Chapter 13: Torts

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§13.1. Introduction. During the present Survey year, the Supreme Judicial Court and the General Court have continued to advance the interests of injured persons in the tort field by deserting old precedents involving governmental and municipal liability, the attractive nuisance doctrine, and the necessity of the proof of "hidden defect" in landowners' liability cases. The two significant statutory enactments in the area of governmental immunity and attractive nuisance have followed the Court's strong suggestion in Morash & Sons, Inc. v. Commonwealth and Mounsey v. Ellard that it would reassess old doctrine in the light of present concepts of societal responsibility. In both instances, the legislature has responded in a more limited fashion than was suggested by the Court's direction. Nevertheless, it has significantly broadened the liability of municipalities and landowners with respect to the rights of injured persons.

§13.2. Governmental Immunity. The Survey year witnessed a remarkable degree of activity in the area of governmental immunity from tort liability. The Supreme Judicial Court continued its frontal assault on the doctrine, impelling the General Court to enact a comprehensive scheme creating, but limiting, liability for the commonwealth and its political subdivisions in tort. A brief review of the Court's erosion of the doctrine will be followed by a discussion of the new statute.

Until July of 1978, when the Massachusetts Tort Claims Act was enacted, the commonwealth, with one exception, enjoyed absolute tort immunity. That one exception, as set forth in Morash & Sons v. Commonwealth, would be discussed in the next section.
imposed liability on the commonwealth for creating a private nuisance resulting in damage to the property of another. Municipalities were similarly liable for the creation of such nuisances, as well as for torts which arose out of proprietary activities. Municipalities, however, enjoyed immunity for tortious conduct which resulted from governmental activities. Morash criticized this governmental-proprietary distinction as having “no necessary relationship to accepted tort principles, equitable principles, or principles of sound public policy.”

Although the Supreme Judicial Court in Morash expressed its sentiment that the governmental immunity doctrine was no longer defensible, the Court refrained from judicial abrogation, stating that comprehensive legislative action abrogating the doctrine was preferable. With the passage of four years and the legislature’s continued failure to act, the Supreme Judicial Court in Whitney v. City of Worcester, heralded its final warning, declaring its intention to abrogate state, county, and municipal immunity in the next appropriate case if the legislature had not dealt with the matter by the end of the 1978 legislative session. In addition, it stated that judicial abrogation of governmental immunity, if it were to occur, would be applied retroactively to all injuries occurring after the publication date of Morash.

Shortly after Whitney, the Court, in Feldman v. City of Worcester, acted in accordance with its stated intention to abrogate retroactively governmental immunity if the legislature refused to act by the end of the 1978 legislative session. The complaint in Feldman alleged that the negligent administration of medication and external cardiac massage by the city’s agents in a municipal hospital in October of 1973 was the proximate cause of the plaintiff’s injuries. Although the operation of a hospital is a governmental function and hence would fall within the area of conduct traditionally protected by governmental immunity, the Court refused to apply the doctrine. Instead, it reversed the dismissal of the action and remanded the case to the superior court to await action by the legislature in accordance with Whitney.

3 Id. at 616, 296 N.E.2d at 463-64.
4 Id.
5 Id.
6 Id. at 621, 296 N.E.2d at 467.
7 Id. at 618, 296 N.E.2d at 465.
8 Id. at 624, 296 N.E.2d at 468.
10 Id. at 210, 366 N.E.2d at 1212.
11 Id. at 225, 366 N.E.2d at 1220.
13 Id. at 277, 366 N.E.2d at 1240.
14 Id. at 278, 366 N.E.2d at 1241.
15 Id.
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In the closing days of the 1978 session, the legislature finally responded to the Court's admonition in Whitney by enacting a total revision of General Laws chapter 258, thereby creating a tort claims act. Contrary to the judicial intent, as expressed in Whitney, that abrogation should apply to all causes of action arising on or after the 1973 Morash decision, the Act is applicable only to causes of action arising on or after August 16, 1977, the date of the Whitney decision. It appears the General Court considered that public entities were entitled to rely on the doctrine of governmental immunity until Whitney was decided and not, as the Court felt, only until the time Morash was decided in 1973.

Whenever American jurisdictions have abolished governmental immunity, whether judicially or legislatively, they have at the same time uniformly recognized the need to limit liability. Specified torts such as conduct involving a particular state of mind of the public employee and legislative, judicial, or discretionary activities or functions are frequently excepted from liability. Even where liability exists, damages are often limited by establishing a maximum recoverable judgment, disallowing recovery for punitive damages, or requiring the subtraction of collateral benefits. Procedural limitations, such as the requirement of giving notice to a specified official within a designated period of time, are also frequently imposed. The abrogation of traditional common law immunity in the exercise of governmental functions has expanded to all states except Maryland and South Dakota.

Some states have not explicitly abolished immunity but have permitted or mandated the purchase of liability insurance. Generally, exercising this option constitutes a waiver of immunity to the extent that the insurance coverage has been procured. Even if a state has explicitly abolished the doctrine, it may still authorize governmental units to purchase insurance to cover liability, even though in the absence of insurance, the unit would not be liable.

The general grant of liability to suit in chapter 258 is that the public employer "shall be liable for injury or loss of property or personal injury or death . . . in the same manner and to the same extent as a private individual under like circumstances . . . ." This language is essentially the same as the language of the Federal Tort Claims Act, on which

16 See text at note 11 supra.
18 373 Mass. at 225, 366 N.E.2d at 1219-20.
21 Id.

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the Massachusetts Act was largely patterned. It has been interpreted to mean that if a theory of liability exists applicable to the governmental entity as if it were a private individual, then the governmental entity will be held liable. Numerous states have also defined the scope of governmental liability according to this same "private individual" standard.

Section 10 of chapter 258 sets out four exceptions to liability of the public employer, which to a large extent were taken from the federal legislation. These exceptions are:

1. claims arising out of conduct while exercising due care in the execution of a statute, regulation, or ordinance, regardless of whether the statute, regulation, or ordinance is valid;
2. claims based upon the performance of a discretionary function by a public employee who is acting within the scope of his employment regardless of whether the discretion is abused;
3. claims arising out of an intentional tort [all the intentional torts are specifically mentioned];
4. claims arising out of the assessment or collection of taxes or the lawful detention of goods by a law enforcement officer.

Several states have enacted nearly identical provisions; these statutes assume total liability as the rule and then establish certain types of activities as exceptions to liability.

An initial question arises as to whether the liability of the state is the same as or different from the liability imposed on local governmental bodies. Generally, liability of local governmental bodies is broader than liability of the states. This calls to mind the old rule that the state enjoyed an absolute immunity, but the municipality enjoyed a qualified immunity, extending to governmental but not to proprietary functions.

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25 See, e.g., CONN. GEN. STAT. § 4-160 (a); WASH. REV. CODE ANN. § 4.92.090.
27 See, e.g., ALASKA STAT. § 09.50.250; HAW. REV. STAT. § 662-15; IOWA CODE ANN. § 25A-14(1); NEB. REV. STAT. § 23-2409.
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Today Connecticut, Vermont, and North Carolina represent the view that the state faces broader liability than the municipalities.\(^{29}\) The Massachusetts Tort Claims Act, like legislation in several other states,\(^{30}\) draws no distinction between the commonwealth on one hand, and municipalities, commissions, and districts on the other hand.\(^{31}\)

The first exception to liability set forth in section 10 of chapter 258 is that a public employer will not be held liable for harm caused by an employee in the execution of a statute, regulation, ordinance, or by-law, whether or not the statute, regulation, ordinance, or by-law is reasonable or valid. Other jurisdictions have similar provisions;\(^{32}\) those jurisdictions which do not recognize a similar exception have based their decisions finding liability on the fact that potential liability tends to encourage proper performance of a statutorily prescribed ministerial duty.\(^{33}\)

The second, and most important, exception to liability is the so-called discretionary function exception. Cases interpreting this exception under the Federal Tort Claims Act frequently draw a distinction between planning and operational level functions, finding liability only when tortious conduct arises out of operational level decisions. This distinction was elaborated upon in \(\text{Swanson v. United States}\):\(^{34}\)

The planning level notion refers to decisions involving questions of policy, that is, the evaluation of factors such as financial, political, economic, and social effects of a given plan or policy . . . . The operational level decisions, on the other hand, involve decisions relating to the normal day-to-day operations of government.\(^{35}\)

The Supreme Judicial Court in \(\text{Whitney}\) also listed inquiries that would be relevant in determining whether conduct would fall within the discretionary function exception:

Was the injury-producing conduct an integral part of the governmental policymaking or planning? Might the imposition of tort liability jeopardize the quality and efficiency of the governmental

\(^{29}\) See K.C. \textsc{Davis}, \textit{Administrative Law Treatise} § 25 at 553-54 (1st ed. Supp. 1976).


\(^{31}\) See Acts of 1978, c. 512, § 15, \textit{adding} new G.L. c. 258, § 1, which contains a broad definition of the term "public employer," but excludes several authorities.

\(^{32}\) See, \textit{e.g.}, \textit{Or. Rev. Stat.} § 30.265(3).

\(^{33}\) See, \textit{e.g.}, Dalton \textit{v. Hysell}, 56 Ohio App. 2d 109, 110, 381 N.E.2d 955, 956 (1978) (liability of court clerk for failure properly to enter record payment of plaintiff's fine, contrary to a duty imposed by statute.)

\(^{34}\) 229 F. Supp. 217 (N.D. Cal. 1964).

\(^{35}\) \textit{Id.} at 220.
process? Could a judge or jury review the conduct in question without usurping the power and responsibility of the legislative or executive branches? Is there an alternate remedy available to the injured individual other than an action for damages . . . . [O]ther relevant considerations are the reasonable expectations of the injured person with respect to his relationship to the governmental entity in question, the nature of the duty running from the government to the governed in the particular case, and the nature of the injury.36

In defining the scope of governmental liability, nearly every state, by judicial or legislative action, has excepted liability for tortious conduct arising in the course of the performance of discretionary activities. The rationale behind the exception is that it "... is essential to a good system of law on governmental tort liability, but the exception should not be pushed beyond the reasons behind it."37

Depending upon which analysis is employed in the jurisdiction, the determination of whether a particular activity is discretionary will vary. For example, courts have generally held that the basic decision to release a prisoner on parole is a discretionary function involving policy considerations that compel immunity from judicial review.38 However, in *Rieser v. District of Columbia*, the conduct of a parole officer in failing to disclose the dangerous propensities of a parolee to his employer was found not to be discretionary. In its decision the court reasoned that potential liability would encourage conscientious performance.40 In *State v. Silva*, the court held that the establishment of a work release program for prisoners and the selection of inmates for the program were discretionary but that the manner in which the camp was supervised and controlled was mainly operational.42 *Rieser*, like *Silva*, involved the implementation and supervision of the parole program; they thus are distinguishable from those cases which hold that the selection of prisoners for a parole program falls within the discretionary function exception.

The third exception of section 10 is for intentional torts by employees and agents of the public employer. This exception, like that in statutes of other states, is taken practically verbatim from the federal Act.44

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36 373 Mass. at 219-20, 366 N.E.2d at 1217.
39 563 F.2d 462 (D.C. Cir. 1977).
40 Id. at 475.
42 Id. at 913, 478 P.2d at 593.
43 See ALASKA STAT. § 09.250(3); HAW. REV. STAT. § 662-15(4); IOWA CODE ANN. § 25a.14(4); NEB. REV. STAT. § 23-2409(5).
Police conduct involving excessive force would probably fall within the intentional torts exception. In states abrogating governmental immunity, but failing to except intentional torts, the public employer would probably be liable for unreasonable arrest and imprisonment.

Certain conduct attributable to negligent execution of police procedures would in all likelihood sound in negligence and not fall within the intentional tort or discretionary activities exception. Thus, noncompliance with statutory requirements for adequate police training would give rise to liability. In *Carter v. Carlson*, a federal appeals court held that failure to provide adequate training and supervision of police officers did not necessarily fall within the discretionary function exception. Although jurisdictions are not in agreement as to whether the initial police decision to stop or pursue a suspected wrongdoer falls within the discretionary function exception, there is uniformity among jurisdictions that, absent a specific statutory exception excluding this activity from liability, a pursuit executed negligently will give rise to liability. Some statutes have specifically excepted from immunity the negligent operation of motor vehicles; in those jurisdictions, police negligence in a chase would give rise to liability. In Massachusetts, such conduct would be actionable because it falls within the general rule of liability. The legislature has amended chapter 41, section 100, so that municipalities will indemnify police officers or firefighters for expenses and damages incurred in the defense or settlement of claims against them for acts done while operating a motor vehicle in their capacity as a police officer or firefighter.

The question arises whether the failure to provide police protection will give rise to liability for harm resulting from the lack of protection. In those jurisdictions that continue governmental immunity for discretionary acts, or provide a specific statutory exception, courts have consistently held that the failure to provide police protection will not

45 *See* G.L. c. 41, § 96B.
46 447 F.2d 358 (D.C. Cir. 1971).
47 *Id.* at 368.
48 *See*, e.g., Mason v. Bitton, 85 Wash. 2d 321, 328, 534 P.2d 1360, 1365 (1975) (The decision whether to chase and continue in pursuit is operational and not a basic policy decision); Sparks v. City of Compton, 64 Cal. App. 3d 592, 596, 134 Cal. Rptr. 684, 686-87 (1976) (Although the original decision to stop or pursue is deemed discretionary, negligence in the execution of the act might give rise to liability); *But cf.* Cole v. Rife, 77 Mich. App. 545, 553, 258 N.W.2d 555, 558 (1977) (Municipality, but not individual officer, may claim the protection of sovereign immunity from claims of negligence in setting up a roadblock).
49 *See*, e.g., TENN. CODE ANN. § 23-3308; UTAH CODE ANN. § 63-30-7.
50 CAL. GOV'T CODE § 884.6 (West) (no liability for injury to prisoners); Jamison v. City of Chicago, 48 Ill. App. 3d 567, 363 N.E.2d 87 (1977) (interpreting ILL. REV. STAT. c. 55, §§ 4-104, 4-107).
give rise to liability. The reason for the courts' refusal to impose liability is known as the public duty doctrine. This doctrine holds that police protection is owed to the public generally and not to a particular individual.51 Where, however, a specific duty to provide protection is assumed toward a particular individual, it must be executed in a non-negligent manner; otherwise liability will result.52

The public duty doctrine is not limited to police protection. Other activities to which it is frequently applied and which therefore would not give rise to liability are the provision of fire protection services,53 the inspection of buildings,54 and the issuance of building permits.55 Specific statutory exceptions from liability exist in some jurisdictions for these activities and provide immunity without reliance on a public duty rationale.56 Since the Massachusetts Tort Claims Act does not have any such provisions, the Commonwealth and its political subdivisions will avoid liability for these activities based upon the public duty doctrine.57 Again, some jurisdictions that apply the public duty doctrine to these activities hold that when a specific duty is undertaken with respect to a particular individual, it must be executed in a non-negligent manner.58

In enacting the new statute, the General Court explicitly retained chapter 84, sections 15-25, which govern actions arising out of defective municipal streets, and chapter 81, section 18, which governs actions

52 See e.g., Hargrove v. Cocoa Beach, 96 So.2d 130, 133-34 (Fla. 1957) (liability for negligently leaving prisoner unattended in his cell after a fire broke out); Schuster v. New York, 5 N.Y.2d 75, 84-86, 154 N.E.2d 534, 539-40, 180 N.Y.S.2d 265, 272-73 (1958) (liability for failure to provide proper police protection to informant).
55 Modlin v. City of Miami Beach, 201 So.2d 70, 75 (Fla. 1967); Hoffert v. Owatonna Inn Towne Motel, Inc., 293 Minn. 220, 222-23, 109 N.W.2d 158, 160 (1962).
56 TENN. CODE ANN. § 23-3311(3) (no liability for issuance of licenses or permits); Id. § 23-3311(4) (no liability for failure to make an adequate inspection).
57 See Reynolds Boat Co. v. City of Haverhill, 357 Mass. 668, 669, 260 N.E.2d 176, 177 (1970) (duty of municipality is to provide firefighting services to the community at large and not to its members individually).
58 See, e.g., In Re M/T Alva Cape, 405 F.2d 962 (2d Cir. 1969) (reversing district court's grant of defendant's motion for summary judgment in case of negligence in fighting shipboard fire).
arising out of defective state highways.\textsuperscript{59} Section 15 of chapter 84 limits recovery to actions arising out of defects in municipal property that can be considered a public way. The municipality must have had reasonable or constructive notice of the defect, which defect could have been corrected by the exercise of reasonable care.\textsuperscript{60} Recovery is expressly precluded where the injury is sustained because of snow or ice upon a public way, if the public way was otherwise reasonably safe,\textsuperscript{61} or sustained during construction or repair, if the way has been closed and sufficient means have been taken to caution the public against entering.\textsuperscript{62} As in Bancroft v. Town of Canterbury,\textsuperscript{63} however, recovery will now be allowed for injuries caused by "tortious municipal conduct in constructing and/or maintaining a barrier to a discontinued bridge . . ."\textsuperscript{64} or public way. The statute has been construed to deny recovery unless the defect is the sole cause of the injury\textsuperscript{65} or unless a third person's conduct contributing to the injury was innocent.\textsuperscript{66}

It appears that chapter 229, section 1, which sets a $4,000 limit on recovery for wrongful death actions against municipalities arising out of defective public ways, is no longer in force. The Massachusetts Tort Claims Act specifically refers to death as a compensable loss.\textsuperscript{67} Since the statute does not refer to chapter 229, section 1, and provides that "[a]ny other provision of law inconsistent with any other provisions of the chapter shall not apply, . . ."\textsuperscript{68} it appears that chapter 229, section 1, has been impliedly repealed. Thus, where death results from a defective public way municipalities will be liable under the general Massachusetts Wrongful Death statute.\textsuperscript{69} Judgments will be limited to $100,000 and no recovery will be permitted for punitive damages,\textsuperscript{70} even though the wrongful death statute would permit punitive damages.\textsuperscript{71}

Chapter 81, section 18, which applies to state highways, incorporates by reference the provisions of chapter 84, sections 15, 18, and 19, with

\textsuperscript{59} Acts of 1978, c. 512, § 18 provides:

The provisions of this act shall be construed liberally for the accomplishment of the purposes thereof but shall not be construed to supersede or repeal section eighteen of chapter eighty-one and sections fifteen to twenty-five, inclusive, of chapter eighty-four of the General Laws. Any other provision of law inconsistent with any other provisions of this chapter shall not apply.

\textsuperscript{60} G.L. c. 84, § 15.

\textsuperscript{61} Id. § 17.

\textsuperscript{62} Id. § 15.

\textsuperscript{63} 118 N.H. 453, 388 A.2d 199 (1978).

\textsuperscript{64} Id. at 458, 388 A.2d at 203.


\textsuperscript{66} Clinton v. City of Revere, 195 Mass. 151, 80 N.E.2d 813 (1907).


\textsuperscript{68} See note 60 supra.

\textsuperscript{69} G.L. c. 229, § 2.


\textsuperscript{71} See G.L. c. 229, § 2.
the result that the preceding analysis will apply to such actions against the commonwealth. Chapter 81, section 18, however, limits recovery to $4,000 and precludes liability where the injury is sustained because of the lack of a railing on a highway, from a defective sidewalk, or during construction or repair of the highway. Since chapter 229, section 1, did not apply to the commonwealth, wrongful death recovery will be permitted without superseding any statute. Other jurisdictions have held that the negligent planning of a highway is not a discretionary act and does give rise to liability. Some state tort claims statutes explicitly allow recovery for injuries caused by the dangerous conditions of public ways. In Massachusetts, however, negligent planning or design of a highway would likely be considered a defect recoverable only under chapter 84, sections 15-25, or chapter 81, section 18.

The new act does not specifically protect the public employer from liability for attractive nuisance. Chapter 231, section 850, gives a trespasser of young age a cause of action against a possessor of land who maintains an artificial condition thereon and fails to exercise reasonable care to protect the trespassing child from injury sustained from the artificial condition. Since chapter 231, section 850, is not mentioned in the new statute and is not inconsistent with its terms, recovery under the attractive nuisance principle will presumably be allowed against governmental landowners.

Section 2 of chapter 258 provides that the public employer shall not be liable in excess of $100,000. The Massachusetts comparative negligence statute provides that the gross amount of damages will be diminished in proportion to the amount of the plaintiff's negligence and denies recovery if plaintiff's negligence is greater than the defendant's. The $100,000 figure recoverable under the Tort Claims Act is apparently the net recovery once the amount attributable to the comparative negli-
gence of the plaintiff has been deducted from the damages assessed against the tortfeasor.

Many jurisdictions have limited governmental liability by establishing maximum recoverable judgments. These maximum judgments are generally categorized on a per claimant basis, a per incident basis, or both and sometimes according to the type of damage or the activity out of which the tort arose. Some statutes also authorize the governmental unit to purchase insurance against tort liability which will cover liability for judgments in excess of statutory limits. Although the act limits liability to $100,000, it does not indicate whether this is a per claimant or per incident limitation. The lack of qualifying language implies that each claimant may recover up to $100,000. Section 8 of the act authorizes public employers to procure tort liability insurance “for payment of damages incurred pursuant to this chapter.” By this language it appears that the $100,000 recovery limit will still apply even though insurance is procured.

The act provides a specific procedure for the settlement of claims against public employers. The “executive officer” of the public employer may settle a claim for $2,500 or less within six months of the date when the claim is presented. If the proposed settlement exceeds $2,500, there must be prior approval by the public employer’s “public attorney.” When the public employer is the commonwealth, settlements in excess of $20,000 must also have the prior approval of the

75 See, e.g., Fla. Stat. Ann. § 768.28 ($50,000 per claim, $100,000 per occurrence); Ill. Rev. Stat. c. 37, § 4398 (Court of Claims granted jurisdiction over tort claims, which may not exceed $100,000); Minn. Stat. Ann. § 466.04(a) ($100,000 per claim, $300,000 per incident for torts of local governments); Nev. Stat. Rev. § 41.035 ($25,000 maximum judgment); Vt. Stat. Ann. tit. 12, § 5601 ($75,000 per claimant, $300,000 per occurrence).

76 See, e.g., Or. Rev. Stat. § 30.270 ($20,000 for property damage, $50,000 for other claims, $300,000 per occurrence); Tex. Rev. Civ. Stat. Ann. art. 6252-19 ($10,000 for property damage, $100,000 per person, $300,000 per occurrence).

77 See R.I. Gen. Laws §§ 9-21-2, 9-21-3 ($50,000 maximum recovery not applicable where tort is committed in course of proprietary function).

78 See, e.g., Minn. Stat. Ann. § 466.06.

79 Acts of 1978, c. 512, § 15, adding new G.L. c. 258, § 2 merely provides in this regard that “public employers shall not be liable . . . for any amount in excess of one hundred thousand dollars.”


81 But see Delong v. City & County of Denver, 195 Colo. 27, 576 P.2d 539 (1978) where the court held that a statute limiting amount of recovery against a governmental entity was not in conflict with a city charter provision abrogating immunity and placing no limit on the award; recovery would not be limited to the ceiling established by the state statute.


84 Id. “Public attorney” is defined in id. § 1.
Secretary of Administration and Finance. Additionally, if a civil action has been brought on the claim, any settlement in excess of $20,000 must have the prior approval of a judge of the superior court having jurisdiction over the action. These procedural restraints for settlements in excess of certain amounts are not as restrictive as statutes in other jurisdictions which impose absolute ceilings on settlements that are significantly lower than the potential recovery if the case went to trial.

In order to commence a civil action against a public employer under chapter 258, the claimant must have presented his claim in writing to the executive officer of the public employer within two years of the date when the cause of action arose. Within six months of presentation of the claim, the executive officer may pay it, deny it, refer it to arbitration or settle it. Failure to deny, refer to arbitration, or settle within six months will be deemed to be a final denial of the claim. If the claim has not been settled within six months of presentation, the claimant may commence suit. The action under the general tort statute of limitations may be brought up to three years after the date when the cause of action accrued even though written presentation to the executive officer must occur within two years.

Many jurisdictions have notice requirements which are generally shorter than the applicable statute of limitations. Some of these statutes with extremely short notice requirements, ranging from two to six months, have been challenged and determined to be unconstitutional as a denial of equal protection and due process. In one case, however, a ninety day county notice requirement, which stood in contrast to a six month

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85 Id. § 5.
86 Id. § 7.
87 See, e.g., D.C. CODE ENCYCL. § 1-904 ($10,000 maximum amount permitted for settlement of tort claim; no apparent limit to judgment recovery).
89 Id.
90 Id.
91 G.L. c. 260, § 2A.
93 Reich v. State Highway Dept., 386 Mich. 617, 194 N.W.2d 700 (1972) (MICH. COMP. LAWS ANN. § 691.1404; 60 day state notice requirement); Turner v. Staggs, 89 Nev. 230, 510 P.2d 845 (1975) (NEV. REV. STAT. §§ 244.245, 244.250; 190 day county notice requirement); Hunter v. North Mason High School, 85 Wash.2d 810, 539 P.2d 845 (1975) (WASH. REV. CODE § 4.96.020; 120 day notice requirement). A rationale in support of these decisions is that since the legislature had waived the immunity of governmental units it made clear an intent to put all tortfeasors on an equal footing. The notice provision frustrated that intent by setting up different classes of tortfeasors (public and private) and tort victims. Such planned discrimination from dual classification of tortfeasors and their victims inevitably founded on the equal protection condemnation of individious classifications. Lambert, Tort Law, 36 A.T.L.A.L.J. 20, 33 (1976).
notice requirement for municipalities and a one year notice requirement for the state, was held to be constitutional.\footnote{Crowder v. Salt Lake County, 552 P.2d 646, 648 (Utah 1976).} The Utah Supreme Court reasoned that the "legislature has wide discretion in enacting laws which affect one group of citizens differently than other groups. The constitutional safeguard of equal protection is offended only if the classification rests upon the ground not relative to the state's objective."\footnote{Id. at 647 (citing McGowan v. Maryland, 366 U.S. 420 (1961)).} The Massachusetts two year notice requirement is not unreasonably short in comparison to the three year tort statute of limitations. Therefore, an equal protection challenge to the Massachusetts notice requirement would be weaker than a similar challenge to those statutes having two to six month notice requirements.

Prior to the enactment of chapter 258, many public employees were personally liable only for injuries caused by their own misfeasance. Chapter 258, section 2, makes no distinction between misfeasance and nonfeasance and provides that a public employee while acting within the scope of his employment is not liable as long as he cooperates in the defense of any claim. If the employee does not cooperate, he faces the risk of being held jointly liable in the action for negligence. Certain conduct of enumerated professions, however, has been statutorily excepted from liability. Under chapter 112, section 12B, and chapter 71, section 55, the "Good Samaritan Rule" that a person under no duty to act will be held liable if he acts negligently,\footnote{Black v. New York, N.H., & H. RR. Co., 193 Mass. 488, 79 N.E. 797 (1907).} is inapplicable under certain circumstances to physicians, registered nurses, public school teachers, principals, and school nurses. Under the 1977 enactment of chapter 111C, section 14, the exceptions to the "Good Samaritan Rule" have been extended to certified medical technicians, police officers, and firefighters. Thus, any such person who "in the performance of his duties and in good faith, renders emergency first aid or transportation to an injured person" shall not in any way be personally liable as a result of rendering such aid or providing transportation.\footnote{G.L. c. 111C, § 14 added by Acts of 1977, c. 649.} Since these provisions are not inconsistent with the Massachusetts Tort Claims Act, any person whose conduct falls within one of these statutory exceptions will remain immune from liability regardless of his status as a public employee.

Where, however, a public employee has committed an intentional tort of a civil rights violation, the employee may be subject to personal liability regardless of his employment status or his willingness to cooperate with the defense of claims against the government.\footnote{Acts of 1978, c. 512, § 15 adding new G.L. c. 258, § 9.} In such
cases, public employers are authorized to provide indemnification of up to $1,000,000 for losses and expenses sustained by the employee during his defense.\footnote{id} Indemnification, however, will only be available when the employee's action was within the scope of his employment.\footnote{id} Moreover, an employer may not indemnify an employee for claims resulting from willful, malicious, or grossly negligent conduct.\footnote{id} Several other jurisdictions provide for compulsory indemnification of an employee held liable in tort. In many of these jurisdictions indemnification is conditioned on the standard of care exercised by the employee.\footnote{id} Some jurisdictions forbid indemnification in such instances,\footnote{id} and other jurisdictions permit, but do not mandate, indemnification.\footnote{id}

The Massachusetts Tort Claims Act is a welcome recognition that the sovereign can do wrong and should be responsible for its damages. The commonwealth, at the constant prodding of the Supreme Judicial Court, has finally been brought in line with the humanitarian approach of the federal government and the vast majority of state governments. It remains to be seen how the new act will be construed, but it is a safe guess that the Supreme Judicial Court will in future cases apply the analysis it set forth in Whitney.

\section{Collateral Source Rule.} It is well settled in Massachusetts that a tortfeasor's liability to an injured person is not reduced by the amount of compensation received by the injured person pursuant to an insurance policy.\footnote{id} This principle, commonly known as the collateral source rule, had been applied intact in this state until this Survey year, when the Supreme Judicial Court carved out the first exceptions to the rule in Jones v. Town of Wayland.\footnote{jones} Jones, the plaintiff, was a police officer who had been struck in the left temple by a rock as he was driving in his police cruiser.\footnote{jones} Jones received compensation under the Wayland group health and accident insurance policy.\footnote{jones} Jones also sought further payments from Wayland under General Laws chapter 41, section 111F.\footnote{jones}

\footnote{99 Id.}
\footnote{100 Id.}
\footnote{101 Id.}
\footnote{102 See, e.g., CAL. GOV'T CODE § 825 (scope of employment); COLO. REV. STAT. § 24-10-110; CONN. GEN. STAT. ANN. § 4-165; § 7-465 (scope of employment; not wanton or willful conduct); FLA. STAT. ANN. § 768.28(9); IOWA CODE ANN. § 613A.8; N.J. STAT. ANN. §§ 59:10-1 & 10-2.}
\footnote{103 See, e.g., IDAHO CODE ANN. § 6-903.}
\footnote{104 See, e.g., MINN. STAT. ANN. § 466.07; OH. REV. STAT. § 30.285; S.D. COMP. LAWS ANN. §§ 3-19-1 to 3-19-3.}
\footnote{\S 13.3. 1 Shea v. Rettie, 287 Mass. 454, 457-58, 192 N.E. 44, 45 (1934).}
\footnote{3 Id. at 159, 373 N.E.2d at 202.}
\footnote{4 Id. at 161, 373 N.E.2d at 203.}
\footnote{5 Id. at 157, 373 N.E.2d at 201.}
That statute provides that a police officer or firefighter who is incapacitated because of injuries sustained without fault of his own in the performance of his duties is entitled to leave without loss of pay until he resigns or retires. Wayland contended that it should be allowed to deduct from any payments due under section 111F the amounts paid to Jones under the town's group insurance policy.  

The Supreme Judicial Court, referring to the collateral source rule and its rationale, stated that "if there is to be a windfall [due to the fact that plaintiff is insured for the loss] such benefit should accrue to the injured party rather than to the wrongdoer." 7 It determined that the rule is inapplicable in two situations: where the party liable to the injured person is not responsible for the injury and where the party found liable has established a fund to cover its liability to others. 8 Both of these situations obtained in this instance because Wayland, though liable to Jones, was not a tortfeasor with respect to the injury and because the insurance payments were from a policy "most likely acquired" by Wayland "with a view toward possible liability under §111F." 9 The Court concluded that Wayland "should not be penalized for its foresight" 10 by being required to duplicate the payments already made under the policy. Accordingly, it held that Wayland could deduct from payments made to Jones under section 111F insurance payments representing indemnity but could not deduct payments for loss of eyesight and medical expenses because these are not a duplication of section 111F payments. 11

§13.4. Medical Malpractice—Screening Tribunal—Constitutionality.

In Austin v. Boston University Hospital, 1 the Supreme Judicial Court answered questions certified to it by the U.S. District Court concerning the application and interpretation of chapter 231, section 60B, of the General Laws. This statute, which was to take effect on January 1, 1976, requires a hearing before a tribunal prior to any medical malpractice action. The tribunal is to consist of a doctor, a lawyer, and a judge and is to "determine if the evidence presented if properly substantiated is sufficient to raise a legitimate question of liability appropriate for judicial inquiry or whether the plaintiff's case is merely an unfortunate medical result." 2 If it determines that the evidence is

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insufficient to substantiate the claim, plaintiff must post a $2,000 bond to cover defendant's costs and attorney's fees in the event plaintiff does not prevail in the litigation.\(^3\)

The first issue addressed by the Court was what the legislature meant by providing that the statute was to take effect on January 1, 1976. In \textit{Austin}, the complaint was filed on December 31, 1975, but the answer was not filed until after January 1, 1976.\(^4\) The Court determined that section 60B, in addition to providing procedural elements, also dealt with substantive rights in that it imposed liability for legal costs and expenses on unsuccessful litigants.\(^5\) Because of the substantive aspect of section 60B, the section should only apply to those cases to which the legislature clearly intended it to apply.\(^6\) Since appointment of the tribunal and a hearing is to occur within fifteen days after the defendant's answer has been filed, the Court considered that it would be an overly broad construction of section 60B to make it applicable to all medical malpractice cases pending for which both the complaint and the answer had already been filed by January 1, 1976.\(^7\) The Court further determined that section 60B was not intended to apply to pending medical malpractice actions for which answers had not yet been filed, since this interpretation would create problems in cases where one co-defendant had filed an answer before January 1, 1976, but another had not.\(^8\) Thus, the Court concluded that section 60B is applicable to those medical malpractice cases in which both the complaint and answer were filed on or after January 1, 1976.\(^9\)

The second question addressed by \textit{Austin} was what, if anything, should be done if a medical malpractice action is brought and remains in either the district or municipal court.\(^10\) Since section 60B provides that every medical malpractice action is to be heard by a tribunal, the Court ruled that such cases brought in a district or municipal court must be transferred to the superior court for a hearing by a section 60B tribunal.\(^11\) Thereafter, the trial will be held in the appropriate municipal or district court. Section 60B therefore does not give the superior court exclusive jurisdiction over medical malpractice actions.\(^12\)

\(^3\) \textit{Id.}
\(^4\) 372 Mass. at 656, 363 N.E.2d at 517.
\(^5\) \textit{Id.} at 657-58, 363 N.E.2d at 517.
\(^6\) \textit{Id.} at 658, 363 N.E.2d at 517-18.
\(^7\) \textit{Id.} at 658, 363 N.E.2d at 518.
\(^8\) \textit{Id.}
\(^9\) \textit{Id.}
\(^10\) \textit{Id.} at 559, 363 N.E.2d at 518.
\(^11\) \textit{Id.} at 660, 363 N.E.2d at 519.
\(^12\) \textit{Id.}
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The last question to which the Austin Court addressed itself dealt with the disposition of cases where the tribunal has found that "the plaintiff's case is merely an unfortunate medical result," and the plaintiff fails to file the $2,000 bond. The Court agreed that a judge may reduce the amount of the bond in the event of a plaintiff's indigency. It nevertheless held that, under section 60B, failure to post the required bond within thirty days of the tribunal's finding results in dismissal of the action.

In Paro v. Longwood Hospital the Court considered challenges to the constitutionality of the section 60B procedure requiring screening of all medical malpractice complaints. The suit also challenged the imposition of a bond for further prosecution, where the tribunal determined that a legitimate question of liability was not presented. The challenges were brought on equal protection, due process, and separation of powers grounds.

The Supreme Judicial Court rejected these constitutional challenges, holding first that there was a rational purpose for treating defendants differently from plaintiffs and medical malpractice cases differently from other tort cases. The legislative goal of section 60B was the elimination of unnecessary malpractice litigation and the assurance of the continued availability of malpractice insurance at reasonable cost. The plaintiffs did not contend that the classifications created by section 60B were inherently suspect or that they violated fundamental personal rights. Thus, the Court found no need to show a compelling state need in order to uphold the constitutionality of the statute. Applying the rational relation standard, the Court held that since the tribunal procedure was a rational means to achieve these goals, the classifications created by the statute did not violate plaintiff's right to equal protection. The Court further determined that since the judge is given wide discretion to determine the bond amount, there was no denial of equal protection as long as that discretion was exercised so as not to burden unduly meritorious claims. Moreover, the Court reasoned that since

13 Id. at 661, 363 N.E.2d at 519.
14 Id.
15 Id.
17 Id. at 646-47, 369 N.E.2d at 986.
18 Id.
19 Id.
20 Id. at 648-49, 369 N.E.2d at 987-88.
21 Id. at 651, 369 N.E.2d at 989.
22 Id. at 650, 369 N.E.2d at 988-89.
23 Id. at 651, 369 N.E.2d at 989.
24 Id. at 652-53, 369 N.E.2d at 990.
the tribunal procedure only creates a limited obstruction to bringing
a medical malpractice action, the substance of a plaintiff's jury trial
right is not impaired.25 Addressing itself to the separation of powers
challenge, the Court pointed out that the tribunal's intimate connection
with the judicial proceeding and the judge's preeminence in the entire
process make it clear that the hearing is itself part of the judicial
process and that the tribunal is not a legislative body.26 Thus, the
Court held that section 60B does not violate the separation of powers
 provision of the Massachusetts Constitution.27

Where the matter involved in a negligence action is of a professional
nature, such as a medical practice, expert evidence is usually necessary
on the issues of whether the defendant was negligent and whether his
negligence caused the plaintiff's harm. Under General Laws chapter
233, section 79C, medical writings may be used in malpractice cases
to supply the expert evidence. A preliminary finding of fact, however,
must be made by the court before such writings may be introduced
into evidence. The court must find that the author of the writing is
recognized in his profession as an expert on the subject. In addition,
the party intending to introduce the writing must give thirty days notice
before the trial of his intention to introduce such evidence.

In Mazzaro v. Paull,28 the plaintiffs sought to introduce their expert
evidence through examination of the defendant and through medical
treatises under chapter 233, section 79C.29 The defendant, however,
was unwilling to express his opinion on the qualifications and expertise
of the authors of those treatises.30 The plaintiff later attempted to
qualify the authors by introduction of the Directory of Medical Special-
ists.31 The judge excluded the directory, however.32

On appeal, the plaintiff relied on chapter 233, section 79B, as grounds
for the admissibility of the treatise.33 Section 79B provides that "[s]tatements of facts of general interest to persons engaged in an occupation
contained in a list, register, periodical, book or other compilation, issued
to the public, shall, in the discretion of the court, if the court finds that
the compilation is published for the use of persons engaged in that
occupation and commonly is used and relied upon by them, be admis-

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25 Id. at 655, 369 N.E.2d at 991.
26 Id. at 657, 369 N.E.2d at 992.
27 Id.
29 Id. at 646, 363 N.E.2d at 510.
30 Id. at 646, 363 N.E.2d at 511.
31 Id. at 647, 363 N.E.2d at 511. This directory is a part of the series known
as Marquis Who's Who, Inc. Id.
32 Id. at 647-48, 363 N.E.2d at 511.
33 Id. at 649, 363 N.E.2d at 512.
sible in civil cases as evidence of the truth of any fact so stated."

The Supreme Judicial Court rejected the plaintiff's argument, citing Reddington v. Clayman, a case similar to Mazzaro in many respects. In Reddington a medical directory was held to be inadmissible for the purpose of proving the expertise of the authors of medical treatises. As in Mazzaro, the directory was not offered below under chapter 233, section 79B. Therefore, the judge could not make the preliminary findings necessary to introduce the directory, namely, that the compilation be (1) issued to the public, (2) published for persons engaged in the applicable occupation, and (3) commonly used and relied upon by such persons. Since the plaintiff in Mazzaro did not make an offer of proof of these threshold requirements nor mention section 79B to the trial court as grounds for the admissibility of the directory, the Court held that exclusion of the directory was proper. In pointing out that perhaps the most expeditious way to prove these prerequisites is through the testimony of an expert who relied on the directory, the Court indicated that once the proper foundation for admission is laid, the trial judge could make the requisite preliminary findings, and the directory would be admissible in the judge's discretion. Although the Court did not address itself to whether the treatises would then have been admissible under section 79C, it is likely that once the qualifications and expertise of their authors had been established, the text of the treatises would be admissible.

In Harrington v. Cohen, the Appeals Court considered whether a doctor who had negligently performed a first operation could be found liable for damages resulting from a second operation when the second operation was performed, not to correct injuries resulting from the first, but to cure the patient's original condition. The defendant performed an initial unsuccessful spinal correction operation on the minor plaintiff, which was followed by an identical operation unsuccessfully performed by another doctor. Shortly after the second operation, the minor plaintiff developed a brain abscess which resulted in continuing epileptic type of seizures. There was no evidence that the negligence of the

34 G.L. c. 233, § 79B.
35 334 Mass. 244, 134 N.E.2d at 920 (1956).
36 Id. at 247, 134 N.E.2d at 922.
37 Id. at 248, 134 N.E.2d at 922.
38 Id. at 248, 134 N.E.2d at 923.
39 G.L. c. 233, § 79B.
40 372 Mass. at 652, 363 N.E.2d at 514.
41 Id.
43 Id. at 341, 374 N.E.2d at 345.
44 Id. at 340, 374 N.E.2d at 345.
45 Id. at 341, 374 N.E.2d at 345.
first operation caused or contributed to injuries from the second operation. At trial, the judge ruled that if the defendant were found to be liable, damages assessed against him were to be limited to the first hospitalization and its resultant damages and were not to include the subsequent hospitalization and damages resulting from performance of the second orthopedic operation.

On appeal, the Appeals Court upheld the ruling of the trial judge. The plaintiff argued that the failure to perform successfully an unusually high risk operation foreseeably necessitated performing it a second time and thus foreseeably exposed the plaintiff twice to an unusual risk when the first operation was negligently performed. The court rejected this contention, noting that while multiple exposures to a risk of complications necessarily multiply the chance that the complications will occur, the risk on each subsequent exposure does not itself increase. The court remarked that as in the continuous flipping of a coin, "the odds are the same each time." There was no evidence that the first operation created any propensity for complications nor that the plaintiff's condition was made more severe or difficult to cure by the first operation. Thus, the complications that ensued from the second operation were caused by the plaintiff's condition and were in no way attributable to the first operation. Therefore, the defendant-doctor who performed the first operation should not be liable for the damages due to the complications which arose from the second operation.

§13.5. Defamation—Privilege—Truth as an Absolute Defense. The privilege defense in defamation actions is based upon the public policy that people must be free in certain situations to speak candidly without fear of being subjected to a defamation suit. Privileges are either absolute or conditional depending upon the importance of the social need giving rise to the privilege. An absolute privilege shields a person from liability for a statement published maliciously or with knowledge of its falsity. It applies to statements of high public officials in the performance of their duties, as well as to statements that are part of judicial proceedings. Massachusetts has adopted the view of the Restatement

46 Id.
47 Id.
48 Id. at 342, 374 N.E.2d at 346.
49 Id. at 342-43, 374 N.E.2d at 346.
50 Id. at 343, 374 N.E.2d at 346.
51 Id.
52 Id.
53 Id. at 343-44, 374 N.E.2d at 346.

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(Second) of Torts and has extended the absolute privilege to statements made by attorneys preliminary to a proposed judicial proceeding. In Smith v. Suburban Restaurants, Inc., the plaintiff brought a libel action against a restaurant based upon a copy of a letter sent by the defendant's attorney to the city police department. The contents of the letter, the original of which was sent to the plaintiff, informed her that she was no longer welcome on the restaurant premises and that any intrusions onto such premises would be considered a trespass for which legal action would be taken. The defendant moved for summary judgment on the grounds that the contents of the letter were not susceptible of a defamatory meaning as a matter of law and that, in any case, the defendant's actions were absolutely privileged. The trial court granted the defendant's motion and the plaintiff appealed. Disagreeing with the trial court's finding that the letters could not be libelous, the Supreme Judicial Court reversed.

Addressing the issue of whether the words in the letter were libelous, the Court held that since the publication was susceptible to both a defamatory and a harmless meaning, the letter could not be found non-libelous as a matter of law. Whether a publication is libelous, the Court ruled, presents a question for the trier of fact. The Court then considered the defendant's absolute privilege claim. It rejected this claim on the grounds that "[t]he absolute privilege of an attorney to publish false and defamatory matter in communications preliminary to a proposed judicial proceeding applies only where the proceeding is contemplated in good faith and is under serious consideration." The Court observed that since in this case any judicial proceeding was contingent upon some further conduct of the plaintiff, such a proceeding was neither contemplated in good faith nor was under serious consideration. Finding, therefore, that the letter was not libelous as a matter of law and that the defendant was not absolutely privileged in sending

2 Restatement (Second) of Torts § 586, (1938) provides:
An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding.

5 Id. at 532, 373 N.E.2d at 217.
6 Id. at 532, 373 N.E.2d at 216-17.
7 Id.
8 Id. at 531, 373 N.E.2d at 217.
9 Id. at 534, 373 N.E.2d at 217-18.
10 Id. at 534, 373 N.E.2d at 218.
11 Id. at 535, 373 N.E.2d at 218.
a copy of the letter to the police department, the Court reversed the
trial court’s order for summary judgment.

In reaching this decision, the Court commented that under certain
circumstances a good faith communication to the police may be condi-
tionally privileged.\textsuperscript{13} It noted that under chapter 266, section 120, of
the General Laws, a person who, without right, enters a building “after
having been forbidden so to do by the person who has the lawful
control of the said premises, either directly or by notice posted
thereon . . .” is guilty of a crime.\textsuperscript{14} On the facts before it, however,
the Court declined to find that sending the full text of the letter to
the police was privileged as an assertion of the defendant’s rights under
section 120.\textsuperscript{15}

In \textit{Ezekiel v. Jones Motor Co., Inc.}\textsuperscript{16} the Supreme Judicial Court con-
sidered whether the absolute privilege to make defamatory statements
that witnesses enjoy in judicial proceedings applies to the testimony of
witnesses before a joint management-union grievance board.\textsuperscript{17} In
\textit{Ezekiel}, the plaintiff brought an action to recover damages against his
former employer and one of its employees for an allegedly slanderous
statement made before a union grievance board to the effect that the
defendant employee had seen the plaintiff steal merchandise.\textsuperscript{18} At trial,
the jury returned a verdict for the plaintiff, but the trial judge entered
judgment notwithstanding the verdict for the defendant on the ground
that the statements made by the defendant at the grievance board
hearing were protected by an absolute privilege.\textsuperscript{19}

On appeal, the Supreme Judicial Court reversed and held that the
defendants enjoyed only a conditional privilege which can be destroyed
upon a showing of malice or abuse of the privilege.\textsuperscript{20} The Court
acknowledged that the defendant had a duty to explain the grounds
for termination of plaintiff’s employment at the grievance hearing.\textsuperscript{21} It
noted, however, that the conditions under which he was giving testi-
mony differed significantly from those of a judicial proceeding.\textsuperscript{22} First,
the defendant was not giving testimony under oath and therefore was
not subject to perjury charges for giving false testimony.\textsuperscript{23} Second, he

\textsuperscript{13} \textit{Id.}
\textsuperscript{14} G.L. c. 266, § 120.
\textsuperscript{17} \textit{Id.} at 335, 372 N.E.2d at 1284.
\textsuperscript{18} \textit{Id.}
\textsuperscript{19} \textit{Id.} at 334, 372 N.E.2d at 1283.
\textsuperscript{20} \textit{Id.} at 337, 372 N.E.2d at 1284.
\textsuperscript{21} \textit{Id.}
\textsuperscript{22} \textit{Id.} at 338, 372 N.E.2d at 1285.
\textsuperscript{23} \textit{Id.}
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was not subject to the control of a judge who would limit his testimony to competent, relevant, and material evidence.\(^\text{24}\) The Court decided that since the safeguards present at a judicial proceeding do not exist at a management-union grievance hearing, a conditional privilege will provide sufficient motivation for candid testimony while retaining protection against deliberately false testimony.\(^\text{25}\)

The Court also rejected the defendant's contention that denying witnesses an absolute privilege at management-union grievance hearings would impair the national labor policy of encouraging the settlement of labor disputes "through the processes of conference and collective bargaining in order to promote industrial peace." \(^\text{26}\) In this regard, the Court relied on Farmer v. United Brotherhood of Carpenters, Local 25\(^\text{27}\) where the United States Supreme Court held that the National Labor Relations Act did not bar a state cause of action for the intentional infliction of emotional distress which arose in the context of a labor dispute.\(^\text{28}\) Although the present case involved a charge of slander, the Ezekiel Court noted that the state's interest in protecting its citizens from tortious conduct in both cases outweighs the potential interference with the federal scheme of labor regulation.\(^\text{29}\) Furthermore, the Court concluded, a conditional privilege would suffice to promote the candid discussion necessary to the settlement of labor disputes.\(^\text{30}\)

After determining that the defendant could not claim an absolute privilege, the Court considered whether he had forfeited his conditional privilege by exhibiting malice or bad faith.\(^\text{31}\) Bad faith may be proved by a showing that the defendant acted because of an "improper motive." \(^\text{32}\) In Ezekiel the Court found evidence of an improper motive in the statements of the employer's regional and terminal managers.\(^\text{33}\) Since the managers were authorized to fire the plaintiff, the jury could have found that the defendant made his accusation to the grievance board to effectuate the managers' previously expressed desire to rid the company of an employee whose industrial accidents were costing the company too much money.\(^\text{34}\) The Court also determined that there was sufficient evidence of a causal connection between the employer's ill will

\(^{24}\) Id.
\(^{25}\) Id.
\(^{26}\) Id. at 338, 372 N.E.2d at 1285.
\(^{28}\) Id. at 304-05.
\(^{30}\) Id.
\(^{31}\) Id. at 342, 372 N.E.2d at 1286.
\(^{34}\) Id. at 344, 372 N.E.2d at 1287.
and the alleged slanderous statement of the defendant employee to allow the question to go to the jury.\textsuperscript{35} The Court concluded that since the jury could have found that the defendant's statements were prompted by an improper motive, its verdict for the plaintiff was not in error.\textsuperscript{36}

Truth is an absolute defense for slander. Thus, even if a defendant's statement is prompted by malice, the fact of its truth will shield the defendant from liability.\textsuperscript{37} In Bzeznik v. Chief of Police of Southampton,\textsuperscript{38} the Supreme Judicial Court considered whether sealed felony convictions were admissible into evidence to establish truth as a defense to allegations of slander.\textsuperscript{39} The plaintiff, a gun license applicant, brought an action for declaratory and injunctive relief and for damages for slander.\textsuperscript{40} The plaintiff contended that since his prior felony convictions had been sealed, they could be used for no purposes other than those enumerated in the statute.\textsuperscript{41} He further argued that even if the fact of the convictions were true, its truth could not be proved since under G.L. chapter 276, section 100A, sealed records are not admissible in any court proceedings except for the purpose of imposing sentences.\textsuperscript{42}

The Court, however, rejected plaintiff's arguments and held that the sealed records statute does not operate to render prior convictions non-existent but rather assures their confidentiality under certain circumstances.\textsuperscript{43} Under G.L. chapter 276, section 100A, the Commissioner of Probation is to respond "to inquiries by authorized persons other than any law enforcement agency, any court, or any appointing authority, . . . in the case of a sealed record . . . that no record exists." Contrary to the plaintiff's contention, the Court concluded that this statutory language must be interpreted to imply that law enforcement agencies, courts, and appointing authorities do have access to sealed criminal records.\textsuperscript{44} Furthermore, the Court noted that under the gun licensing statutes,\textsuperscript{45} the chief of police "has an affirmative duty to determine whether an applicant has 'any criminal record'."\textsuperscript{46} Thus, in the Court's view, the defendant had not only the right, but also the duty to refer to the plain-

\textsuperscript{35} Id.
\textsuperscript{36} Id.
\textsuperscript{39} Id. at 462, 373 N.E.2d at 1130.
\textsuperscript{40} Id.
\textsuperscript{41} Id. at 466, 373 N.E.2d at 1132.
\textsuperscript{42} Id.
\textsuperscript{43} Id. at 470, 373 N.E.2d at 1133.
\textsuperscript{44} Id. at 467, 373 N.E.2d at 1132.
\textsuperscript{45} G.L. c. 140, §§ 122, 122B, and 131.
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In determining his eligibility for gun licenses, the Court held that by stipulating to the fact of his prior convictions in a statement of agreed facts filed with the trial court, the plaintiff waived any objections to the admission of evidence of those prior convictions. Thus, the Court concluded that the sealed record statute does not operate to erase the fact of a prior conviction and render it untrue for the purposes of the common law of defamation.

§13.6. Negligence. In *Poirier v. Town of Plymouth* the Supreme Judicial Court changed the rule governing the duty owed by a landowner to an employee of an independent contractor to conform to the *Mounsey* rule that a landowner owes a duty of reasonable care to all lawful visitors on the premises. Prior to *Poirier*, an employee of an independent contractor employed by a landowner had the burden of showing that his injury was caused by the landowner’s failure to warn of a hidden defect and that the defendant landowner, in the exercise of reasonable care, should have been aware that the defect existed. The Court first determined that according to the facts presented in *Poirier* the town was liable under the “hidden defect test.” It then ventured further and abrogated the hidden defect test in tort actions against landowners.

In *Poirier*, an employee of an independent contractor hired by the town of Plymouth to paint the town’s water tank brought an action against the town to recover damages for injuries sustained in a fall when the ladder “sprang out” from the side of the tank. At trial, the jury returned a verdict for the plaintiff. The Appeals Court set aside the verdict and entered judgment for the defendant on the ground that there was insufficient evidence to support the verdict. The Supreme Judicial Court granted the plaintiff’s petition for further appellate review and reinstated the judgment of the superior court. In so doing the Court held that there was sufficient evidence on which a jury could conclude that a hidden defect existed; that the defendant, in the exercise of reasonable care, should have been aware of the defect; and that the

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47 *Id.* at 468, 373 N.E.2d at 1133.
48 *Id.* at 471, 373 N.E.2d at 1133.
49 *Id.*

5 *Id.*
6 *Id.* at 100, 372 N.E.2d at 217.
7 *Id.* at 101, 372 N.E.2d at 217.
8 *Id.*
plaintiff’s injury was caused by the defendant’s failure to warn plaintiff of the defect.\textsuperscript{9}

In reaching this decision the Court first considered whether the admission into evidence of inspection standards promulgated by the American Water Works Association was correct.\textsuperscript{10} It concluded that the admission was not improper.\textsuperscript{11} The Court found there was evidence that the superintendent of the town’s water department was aware of the standards and that the standards had been approved by the regional water works association to which the superintendent belonged.\textsuperscript{12} Since the standards were probative as to whether the defendant was negligent in failing to inspect the ladders and discover the hidden defect, the standards were properly allowed into evidence.\textsuperscript{13}

After concluding that the inspection standards were properly admitted, the Court overruled the Afenko hidden defect test.\textsuperscript{14} The Court limited its overruling of Afenko to cases involving “an injury suffered by one not an employee of the Defendant to do work on the property of the defendant.”\textsuperscript{15} The Court pointed out the inconsistency within the rule, which required that in order for an employee to recover, the defect must be hidden and yet must also be discoverable by the employer in the exercise of reasonable care. Furthermore, the Court noted that its recent ruling in Mounsey abrogating the practice of varying the duty of care owed by a landowner according to the status of the plaintiff cast doubt on the validity of the rule that the status of the plaintiff should be determinative of the tort standard of care.\textsuperscript{16} It observed that the same rationale was invoked in King v. G.S.M. Realty Corp.\textsuperscript{17} and in Lindsey v. Massios,\textsuperscript{18} where it was held that a landlord owes a duty of reasonable care to the tenant and to all lawful visitors.\textsuperscript{19} Applying this principle to the facts of Poirier, the Court pointed out that since an employee of an independent contractor engaged to work on the landowner’s property is a lawful visitor, he too should be owed a duty of reasonable care.\textsuperscript{20} The Court also commented that the “hidden defect” rule was similar to the “assumption of the risk” doctrine which was abolished by

\textsuperscript{9} Id. at 107, 372 N.E.2d at 219.
\textsuperscript{10} Id. at 105, 372 N.E.2d at 218.
\textsuperscript{11} Id. at 105, 372 N.E.2d at 218-19.
\textsuperscript{12} Id. at 105, 372 N.E.2d at 218.
\textsuperscript{13} Id. at 105, 372 N.E.2d at 219.
\textsuperscript{14} Id. at 116, 372 N.E.2d at 223.
\textsuperscript{15} Id. at 117-18, 372 N.E.2d at 224.
\textsuperscript{16} Id. at 120, 372 N.E.2d at 224.
\textsuperscript{17} 373 Mass. 658, 370 N.E.2d 413 (1977).
\textsuperscript{19} Id. at 82, 360 N.E.2d at 634.
chapter 231, section 85. An independent contractor should not be made to suffer for the negligence of the property owner. The property owner should take those steps to prevent injury that are reasonable and appropriate under the circumstances. Thus, the duty of care owed by a property owner to the employee of an independent contractor is the same as that owed to all other lawful visitors.

There were two concurring opinions in *Poirier*. Since the abrogation of the "hidden defect" test had not been presented, briefed, or argued on appeal by the parties, Justice Quirico, joined by Chief Justice Hennessey and Justice Wilkens, disagreed that this was an appropriate case in which to abrogate the rule. They did, however, agree with the Court's conclusion that there was a hidden defect that had caused the plaintiff's injury. Justice Braucher, on the other hand, took essentially the opposite position. He disagreed that there was a hidden defect but concurred in the abrogation of the "hidden defect" test, finding it out of harmony with other recent developments in the area of workmen's compensation.

§13.7. Statute of Limitations. In *Cannon v. Sears, Roebuck and Co.*, the Supreme Judicial Court once again considered the question of when a cause of action begins to accrue in a products liability case. In *Cannon*, the plaintiff brought an action to recover for injuries sustained from the collapse of an aluminum ladder. The plaintiff alleged that the defendants were negligent in the manufacture and design of the ladder and breached the warranties of fitness and merchantability. The action was brought within two years of the plaintiff's injury, but approximately nine years after the manufacture and sale of the ladder. An appeal was made after the defendant's motion for summary judgment was allowed on the ground that the statute of limitations barred both the warranty and negligence counts. The Supreme Judicial Court reversed.

In reaching its decision the Court rejected the defendant's contention that *Omni Flying Club, Inc. v. Cessna Aircraft Co.* requires that the

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21 Id. at 121-22, 372 N.E.2d at 225.
22 Id. at 127, 372 N.E.2d at 227.
23 Id. at 128, 372 N.E.2d at 228.
24 Id.
25 Id. at 129, 372 N.E.2d at 228-29.

2 Id. at 819, 374 N.E.2d at 582-83.
3 Id. at 820, 374 N.E.2d at 583.
4 Id. Since the plaintiff did not argue the issue of the applicability of the statute of limitations to his claim for breach of warranties, the only issue on appeal was whether the plaintiff was barred by the statute of limitations on his negligence count. Id.
limitation period be measured from the date of manufacture or from
the date of sale.\footnote{6} It noted that \textit{Omni} was predicated upon the negligent
sale as well as the negligent manufacture of the airplane.\footnote{7} As a result,
the action brought in \textit{Omni} was not barred by the statute of limitations,
because the cause of action accrued on the date of sale, which, under the
circumstances could also be regarded as the date of injury.\footnote{8} After dis­
tinguishing \textit{Omni}, the Court ruled that since negligence, harm, and
causation must be shown before a negligence action for personal injury
can be maintained, it would be unjust to bar the plaintiff’s action even
before the harm occurred.\footnote{9} In a products liability case, for instance, the
cause of action commences to run from the time of injury and not from
the time of manufacture or sale of the defective product.\footnote{10} The Court
noted that although the burden on defendant manufacturers and re­
tailers would be greater in defending these delayed actions, the burden
would likewise be greater on the plaintiff in proving its case and over­
coming the inferences of intervening negligence.\footnote{11} The Court further
commented that the determination of the accrual of a cause of action
in a products liability case predicated upon negligence as the date of
injury was in accordance with the time for the accrual of a cause of
action in a breach of warranty action.\footnote{12} Thus, the Court held that the
plaintiff’s claim was not barred by the statute of limitations, because
in accordance with the prevailing rule in products liability cases, the
cause of action arose at the time of injury, not at the time of manu­
facture.\footnote{13}

\section*{§13.8. Landlord and Tenant.} It is the general rule that an inten­
tional tort or crime committed by a third person is a superseding cause
of harm to the plaintiff even though the defendant’s conduct created the
opportunity for the intentional tort or crime.\footnote{1} If, however, the defend­
ant should have realized that his negligence would create an opportu­
nity for the commission of such tort or crime by a third party and that
a third party might avail himself of the opportunity to commit an
intentional tort or crime, then such tort or crime is not a superseding
cause of the plaintiff’s harm.\footnote{2}

\begin{footnotes}
\item[7] \textit{Id.} at 821-22, 374 N.E.2d at 583-84.
\item[8] \textit{Id.} at 822, 374 N.E.2d at 584.
\item[9] \textit{Id.} at 822-23, 374 N.E.2d at 584.
\item[10] \textit{Id.} at 822, 374 N.E.2d at 584.
\item[11] \textit{Id.} at 823, 374 N.E.2d at 584.
\item[12] \textit{Id.} Under G.L. c. 106, § 2-318, the statute of limitations in a breach of warranty
action begins to run after the date of injury and damage occurs.
\end{footnotes}
The issue of superseding cause was raised in Gidwani v. Wasserman. In Gidwani, a tenant storeowner brought an action against his landlord seeking recovery for wrongful entry and repossession of the leased premises and for compensation for merchandise stolen from the premises as a consequence of the landlord's having disengaged the burglar alarm. At trial, the judge found that the landlord, in repossessing the premises, had failed to comply with the notice requirement of the lease. She concluded, therefore, that the landlord's entry and repossession of the premises was unlawful.

On appeal, the Supreme Judicial Court affirmed the finding of the Court of Appeals that there was no error in the trial court's rulings. The Court first upheld the judge's ruling that the landlord's entry was unlawful. It did so on the ground that it was not plainly wrong for the judge to conclude, largely on the basis of oral evidence, that the lease's notice requirement had not been met. The Court also concluded that the burglary which occurred subsequent to the landlord's wrongful entry was not a superseding cause which would relieve the landlord of liability. With respect to the burglary, the Court noted that the "likelihood of burglary was a natural and foreseeable consequence of [the landlord's] unlawful entry and subsequent conduct." It reasoned that a burglary could be a natural and probable consequence of the landlord's disengaging an alarm, the purpose of which was to protect the building from such acts. Thus, the Court concluded, the burglary was not a superseding cause, and the landlord's negligence in failing to reset the alarm after disengaging it rendered him liable for the loss resulting from the burglary.

During the Survey year the Supreme Judicial Court considered and left undisturbed the rules with respect to a landlord's duty of care in maintaining areas within a tenant's control. These rules provide that in the absence of an agreement imposing a duty on the landlord to keep the premises safe, the landlord is not liable to a tenant for injuries

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4 Id. at 163, 365 N.E.2d at 829.
5 Id. at 166, 365 N.E.2d at 830.
6 Id. at 165, 365 N.E.2d at 830.
7 Id. at 163, 365 N.E.2d at 829.
8 Id. at 166, 365 N.E.2d at 830.
9 Gannon v. MacDonald, 361 Mass. 851, 851-52, 279 N.E.2d 668, 669 (1972);
10 373 Mass. at 166, 365 N.E.2d at 930.
11 Id. at 166-67, 365 N.E.2d at 830-31.
12 Id. at 167, 365 N.E.2d at 831.
13 Id.
14 Id.
suffered by a tenant for failure of the landlord to execute repairs.\textsuperscript{15} Agreements to keep premises in a safe condition, which imply access by the landlord to the premises, have been distinguished from agreements to make repairs on the premises, which require notice to the landlord before the duty to repair is imposed.\textsuperscript{16} Where the landlord gratuitously makes faulty repairs that result in injuries, in the absence of an agreement to make repairs, the plaintiff must prove gross negligence by the landlord in making those repairs.\textsuperscript{17} If, however, there is an agreement to make repairs, a tenant may recover for injuries suffered as a result of faulty repairs upon a showing of ordinary negligence.\textsuperscript{18}

In \textit{Markarian v. Simorian}\textsuperscript{19} the plaintiffs, a two-year-old child and his father, sued their landlord for injuries suffered by the child when it fell through a window screen allegedly installed in a negligent manner by the defendants' mother.\textsuperscript{20} The apartment where the injuries occurred was originally owned by the defendants' parents.\textsuperscript{21} In 1949 it was placed in a trust of which the defendants served as trustees.\textsuperscript{22} At trial the judge granted the defendants' motion for a directed verdict.\textsuperscript{23}

On appeal, the Supreme Judicial Court reversed.\textsuperscript{24} The defendants conceded that their parents had made an agreement to make repairs for the plaintiffs, but they argued that the agreement applied only to those repairs necessary at the commencement of the tenancy and not to those needed six years later.\textsuperscript{25} The Court rejected this contention, however, finding that the evidence presented precluded such a limited construction of the agreement.\textsuperscript{26} The Court also rejected the defendants' argument that they were not bound by the agreement to repair because it had been made by their parents and not the defendants themselves.\textsuperscript{27} It concluded that there was sufficient evidence to support the jury's finding that an agency relationship did exist between the defendants and their parents.\textsuperscript{28}

\textsuperscript{16} Id.
\textsuperscript{17} Carney v. Bereault, 348 Mass. 502, 508, 204 N.E.2d 448, 452 (1965).
\textsuperscript{20} Id. at 671, 369 N.E.2d at 720.
\textsuperscript{21} Id. at 670, 369 N.E.2d at 719.
\textsuperscript{22} Id. at 670, 369 N.E.2d at 719-20.
\textsuperscript{23} Id. at 670, 369 N.E.2d at 720.
\textsuperscript{24} Id. at 676, 369 N.E.2d at 722.
\textsuperscript{25} Id. at 673, 369 N.E.2d at 721.
\textsuperscript{26} Id.
\textsuperscript{27} Id. at 673-74, 369 N.E.2d at 721.
\textsuperscript{28} Id. at 674, 369 N.E.2d at 721.
The Court also declined to accept the defendants' final contention that they were not liable for the injuries to the child because those injuries were not a foreseeable harm within the purpose of the agreement to repair. 29 To support their position, the defendants relied upon Chelefou v. Springfield Institution for Savings. 30 Chelefou, like Markarian, concerned a child injured as a result of a fall through a screen improperly installed by the landlord. 31 The Chelefou Court upheld the trial court's direction of a verdict for the defendant on the ground that the injuries suffered by the child were not a foreseeable harm when the agreement to repair was made. 32

Despite the factual similarities between the two cases, the Markarian Court noted several significant differences. First, the Court found that in Markarian, the defendants' mother created a situation in which a previously safe situation was rendered dangerous by the repairs itself. 33 Second, the Court noted that the low height of the window in Markarian made it likely that a defective installation of the screen would pose a hazard to a small child. 34 Finally, there was evidence in Markarian that the defendants' mother said that she was repairing the window so that it would be safe. 35 Thus, the Court found Chelefou distinguishable from Markarian and concluded that the directed verdict was improperly granted. 36

§13.9. Attractive Nuisance. The Survey year was the scene of the enactment by the General Court of an attractive nuisance statute. 1 Generally, the duty owed by an owner or occupier of land to a trespasser is to refrain from wanton or reckless conduct. 2 Even amidst the recent reforms in Massachusetts tort law regarding standards of care owed by owners or occupiers of land, this lesser duty owed to trespassers has remained unchanged. 3 There are, however, several exceptions to the duty of care owed to trespassers, 4 the most recent of

29 Id. at 675, 369 N.E.2d at 722.
31 Id. at 238, 8 N.E.2d at 771.
32 Id. at 241, 8 N.E.2d at 772.
33 373 Mass. at 675, 369 N.E.2d at 722.
34 Id.
35 Id.
36 Id. The Court noted that since Chelefou was distinguishable, it did not need to overrule it. It did state, however, that it found the Chelefou result "of dubious validity." Id.

§13.9. 1 Acts of 1977, c.259 adding new G.L. c. 231, § 85Q.
which is G.L. chapter 231, section 85Q, the attractive nuisance doctrine. Under this statute a person who maintains an artificial condition on his land will be liable for physical harm suffered by trespassing children under the following conditions:

... if (a) the place where the condition exists is one upon which the land owner knows or has reason to know that children are likely to trespass, (b) the condition is one of which the land owner knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, (d) the utility to the land owner of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and (e) the land owner fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.5

The attractive nuisance doctrine, which is aimed at providing protection to trespassing children enticed onto property by artificial conditions has had a long history in other jurisdictions.6 By 1934, the doctrine was recognized in section 339 of the Restatement of Torts, but without the fiction of "attractive." At present there are only a few, if any, jurisdictions that continue to reject a duty to foreseeable child trespassers.7 In the commonwealth the doctrine had been continually rejected by the courts since 1891.8 The enactment of section 85Q has brought Massachusetts into line with the vast majority of jurisdictions which have recognized the need to protect children from this immaturity and poor judgment.

669 (1957) (duty of reasonable care owed by owner or possessor who induces trespasser to believe that his property is a public way); Haskins v. Gyrbo, 301 Mass. 322, 323, 17 N.E.2d 146 (1938) (duty of ordinary care owed to trespasser on property of neighbor); G.L. c.84, § 27 (no cases interpreting this statute but it seems to impose strict liability on persons in control of property who fail to put up a sufficient railing between a public way and a hazardous excavation).

5 G.L. c. 231, § 85Q.
6 See Railroad Co. v. Stout, 84 U.S. 657 (1873).