Chapter 3: Torts

James W. Smith
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A. Court Decisions

§3.1. Res ipsa loquitur: Shattering bottles. In the 1959 decision, Evangelio v. Metropolitan Bottling Co., the Massachusetts Supreme Judicial Court, applying the doctrine of res ipsa loquitur, overruled precedent and upheld a recovery by the victim of an exploding carbonated beverage bottle against the bottling company. The significance of this decision did not lie in any reversal of position by the Court concerning its interpretation of the doctrine of res ipsa loquitur. The Court adhered to its position that the res ipsa doctrine "however denominated, merely permits the tribunal of fact, if it sees fit, to draw from the occurrence itself of an unusual event the conclusion that it would not have happened unless the defendant had been negligent." The decision did reflect however a more liberal attitude by the Court toward the problem of the extent to which a plaintiff must negate negligent conduct on the part of others, as being instrumental in bringing about the harm, in his attempt to create an inference of negligent conduct on the part of the defendant. In the Evangelio case recovery by the plaintiff was upheld despite the fact that not only had the bottle left the control of the defendant at the time the explosion occurred but also the plaintiff failed to introduce evidence of any recent similar explosions by the defendant’s product. Further no evidence was introduced of the standard of care ordinarily exercised by the bottle manufacturer.

A 1961 decision of the Supreme Judicial Court, Hadley v. Hillcrest Dairy Inc., dispelled any notion that the Evangelio decision would result in a stampede of recoveries for plaintiffs injured by the sudden, unexplained shattering of glass containers. The plaintiff in the Hadley

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The plaintiff in the Hadley case relied heavily on the Evangelio decision in arguing that he had established a "res ipsa" case on the above facts and therefore was entitled to have the issue of the defendant's negligence submitted to the jury. The Court rejected this contention by pointing out that the bottle in the Evangelio case contained a carbonated beverage and that the inference of negligence created in the case referred principally to the possibility that the contents of the bottle were excessively carbonated. This position is consistent with a Massachusetts decision, Burnham v. Lincoln, distinguished by the Court in the Evangelio decision. It is obviously sound.

In order to establish a "res ipsa" case, the plaintiff must show a greater likelihood that the injury resulted from the defendant's negligence than from some other cause. This necessarily involves the weighing of the possibilities of negligence. In the Evangelio case the possibility that excessive carbonation of the defendant's beverage caused the shattering of the bottle tilted the scales sufficiently to warrant submission of the case to the fact finder. The absence of that fact in the Hadley case tilted the scales in the opposite direction.

§3.2. Joint tort-feasors: Release. It has long been settled in this Commonwealth that the release of one joint tort-feasor releases all, regardless of the intention of the parties, the cause of action being thought of as one and indivisible. The manner in which the mechanical operation of this rule has tended to deprive unwary plaintiffs of adequate recoveries was vividly demonstrated in a 1961 decision of the United States Court of Appeals, First Circuit, Clark v. Zimmer Manufacturing Co. The plaintiff in this case suffered a compound fracture of the right femur as the result of a collision of automobiles in Massachusetts. During an operation to reduce the fracture, an intramedullary nail, alleged to have been manufactured by the defendant, was inserted within the plaintiff's femur. Several weeks later the nail broke causing the plaintiff to suffer permanent injury. The plaintiff brought an action against the other driver and, three months after the breaking of the nail, he released the driver in a $10,000 settlement. The plain-

5 Burnham v. Lincoln, 225 Mass. 408, 114 N.E. 715 (1917).
§3.2. 1 See Matheson v. O'Kane, 211 Mass. 91, 97 N.E. 638 (1912).
2 200 F.2d 849 (1st Cir. 1961).

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tiff then brought an action against the defendant manufacturer for negligence and breach of warranty. The defendant removed the action to the United States District Court for the District of Massachusetts on the basis of diversity of citizenship of the parties. On the basis of the release given to the original tort-feasor, the driver, the court granted the defendant's motion for summary judgment.

On appeal the plaintiff argued that the alleged negligence of the defendant had no causal relation to the original injury but created a new and independent cause of action (for which the original defendant would not be liable), and therefore the present action was not barred by the release or at least the question should have been submitted to the jury. The defendant argued that under Massachusetts law the release bars the action unless, as a matter of law, the original tort-feasor would not have been liable for the subsequent nail fracture and accompanying damages. The court held that the defendant's contention was supported by two Massachusetts decisions, Purchase v. Seelye and Vatalaro v. Thomas; and since it would be unable to say as a matter of law that the original tort-feasor was in no way responsible for the subsequent harm caused by the fracture of the nail, the release given to the original tort-feasor released also the defendant.

An original tort-feasor is liable for subsequent harm brought about by a negligent intervening act only if the subsequent act is a result which reasonably ought to have been anticipated by him. The original tort-feasor is not responsible as a matter of law for the subsequent harm if reasonable men could not differ on the question of whether the subsequent act is a result which ought to have been reasonably anticipated by him, i.e., if the result is clearly too remote. While the nebulous standard of foreseeability does not easily lend itself to an argument based upon strict logic, it is difficult to place the fortuitous event of the nail's breaking in the plaintiff's femur in the category of possible foreseeable consequences. The decisions cited by the court in its opinion would not compel the conclusion reached. In Purchase v. Seelye the Massachusetts Supreme Judicial Court held that a release given to an employer, a railroad company, did not bar an action against the surgeon who, believing that he was operating upon a person other than the plaintiff, operated upon the wrong side of the plaintiff. In the Purchase case the Court stated:

The railroad company could not be held liable because of the defendant's mistaken belief that he was operating upon some person other than the plaintiff, such a mistake was not an act of negligence which could be found to flow legitimately as a natural and probable consequence of the original injury, and a ruling in effect to the contrary could not properly have been made.

3 251 Mass. 434, 121 N.E. 413 (1918).
5 See note 3 supra.
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A contrary result was reached in Vatalaro v. Thomas, where the surgeon negligently performed the operation but where there was no mistake by the surgeon as to the identity of the plaintiff.

While negligence on the part of a doctor in the treatment of the original injury may in some cases be within the realm of foreseeability, it is submitted that negligence in the manufacture of the instruments or other objects used by the doctor is an event too remote to hold the original tort-feasor, and thus a release given to the original tort-feasor should not constitute a bar to recovery against the manufacturer of the defective object.

Perhaps the primary criticism of the result reached in the Clark case should be leveled against the artificial distinction that exists in Massachusetts between a release and a covenant not to sue. This distinction places the plaintiff, in a situation such as existed in the Clark case, in a difficult position. He is unable to negotiate a settlement with the insurance company, which is generally unwilling to accept a covenant not to sue, without jeopardizing a just claim which he may have against another party remotely connected with the situation. Perhaps Massachusetts should adopt the view receiving favor in other jurisdictions that, unless the plaintiff has received such full compensation that he should no longer be entitled to maintain the claim, the court should give effect to the intention of a plaintiff and one tort-feasor that their separate settlement does not bar claims against other joint tort-feasors.

§3.3. Libel: Mercantile agencies. The action of libel has traditionally involved the strict liability concept. Thus, absent a privileged communication, the diligence of the defendant in collecting, assessing, and publishing his information will not excuse him if the statement is defamatory. It is for this reason that there early evolved the concept of privileged communications. The privilege, whether absolute or conditional, is based upon social interests which require protection even at the expense of individual interests. Each case must be examined closely to determine whether the denial of a privilege will so undermine a social interest that the individual right of the person defamed must be subordinated to the greater social need.

A type of qualified privilege generally recognized by the courts pertains to the publication of information by a person in discharge of a public or private duty, whether moral or legal. Solicitation by the person to whom the information is published is not essential to the operation of the privilege. Thus a communication made voluntarily by a person is privileged if a special relationship exists between the parties and the information is disclosed for the purpose of protecting

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6 See note 4 supra.

§3.3. 1 See Corrigan v. Bobbs Merrill Co., 228 N.Y. 58, 126 N.E. 260, 10 A.L.R. 662 (1920); Prosser, Law of Torts §94 (2d ed. 1955).
a legitimate interest of the other person. The question has continually arisen in recent years as to whether a qualified privilege may be claimed by mercantile agencies furnishing information for profit. In the United States a majority of the jurisdictions that have considered the problem have upheld the qualified privilege, principally upon the basis that these agencies perform a very useful function in an economy whose lifeblood is credit. The courts take the position that without a privilege few would undertake to furnish the information so essential to a dynamic economy or, alternatively, the cost of such a service would be prohibitive. In England and in a minority of jurisdictions in the United States the privilege is not upheld in this situation. This position is grounded upon the theory that, in soliciting requests for information for their own profit, the mercantile agency should not be treated in a fashion similar to one who provides information because of a legal or moral duty to so do.

In the 1961 decision, *Petition of Retailers Commercial Agency, Inc.*, the question was presented to the Supreme Judicial Court for the first time. In this case a subscriber of the defendant requested and received a report concerning the plaintiff, a mortgage broker. The report contained several inaccurate statements about the plaintiff, as the result of which the subscriber ceased to do business with the plaintiff. Several of these statements referred to facts which were easily susceptible of a precise check. In the trial court the plaintiff obtained a judgment and the defendant appealed. In remanding the case the Supreme Judicial Court accepted the majority view holding that reports made by a mercantile agency to an interested subscriber should be conditionally privileged. The Court indicated, however, that the plaintiff need not show ill will or spite in order to destroy the privilege. The privilege would fall if the reports were made recklessly or without reasonable grounds. This latter position is consistent with a 1960 Massachusetts decision dealing with abuse of a privilege through excessive publication. The Court rejected, however, the plaintiff's contention that, with reference to mercantile agencies, the standard of reasonable care should be imposed.

Although the view which would require that the standard of reasonable care be imposed upon mercantile agencies has been advocated by many legal writers, the judiciary has been less than

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2 For a discussion of this type of privilege see 1 Harper and James, The Law of Torts §5.26 (1956).
7 See Hallen, Conditional Privilege in Defamation, 25 Ill. L. Rev. 865, 875-876 (1951); 5 Restatement of Torts §595, Comment g.
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enthusiastic about it. It has, however, much merit. While there are strong arguments against holding a mercantile agency strictly liable for inaccurate reports, the question arises as to the necessity of holding such a business liable only for conduct which involves some degree of malice. Such a question is particularly pertinent in a jurisdiction which, unlike Massachusetts, requires as proof of malice a showing of ill will, spite, or willful and wanton conduct. Is such a protection really as vital to the operation of a thriving economy as the courts indicate? It may be argued that a requirement of exercise of reasonable care on the part of mercantile agencies might advance rather than hinder social interests. If more accuracy is demanded of agencies holding themselves out as collectors of information, the subscriber's interest, in receiving reports upon which he may invariably rely, would be correspondingly advanced.

Perhaps some confusion in this area has resulted from a failure to differentiate the various types of credit agencies. Some agencies merely act as repositories of information which they make available to subscribers. Verification of the voluminous information provided to such agencies is virtually impossible. Therefore, absent a negligent communication of such information, liability should not accrue. Where, however, the agency actively investigates individuals and reports such information to its subscribers, a requirement that the agency exercise due care in its investigation and reporting would not appear too onerous.

§3.4. Deceit: Fact and opinion. In 1889 the famous English decision Derry v. Peek established a rule that in order for a plaintiff to sustain an action for deceit there must be proof of fraud and nothing short of that will suffice. A year earlier the Supreme Judicial Court in the decision Chatham Furnace Co. v. Moffatt held that an action for deceit may be maintained "by proof of a statement made, as of the party's own knowledge which is false, provided the thing stated is not merely a matter of opinion, estimate, or judgment, but is susceptible of knowledge; and in such case it is not necessary to make any further proof of an actual intent to deceive." This latter position has been consistently upheld in Massachusetts.

Two 1960 Massachusetts decisions, Pietrazak v. McDermott and

8 For an early case applying the standard of due care in an action brought against a mercantile agency, see Douglass v. Daisley, 114 Fed. 628, on remand, 119 Fed. 485 (D. Mass. 1902).
9 See, for example, Cullum v. Dun & Bradstreet, 228 S.C. 384, 90 S.E.2d 370 (1955).
For a comment on the Cullum case see 11 S.C.L.Q. 256, 271 (1959).

2 According to this decision fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false.
3 147 Mass. 403, 18 N.E. 168 (1888).
4 147 Mass. at 404, 18 N.E. at 169.
Yerid v. Mason,7 highlight the inherent difficulty in many cases of distinguishing between a statement of fact and an expression of opinion. Each case involved the sale of a house to the plaintiff by the defendant after representations were made by the defendant concerning the dryness of the cellar of the house.

In the Pietrazak case the plaintiff, having seen a puddle of water in the middle of the cellar floor, asked the defendant builder whether the cellar would be dry. The defendant stated “that he built a good house and that there would be no water in the cellar.” In reliance upon this statement the plaintiff purchased the house. Thereafter extensive water entered the cellar. In an action for deceit the plaintiff recovered for damage to personal property in the cellar and for the cost of corrective work. On appeal the defendant argued that the statements constituted mere opinion and, therefore, in the absence of actual fraud, the plaintiff should have been denied recovery. In sustaining the judgment for the plaintiff the Supreme Judicial Court held that the defendant's statements could reasonably have been understood by the plaintiff to mean that the construction of the house was such as to preclude the entrance of water and therefore constituted statements of fact as of the defendant's own knowledge rather than opinions.

In the Yerid case the defendant builder, in response to the plaintiff’s questions concerning an opening in the cellar floor around the walls, told the plaintiff that he was putting in a blind drain to correct a water problem. He explained that the drain would pitch toward a sump pump which would draw off the surface water which collected under the floor. This, he said, would keep the floor dry. There was at this time water on the floor near the pump. On a return visit by the plaintiff, the defendant assured the plaintiff that he would have no further trouble with water. Shortly after purchasing the house the plaintiff discovered that whenever it rained the cellar floor became flooded. The plaintiff brought a bill in equity for rescission. From a final decree ordering rescission the defendant appealed. The Supreme Judicial Court reversed the decree and ordered the bill dismissed on the basis that the statements constituted opinion or referred to matters promissory in nature and were therefore not actionable. In distinguishing the Pietrazak case, the Court stated that in that case there appeared to have been no pending serious water problem and that the builder’s assertion could reasonably have been understood to mean that the construction of the house was such as to preclude the entrance of water. The Court was apparently unwilling to hold on the facts of the Yerid case that the defendant’s assurances could reasonably have been understood by the plaintiff to mean that the construction of the drain was such as to preclude the gathering of water on the cellar floor.

The Pietrazak and Yerid cases indicate that in distinguishing between statements of fact and opinion examination is not confined to

the language used by the defendant. The language used in the *Pietrazak* and *Yerid* cases is very similar. Consideration must also be given to the right of the plaintiff to rely on the statements. While reasonable reliance is generally considered as a separate element in a deceit action, it is necessarily germane to the question of whether a statement may be reasonably interpreted as fact rather than opinion. In the *Yerid* case the house in question was built in an area which had a serious water problem, principally because there was no drainage in the street. Very few houses in the immediate area had cellars. This, together with the presence of the drain and the sump pump, perhaps militated against a finding that anyone could reasonably construe the statements to be anything other than opinions that the drain and the sump pump would remedy the water situation.

It appears that the Supreme Judicial Court in the *Pietrazak* case went very far in construing the defendant’s statements as fact and was unwilling in the *Yerid* case to initiate a series of decisions which might gradually dilute or greatly diminish the distinction drawn in the *Chatham Furnace Co.* case between fact and opinion.

§3.5. Imputed negligence: Owner-passenger. In a 1961 United States District Court decision, *Miller v. United States*, recovery was denied to the owner of an automobile for injuries and property damage sustained by her as a result of the combined negligence of the operator of the vehicle and the defendant, an employee of the United States Government. While there was no showing of actual negligence on the part of the plaintiff, the wife of the operator of the automobile, the court, applying Massachusetts law under the Federal Tort Claims Act, held that since the plaintiff was the owner of the automobile and had the right to control the operator the negligence of the operator was imputed to her. Contributory negligence then barred recovery. This decision is consistent with Massachusetts cases which hold that the negligence of the operator of an automobile, in which the owner is traveling, is chargeable to the owner if at the time of the collision the owner had the right to control the operator. Actual control is not necessary. If the plaintiff is to avoid the fiction of imputed negligence, he must come forward with evidence that he surrendered or abandoned control to the operator.

While the *Miller* case may have been correctly decided under


2. Under the Federal Tort Claims Act the United States is liable in the same manner and to the same extent as a private individual under like circumstances. Since the accident occurred in Massachusetts, the issues of liability are to be determined in accordance with the laws of that state. 28 U.S.C. §§1346(b), 2674 (1958); *United States v. Massachusetts Bonding & Ins. Co.*, 227 F.2d 385 (1st Cir. 1955), rev’d on another point, 352 U.S. 128, 77 Sup. Ct. 186, 1 L. Ed. 2d 189 (1956); *United States v. Schultz*, 282 F.2d 628 (1st Cir. 1960).

3. Pennsylvania has held that since a husband is the head of the family, he is presumed to be in control of the automobile even while driving his wife’s automobile in her presence. *Rogers v. Saxton*, 305 Pa. 479, 158 Atl. 166, 80 A.L.R. 280 (1931).


existing Massachusetts law, it is this writer's view that legislative or judicial changes would be warranted in this area of imputed negligence. While a fictionalized type of negligence has merit in agency relationships, no sound reason appears for imputing the negligence of the operator of an automobile to its owner merely because of the owner's physical presence in the automobile. The negligence of the bailee of an automobile is not imputed to the bailor even though the parties are husband and wife. The argument that the present situation is distinguishable from the bailor-bailee situation because of the retention of the right to control in the former situation lacks reality. If the operator of the automobile is driving negligently prior to the accident, the owner is negligent in allowing the operator to continue to drive. This negligence is actual rather than imputed. Where, however, the negligence of the operator is a sudden and unforeseen act, of what importance is the owner's right to control?

Consideration might be given to the position of the Restatement of Torts that a plaintiff is barred from recovery by the negligent act or omission of a third person if, but only if, the relation between them is such that the plaintiff would be liable as defendant for harm caused to others by such negligent conduct of a third person.

§3.6. Refusal to contract: Right of newspapers to reject advertising. Historically the law of torts has been primarily concerned with the concept of misfeasance. Each individual in society owes a duty to his fellow beings to refrain from committing acts which either are designed to result in harm to person or property or foreseeably may do so. It is less clear that one owes a legal duty to assist others in the protection or maintenance of their person or property. It is therefore not surprising that, absent some type of estoppel or special relationship creating a duty, difficulty is usually encountered when a plaintiff attempts to recover tort damages based upon a defendant's failure or refusal to act. Courts have refused to transform moral obligations into legal duties. Thus liability has been denied in such cases as an expert swimmer arbitrarily refusing to save a drowning person or a doctor

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7 2 Restatement of Torts §485.
8 Comment a in §485 of the Restatement of Torts states: "In order that a negligent act or omission of a third person may bar a plaintiff from recovery, the relation between the plaintiff and the third person must usually be such as to make the plaintiff responsible at common law to others who may be harmed by the same or a similar act or omission of such third person." (Emphasis supplied.)

The question arises as to the effect in this situation of a statute such as G.L., c. 90, §34A, dealing with compulsory motor vehicle liability insurance. While §485 of the Restatement of Torts indicates by caveat that the American Law Institute expresses no opinion on the effect in this area of a statute which imposes vicarious liability, Comment b on the caveat appears to indicate that a statute such as G.L., c. 90, §34A, should not have the effect of making the driver's contributory negligence a bar to the owner's recovery. The result in Nash v. Lang, 268 Mass. 407, 167 N.E. 762 (1929), is consistent with this view.

§3.6. 1 See Osterlind v. Hill, 263 Mass. 73, 160 N.E. 301, 56 A.L.R. 1123 (1928).
without good cause refusing to answer the call of one who is dying and might be saved.\(^2\) This distinction between misfeasance and nonfeasance has taken on a great degree of importance in today’s business world, particularly in the area of refusal to contract. Under modern law duty to contract generally exists only as to public officers, common carriers, innkeepers, public warehousemen, and public utilities.\(^3\)

In a 1961 Massachusetts case, *Gordon, Inc. v. Worcester Telegram Publishing Co.*,\(^4\) the question raised was whether the defendant, the owner and publisher of the only newspapers of general circulation in the Worcester area, was under a duty to accept advertising from the plaintiff, a real estate agent doing business in and around the Worcester area. No allegation was made that the defendant’s conduct was in furtherance of an illegal monopoly or other unlawful purpose, nor was any claim made that the defendant had entered into a conspiracy to deprive the plaintiff of his livelihood.\(^5\) The Massachusetts Supreme Judicial Court, in affirming the sustaining of the defendant’s demurrer, rejected the plaintiff’s argument that a newspaper which enjoys a virtual monopoly in a given area becomes a quasic-public utility and must therefore accept advertising from all who may apply for it. The Court held that the publication and sale of newspapers is a private enterprise as distinguished from a business affected with a public interest, approving the distinction between the public interest concerning the advertising function of newspapers and the public interest in the newspaper as a news media. The view of the Court in the *Gordon* case is, with the exception of one case,\(^6\) in agreement with the decisions which have considered this matter.\(^7\)

While admittedly the defendant’s conduct in the *Gordon* case has placed the plaintiff in a difficult position (newspaper advertising being extremely important to the operation of a real estate agency), significant problems would be created were the result in the *Gordon* case otherwise. In today’s complex society the public has been induced to rely upon various types of private enterprises for extremely important goods and services within a community. To say that the public has an interest in these particular businesses is to state the obvious. To say that this interest is of such a degree as to preclude the business from selecting those individuals with whom it wishes to contract on the basis that it is the only business in the area providing a particular service or commodity is another proposition.

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\(^3\) For collected cases see Prosser, Law of Torts 480 (2d ed. 1955).
\(^5\) A conspiracy would appear to involve misfeasance rather than mere refusal to act.
While freedom of contract is far from an absolute right, the judiciary, mindful of its reciprocal function, the establishment of precedent, must exercise restraint in this area. While an occasional "hard" case may tempt judicial interference, it would generally appear more beneficial to allow the legislature to define the limitations of this right in connection with businesses which have become affected with a public interest.

B. LEGISLATION

§3.7. Excavation abutting on a public way: Duty to maintain a barrier. Chapter 766, Acts of 1960, amends Chapter 84 of the General Laws by providing as follows:

Sec. 27. If, on premises abutting on a public way, an excavation is a hazard to travelers upon such way who are in the exercise of due care, the person in control of such premises shall be liable in tort to any such traveler who, by reason of a want of a sufficient railing or barrier in or upon such excavation or between such excavation and such way, sustains bodily injury or property damage.

The provisions of Chapter 766 are directly contra to established case law in Massachusetts. The duty owed by an owner or possessor of land to a trespasser in Massachusetts and many other jurisdictions is to avoid willful and wanton conduct. Most jurisdictions modify this position with reference to a technical trespasser (one who inadvertently or involuntarily comes in contact with land very close to the public way), and permit recovery based upon the negligence of the landowner in failing to take reasonable steps to protect travelers on the public way against excavations or artificial conditions near the public way. This position, which has the endorsement of the Restatement of Torts, has not been followed in Massachusetts.

Chapter 766 differs from the position of the Restatement in several

8 For a recent discussion on the limitations on this right see concurring opinion by Mr. Justice Douglas in Garner v. Louisiana, 368 U.S. 157, 176, 82 Sup. Ct. 248, 258, 261, 7 L. Ed. 2d 207, 221, 224 (1961).

4 Section 368 of the Restatement of Torts provides: "A possessor of land who creates or maintains thereon an excavation or other artificial condition so near an existing highway that he realizes or should realize that it involves an unreasonable risk to others accidentally brought into contact therewith while traveling with reasonable care upon the highway, is subject to liability for bodily harm thereby caused to them."
respects. It refers only to an "excavation," while the Restatement refers to an "excavation or other artificial condition." It is not clear why Chapter 766 limits the potential danger to excavations. Chapter 766 permits recovery for both bodily injury and property harm, while the Restatement refers only to bodily harm. Finally, the Restatement uses the language: "... that he [the possessor of land] realizes or should realize that it involves an unreasonable risk to others. . . ." The standard thereby imposed is due care on the part of the landowner. Chapter 766 uses the language: "If . . . an excavation is a hazards to travelers . . . who by want of a sufficient railing or barrier . . . sustain[s] bodily injury . . ." (Emphasis supplied.) It is arguable that under the above provision a landowner might be held liable even if he had not had a reasonable opportunity to discover and correct a defective railing. If the word "excavation" may be interpreted as including stairs leading to a cellar doorway, the possibility of such an occurrence does not appear too remote. It would not appear, however, that the legislature intended that Chapter 766 operate as a strict liability statute despite the absence of any language referring to reasonable care. Otherwise the duty owed to a technical trespasser would become greater than the duty owed to a business invitee.

This would appear to be so despite the fact that the House bill (H. 1337) contained the following language which was later deleted: "... provided such owner knew, or by the exercise of proper care and diligence should have known . . ."