. Contribution among tortfeasors has eliminated the inequity of permitting the entire burden of a loss, for which several tortfeasors were responsible, to be shouldered by one alone. See G.L. c. 231B, §1
recent movement toward the widespread application of loss distribution.88

Aside from its decision to impose liability on the Commonwealth with respect to private nuisances, the Morash decision might be criticized for its determination to leave the task of reform to the Legislature. This decision to await legislative action is unfortunate because, first, it creates uncertainty as to the current vitality of sovereign immunity in Massachusetts,89 and second, it ignores the history of legislative inertia surrounding such calls for legislative reform of governmental immunity. An examination of Massachusetts legislative history and the legislative histories of the several other states in which the courts have called for the abolition of governmental immunity exposes a marked legislative indifference to reform and points to the futility of waiting for such a response.

For the past five years, legislation designed to impose tort liability on the Commonwealth and its subdivisions has been introduced in the Massachusetts General Court.90 Each year the bills have died, without thorough consideration by the Legislature—a clear expression of the Legislature's indifference toward reform of governmental immunity. Since the dramatic movement away from governmental immunity began in 1957, ten state courts have taken the position of the Morash court and left the task of reform to the legislature.91 In these ten states only two


88 A notable trend in tort law has been the widespread recognition of the social desirability of distributing individual losses over a wide "market." This development is evinced by the extensive use of liability insurance, the application of the "deep pocket" theory in imputing negligence to employers (see W. Prosser, supra note 87, at 459), the nearly universal acceptance of Workman's Compensation and the recent strides made in allowing the consumer recovery based on strict liability (see id. at 657-58). Loss distribution avoids both the injustice of leaving an injured party without compensation and the danger of burdening an unintentional tortfeasor with a crushing judgment. Oblivious of this policy, the doctrine of sovereign immunity leaves an injured victim without recourse.

89 See text at notes 72-75 supra.


91 Since the beginning of the movement with Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957), the courts in nineteen states and the District of Columbia have severely limited governmental immunity, and ten state courts have considered overruling the doctrine but have chosen to leave the task to the legislature. Citations and summaries of the cases abolishing or refusing to abolish in deference to legislative reform are listed in K. Davis, Administrative Law Treatise §25.00, at 824-48 (Supp., 1970). Recent cases, not included in that text, in which the doctrine has been abolished are Becker v. Beaudoin, 106 R.I. 562, 261 A.2d 896 (1970), and Smith v. State, 95 Idaho 795, 473 P.2d 937 (1970). A refusal to abolish in deference to legislative reform is Duncan v. Koustenis, 260 Md. 98, 271 A.2d 547 (1970).
have responded with statutes. In the remaining eight states an average interval of nine years has elapsed since the legislatures were called upon to act. These instances of legislative indifference speak strongly for the desirability of judicial action.

The criticism that the court acted too cautiously in deferring the work of reform of governmental immunity to the Legislature cannot be easily rebutted. It is irrefutable that legislatures in general and the Massachusetts General Court in particular have, in the past, failed to respond to such calls for reform. Also undeniable is the criticism that the Morash decision leaves sovereign immunity in a state of uncertainty. Nonetheless, in support of the court's decision to leave the task of reform to the Legislature, there is the contention, recognized by the Morash court, that the Legislature is better adapted to accomplish a comprehensive reform of governmental immunity. Among the reasons cited by the court were: first, that the Legislature would be better suited to define limitations and exceptions to liability in a comprehensive statute; and second, that an avalanche of tort claims might follow a judicial abrogation of governmental immunity. Both of these grounds have validity and can serve to support the Morash approach.

Clearly, abolition of governmental immunity by the Legislature is a more satisfactory method of changing the law. The flexibility of the legislative approach, allowing for hearings, studies and analyses of the principles and policies involved, lends itself to the formulation of a comprehensive statute. The legislative machinery could be set to work resolving a number of problems inherent in reform, such as: defining statutory limits on the amount of recovery; providing the administrative framework to implement the program; studying the feasibility of establishing a special court of claims; and deciding whether jury trials would be available. Similarly, the scope of governmental liability could be considered, resolving such questions as whether recovery of legal expenses incurred in a successful criminal defense would be recoverable; whether the government should be liable for the intentional torts of its

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93 The dates on which the various state courts requested legislative reform of sovereign immunity are listed in K. Davis, supra note 91, §25.00, at 836-43; K. Davis, Administrative Law Text, §25.02, at 468-69 (3rd ed. 1972). Since then, no legislation has been enacted, as evidenced by a survey of the states involved.
94 For the substance of this criticism, see text following note 88 supra.
95 See text following note 89 supra.
96 See text at notes 73-76 supra.
98 Id. at 795 n.6, 296 N.E.2d at 468 n.6.
99 Traditionally, American law has required that the defendant bear the costs, yet some European countries provide that the government must compensate the successful defendant. K. Davis, supra note 91, §25.17, at 861-62 (Supp. 1970).
officers and employees; and whether a public entity should be immune from liability for the acts of an employee, if the employee himself is immune from liability. These questions can be resolved more properly by a lawmaking body, which is designed to study and hold hearings on the ramifications of all aspects of the issue before it and frame its answer carefully in a detailed statute, than by a judicial body, which must establish limits and exceptions by an attenuated case-by-case process.

Another reason mentioned by the court as weighing against judicial abrogation was the "potentially catastrophic financial burdens" which would follow a judicial overruling of the immunity rule. These fears and the fears expressed by other writers that a judicial abrogation would besiege the courts with fraudulent claims have merit. For example, the California experience is illustrative of the chaos which can be unleashed by a judicial abolition of governmental immunity without proper safeguards. The abrogation in Muskopf v. Corning Hospital District was complete as to nearly all governmental immunities. What followed the Muskopf case was a torrent of tort claims, many of them frivolous and unfounded, but all requiring the state's attention. The California Legislature was compelled to enact moratorium legislation suspending the effect of the Muskopf decision and temporarily reenacting the doctrine for two years, while it addressed itself to the problem of reform.

The superiority of the legislative approach in accomplishing the reform and the potentially disastrous consequences of judicial reform, considered together, support the restraint exercised by the court. However, since considerable indifference has surrounded the move for legislative reform of governmental immunity, both avenues of reform, legislative and judicial, are less than satisfactory. The court might have followed a third course, avoiding the problem of legislative inertia and uncertainty in the law, on the one hand, and the risk of unleashing a flood of litigation and bypassing the better-suited legislative process, on the other. The court could have established an effective date for prospective overruling far enough in the future to give the Legislature sufficient time to enact a tort claims statute.

101 But see Peck, The Role of Courts and Legislature in the Reform of Tort Law, 48 Minn. L. Rev. 265 (1963), where the peculiar ineptness of the legislatures in reforming tort law is discussed.
106 See text at notes 90-93 supra.
In the past the court has provided catalytic decisions that have sparked legislative enactments. For instance, the struggle to reform the charitable immunity doctrine, which continued for nearly half a century, was resolved by the creative efforts of the Supreme Judicial Court. Beginning in 1923 with Foley v. Wesson Memorial Hospital, the Supreme Judicial Court intimated to the Legislature that while a change in the charitable immunity rule would be desirable, legislative, not judicial, action was needed. With the action of other jurisdictions in abolishing charitable immunity, the court in recent years reasserted its opposition to the immunity. In 1958 the court expressed its dissatisfaction with charitable immunity in Simpson v. Truesdale Hospital, Inc. and pressed for legislative action. During the next decade the court continued to await a legislative response. The Legislature had not overlooked the issue; repeatedly, bills were introduced to limit charitable immunity, but they were consistently defeated. The Legislature had made it apparent that it would not act to reform the indefensible doctrine. In December of 1969, the court handed down Colby v. Carney Hospital. The court noted its continued opposition to charitable immunity and its frustration in awaiting legislative action, and announced that the time had come for the judiciary to act. Charitable immunity was prospectively overruled. Before the court had the opportunity to overrule in the next case, the Legislature responded with reform legislation.

This lesson should have prompted the Morash court to prospectively overrule the doctrine of governmental immunity. The issue before the court should not have been legislative versus judicial reform, but how the judiciary could act to insure that reform is accomplished. To date, the Legislature has refused to act; it should have been incumbent upon the court to play a creative role and focus the Legislature's attention squarely on the governmental immunity issue. The charitable immunity struggle revealed that, given enough of a prod, the Legislature would respond, but given years of recommendations such as the one presented...
in Morash, it would not. Prospective overruling would allow for a judicial interplay with the Legislature in providing the momentum to achieve reform. Prospective overruling would have avoided the problems that the Morash court feared would result from a judicial abolition of governmental immunity—bypassing the more suitable legislative reform process and incurring a flood of tort claims against the state—as well as the problems that the Morash decision created—uncertainty in the law and the probability that because of legislative indifference the governmental immunity doctrine would not soon be reformed. It is therefore submitted that the Morash court should have prospectively overruled the rule of governmental immunity.

In summary, the Morash decision is an important though indecisive step towards reform of governmental immunity in Massachusetts. The court asserted the power of the judiciary to abolish the immunity, abrogated a fragment of sovereign immunity to allow recovery in the case before it, analogized the legal foundation of sovereign immunity to that of municipal immunity, and called upon the Legislature to reform the indefensible doctrine. The decision has had the impact of creating uncertainty over the future vitality of sovereign immunity in Massachusetts. One of three results may follow Morash if the Legislature refuses to heed the call for reform. The court may continue to carve away exceptions to sovereign immunity by continued analogy to municipal immunity. It may refuse to create any additional exceptions to sovereign immunity. Or the court may, itself, abolish the doctrine of governmental immunity. The viability of sovereign immunity in Massachusetts consequently remains an open question at this time.

The court approached the Morash case on two fronts. First, it looked to the limited question of allowing recovery in the case at bar. It correctly found that the judiciary was empowered to abrogate the sovereign immunity doctrine since legislative silence with respect to the judicially created immunity rule ought not imply a legislative preemption of the field. The court was also correct in creating an exception to the immunity rule in imposing liability on the Commonwealth if it maintains nuisances on its land. To allow the state to maintain nuisances to the detriment of its citizens runs contrary to the basic principles of tort law. Secondly, the court confronted the larger problem of reform of the doctrine of governmental immunity, and posed two alternatives: legislative or judicial reform. Analysis of these alternatives exposes shortcomings attendant on either choice. As the Morash court pointed out, judicial reform would bypass the more suitable legislative reform process and might inspire a flood of tort claims and bring about catastrophic judgments against the Commonwealth. However, the decision of the court to await legislative reform may be equally unsatisfactory since not only does it ignore the fact of legislative indifference to reform of the doctrine of governmental immunity, documented within and without the Commonwealth, but it
also introduces doubt as to the current viability of sovereign immunity in Massachusetts. A third approach, that of prospective overruling, would have minimized the adverse consequences of the two courses considered by the court and would have enhanced the possibility of achieving the court's objective—comprehensive reform of governmental immunity.

James M. Whalen

§11.19. Damage to marital relationship: Cause of action for loss of consortium recognized: Diaz v. Eli Lilly & Co.1 In the instant case, the plaintiff, whose husband had allegedly sustained serious physical injury from his use of the defendant corporation's fungicidal drug,2 brought suit for loss of her husband's consortium "including his 'services, society, affection, companionship, [and] relations.'"3 The defendant demurred, claiming that the plaintiff's declaration had failed to state a cause of action. The superior court sustained the demurrer without leave to amend. Upon appeal, the Supreme Judicial Court, reversing the order of the superior court and overruling a long line of decisions,4 HELD: each spouse has a cause of action for an invasion of the consortium right against a tortfeasor whose negligence caused personal injuries to the other spouse.5

The Supreme Judicial Court's ruling in Diaz is clearly a landmark decision in Massachusetts law because it enunciates for the first time the rule that whenever a spouse suffers a personal injury due to the negligence of a tortfeasor, the other spouse has a cause of action for injuries to the marital relationship which he or she has sustained. This comment will first trace the history and development of the concept of consortium and the treatment which that concept has received from the Massachusetts courts. Various criticisms of the consortium cause of action which have arisen in other jurisdictions will then be examined, as will the responses which other courts have offered to refute these criticisms. Finally, the dis-

2 Plaintiff's husband had previously brought suit for his own personal injuries. He attempted to have his wife joined as a party plaintiff. When that motion was denied, apparently because the lower court felt that she had no cause of action, she brought the present suit. It has been communicated to the present writer by the plaintiff's attorney that the injury sustained by Mr. Diaz rendered him sightless.
Discussion will focus on certain practical problems which the Diaz decision has either raised or left unanswered.

Before discussing the merits of this decision, it would be valuable to examine the evolution and meaning of "consortium"; it has been a source of confusion to judges and commentators alike, primarily due to the fact that "[t]his particular branch of matrimonial law is, for historical reasons, intimately related to the law of master and servant." It is difficult to fully understand the current status of the law in this area without first discussing its historical underpinnings.

In marriage, the law imposes certain duties and obligations upon the husband and grants both husband and wife certain rights. He is required to support his wife, each of the spouses is entitled to engage in sexual relations with the other, and each is entitled to the other's consortium. Traditionally, the latter entailed "the mutual rights of the parties to the society, companionship and affection of each other, and the right of the husband to the services of the wife." The husband could sue a person who intentionally interfered with the marriage relationship by carrying off the wife or by "alienating her affections." Upon the occurrence of such an event, the husband had a cause of action in trespass, due to the wife's incapacity at law to consent to such acts. This action was separate and distinct from the wife's personal injury action in which both the husband and wife had to be joined as plaintiffs, since the wife lacked the requisite capacity to sue in her own name. At the core of the trespass action lay the notion that the husband had a definite economic interest in the services and society of the wife, as if she were merely another household servant. Thus, the husband was directly wronged by the conduct of a third person which in any way interfered with her ability to render those services. As a result, "the loss of services, even in the case of a wife, became the gist of the legal wrong." The husband's cause of action was extended gradually to include the situation in which the wife became unable to perform her domestic functions due to the negligent acts of a third person.

The wife, of course, had no parallel rights. If the husband were injured, he could obviously bring suit in his own name for those physical injuries.

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10 8 W.S. Holdsworth, History of English Law 430 (1926).
12 See note 9 supra.
"But could she [the wife] sue a wrongdoer for injury to him? A servant sue for the loss of services of the master? Clearly not."\(^{14}\)

The legal subservience of the wife, however, purportedly changed with the passage of the Married Woman's Acts.\(^{15}\) Typical is the provision of the Massachusetts Act which states that "[a] married woman may sue and be sued in the same manner as if she were sole."\(^{16}\) She could therefore maintain her own personal injury action and claim as an element of her damages her resultant inability to render household services. The question thus arose: if the husband no longer had to claim his loss of those services, had the action for loss of his wife's consortium been eliminated? The Massachusetts Supreme Judicial Court ruled that his action still survived:\(^{17}\) "As her husband is bound to provide for her support, he may maintain an action in his own name to recover the expenses to which he was put . . . as well as for his loss of consortium."\(^{18}\) Further, the court stated:

"The husband's right to compel his wife to work for him is abridged, but he still has a right to her society and assistance . . . . A married woman may now perform any labor or services on her sole separate account, as her husband may; nevertheless each owes certain duties to the other which are not annulled by the statutes. These duties are included in the word consortium . . . .\(^{19}\)

But did the legal emancipation of married woman give to a wife the analogous right to enforce a consortium claim? In an action by a wife for criminal conversation against her husband's paramour, the Supreme Judicial Court held that "this [the alleged act of criminal conservation] is distinctly a wrong . . . depriving her [the wife] of the consortium of her husband, for which she can, by force of our laws, maintain an action."\(^{20}\) However, three years later, in Feneff v. N.Y. Central & Hudson River R.R.\(^{21}\) the same court denied a wife recovery when injuries to her husband were negligently inflicted. The court apparently reached that conclusion by erroneously reading earlier cases to characterize the action as being almost totally for loss of services;\(^{22}\) no recovery was thought

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19 168 Mass. at 311-12, 46 N.E. at 1063.
22 Id. at 280, 89 N.E. at 437. The court reasoned that there could be no allowance to the wife for her loss of ability to earn wages and at the same time an allowance to the husband for loss of consortium "for the same diminution of the [wife's] ability to be helpful." Id. at 281, 89 N.E. at 437.
to be available when the sole effect of the husband's injury upon the wife was that "the companionship [of the husband] is less satisfactory and valuable than before the injury." The court indicated that the emphasis in negligence actions is placed upon material loss, while an action for intentional tort aims at compensating injured feelings. By viewing consortium primarily as the right to services, and by correctly recognizing that either spouse could recover in his or her own name for diminution in the ability to render services (the husband for his loss of earning capacity and the wife for her inability to perform household functions), the court found that the consortium action had lost its usefulness. There was no longer a need, thought the court, to permit the other spouse to institute an action for loss of the injured spouse's ability to render services, since the latter could do so in his or her own right. By denying the right to recover for "relational" damages, the court once again barred the wife from maintaining an action for negligent invasion of the consortium right. This opinion had the additional effect of abrogating the husband's action for negligent invasion of his consortium right as well. Although the Married Woman's Act did not abolish the duty of the husband to support his wife, nor did it eliminate the duty of the wife to render household services, the Act was seen as enabling the injured spouse to recover on his or her own account for the loss of ability to perform those marital duties.

Although abolishing all consortium claims grounded in negligence, the court nevertheless continued to recognize the action when the injury to the marriage relationship was "intentionally" inflicted. Thus, actions by either spouse for alienation of affections or adultery survived. It

28 Id. at 280, 89 N.E. at 427.
24 "Relational" damages include the loss of "love, companionship, affection, society, sexual relations, solace and more." Millington v. Southeastern Elevator Co., 22 N.Y.2d 498, 502, 239 N.E.2d 897, 899 (1968).

Given the initial judicial misconception of the nature of the consortium action, the Massachusetts Court was correct in extinguishing the negligent consortium action since each spouse was personally capable of recovering for his or her own loss of ability to render material "services."

28 Herein lies a basic inconsistency. If the court refused to recognize "relational" injuries in the case of negligent invasions of the marital relationship, then why should there have been continued judicial recognition of intentional invasions of that same relationship? In the case of intentional invasions, there was no impairment of the ability to render "services"; thus, the entire basis of the action was "relational." Certainly it cannot be said that the quality of the relational injury is any different in negligent invasions than in intentional invasions.
was upon this seeming inconsistency that the court relied in the present case to redirect the course of the common law. The court first dealt with what they felt to be the only possible rationale for the apparent dichotomy which developed between intentional and negligent invasions of the consortium right, namely, that in intentional cases, if the third party were not held liable on the "consortium" claim, he or she would escape all civil liability. This is necessarily so, went the argument, as the "participating" spouse has no grounds of his or her own on which to base an action against the third person; that spouse would be barred due to his or her own contribution to the alleged injury-producing act. Moreover, even if the "participating" spouse had such a cause of action, he or she would invariably be unwilling to pursue it. However, as the court in Diaz properly recognized, this particular explanation is spurious for several reasons. First, the "intentionalness" of the tortfeasor's act is often lacking. The defendant in an alienation of affection or criminal conversation action might well be "in truth the seduced rather than the seducer." Further, the injury is often more real and more in need of compensation in the case of the negligent tort than it is where the act is intentional. Hurt feelings are more easily endured than are permanent and disabling injuries to the spouse. Moreover, the court disagreed with the notion expressed in Feneff that the consortium claim in a negligence action is "remote." How can it be said, asked the court, that the injury to the marital relation is more remote in the negligence claim than in the case of an intentional tort? Finally, the court underscored the fact that the major drawbacks of the availability of claims for criminal conversation and alienation of affections—i.e., blackmail and extortion—are not present in the negligence action.

The only projected shortcoming of a change in the common law rule that made any impression upon the court was the expressed fear of double recovery. Either spouse can now recover for loss of the ability to render services (the husband through his claim for loss of earning capacity). The ability to render services, although not the sole element of the consortium claim, nevertheless remains as one of its components. Therefore, it was feared that if, after the husband recovers for his loss of earning capacity, and the wife were allowed to recover for the loss of

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28 It might also be noted that where the husband intentionally fails to support the other spouse or where either spouse engages in criminal conversation, the other spouse has grounds for an action of divorce. This is not true where the marital relation is injured by the negligent deeds of a third party. Although not in reality a means of compensation for injury to the marital relationship, the divorce action is a separate method of assuaging hurt feelings not available to the spouse whose husband or wife is injured negligently.
30 Id.
31 Id.
the husband's consortium, the "service" portion of the combined recoveries would be duplicated. In other words, the husband's award in his main action would include compensation for his loss of earning capacity, part of which necessarily goes to support his wife, while at the same time, the wife's claim for loss of consortium would include as one of its elements loss of her husband's services. There would thus be some overlapping.

The court, however, correctly emphasized that services is merely one element of the cause of action; "in fact [it has progressively] been emptied of the element of services or earning capacity." It has become emptied of the "service" element because each spouse could recover that aspect of the injury in his or her own personal injury suit. Further, the practical, rather than the theoretical, considerations involved in the problem of duplication of recovery for services can be easily alleviated by joinder of the consortium action with the personal injury action.

Although basing its decision upon the inconsistency in the law which distinguished between negligent and intentional invasions of the consortium right, the court did recognize the validity of the interest sought to be protected, namely, the marital relationship itself. It said: "The marital interest is quite recognizable and its impairment may be definite, serious, and enduring, more so than the pain and suffering or mental or psychic distress for which recovery is now almost routinely allowed in various tort actions." Finally, the court rejected the contention that any such change should be made by means of legislative enactment. It correctly noted that the state of the law prior to its decision in the instant case was a result of judge-made changes in the common law. The court invited the legislature to change the rule expressed in its decision if that body determines "that we have mistaken the present public understanding of the nature of the marital relation."

The right of consortium has become subject to judicial scrutiny and revision in many other jurisdictions. Prior to 1950, no state court had held that the wife had a cause of action for loss of consortium due to negligent injury to the husband, although all but five jurisdictions

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32 1973 Mass. Adv. Sh. at 1271, 302 N.E.2d at 560. To emphasize this point, the court pointed to the allowed recovery in intentional invasions where there is no impairment of ability to render services, and the total recovery goes to other aspects of the injured marital relationship.
33 Id. at 1276, 302 N.E.2d at 563.
34 Id.
35 Id. at 1277, 302 N.E.2d at 564.
(including Massachusetts) allowed recovery to the husband. In 1950, in Hitaffer v. Argonne Co., the United States Court of Appeals for the District of Columbia Circuit, believing that the disparity in the treatment given to husbands and wives in regard to the consortium action was inconsistent with the supposed "emancipated" status of women, extended to a wife the same consortium right that husbands had enjoyed for many years. Several jurisdictions have followed the pioneering step taken in Hitaffer. Presently, the number of jurisdictions which deny the right to the wife while allowing it to the husband is almost equalled by the number of jurisdictions which have extended the right to both. It is interesting to note that of those jurisdictions which denied the right to both spouses, Massachusetts is the first to have totally reversed its position to allow either spouse to pursue a consortium action.

The extention of consortium rights to women has not been without criticism. The merits of the Diaz decision can be better evaluated by an examination of the criticisms raised in courts in other jurisdictions when the issue of recognition of the consortium right was presented to them for decision.

Some courts and individual justices have expressed the belief that the consortium action is simply an antiquated relic which has no place in modern law. In Illinois, the husband had traditionally retained the consortium action while the parallel cause had been denied the wife. When the Illinois Supreme Court recently extended the consortium right to the wife, Chief Justice Schaeffer voiced his dissatisfaction with the majority's decision by stating that: "It is no more than an historical accident that the husband's common law action survived the enactment of the Married Women's Act. . . . The husband's action has survived in theory by acquiescence and not because it has withstood critical analysis." Pennsylvania, in denying the extension of the cause of action to the wife stated:

If . . . the husband's right to recover for loss of consortium is based upon the wife's lowly status as a servant or as a chattel, then to grant the wife a right to so recover does not lift the wife to the status of her husband, but it reduces the husband to the outworn concept of the wife's lowly status. . . . [T]he logical solution would be to terminate the husband's claim on the theory that the wife is no longer the servant and chattel.

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37 See note 25 supra.
39 See cases cited in Restatement (Second) of Torts §695, at 18-21 (Tentative Draft No. 14, April 15, 1969).
Admittedly, the concept of consortium has long been taken to mean the right of the husband to the services of his wife. Whether this interpretation in itself was incorrect, or whether modern courts have erroneously construed the concept as embodying other aspects of the marriage relationship, should not be crucial in weighing the merits of the consortium right. Rather, the question for modern courts should be whether there is a valid interest which the law should protect. If courts discover that the societal objective of protecting the marriage relationship outweighs the desirability of limiting the extent of a tortfeasor's liability, they should not feel constrained by notions of what the medieval concept once meant. As the Michigan court stated: "The question . . . is not whether such a right existed but whether it exists today." Moreover, the leading commentators have found consortium to mean more than a right to services. "[The view that consortium means services] leaves out of account the loss of companionship and society." The Hitaffer court noted that consortium "also includes love, affection, companionship, sexual relations . . . all welded into a conceptualistic unity." Analyzing that decision, Professors Harper and James stated:

This devastating attack upon the older rule is a realistic approach to the problem and a recognition of the obvious fact that the often hypothetical "services" may and frequently are the least valuable aspect of the incidents of the marital relation . . . . [C]ertainly the problem is not well handled by refusing protection to either [spouse].

Opponents of the concept of consortium have argued that apart from services, recovery for loss of consortium is compensation for emotional injury, upon which the law of torts does not look with favor, that it is in the nature of "parasitic" damages, that it is too "personal, intangible, and conjectural," or that the common law does not recognize "sentimental" injuries. However, as the New York Court of Appeals in Millington v. Southeastern Elevator Co. pointed out: "[these views are] not in accord with the growing recognition that the law of torts must

43 Harper & James, supra note 9, at 638. Dean Prosser has referred to the labelling of consortium as "services" as an "outworn fiction." W. Prosser, The Law of Torts 704 (2d ed. 1955).
44 Hitaffer, 183 F.2d at 814.
45 Harper & James, supra note 9, at 643.
47 See, e.g., Ignieri v. Cie. de Transports Oceaniques, 323 F.2d 257, 261 (2d Cir. 1963).
48 Id. at 264.
49 Hitaffer, 183 F.2d at 814.
recognize the interests of persons in the protection of essentially emotional interests." That opinion pointed to the fact that actions are now allowed for negligently induced fright and for an infant's loss of parental care due to the wrongful death of its parents. One commentator has remarked: "It is hardly to be denied that this sort of harm is real rather than illusory, and that it is substantial rather than trivial." Given the fact that the trend in other areas of tort law has increasingly been to recognize claims for emotional injury, the argument against consortium loses its force, since the injury suffered by a spouse who must live with a husband or wife incapacitated by personal injury is clearly real and deserving of compensation.

Some critics have expressed doubt as to the ability of juries to competently measure the loss of consortium in monetary terms. However, juries have been entrusted with similar responsibilities in other types of actions. For instance, they must arrive at a figure for the pain and suffering element in a personal injuries case. Similarly, juries are relied upon to exclude any pecuniary award for the plaintiff's grief and anguish in a wrongful death action. Needless to say, there is no formula by which juries may come to an exact determination of the correct amount of the plaintiff's recovery in a consortium action, but this same problem is present in many other types of action as well. Indeed, this shortcoming—if it is a shortcoming—lies at the very heart of the legal system. As the Millington court believed:

Money . . . cannot truly compensate a wife [or husband] for the destruction of . . . [the] marriage, but it is the only known means to compensate for the loss suffered and to symbolize society's recognition that a culpable wrong—even if unintentional—has been done.

Several jurisdictions have been confronted with the argument that to allow a consortium recovery would be to ignore the rules of causation or that a consortium claim is not a direct consequence of the wrong. In other words, the injury to the spouse who suffers a loss of consortium does not flow directly from the tortfeasor's negligence which caused the other spouse to suffer personal injuries. The Hitaffer court rejected this argument with the following rationale:

51 Id. at 507, 293 N.Y.S.2d at 311, 239 N.E.2d at 902 (emphasis added).
52 Id.
54 22 N.Y.S.2d at 507, 293 N.Y.S.2d at 311, 239 N.E.2d at 902.
56 See Hitaffer, 183 F.2d at 815.
We are committed to the rule in negligence cases that where in the natural and continual sequence, unbroken by any intervening cause, an injury is produced which, but for the negligent act would not have occurred, the wrongdoer will be liable. And it makes no difference whether or not that particular result was foreseeable.\(^{57}\)

Clearly, there is no independent intervening cause where, for example, the husband is incapacitated by physical injury and the wife is forced to become a nurse and caretaker rather than a partner in the marriage relationship. Moreover, if an independent cause does arise, there is nothing to deter the defendant from alleging it as a defense to the consortium action. In New Jersey, which, significantly, is a jurisdiction which limits defendant's liability to only foreseeable consequences of his actions, the court answered: "[T]hose losses were immediate and consequential rather than remote and unforeseeable and, there being no sufficient countervailing policy, the law now rightly views them as remediable by responsible tortfeasors."\(^{118}\) It appears that one more element will be added to the traditional caveat to the tortfeasor: he not only bears the burden of taking the plaintiff as he finds him, but he also runs the risk of finding him to be married.

Critics have often expressed fears that this judicial recognition of a relational interest will result in a superfluity of cases claiming relational damages upon physical injury to a parent, child, or sibling, and that this will result in placing unbearable financial burdens on future tortfeasors. Logically, an argument can be made that the child who loses the active guidance and supervision of a parent due to a crippling injury to that parent has a claim of at least equal validity to the husband's or wife's consortium claim arising out of that same injury. The New Jersey court cogently answered this argument in a manner which appears dispositive of the issue: "[P]olicy rather than logic is the determinative factor and ... the reciprocal recognition of the wife's claim may readily be rested on its own footing ... without any compulsion of going further."\(^{59}\) The Massachusetts court has declared that injuries to the marital relationship will not go uncompensated and that decision, it appears, rests on firm ground. While other relational interests may, in the future, be found to be in need of similar protection, the \textit{Diaz} decision does not necessarily imply that the floodgates will be opened to all types of relational suits.

Some critics have argued that since courts will take heed to insure that the services element will not be duplicated in the spouse's consortium action, and since the injured spouse can recover for his or her

\(^{57}\) Id.

\(^{58}\) Ekalo \textit{v.} Constructive Serv. Corp. of America, 46 N.J. 82, 95, 215 A.2d 1, 8 (1965).

\(^{59}\) Id. at 92, 215 A.2d at 7.
loss of sexual capacity, there is nothing left for which compensation is needed in the other spouse's consortium action. There are two answers to this criticism. First, consortium is not limited to services and sexual relations; consortium also includes the companionship, love, and affection which a husband and wife share. Secondly, as one commentator described the negligent, injury-producing actions of a defendant in the consortium context:

This is an example of a single tortious act which harms two people by virtue of their relationship to each other. The husband's loss of sexual capacity is his injury and the damages he receives to compensate for it have nothing to do with the wife's deprivation of the right to have sexual relations with her husband.

In jurisdictions that retained the husband's common law consortium right but refused to extend the right to the wife, arguments have been raised that there is a valid basis for allowing the wife to sue for intentional invasions of the marital interest while denying her that same right when the invasion occurred through "mere" negligence. Proponents of this view have argued that the intentional cause of action is punitive in nature, and there is no place for punitive damages when the defendant's actions are only negligent. Others, however, are of the view that allowance of exemplary damages does not widen the range of actionable wrongs. In other words, no state of facts exists upon which a claim for exemplary could be based, which would not be actionable if the claim for exemplary damages were omitted.

The claim must be based first on a compensatory element. Further, the Supreme Court of Michigan rejected the argument that a valid distinction exists between negligent and intentional torts in this area.

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60 See, e.g., Clark, supra note 55, at 202.
61 See text following note 43 supra.
62 Clark, supra note 55, at 202.
63 The fact that the consortium right was available in many jurisdictions to the husband but not to the wife has prompted numerous equal protection claims. The Maryland court seized upon this inconsistency to extend the right to the wife, but refused to reach the constitutional issue. Deems v. Western Maryland Ry., 247 Md. 95, 231 A.2d 514 (1967), In Krohn v. Richardson-Merrell Inc., 219 Tenn. 37, 406 S.W.2d 166 (1966), cert. denied, 386 U.S. 970 (1967), the Tennessee Supreme Court held that there were sufficient differences in the position of the husband and the wife to justify allowing the husband's action while denying it to the wife. The United States Supreme Court declined to review the case. Still other jurisdictions have relied upon the equal protection argument to extend the consortium right to the wife. See, e.g., Clem v. Brown, 3 Ohio Misc. 107, 207 N.E.2d 398 (1965).
64 See generally Hitaffer, 183 F.2d at 816-17.
65 C. McCormick, Damages 299 (1938).
by underscoring policy considerations. They reasoned that if the interest sought to be protected by the availability of the intentional cause of action is the community's interest in the protection of the family, then social policy requires that injury to that relationship be compensable, whether intentionally or negligently inflicted. In either case, the societal interest outweighs the importance of insulating the defendant from further liability.\textsuperscript{66} It is submitted that the \textit{Diaz} decision can adequately withstand any of these criticisms, and that the court will be praised in the future for recognizing the need to protect so vital a social relationship from negligently caused injury.

Besides inviting theoretical analysis, the \textit{Diaz} decision raises several questions of practical importance. First, must a spouse join his or her consortium action with the other spouse's action for personal injuries? Other jurisdictions, ostensibly for the purpose of eliminating the dangers of duplication of the service element\textsuperscript{67} have required joinder as a condition precedent to maintenance of the consortium action.\textsuperscript{68} The Massachusetts Supreme Judicial Court recognized the danger of double recovery\textsuperscript{69} and therefore prescribed several procedural rules for bringing a consortium claim. As a matter of practical convenience to both plaintiffs (i.e., husband and wife) the consortium claim will, under Rule 20(a) of the new Massachusetts Rules of Civil Procedure, usually be joined with the personal injury claim.\textsuperscript{70} "Such joinder is of course permitted and invited by the procedural rules."\textsuperscript{71} If, for some reason, the two actions are brought separately, the court announced that the defendant may have the two actions consolidated for trial under the consolidation provisions of Rule 42(a) of the Massachusetts Rules of Civil Procedure.\textsuperscript{72}

\textsuperscript{67} See, e.g., Moran v. Quality Aluminum Casting Co., 34 Wis.2d 542, 150 N.W.2d 137 (1967).
\textsuperscript{68} See, e.g., Id. at 558, 150 N.W.2d at 145. See also Ekalo v. Constructive Serv. Corp. of America, 46 N.J. 82, 95, 215 A.2d 1, 8 (1965).
\textsuperscript{70} The new Massachusetts Rules of Civil Procedure which were modeled upon the Federal Rules, and which came into effect on July 1, 1974, state in Rule 20(a):
All persons may join in one action as plaintiffs if they assert any right to relief . . . severally . . . in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action.

Clearly, the consortium claim arises out of the same occurrence and will turn on the common question of fact and law—i.e., defendant's negligence vis-a-vis the spouse who incurred personal injury.
\textsuperscript{71} Id., 302 N.E.2d at 560.
\textsuperscript{72} Rule 42(a) reads:
When actions involving a common question of law or fact are pending before the court, . . . it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.
These two provisions are practical as well as logical. Both plaintiffs may be represented by the same attorney, thus limiting preparation for trial and reducing attorneys' fees by eliminating double court appearances. If the consortium action and the personal injury action are both pending, the defendant can have the two actions consolidated for trial in order to avoid the unnecessary duplication which would otherwise inhere in separate trials concerning the same basic set of operative facts.

However, the Diaz court did not stop there. It also intimated that a defendant might be able to insist that the spouse holding a consortium claim be joined in the main negligence action, so that the consortium claim would not be outstanding when the negligence action was disposed of. The Court pointed to new Rule 19(a) as a potential mechanism for defendant's compelling such joinder. That rule states in pertinent part:

A person who is subject to service of process shall be joined as a party in the action if . . . (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may . . . (ii) leave any of the persons already parties subject to a substantial risk of incurring double . . . obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party.

Since both husband and wife will usually share the same domicile, there will seldom be any problem of service of process on the spouse who has refused to assert the consortium claim. Because the court views the spouse's consortium claim as "an interest relating to the subject of the action," and because the danger of "incurring double . . . obligations" does, arguably, exist, it would seem that all of the conditions precedent are met so that the defendant can demand that the spouse with the consortium claim "shall be joined." Moreover, this demand can be made even if the spouse holding the consortium has not instituted an action. While the court in Diaz purported to stop short of the rule enunciated by courts in other jurisdictions which require joinder with the personal injury action as a condition for bringing the consortium claim, Rule 19 does go that far and in fact appears to go even further. If a spouse with a consortium claim refuses to be joined in the other spouse's personal

73 Id. at 1272-73 & n.29, 302 N.E.2d at 561 & n.29.
75 "We would leave open the possibility that in appealing circumstances the consortium claim might be held to be lost if not asserted by the time the negligence action is tried." Id. at 1273 n.30, 302 N.E.2d at 561 n.30. The court also referred in footnote 30 to the New Jersey rule that "In all future actions the wife's consortium claim may be prosecuted only if joined with the husband's action." See Ekalo v. Constructive Serv. Corp. of America, 46 N.J. 82, 95-96, 215 A.2d 1, 8 (1965). The New Jersey rule is identical to the Wisconsin rule adopted in Moran v. Quality Aluminum Casting Co., 34 Wis.2d 542, 558, 150 N.W.2d 137, 145 (1967).
injury action in accordance with a proper request by the defendant pursuant to Rule 19(a), it is not only conceivable, but in fact likely, that when the consortium action is brought at a later time the court will refuse to hear it. Furthermore, if the spouse could not be joined as a party, and refused to join voluntarily, Rule 19(b) requires that "the court shall determine whether in equity and good conscience the [personal injury] action should proceed among the parties before it, or should be dismissed . . . ." Thus, if the consortium claim is not asserted, not only may it be lost but the spouse holding the personal injury claim faces the possibility that his or her claim will be dismissed.

In most cases, Rule 19 will work no injustice. Either the husband and wife will bring the two actions together, or else the two actions, although brought separately, will be consolidated for trial. Further, the compulsory joinder of the consortium claim will be equitable where the second spouse has failed to assert his or her consortium claim due to oversight. It might even apprise a potential plaintiff of a right which he or she did not even know existed. It is equally true that the court is within its rule-making power to prescribe such a procedure. However, it is not clear that the possibility of double recovery should be obviated at the price of so rigid a rule. Hypothetically, a situation could arise wherein the value of the injured spouse's consortium is not in any way diminished at the time he or she institutes his or her personal injury action; yet, at a time subsequent to the final adjudication of that claim, the value of his or her consortium could be diminished due to medical complications or the psychic stress caused by long-term physical incapacity. If one spouse were compelled to assert the consortium claim while the other's personal injury action was pending, he or she would have lost, since it could not have been proved that the consortium had been diminished. Moreover, if he or she refuses to bring the consortium action at the same time as the personal injury action, he or she will, no doubt, under Rule 19(a) be precluded from doing so at a later time. Thus, it is quite likely that although he or she has suffered a legally compensable loss, there will be no recovery for that loss. Additionally, there is the possibility that the personal injury action will itself be dismissed because of the refusal to assert the consortium claim while his action was pending. It is submitted that the rules allowing the joinder of parties and consolidation of actions involving common questions of law or fact strike a sufficient balance between protection of the defendant from double liability and preservation of the other spouse's individual consortium claim.

This is especially true in light of the fact that the court's interpretation of Rule 19 may in itself be erroneous. One court disapproved of the application of Rule 19(a) to a consortium claim on the grounds that "[p]laintiff's wife has no legal interest in her husband's cause of action.
and he has none in hers."\textsuperscript{76} The Wisconsin Supreme Court has said: "[H]er claim is not for his personal injuries but for the separate and independent loss she sustained. Consistent with her statutory right to assert her claim . . . she should be able to pursue it individually if necessary."\textsuperscript{77} It would seem if the trial courts heed the advice of the Supreme Judicial Court that "there should in all events be plain instructions to the jury describing and distinguishing the different elements of compensable damage,"\textsuperscript{78} this, when taken in conjunction with option of consolidation for trial and the availability of the special verdict,\textsuperscript{79} will afford the defendant sufficient procedural safeguards to avoid the danger of incurring double obligations.

Another problem which might arise as a result of the Diaz decision involves the right of one of the spouses to maintain a consortium action when the other spouse has previously recovered for his or her personal injuries under the Workmen's Compensation law. This very problem was raised in the Hitaffer case, in which the Court of Appeals for the District of Columbia Circuit held that recovery by the husband under the act did not bar the wife's action for loss of consortium even though the statutory language indicated that the husband's recovery "shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents [or] dependents . . . ."\textsuperscript{80} Conceding that the literal language of the statute could be applied to bar any other recovery flowing from the compensable injury, the court nevertheless found that this would not comport with the legislative intent, and therefore they ruled that when a third person sues in his or her own right on account of the breach of some independent duty owed them by an employer, even though the operative facts out of which this independent right arose are the same as those out of which the injured employee recovers under the Act, the Act does not bar the third person's cause of action.\textsuperscript{81} The court found an additional basis for its decision in the fact that the Act made no distinction in the amount of the damage award between married and unmarried workers. Thus, they concluded, the Act made no provisions for the injuries suffered by the

\textsuperscript{76} Wright v. Schebler Co., 37 F.R.D. 319, 320-21 (S.D. Iowa 1965). It is true that Federal Rule 19(a) has been changed since that decision. Nevertheless, the language "claims an interest," upon which that court based its decision, has been retained in the new version of the rule.

\textsuperscript{77} Fitzgerald v. Meissner & Hicks, Inc., 38 Wis.2d 571, 581, 157 N.W.2d 595, 600 (1968).

\textsuperscript{78} 1978 Mass. Adv. Sh. at 1273, 302 N.E.2d at 561.

\textsuperscript{79} See new Mass. R. Civ. P. 49(a) which provides for verdicts in the form of a special written finding upon each fact.


\textsuperscript{81} Hitaffer, 183 F.2d at 819-20.
claimant’s spouse and it could not be Congress’ intention to have her independent cause of action barred.\textsuperscript{82}

However, this aspect of the Hitaffer decision was subsequently overruled in Smither & Co. v. Coles.\textsuperscript{88} Relying upon the policy consideration that “Congress was necessarily interested in the employers’ immunity to suits as well as in the employees’ right to recovery,”\textsuperscript{84} the court held that “[u]nder this statute, as indeed under the statutory scheme of such statutes everywhere, all the rights of ‘husband and wife’ are merged into the exclusive remedy provided by the Act . . . .”\textsuperscript{85} This appears to be the dominant view,\textsuperscript{86} and in light of the gradations in recovery for married and unmarried claimants in Massachusetts,\textsuperscript{87} it might be argued that the result in the Commonwealth should follow the reasoning in Smither. On the other hand, however, neither spouse’s consortium action was recognized at the time the present Massachusetts Workman’s Compensation statute was enacted. This being so, the Massachusetts legislature could not have contemplated the effect of the Workmen’s Compensation Act upon the consortium recovery. Therefore, an argument \textit{contra} can be made that “the independent cause of action of the spouse . . . simply was not dealt with by the statute” and that “[i]ts judicial recognition might warrant further legislative consideration . . . .”\textsuperscript{88} It is not known whether or not the Massachusetts judiciary will recognize the continued existence of a consortium action brought by one spouse after the other spouse has recovered for personal injuries through Workmen’s Compensation. It is likely, however, that they will follow the reasoning of most other jurisdictions and hold that the consortium action is barred.

It has generally been held that since one spouse’s consortium action is derived from the other spouse’s personal injury claim and is dependent upon the injured spouse’s right to recover, a valid defense, \textit{i.e.}, contributory negligence, to one action will bar the other.\textsuperscript{89} One commentator,

\begin{itemize}
\item \textsuperscript{82} Id. at 818.
\item \textsuperscript{88} 242 F.2d 220 (D.C. Cir.), cert. denied, 354 U.S. 914 (1957).
\item \textsuperscript{84} Id. at 223.
\item \textsuperscript{85} Id. at 225.
\item \textsuperscript{88} See, e.g., Ziegler v. United States Gypsum Co., 251 Iowa 714, 102 N.W.2d 152 (1960); Bevis v. Armco Steel Corp., 156 Ohio St. 295, 102 N.E.2d 444 (1951); Ellis v. Fallert 209 Ore. 406, 307 P.2d 283 (1957).
\item \textsuperscript{87} See G.L. c. 152, §35A.
\item \textsuperscript{88} Smither, 242 F.2d at 227 (dissenting opinion).
\item \textsuperscript{89} See Harper & James, 640 (1956). This should not be confused with the fact that judicial resolution of one claim will not operate as res judicata insofar as the second claim is concerned. Since the Supreme Judicial Court apparently requires joinder of the two parties asserting claims, see text at notes 69-74 supra, it will usually be of little consequence. However, if the two actions are tried separately, a judgment in the first action will have no effect upon the second. In Duffee v. Boston Elevated Ry., 191 Mass. 563, 77 N.E. 1036 (1906), wherein a husband sued for loss of consortium arising from personal injuries sustained by his wife. The Massachusetts court held that the liability of the defendant depends upon the same facts in each case; but the
\end{itemize}
§11.19

TORTS

385

however, has argued that this reasoning "has certain illogical aspects to it. If there are different interests invaded by different wrongs, it might be thought irrelevant to the husband's cause of action [for loss of consortium] that the wife has been barred by her contributory negligence."90 In this regard, Restatement (Second) of Torts declares that "negligence is not 'imputed' to a plaintiff unless his relationship to the person whose [contributory] negligence is involved is such as to make him—[the plaintiff] liable for that person's negligence if it resulted in injury to a third person."91 Clearly, one spouse is not liable for the torts of the other. And "to state that there is but one cause of action which is divided . . . is not accurate, since the nature of the husband's interest is different and distinct from the wife's."92 Nevertheless, courts in other jurisdictions have generally held that if the spouse's personal injury claim is invalid because of his or her contributory negligence, the other spouse has no right to recover for loss of consortium.93

The fact that the holding in Diaz was based upon the availability of a consortium action where the invasion of the marital relationship was intentional and where the non-suing spouse is often more responsible for the tort than is the defendant, seems to militate against a rule which imputes contributory negligence to the plaintiff in a loss of consortium action based on negligence. Further, if the husband were negligent and the wife sustained personal injuries partly due to the negligence of her husband and partly due to the negligence of a third party, she could recover from the third party even though her husband might be barred from asserting his own consortium claim because of his own contributory negligence are as independent of each other as are two actions founded on a collision of two teams, caused by the negligence of the defendant, one brought by the driver . . . to recover for his personal injuries, and the other by the owner, to recover for damages to his horses and wagon. . . . Each is enforcing an independent right.

Id. at 564, 77 N.E. at 1037.

In McGreevey v. Boston Elevated Ry. Co., 232 Mass. 347, 122 N.E. 278 (1919), an action was brought by a father for personal injuries suffered by his son, against the defendant who had already been held liable in a negligence action brought by the son. The court held:

The rights of each although springing from the same wrong are independent, and the judgment in the son's case is no bar to the maintenance of the present action. . . .

[T]he plaintiff, who was not a party or a privy to the former judgment, must prove every essential allegation of the declaration as if his son's action had not been brought. . . .

Id. at 350, 122 N.E. at 279.

90 Harper & James, supra note 89, at 640.

91 Restatement (Second) of Torts, §485.

92 Harper & James, supra note 89, at 640.


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negligence. Nevertheless, despite these apparent inconsistencies, the contributory negligence of one spouse will most likely be imputed to the spouse claiming the consortium right. For example, in Thibault v. Poole, in which the husband brought an action to recover expenses for injuries suffered by his wife in a collision between his car and the car driven by the defendant, it was held that "the husband cannot recover compensation for expenses . . . where the negligence of the wife contributed to her injuries." The court reasoned that although each plaintiff has a separate cause of action and must prove his own case,

[n]evertheless, an essential element of the part of the cause of action vested by the law in the husband is that the compensation recoverable by him for expenses flows from a personal injury for which the wife was under the law entitled to recover compensation. Proof of that factor is an essential prerequisite to recovery.

It appears, therefore, that in Massachusetts the contributory negligence of one spouse will be imputed to the other spouse in the latter’s consortium action.

Finally, there is the possibility that the Massachusetts Legislature will unconsciously abolish the cause of action for loss of consortium. The ratio decidendi of the Diaz decision is based upon the availability of civil actions for intentional interference with the marital relationship and the incongruity of denying recovery when the interference is negligent in nature. Many states have enacted "Heart Balm" statutes eliminating civil actions for criminal conversation and alienation of affections. This is attributed to the fact that "[the law has been] subjected to grave abuses, causing extreme annoyance, embarrassment, humiliation and pecuniary damage to persons wholly innocent . . . and such remedies have been exercised by unscrupulous persons for their unjust enrichment." If such a repeal were to take place in Massachusetts the argument could be made that the cause of action for loss of consortium due to negligence was likewise abolished. In a jurisdiction wherein the above intentional torts were abolished by statute, one justice was prompted to remark that "actions for direct invasion . . . of consortium do not now exist under the statute cited . . . [To allow

94 Harper & James, supra note 89, at 640. Dean Prosser ascribes these inconsistencies to the fact that consortium is a historical exception to the general rule that one person may not recover for injury to another. W. Prosser, The Law of Torts 916 (3d ed. 1964).
95 283 Mass. 480, 186 N.E. 682 (1933).
96 Id. at 487, 186 N.E. at 685 (emphasis added). If the consortium right existed at that time, the husband's action for loss of his wife's consortium would similarly have been barred.
97 Id. at 485, 186 N.E. at 684.
99 Harper & James, supra note 89, at 629.
the right for negligent invasion[1] would be inconsistent with the legislative action." It should be noted, however, that the basis for abrogating the intentional tort—fear of collusion and baseless suits—is lacking when loss of consortium arising out of a personal injury action is claimed. This is necessarily so since a negligent injury to the marital relationship cannot occur without a simultaneous physical injury to either the husband or the wife. The participating spouse in an alienation of affections or a criminal conversation suit, however, never suffers any such injury. As the Maryland court concluded, the abrogation of such rights was "for practical reasons unrelated to legal principle. . .".

To summarize, the Massachusetts Supreme Judicial Court has granted to the spouse of a victim of personal injury a cause of action for the diminution in value of the marital relationship arising out of that injury. Thus, recovery will be allowed when it can be established that the tort-feasor's negligence has inflicted injuries which reduce the victim's ability to render affection, companionship and emotional reinforcement, those qualities which society recognizes as inherent in the normal relationship between husband and wife.

MARSHALL F. NEWMAN

§11.20. Tort liability of non-judicial public officers: Acts performed within scope of authority: Gildea v. Ellershaw. 1 In this case, the Supreme Judicial Court was confronted with the question of whether a public official acting within the scope of his authority or jurisdiction can be held liable in a private negligence suit. Plaintiff Gildea sought special damages for loss of reputation, credit and community standing against five Brockton city council members for injuries suffered as a result of their wrongful termination of his employment as city manager of Brockton. At the trial of the damage suit, Gildea did not allege malice or bad faith in the defendants' termination of his employment. The defendants offered

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101 Deems v. Western Maryland Ry., 247 Md. 95, 107, 241 A.2d 514, 525 (1967).

2 Id. at 992, 298 N.E.2d at 848. The case at bar arose following a successful mandamus action brought by Gildea contesting the validity of his removal by the councilmen. In that action, the trial court found the removal wrongful and hence void, since no written statement of the reasons for removal had been adopted by a regular meeting of the full council as required by G.L. c. 45, §89, which reads in pertinent part: "The city manager may be removed for cause by the city council . . . but he shall, prior to his removal, upon his request, be given a written statement of the reasons alleged for his removal . . . ." 1973 Mass. Adv. Sh. at 994-95, 298 N.E.2d at 849. The writing received by Gildea was drafted at an informal conference of four council members and therefore was not a statement written by the city council. 1973 Mass. Adv. Sh. at 993-94, 298 N.E.2d at 849.
evidence of good faith in their actions, but this evidence was excluded by the trial court. A subsequent motion by the defendants for a directed verdict raised the issue of the sufficiency of Gildea's allegations and proof, thus squarely presenting the question of whether malice was a prima facie element of plaintiff's case. The trial court denied defendants' motion, and the jury found for Gildea.

Defendants' appeal presented the question to the Supreme Judicial Court, which reversed the judgment of the trial court and HELD: where a non-judicial public officer is authorized to use judgment and discretion in reaching a decision, and the decision is within the scope of his authority or jurisdiction, such officer is not personally liable in a private negligence suit. However, the court limited the application of this rule to officers acting in good faith, without malice or corruption.a

In Gildea, Massachusetts recognized for the first time a broad principle of public officer immunity affecting all non-judicial public officers whose duties require the use of judgment and discretion in making decisions. The rule is expressly limited to civil suits for negligence and thus has no effect on actions for intentional torts or criminal actions.

This note will first discuss the issue of an officer's jurisdiction to act as the determinative test of his immunity by comparing the prior jurisdictional facts approach to the question with the new outer perimeter standard as adopted by the court. There will then be an analysis of the court's rejection of analogizing from the judiciary and its adoption of a standard based on an officer's use of discretion in determining which official activities are to be immunized. The type of immunity which the court has adopted and the difficulties which that rule presents will then be discussed. The note will conclude by presenting an alternative approach to public officer immunity which meets the problems which the Gildea immunity rule creates.

The Supreme Judicial Court followed past precedent in limiting the application of the Gildea immunity rule to officers acting within the scope of their authority, duty, or jurisdiction. However, the court significantly altered the definition of that scope by expressly overruling the much criticized "jurisdictional facts" rule, which was formerly the

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a Id. at 1010-11, 298 N.E.2d at 858-59.

4 Prior Massachusetts cases do not deal squarely with the immunity issue with respect to non-judicial officers. Instead, the officer is said to perform a quasi-judicial function. The suggested remedy is an extraordinary writ or direct appeal, not an action against the officer. See Alperin, Immunity of Administrative Officials from Tort Liability in Massachusetts, 56 Mass. L.Q. 79, 83-85 (1971), citing Barry v. Smith, 191 Mass. 78, 77 N.E. 1099 (1906); Jaffarian v. Murphy, 280 Mass. 402, 183 N.E. 110 (1932).

5 Judicial officers are protected by their own immunity. Pratt v. Gardner, 56 Mass. (2 Cush.) 63 (1848). This is the reason they are excluded from the Gildea rule. 1973 Mass. Adv. Sh. at 1010 n.13, 298 N.E.2d at 858 n.13.


7 Id. at 1010, 298 N.E.2d at 858.
law in Massachusetts, and adopting in its place the more liberal "outer perimeter" standard. The "jurisdictional facts" approach to the definition of the scope of an officer's authority is predicated on strict statutory construction. Basically, the rule required that all circumstances mentioned in the empowering statute must exist for an officer to be found to be within the scope of his authority or jurisdiction. He would be immune from civil suit only at that point. The existence of each material fact mentioned in the statute operated as a condition precedent to the existence of the officer's authority or jurisdiction to act; thus, each statutory prerequisite became a "jurisdictional fact."

*Stiles v. Municipal Council,* a case very similar to *Gildea,* illustrates the operation of the jurisdictional facts approach. In *Stiles,* the members of the municipal council of Lowell were authorized to remove the city treasurer for cause but were required to act in accordance with civil service laws. One of the provisions of the civil service laws mandated that the person sought to be removed be notified of the proposed action and furnished with a copy of the reasons therefor. The defendants, however, adopted an order removing the plaintiff from office without notifying him of the proposed action or giving him a copy of the reasons for removal. The court held, therefore, that:

> [T]he defendants never acquired a jurisdiction to exercise their quasi-judicial functions respecting the removal from office of the plaintiff, because they never notified him and never gave him a copy of the charges against him . . . . The full performance of all conditions established by the statute are [sic] essential prerequisites to the jurisdiction of the municipal council over the subject-matter of the removal of the officer.

The councilmen were therefore held personally liable for their wrongful removal of the plaintiff since they were acting without authority. Since their actions were beyond their authority, the so-called cloak of officer immunity was denied them.

The jurisdictional facts rule was based on the view that administrative tribunals were inferior courts of special and limited jurisdiction, and therefore no presumption of jurisdiction attached to their deter-

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9 See generally Keefe, Personal Tort Liability of Administrative Officials, 12 Ford. L. Rev. 130, 139 (1943).
11 Id. at 183, 123 N.E. at 616-17 (1919). See also *Miller v. Horton,* 152 Mass. 540, 26 N.E. 100 (1891) (health officer held liable for acts outside of his jurisdiction where empowering statute authorized the destruction of animals infected with glanders and horse in question was found not to have been infected).
minations or those of their officers. The procedural modes imposed by the empowering statute became the measure of administrative authority.

By making each fact mentioned in the statute a condition precedent to the attaching of jurisdiction to act, the power and effect of administrative actions and decisions were strictly controlled and limited. While this was desirable in an age when judicial safeguards had generally not been incorporated into administrative procedure, the policy basis for such a rule is clearly non-existent today.

A further difficulty with the rule concerned the issue of plaintiff/defendant liability and relief. As to the officer, the rule had the unreasonable consequence of holding an officer strictly accountable for reaching a correct decision on the existence of such nebulous matters as the abatement of nuisances and the destruction of health hazards. Absent the existence of all required jurisdictional facts, the officer was liable irrespective of his good faith in reaching his decision. On the other hand, if the facts did exist, the officer was immune despite gross negligence or even malice in the conduct of his action. From the point of view of both the officer and the injured party, the liability was too great on one side and too little on the other.

The "jurisdictional facts" rule was also criticized on two policy grounds. First, a court accepting the rule would adopt the practice of narrowly construing the applicable statute in cases where it might be readily apparent that the legislature had intended to grant relatively broad powers to the defendant officer to act according to his reasonable belief. Secondly, an officer's liability would result from a trial court's ex post facto determination of the true state of the facts, while the officer might have made the decision at a time of crisis on the basis of

12 See Jennings, Tort Liability of Administrative Officers, 21 Minn. L. Rev. 265, 281 (1937).
14 Jennings, supra note 12, at 281-82.
15 See, e.g., Administrative Procedure Act, 5 U.S.C. §§551 et seq.; G.L. c. 30A, §1 et seq.
16 Jennings, supra note 12, at 282-83.
17 Id. at 284-85.
18 Id.
19 See generally Davis, Administrative Officer's Tort Liability, 55 Mich. L. Rev. 201, 223-24 (1956). In analyzing the jurisdictional facts approach used by the court in Miller v. Horton, 152 Mass. 540, 26 N.E. 100 (1891), the author notes:

The [Horton] court's only reason for refusing to interpret the statute to mean that the officers had power to kill a horse they reasonably found to have glanders was that the legislative body said "... cases of ... glanders." The [Horton] court was not wholly unaware of the practical consequences of requiring the officers to act at their peril, for it expressly rejected the argument that "few people could be found to carry out orders on these terms."

limited knowledge. Further, aware of this sort of liability, the officer might, in his reluctance to act, allow the public welfare to be injured, thus breaching his own public duty.

Noting these criticisms, the Gildea court overruled the "jurisdictional facts" approach to the problem of scope of authority and adopted the more liberal "outer perimeter" standard used by the federal courts. Basically, the "outer perimeter" standard requires only that the act of the officer have a "connection with the general matters committed by law to his control or supervision" and not be "manifestly or palpably beyond his authority." Where the act of the officer falls in the latter category, the act is within the officer's jurisdiction, and he is therefore immune from liability for the performance of that act. This liberal attitude towards an officer's scope of authority is an expression of policy designed to aid in the effective functioning of government. By requiring that an officer's act be manifestly unrelated to any general matters within his supervision before liability is imposed, the rule protects officers who act reasonably and in good faith in determining whether an act is in furtherance of matters within their supervision. The rule also

20 Davis, supra note 19, at 223-24. The Horton court was apparently unaware of any problem resulting from the fact that the trial court probably did not examine the horse and was not trained in veterinary science, whereas the officers may have examined the horse and probably were trained in veterinary science. Moreover, the fact of the actual presence or absence of the disease really is determined by what the trial court says the facts were, not what the officer found them to be, even though the legislative body put the fact-finding power in the officer, not the court. Davis at 223-24.


23 Spalding v. Vilas, 161 U.S. 483, 498 (1896). See Norton v. McShane, 332 F.2d 858, 858-59 (5th Cir. 1964), where the court equated the Barr outer perimeter standard with the Spalding rule. See also Scherer v. Brennan, 266 F. Supp. 758, 761 (N.D. Ill. 1966), which follows Norton on this point.

24 The critical issue in determining whether an act by an officer is within his scope of authority is the relation of the act complained of to matters committed by law to his control or supervision. Barr v. Matteo, 360 U.S. 564, 573-74 (1959). Thus, the privilege does not turn on the officer's title but on the relationship of the act in question to the matters which are committed to his supervision. Id.

25 Id. at 573.

26 A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter any authority exercised is a usurped authority . . . But where jurisdiction over the subject-matter is invested by law in the judge, . . . the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions . . .

affords greater latitude for honest mistake as to whether an officer has the power to act. This latter fact serves to at least avoid discouraging the officer from acting out of his fear of personal liability. To the extent that the officer is not discouraged from acting, the rule promotes the probable legislative intent in delegating the duty to the officer. Moreover, the greater latitude given the officer in determining his authority can allow him to develop innovative methods in the performance of his duties limited only by the requirement that his actions be reasonably related to the performance of matters within his general supervision. In this way, the rule can have the positive effect of encouraging an officer to do his duty, unfettered by fear that his good faith effort to carry out his duty might render him personally liable for the consequences. At the same time, the rule allows for the protection of the plaintiff's interest, since the validity of any act by the officer is still subject to a much narrower test and hence voidable if all the statutory conditions are not met.

A comparison of the Stiles case with Gildea amply demonstrates the relative merits of the two approaches to the scope of authority question. Under the rigid Stiles view, the councilmen's failure to satisfy the two statutory requirements of notice and a written statement of the reasons for the proposed action voided entirely their jurisdiction to act. Their attempted removal of the plaintiff was thus a usurpation of executive power, despite the legislature's general delegation of subject matter jurisdiction to the defendants and the broad authority given them to determine sufficient cause for removals. On the other hand, under the outer perimeter rule of Gildea, a more sensible result is achieved. The councilmen's failure to give a written statement of the reasons for the proposed action simply voided the effect of the subsequent removal, thus protecting the plaintiff from the proposed action. It had no effect on the issue of the councilmen's clear authority over removal of city managers and hence the scope of their immunity. Thus, the interests of both the plaintiff and the defendant are given protection.

Having adopted a liberal definition of the scope of an officer's authority for the purposes of granting immunity, the Gildea court sought to establish what official activities are covered by the immunity rule. Historically, the immunity of public officers from tort claims existed only as an extension of judicial immunity, as developed at common law.


28 See generally 3 K. Davis, Administrative Law Treatise §26.05, at 532-33 (1958), citing Raymond v. Fish, 51 Conn. 80 (1883). If an officer feels that by acting he may risk liability, while by not acting he will avoid liability, he is apt not to act. This defeats the purpose for which the state hired the person, namely to have him perform a duty which they assigned to him.

29 See Jennings, supra note 12, at 276-77. Generally, the justifications for judicial immunity were: (1) to avoid drains on judicial time caused by defending vexatious litigation; (2) to prevent undue influence upon judicial determinations through the
Administrative functions were viewed as analogous to judicial inquiries, in that they were designed to secure "a judgment on facts, law, or policy." As a result of this apparent similarity, early decisions tended to apply the doctrine of judicial immunity to administrative inquiries; one case specifically held that "administrative determinations were judicial in character, and that the officers making them [the inquiries] were protected by judicial immunity." Because of this tradition, analysis of public officer immunity focused on the similarity between the officer's duties and a judicial inquiry. The Massachusetts cases prior to Gildea simply never considered the creation of a separate immunity for public officers which would be grounded on policy goals independent of those employed to justify judicial immunity.

With the overruling of the Stiles case, the Supreme Judicial Court turned to a theory of independent justification for public officer immunity. The court reasoned that in the modern governmental scheme many administrative officers exist whose duties are not really judicial in nature. Attempts to extend judicial immunity to these officers would result in strained efforts to find sufficient judicial characteristics to argue that the public officer's duties were quasi-judicial. Such efforts had been allowed to become a substitute for examining whether policy reasons existed which would justify immunizing the officer irrespective of the judicial characteristics of his duties. With Gildea, the court has abandoned the search for judicial characteristics and has adopted a separate immunity for public officers. Rather than looking toward the quasi-judicial nature of the public officer's duties, the court has chosen to emphasize the use of judgment or discretion by the officer as critical to the application of public officer immunity.

Nevertheless, despite the fact that the discretionary standard is a more satisfactory criterion for establishing immunity than the judicial analogy, that standard is still not sufficiently precise. Almost all administrative

threat or possibility of subsequent damage suits; (3) to foster the independence of the judiciary, encouraging them to apply the law according to principles of justice, not according to personal consequences; (4) to insure that persons of property are not deterred from judicial service by the possibility of frequent or large liability judgments being entered against them. Jennings, supra note 12, at 270-72. See also Pratt v. Gardner, 56 Mass. (2 Cush.) 63, 70 (1848).

30 Jennings, supra note 12, at 277.
34 See, e.g., New England Tel. & Tel. Co. v. Dept. of Public Utilities, 327 Mass. 81, 85, 97 N.E.2d 509, 512 (1951), where the court noted that the fixing of utility rates was a legislative function not a judicial one. Were the court to now seek to immunize the DPU from suit on the basis of judicial immunity, the court would of necessity be contradicting itself as to the nature of the rate-making function.
acts involve the use of some judgment or discretion.\textsuperscript{86} In addition, the use of the term "discretion" in describing legal acts has been criticized as inevitably resulting in uncertainty and arbitrariness.\textsuperscript{87}

Despite this inherent ambiguity in the term the court used as the touchstone for its new test, the court offered no detailed explanation of how it intended to define or apply the standard in Massachusetts. In giving its reason for adopting an immunity rule for public officers, the court took judicial notice of the increasing number of officials charged with responsibility for making policy decisions which required the use of their judgment and discretion and cited the Commissioners of the

\textsuperscript{86} Cf. Ham v. Los Angeles County, 46 Cal. App. 148, 162, 189 P. 462, 468 (2d App. D. 1920). "[I]t would be difficult to conceive of any official act . . . that did not admit of some discretion in the manner of its performance, even if it involved only the driving of a nail." Id.

\textsuperscript{87} See Parker, The King Does No Wrong—Liability for Misadministration, 5 Vand. L. Rev. 167, 171-72 (1952). This commentator indicates that:

From a point of view of legal theory, . . . a sharp distinction between discretionary and nondiscretionary [acts] cannot be drawn; more precisely, there is no function that does not involve the exercise of some discretion, however narrow. The duties of every government official consists in applying some law—statute, regulation, directive, court decision, individual instruction—which inevitably lends itself to various constructions of times. Even when a mere messenger is instructed to go to a certain place by the "shortest route" it is still open to question—and hence to his discretion—whether "short" means short in time or in miles. At least since Locke the criteria of functions that involve the "power to act according to discretion for the public good, without the prescription of the law" have plagued the legal world. Of course, there is a factual difference between a very wide, a not so wide and a very limited discretion. The discretion involved in deciding whether the granting of a license is in the "public interest" is certainly wider than that of a government truck driver who must make up his mind which route to choose. But this difference is not a categorical one but rather amounts to a mere gradual transition. In other words, it is impossible to delineate "discretionary" functions from others in an \textit{a priori} fashion. The decision, therefore, as to what a discretionary function [means] (meaning, one that allows a relatively wide discretion) can never be reached with any degree of precision. The inevitably ensuing result will be uncertainty and arbitrariness of the law. Of course, it is not always possible to draw proper categorical definitions and thus a degree of uncertainty is at times inevitable. Who would deny that the transition from "solvent" to "insolvent" is but a gradual one? Yet in order to subject the latter, but not the former, to insolvency laws, the law must rely on just that criterion. In our case, however, the situation is somewhat different. There are definitely people who are insolvent and others who are not. The border cases lie in the middle. But there is no governmental function that cannot at all be said to be discretionary; and even if we construe the term to mean "wide" discretion, the transition will necessarily be fluctuating and uncertain.

Id. (footnotes omitted). For examples of uncertain and conflicting results in applying a standard based on the use of discretion, compare Ferguson v. Brady, 277 Ill. 272, 115 N.E. 299 (1917) (duties of an auditor are purely ministerial), with Hicks v. Davis, 100 Kan. 4, 169 P. 799 (1917) (duties of state auditor are too important and call for too much prudence, judgment and discretion to be characterized as merely ministerial).
Department of Public Utilities (DPU) as an example of officials deserving a separate immunity.\textsuperscript{38}

The precise reason for the court’s reliance on the Commissioners of the DPU as an example of officers deserving immunity but not performing judicial functions is not clear. The court notes that these officers are charged with responsibility for making broad policy decisions, thus rendering their duty “legislative” in character. However, the court goes on to note that it would be unthinkable to subject these officers to liability to utility companies for erroneous rate determinations. Whether this is unthinkable because of the extreme size of the liability which would result in such a case or because the court deems it desirable to insulate their policy decisions from judicial review is not clear. But since such large liability would result from virtually any policy level decision, it is more likely that the controlling factor is the making of policy decisions, and the possibility of large liability is merely another justification for immunizing policy-making officials. The court simply observed that it was unnecessary to identify further other public officials whose position and responsibility are similar to those of the Commissioners of the DPU and to whom the \textit{Gildea} immunity should apply.\textsuperscript{39}

It is difficult to concur in the court’s statement that further clarification of immunizable activities is unnecessary, in view of the diverse results encountered in other jurisdictions in construing standards based on the use of discretion and the ambiguity of the test itself.\textsuperscript{40} While the court clearly cannot be expected to list all the newly immunized activities, the court should have drawn a more definitive test. The court’s failure to adopt a more useful standard and to elaborate more precisely how it intended to apply the standard is sure to generate uncertainty for both the officers\textsuperscript{41} and prospective plaintiffs.\textsuperscript{42} Nonetheless, in the absence of a clearly defined test governing the application of the new immunity rule, some preliminary analysis as to the apparent ramifications of the new rule is in order. The court’s emphasis on the importance of the making of policy decisions and its reliance on the example of the Commissioners of the DPU in rationalizing the need for a separate immunity

\textsuperscript{39} Id.
\textsuperscript{40} See note 37 supra.
\textsuperscript{41} In Barr v. Matteo, 360 U.S. 564 (1959), Chief Justice Warren in a dissenting opinion noted that predictability was essential to any public officer immunity standard. 360 U.S. at 585-86. Unless an officer knows in advance whether he is immune from liability, he can be intimidated by the threat or possibility of personal liability, causing him to reach the decision least likely to cause him the anguish of suit.
\textsuperscript{42} If plaintiffs are uncertain as to the law on public officer immunity, the tendency will be to institute all types of suits in the hope of getting a windfall recovery. This will have two detrimental effects: (1) the number of suits against the officers will increase; (2) court time will be wasted on suits without substantive merit.
for public officers may indicate that the principal issue in applying the
immunity is whether the official is one to whom either the executive or
legislative branch has chosen to delegate the authority for making broad
policy decisions. If this is the issue governing the application of the
immunity, then the determination of whether there has been a delegation
of broad policy-making powers would turn on a number of factors,
including statutory construction, employment of the officer due to his
particular knowledge or expertise, and the specialization or complexity
associated with the duties of the official. Each of these factors would
need to be considered with respect to the larger question of whether it
is desirable as a matter of policy to have the activity under scrutiny re­
main beyond the range of judicial inquiry and thereby avoid the
possibility of a tort suit becoming a vehicle for reviewing the merits of a
decision entrusted to a co-ordinate branch of government. Even if a
particular suit is not instituted, there is the very real danger that the
mere potentiality of such review might influence the decision-making
process.

43 See generally Patterson, Ministerial and Discretionary Official Acts, 20 Mich. L.
Rev. 848, 874 (1922). In construing any statute, the author suggests a consideration of
the following factors in attempting to give effect to the purpose of the legislation: (1)
mandatory language ("must") indicating ministerial functions as opposed to permissive
language ("may") suggesting discretion; (2) words denoting mental operations as
indicating the use of discretion ("satisfied that" or "in his opinion"); (3) the definiteness
or indefiniteness of the statutory norm imposed (the former indicating that the legis-
lature has decided clearly when the officer should act, thus leaving only ministerial
execution to the officer, the latter indicating that some judgment will be necessary in
establishing a norm by one other than the legislature). Id. at 876-78.
44 Cf. Note, 66 Harv. L. Rev. 488, 492 (1953). In discussing whether a particular
activity should be immunized for purposes of the Federal Tort Claims Act, the article
notes the relevance of these factors:
Congress may choose to implement its legislation by delegating to administrative
officers power to make broad policy decisions. Equipped with expertise in a com­
plex, specialized area, the official is asked to make value judgments in a manner
which may be described as "legislative activity." This would seem to be the type
of activity that Congress did not want courts to interfere with in tort actions.
45 3 K. Davis, Administrative Law Treatise §25.11 (1958). The opinion of a court as to
the wisdom or correctness of an exercise of judgment is not to be substituted for that
of the official empowered to make the determination. Note, 66 Harv. L. Rev. 488, 490
(1955).
46 Cf. Note, 66 Harv. L. Rev. 488, 489-90 (1955). If the official is charged with
negligence in the making of his decision, the court will be required to decide whether
a reasonably prudent man in similar circumstances would have reached the same
decision. Thus the court would be reviewing the wisdom of the policy which the
official has decided on.
47 See Johnson v. State, 69 Cal.2d 782, 793-94, 447 P.2d 352, 360, 73 Cal. Rptr. 240,
248 (1968), and authorities cited therein. If there is a chance of judicial review of a
decision, the officer may take that fact into account in reaching his decision and there­
fore reach a result which he thinks the court will approve. In this way he avoids (1)
the embarrassment of reversal by a court, (2) the possibility of being held personally

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While the "discretion" test is useful in immunizing officers based on the desirability of insulating their decisions from judicial review, it is too narrow to identify other officials as to whom other justifications for public officer immunity apply. The potential of heavy personal liability not only may deter competent persons from entering public service but also can intimidate those who do so enter from exercising their judgment freely. If the court considers the critical issue in applying the immunity rule to be the delegation of broad policy-making powers to the officer, it should bear in mind that an immunity test which focuses solely on policy-making power will fail to encompass fully all the relevant issues bearing on public officer immunity. It would therefore be helpful if the court explained in detail its definition of the "use of judgment" standard and incorporated into that expanded definition careful consideration of the justification for immunity.

An additional problem created by the Gildea rule relates to the type of immunity which the court has chosen to apply once the initial determination is made that an officer's acts are to be granted immunity. Rather than adopt a rule of absolute immunity, such as the federal courts have done, the court opted for conditional immunity, that is, immunity conditioned upon the absence of bad faith or malice. Conditional immunity has found favor among legal commentators and in a majority of jurisdictions due to the fact that it avoids the chief disadvantage of absolute immunity: the possibility of the office becoming a shield for the commission of malicious acts. It has been argued that to deny recovery where a malicious wrong has been committed works a gross injustice on the injured plaintiff and is incompatible with acting for the public good. While recognizing that such a denial of recovery would indeed be "monstrous," Judge Learned Hand nonetheless concluded, in his famous decision in Biddle, that the balance of reason tipped in favor of the absolute immunity rule on the grounds that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all liable for the consequences of the decision, and (3) any threat of litigation with its concomitant risks.

52 Cf. Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949).
but the most resolute... in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officials than to subject those who try to do their duty to the constant dread of retaliation.\(^{54}\)

After \textit{Biddle}, the federal courts consistently followed the absolute immunity rule as applied to federal officers.\(^{55}\)

While the \textit{Gildea} court cited to \textit{Biddle} and other absolute immunity cases throughout its opinion, it chose not to apply absolute immunity to the case, apparently because on the facts of the case no evidence of bad faith had been introduced and therefore adoption of conditional immunity was sufficient to decide the case before it. Indeed, the court emphasized that its present holding, limiting public officer immunity to acts committed without malice, was dictated solely by the facts before it, and the court warned against interpreting \textit{Gildea} as a final position by the court on the question of whether it would ultimately adopt a conditional rather than an absolute immunity.\(^{56}\)

Following this caveat, though, the court entered a \textit{directed verdict} against the plaintiff under G.L. c. 231, § 122. The court apparently reasoned that since the plaintiff had offered no evidence of malice at the trial, he had failed to present a prima facie case for recovery under conditional immunity principles, thus justifying a directed verdict against him. However, the court ignored the fact that \textit{Gildea} had not alleged or offered proof of malice because under the then existing law\(^{57}\) malice was not a prima facie element for recovery. Indeed, the court explicitly

\(^{54}\) 177 F.2d at 581 (2d Cir. 1949). But see 3 K. Davis, Administrative Law Treatise §26.04, at 529 (1958). It is there argued that the use of summary judgment procedure can serve as a screening device whereby the courts can look to the affidavit to see if the claim of malice is substantial enough to warrant a trial on the issue. If effective, such a device could eliminate spurious claims without the burden to the officer of a full trial. But such an approach fails to consider that all the plaintiff must do is allege on information or belief that the motive behind the act was malicious to survive a motion for summary judgment.


recognized that the trial court tried the case on absolute immunity principles, charging the jury that malice or its absence was irrelevant to the issue of liability. Since the directed verdict statute applied by the Supreme Judicial Court is permissive, not mandatory, it should only be exercised in a proper case. The statute has been held inapplicable to the situation where the case was tried on the wrong legal principles, as the court openly admits happened in the Gildea trial. It is therefore difficult to explain why the court, in reversing Gildea's jury verdict, directed a verdict for the defendants instead of granting Gildea a new trial at least on the issue of malice, especially in view of the court's admitted uncertainty as to which type of immunity it intended to ultimately adopt.

In sum, the Supreme Judicial Court has at last created a protective immunity for public officers. In delineating the scope of that immunity, the court liberated the doctrine of public officer immunity from the arbitrary limitations of the jurisdictional facts rule and the anachronistic concept of public officer immunity as dependent on judicial similarities sufficient to justify applying judicial immunity to the officer's acts. However, the court's laudable effort to protect public officers in view of the need therefor is doomed by the court's failure to solve two critical problems which are inherent with judicially created public officer immunity law: first, the court failed to delineate an adequate standard by which to determine the activities to which the immunity applies; and second, the court, in its effort to avoid some of the injustices of an absolute immunity rule, adopted conditional immunity, complete with the innate weaknesses of that rule noted in the Biddle decision.

These problems exist because of the court's legitimate fear that any immunity rule will leave a party injured by an official's unjustified action without redress. Under Massachusetts law, an injured party must either sue and recover his damages from the officer involved or be left to bear the burden of the loss himself since the doctrine of sovereign immunity precludes a suit against the state itself. Thus, unless the victim can collect against the officer, he is left without redress for the injury suffered.

In view of the foregoing, it is proposed that the Massachusetts Legislature step into the breach and enact a comprehensive legislative program to deal with the area of public officer immunity. California adopted such a program in response to the judicial overruling of sovereign

60 See Archer v. Eldredge, 204 Mass. 323, 327, 90 N.E. 525, 526 (1910).
62 See generally §11.17 infra.
immunity. First, the legislature statutorily re-enacted sovereign immunity except for stated statutory exceptions. Next, the state was made vicariously liable for the torts of its officers who were acting within the scope of their employment, including those performing ministerial functions except where the employee would be immune. Finally, public officers performing discretionary acts were immunized from suit, thus vicariously immunizing the sovereign.

This type of scheme is advantageous to the interests of all three parties involved—the officer, the injured victim, and the state. With respect to the officer, he is effectively immunized from the possibility of a tort judgment being satisfied from his personal assets. The injured plaintiff has two courses of action which may be taken. He can sue the state directly, the more likely course since here there is no question of the sovereign's ability to pay any judgment the plaintiff can get, or he can sue the officer personally. If he selects the latter alternative, the officer has the right to implead the state as a defendant (if the request is made within ten days of the commencement of the action) so as not to be out of pocket at all if he is found liable, or, failing that, he can apply for indemnity for the judgment plus his costs at the end of the suit. In any event, the state ultimately bears the burden of the judgment, thus preventing any consideration of potential personal liability from intimidating the officer in reaching his decision or in any way discouraging him from diligent performance of the duty entrusted to him. Moreover, under the California system, the officers are free of any fear of retaliation by their superior and free of fear that the state will refuse to indemnify them except in certain specific instances: where the torts were intentional or where they were committed in bad faith. It would not be necessary for Massachusetts to adopt such an exception, since questioning an officer's motive in any circumstance might undercut the very goal of fearless performance which public officer immunity seeks to attain. However, if Massachusetts chose to adopt such an exception, it could at least place the issue before an administrative board which would be familiar with the problems facing an officer in making decisions. In addition, Massa-

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66 Cal. Gov. Code §815.2(a) (West 1966). See also legislative comment thereto.
72 Cal. Gov. Code §825.4 (West 1966) provides that as a general rule officers need not indemnify public entities who pay damages resulting from employee's act. Cal. Gov. Code §825.6(a) (West 1966) excepts from the general rule acts of employees which involve fraud, corruption, or malice.
chusetts could set for the officer clear categories of acts to which immunity will not apply.

With respect to the victim, he will be sure to have an action against someone for any injury he suffers as a result of government decisions or activity. He will not be foreclosed either by the fortuity of his injury being caused by one who is performing his function as a government employee, or because the court or jury thinks it unfair to hold the officer personally liable in a particular situation. In addition, recovery of any judgment gained is virtually assured, since the execution will be against the state itself, as to which there is no risk of insolvency.

Finally, and perhaps most importantly, should the legislature enact such a scheme, the state interest in insulating basic policy decisions from judicial review would still be protected. If an officer is performing a discretionary function involving policy decisions, there can be no recovery against either the officer or the state. This approach has the advantage of tying the justifications for sovereign immunity to the application of the rule, and making the justification for sovereign immunity the measure of it. Also, the courts need not hesitate to grant relief to an injured plaintiff out of a feeling that to impose liability on the officer in the particular situation would be unjust, since the state would, under this type of enactment, be required to meet its responsibilities to the public for injuries caused by the negligence of its agents, just as private industry is vicariously liable for the torts of its servants.

While the Supreme Judicial Court in Gildea has recognized the need for reform in the law of public officer immunity, it must be admitted that the court's attempt to reform the area is far from conclusive. Indeed, the difficulties which the Supreme Judicial Court has encountered may well suggest that judicial resolution of the law of public officer immunity, subject as it is to a case-by-case solution, is not feasible, and that resolution of the uncertainties must come from the General Court.

JOSEPH H. WALSH