Chapter 13: Torts

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§13.1. Introduction. During the 1971 Survey year, the more notable developments in tort law resulted from legislative rather than judicial action. The General Court, turning its attention to several different areas of tort law, enacted a number of important statutes: it extended the no-fault concept to property damage arising from automobile accidents, abolished privity of contract as a defense in products liability cases, expanded existing remedies under consumer protection statutes, increased the maximum amount of permissible damage recoveries under the wrongful death statute, limited the charitable immunity doctrine, and abolished the host-driver, guest-passenger distinction heretofore a part of Massachusetts law. Of the Supreme Judicial Court decisions relating to torts, the more noteworthy cases involved the recovery of damages for loss of consortium and for intentionally inflicted mental distress, and the Court's first interpretation of the state's contribution statute.

A. Legislation

§13.2. Motor vehicles: No-fault property damage insurance. By enacting Chapter 670 of the Acts of 1970, Massachusetts became the first state in the nation to adopt a compulsory no-fault insurance plan to compensate victims of motor vehicle accidents for losses resulting from personal injuries. Although a motor vehicle operator is required to have compulsory liability insurance or to post an equivalent bond, his only cause of action for damages not in excess of $2000 is against his own insurance company; on the other hand, he is not liable in tort for damages from personal injuries not in excess of $2000 suffered.
by other parties who also carry no-fault insurance.\(^4\) Chapter 978 of the Acts of 1971\(^5\) has extended the principles of the no-fault personal liability plan to property damage as well. The new statute requires all motorists to have property protection insurance or an equivalent bond, the purpose of which is twofold: first, to provide no-fault protection for the motorist’s own vehicle and second, to provide liability insurance for reimbursement of damages to the property of others not subject to the no-fault provisions. The statute completely exempts participating motorists from tort liability for damage to vehicles subject to no-fault protection. By emergency preamble, the statute was made effective on January 1, 1972.

Chapter 978 provides three options for the policyholder: all-risk coverage, restricted coverage, or no coverage for his own vehicle. Under the first and second options, the insurer’s liability is limited by the actual cash value of the insured’s vehicle, less a $100 deductible (unless the insured has elected a $50 deductibility option or the policy as been written for some other deductible amount). Under the all-risk option and certain clauses of the restricted coverage option, payments must be made to the insured within 15 days after receipt by the insurer of reasonable proof that the claimant is a policyholder, that the accident has occurred, and that the claimed amount of loss or damage has actually been suffered. The insured may sue in contract to recover payments that are delayed longer than 15 days, and “[i]f the court determines that the insurer was unreasonable in refusing to pay [the] insured’s claim, the claimant shall be entitled to recover double the amount of damages claimed, plus his costs and reasonable attorney’s fees fixed by the court.”\(^6\)

Both the no-fault and the liability benefits of property protection insurance are free of geographical limits; both are available wherever an accident may occur, even though the other motorist involved in the accident may be an out-of-state driver not covered by the no-fault plan. It is important to note that the exemption from tort liability exists, as in the case of the personal injury plan, only when the colliding vehicles are covered by no-fault protection.

\section*{Products liability: Privity of contract.} Probably the most startling development in torts during the 1971 Survey year was the enactment of Chapter 670 of the Acts of 1971,\(^1\) which abolished the privity of contract defense in all products liability cases arising out of sales of goods after the effective date of the act (August 18, 1971). The history of products liability litigation in Massachusetts is a long and

\(^4\) There are certain instances when the no-fault protection does not apply even though the amount of damages may be within the limits of no-fault coverage; see the statute and 1970 Ann. Surv. Mass. Law §22.9, 22.12.

\(^5\) Amending G.L., c. 90, by inserting §340.


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\(^1\) Amending G.L., c. 106, §2-318. Chapter 670 is more fully discussed in §13.18 infra.
tortuous one; it will not be repeated here. It is sufficient simply to note the inconsistency that the Supreme Judicial Court has steadfastly adhered to for the past 25 years since its now famous (or infamous) decision in Carter v. Yardley and Co. In Carter, the Court finally accepted the rationale of Justice Cardozo's landmark opinion in MacPherson v. Buick Motor Co. and held that privity of contract between a manufacturer and purchaser was no longer needed for recovery in negligence. In the ensuing decades, however, the Court repeatedly held that the absence of a privity relationship between the manufacturer and purchaser necessitated dismissal of the case whenever the purchaser proceeded upon a breach of warranty theory of recovery. The intransigent attitude of the Court in this regard is remarkable in light of the almost universal willingness of other jurisdictions to abolish privity as a defense in products liability litigation and the increasing willingness of judges and scholars to recognize warranty as a tort rather than a contract action. At last long, the injustice inflicted upon Massachusetts citizens by the Court's resolution to remain true to an outmoded relic has been rectified.

The full text of the new statute, which is modeled on the Maine amendment to Section 2-318 of the Uniform Commercial Code, is as follows:

Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer, seller or supplier of goods to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not purchase the goods from the defendant, if the plaintiff was a person whom the manufacturer, seller or supplier might reasonably have expected to use, consume or be affected by the goods. A manufacturer, seller, or supplier may not exclude or limit the operation of this section.

While full discussion of the amended provision is deferred to §13.18 infra, there are some points that deserve mention here. The use of the terms supplier and goods appears to be addressed to important jurisdictional matters. The first term seems simply to deny to a lessor of

2 For a summary of the history of the privity of contract doctrine in Massachusetts law, see 1970 Ann. Surv. Mass. Law §§2.1, 2.2; 1969 id. §1.1; 1968 id. §3.3; 1967 id. §3.4.
3 319 Mass. 92, 64 N.E.2d 693 (1946).
4 217 N.Y. 382, 111 N.E. 1050 (1916).
7 Impetus for the Maine amendment was provided by the Donovan article, n.5 supra, and that article should be consulted for assistance in interpreting the Maine and Massachusetts amendments to UCC §2-318.
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\(^3\) 319 Mass. 92, 64 N.E.2d 693 (1946).

\(^4\) 217 N.Y. 382, 111 N.E. 1050 (1916).


\(^6\) See 1968 Ann. Surv. Mass. Law §3.3 at 48-49. See also 1969 id. §1.2 at 5-6.

\(^7\) Impetus for the Maine amendment was provided by the Donovan article, n.5 supra, and that article should be consulted for assistance in interpreting the Maine and Massachusetts amendments to UCC §2-318.
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goods the defense of lack of privity, but the impact of the second is more difficult to decipher. The term goods is defined in UCC §2-105(1) to mean "all things (including specially manufactured goods) which are movable at the time of the identification to the contract for sale. . . ." Although this definition seems to require an actual sale of goods, it is questionable whether the definition is meant to apply to products liability warranty actions, since it would appear that the purpose of the amended Section 2-318 is to remove such cases from the privity requirement of that code section. Nonetheless, the question remains as to whether the amendment abolishes privity as a defense in cases involving the sale or supply of "services," as opposed to cases involving the sale or supply of "goods."

In the pre-code cases arising under the Uniform Sales Act, the service of food in a restaurant for consumption on the premises, the giving of blood transfusions, and the incorporation of construction materials in a building did not constitute sales but only the rendition of services. Decisions under the code have not been consistent where the cost of goods is part of the price for services rendered, as is the case with beauty parlor treatments. Although the services-goods distinction has not been expressly abolished, the scope and tenor of the new amendment would suggest that the General Court intended a complete abolition of privity in cases where the plaintiff was injured by a product put into the channels of commerce, even though the product was used incidentally in the rendition of a service.

Finally, the reference to a person who is "affected" by the goods seems to make it clear that the protection afforded by the statute is not limited to users and consumers of the goods, but extends to innocent bystanders as well.

§13.4. Charitable organizations: Limitation of immunity. Almost a century ago, the Supreme Judicial Court decided that charitable organizations were immune from tort liability for the acts of their agents while engaged in charitable pursuits. In so holding, the Court adopted the theory espoused by a majority of American jurisdictions that charitable funds should not be diverted to purposes other than that for which they were donated. With the advent of inexpensive liability insurance and the action of other jurisdictions in abolishing the immunity, the Court recently began to express second thoughts on the matter. In Simpson v. Truesdale Hospital Inc., the Court went so far

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9 G.L., c. 106, §2-105(1).
10 See Donovan at 198.

as to admit displeasure with the rule: "While as an original proposition the doctrine might not commend itself to use today, it has been firmly imbedded in our law for over three quarters of a century and we think that its 'termination should be at legislative, rather than at judicial, hands.'"2 During the succeeding decade, the Court continued to await legislative action.

When, during the 1969 Survey year, a case raising the charitable tort immunity issue was appealed to the Supreme Judicial Court,3 the Court sent a letter to various bar associations, requesting amici curia briefs. However, the case was settled prior to the scheduled date for arguments, and the issue remained dormant until the end of the year. Then, in Colby v. Carney Hospital, the Court decided to overrule the doctrine prospectively, saying:

  In the past on many occasions we have declined to renounce the defense of charitable immunity . . . because we were of the opinion that any renunciation . . . should be accomplished prospectively . . . by legislative action. Now it appears that only three or four States still adhere to the doctrine. It seems likely that no legislative action in this Commonwealth is probable in the near future. Accordingly, we take this occasion to give adequate warning that the next time that we are squarely confronted by a legal question respecting the charitable immunity doctrine it is our intention to abolish it.4

Although the Court has not had occasion to implement its intention, its warning was not unheeded by the General Court.

Chapter 785 of the Acts of 19715 imposes important limitations on the charitable immunity doctrine. The amendment provides that tort compensation claimants can now recover up to $20,000 "if the tort was committed in the course of any activity carried on to accomplish directly the charitable purposes" of the organization. Following existing law,6 the amendment further provides that charitable organizations are subject to unlimited liability "if the tort was committed in the course of activities primarily commercial in character even though carried on to obtain revenue to be used for charitable purposes."

§13.5. Automobile guests: Ordinary care. It has long been the law in Massachusetts that the driver of a motor vehicle owes to his guest traveling with him only the duty of exercising slight care;1 the host driver is liable in tort to his guest passengers only for conduct that is grossly negligent.2 Over the years, the rule has been much litigated;

5 Amending G.L., c. 231, by inserting §§5K.

§13.5. 1 The rule stems from Massaletti v. Fitzroy, 228 Mass. 487, 118 N.E. 168 (1917).
in most instances, the question to be answered was whether the particular situation created a host-guest relationship—more specifically, whether the circumstances would permit a passenger to claim the status of an invitee so as to entitle him to recover when the driver was guilty of ordinary negligence.

For years, the host-guest doctrine has served no legitimate purpose. Its undesirability is perhaps best illustrated by the rather strange case of *Wheatley v. Peirce*, in which the Court held that the owner of a motor vehicle could not be considered a guest in his own car. The plaintiff, a sports car enthusiast, met the defendant for the first time at a cocktail party. The plaintiff owned an automobile that the defendant much admired but had never driven. At the plaintiff's suggestion, the two went for a ride to savor the delights of the vehicle. After the plaintiff had driven the car for a while, the defendant assumed control of the wheel at the plaintiff's invitation. While the defendant was putting the car through its paces, plaintiff suggested that they go out onto a causeway where they could "drive faster" and he urged the defendant to "open it up." Shortly thereafter, just after defendant had navigated the same seventy-degree turn in the road through which he had driven in the opposite direction some few minutes earlier, the car crashed. The Supreme Judicial Court held that the plaintiff was not a guest, had not assumed the risk, and, therefore, was entitled to recover upon proof of ordinary negligence. A jury verdict in his favor was thus upheld.

The absurdity evident in the *Wheatley* decision has finally been eliminated by the General Court through Chapter 865 of the Acts of 1971, which abolishes the automobile host-guest distinction and provides that "a passenger in the exercise of due care . . . may recover . . . upon proof . . . of ordinary negligence." The act applies to all causes of action arising after January 1, 1972. The new statute has no application to death actions because the wrongful death statute itself requires only a showing of ordinary negligence for recovery. It is not clear, however, why Chapter 865 requires that the passenger be "in the exercise of due care." The relationship between this language and the comparative negligence statute will have to be determined.

§13.6. Wrongful death. In 1808, an inferior English court held that there was no common law action for wrongful death. The decision has been followed by many American jurisdictions, including

5 Amending G.L., c. 231, by inserting §85L.
6 G.L., c. 229, §2.
7 The comparative negligence statute is G.L., c. 231, §85, which provides in part: "Contributory negligence shall not bar recovery in any action by any person or legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person for whose injury, damage or death recovery is made."

Massachusetts, and in those states the creation of a statutory right of action has been necessary. Most of the states that have acted legislatively have adopted compensatory statutes permitting survivors to recover for their loss; but the General Court has instead treated wrongful death as a quasi-criminal offense, and Massachusetts has enacted a statute that permits recovery measured not by the extent of the loss sustained by the decedent's survivors but by the extent of the defendant's culpability. Under the Massachusetts statute, therefore, the amount of damages that can be recovered by survivors bears no relationship to the loss they may sustain. For many years, the maximum amount of recovery permitted under the statute was only $20,000. This amount was increased to $30,000 in 1962, and to $50,000 in 1965. By Chapter 801 of the Acts of 1971, the General Court increased the maximum recovery to $100,000.

It is regretful that the General Court has decided to retain the punitive approach of the existing wrongful death statute. Increasing the maximum amount of recovery from $50,000 to $100,000 may serve to keep some families financially viable, but it will do so only in the small number of cases where the defendant is guilty of extreme culpability. For the vast majority of survivors, the existing statute remains inadequate. The answer is not to be found in successive amendments to the statute increasing the maximum permissible recovery, but in the adoption of a compensatory statute that permits recovery without limit. Only under such a statute can survivors be reimbursed adequately for the losses they sustain through a wrongful death. The present statute serves no legitimate purpose other than to limit the amount of recovery that insurance companies will be forced to pay; it is today completely outdated.

§13.7. Fraud and deceit: Treble damages. Chapter 450 of the Acts of 1971 declares: "Whoever, by deceit or fraud, sells personal property shall be liable in tort to a purchaser in treble the amount of damages sustained by him." The impact of this statute is not entirely clear.

Under existing law, the plaintiff may recover either out-of-pocket damages or benefit-of-the-bargain damages for deceit. The former damage theory permits recovery for actual loss; the latter, for expectant loss. Under the benefit-of-the-bargain theory, the plaintiff may recover the difference between the actual value of the property he received and the value he would have received if the property were as represented. Under this theory, therefore, the plaintiff may recover damages for his

7 Amending G.L., c. 229, §2.

§13.7. 1 Amending G.L., c. 231, by inserting §855.
expectant loss even though he may have sustained no actual loss. The new statute is ambiguous since it does not specify the damage theory to be applied.

It is important to note that a fraudulent state of mind is not an element of deceit. As the Supreme Judicial Court has noted,

\[\text{it has been held in a long line of cases that "the charge of fraudulent intent, in an action for deceit, may be maintained by proof of a statement made, as of the party's own knowledge, which is false, provided that the thing stated is not merely a matter of opinion, estimate or judgment, but is susceptible of actual knowledge and in such cases it is not necessary to make any further proof of an actual intent to deceive."}^{4}\]

If the statute covers all conduct which could be the subject of a deceit action, its impact will indeed be widespread. It is not clear whether the General Court intended this result or whether it intended the statute to operate only where the defendant had a fraudulent state of mind; yet the statute does use the term deceit or fraud, rather than fraud alone, and this argues for an expansive interpretation. This would seem to strengthen further the argument for limiting recovery to out-of-pocket damages only.

§13.8. Trade regulations: Consumer protection. In 1967, the General Court enacted the Regulation of Business Practices and Consumer Protection Act. This statute, which became Chapter 93A of the General Laws, is modeled upon Section 5 of the Federal Trade Commission Act and is all-encompassing. Its pivotal provision is contained in Section 2(a), which declares illegal all "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." The scope and coverage of Section 2(a) is revealed by Section 2(b), which expressed the legislative intent that in construing Section 2(a), the courts are to be guided by the "interpretations given" the federal statute. As a consequence, the scope and coverage of the Massachusetts legislation is extensive, for various practices have already been declared unlawful under the Federal Trade Commission Act:

Among them are "commercial" bribery; payola; coercion or intimidation of customers; scare tactics to make sales; threatening to initiate collection suits; sales or payments wrongfully forced; damaging or withholding customers' property; lotteries or lottery devices in sales; failure to fill orders promptly; shipment of unordered goods; and substitution of goods. Disclosure has been

\[\text{3 Leader v. Kolligian, 262 Mass. 63, 159 N.E. 458 (1928).}\]


\[\text{§13.8. 1 Acts of 1967, c. 813.}\]

required where there is a change in a product; deceptive appearance as to composition; danger in the use of a product; foreign origin of a product; imperfect and rejected goods; a limited number of products available; and old, used, or second-hand goods. Representations as to financial standing, reputation and time in business have been held unlawful practices as have those concerning business nature and trade status and affiliations and connections when such do not in truth exist; Also unlawful are claims of disability; government endorsements; comparisons; guarantees without disclosures of the nature and extent of the guarantee; and therapeutic claims.

Section 2(c) of the act further increases its scope by conferring upon the attorney general authority to "make rules and regulations interpreting the provisions of subsection 2(a)," subject only to the limitation that such rules "shall not be inconsistent with the rules, regulations and decisions of the Federal Trade Commission and the Federal Courts interpreting the provisions of [Section 5 of the] Federal Trade Commission Act, as from time to time amended." The act provides for both public and private enforcement, permitting recovery of damages by private parties as well as equitable relief at the behest of either public or private suitors. Specific provision was also made for class actions.

Two amendments, one procedural and one substantive, were made during the 1971 Survey year. The procedural amendment simply reduced the period of notice required for public equitable proceedings by the attorney general from ten to five days. The substantive amendment relating to private recovery is much more important. The civil enforcement provisions of Chapter 93A, which formerly permitted actions to be brought by "[a]ny person who purchases or leases goods or services," has been amended by Chapter 241 of the Acts of 1971 to permit actions by anyone who purchases or leases "goods, services or property real or personal." As a result, the very extensive protection of Chapter 93A is now available to purchasers and lessees of realty as well as purchasers and lessees of goods and services.

§13.9. Nuisance: Environmental protection. Under both English and American law, a "nuisance" is an interference with the use and enjoyment of land. The existence of a nuisance depends upon the circumstances; it is created by one's use of his property in a manner that results in a substantial and unreasonable interference with his neighbor's right to the use and enjoyment of his own property. The essence

5 Id. §9.
6 Ibid.

of the tort is a balancing test that imposes upon the plaintiff not only
the burden of establishing a substantial interference with his use and
enjoyment of his own property, but also unreasonable conduct on the
part of the defendant. Serious as is this constraint, however, a far more
severe limitation exists upon the ability of private citizens to abate
nuisances that are widespread and affect many people (as does air and
water pollution, the dissemination of pesticides and herbicides, or the
destruction of valuable natural areas). Nuisances of this genre tradi-
tionally have been defined as public or common nuisances as opposed
to private nuisances, a distinction that has a significant substantive
and remedial impact.

As a result of fifteenth century decisions of the English courts that
have been faithfully followed by the American judiciary (including
Massachusetts), only public officials are normally accorded standing
to abate public or common nuisances. This rule persists even though
the public nuisance degrades the total environment and thereby harms
every member of the community. It is only when public nuisances also
create private nuisances (a very complex situation referred to as a
"mixed nuisance") that they are susceptible to private enforcement.

This traditional distinction between public and private nuisances
has been changed during the 1971 Survey year. Chapter 732 of the Acts
of 1971 permits ten or more citizens residing in the Commonwealth
or any political subdivision of the Commonwealth to sue for equi-
table relief to prevent damage to the environment. The suit must be
predicated upon a violation of statute, ordinance, bylaw or regulation,
the major purpose of which is to prevent or minimize environmental
damage. Further analysis of Chapter 732 may be found in Chapter 8
supra; the new statute is mentioned here because of its impact upon the
traditional Massachusetts law of nuisance.

B. Court Decisions

§13.10. Damages: Contribution. For many years prior to 1962,
Massachusetts followed the general rule that there could be no con-
tribution among tort-feasors, despite intense criticism of the rule and
a movement away from it by other states. The traditional approach was
abandoned by statute in 1962, but it was not until 1971 that the statute
came before the Supreme Judicial Court for interpretation. The case

3 Y.B. Pasch. 5 Edw. 4, f. 2, pl. 24 (1466); Y.B. Pasch. 2 Edw. 4, f. 9, pl. 21 (1463); Y.B.
Trin. 33 Hen. 6, f. 25, pl. 10 (1455).
4 Perhaps the best explanation offered by the Supreme Judicial Court for this posi-
tion appears in Wesson v. Washburn Iron Co., 95 Mass. (13 Allen) 95, 103-104 (1866).
5 See Cleary v. Licensing Commn. of Cambridge, 345 Mass. 257, 186 N.E.2d 815 (1962);
6 Amending G.L., c. 214 (equity jurisdiction).

2 The statute had been commented upon in other cases: Crocker v. New England
600, 604-607, 188 N.E.2d 861, 864-866 (1963); Hayden v. Ford Motor Co., 278 F. Supp. 267,
of *O'Mara v. H. P. Hood and Sons* arose from a traffic accident in which the plaintiff was a guest passenger in a car that was being driven by her married daughter when it collided with defendant's truck. The plaintiff brought an action against the owner and driver of the truck for personal injuries sustained in the collision. Defendants, as third-party plaintiffs, impleaded the plaintiff's host driver as third-party defendant, claiming contribution. The case came to the Supreme Judicial Court on the defendants' exceptions to directed verdicts against them on their contribution claims.

The accident had occurred during a heavy snowstorm when the plaintiff's daughter, the driver of the automobile, became confused and turned the wrong way into a one-way street. As she was proceeding up a hill at about fifteen miles per hour, approaching an intersection, the plaintiff's daughter noticed the defendant's truck approaching the intersection from the right. Not wishing to stop and perhaps lose traction, she continued into the intersection, where the collision occurred. The trial court directed verdicts against the defendants on the ground that proof of the impleaded host driver's gross negligence was essential for contribution in a case brought by a guest passenger against the owner and driver of the other vehicle negligently involved in the collision. The *Supreme Judicial Court* affirmed, noting that there was a sufficient basis for the trial court's finding that the daughter had been only ordinarily negligent.

General Laws, c. 231B, §1(a) permits contribution "where two or more persons become jointly liable in tort for the same injury to person or property." The language seems clearly to require joint liability as a prerequisite to contribution. Because the plaintiff's daughter was not liable to the plaintiff, there was no joint liability and, therefore, no contribution under the statute. The theory behind the statute seems to be that "that which could not be accomplished directly, namely, recovery by the guest from the host, ought not to be accomplished indirectly by contribution."

The *O'Mara* case will no longer create a problem under the contribution statute, since the duty now owed by a host driver to a guest passenger has recently been changed, by statute, to that of ordinary care. A similar issue could arise, however, in the context of an intrafamily immunity. It would seem from the Court's handling of *O'Mara* that in an action brought by a wife against a negligent defendant, the defendant could not implead the plaintiff's husband as a third-party defendant, because the interspousal immunity doctrine would prohibit the necessary joint liability.

§13.11. **Damages: Mental distress.** As has been repeatedly pointed

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4 The question of intrafamily immunity was not involved in the case on appeal.


6 See Acts of 1971, c. 865, discussed in §13.5 *supra*.
out in the ANNUAL SURVEY,¹ the general rule in Massachusetts governing compensation for damages resulting from mental disturbance stems from the turn-of-the-century decision of the Supreme Judicial Court in Spade v. Lynn & Boston R.R.² In Spade, the Court held that "there can be no recovery for fright, terror, alarm, anxiety or distress of mind, if these are unaccompanied by some physical injury; and . . . also . . . that there can be no recovery for such mental disturbance, where there is no injury to the person from without."³ Although the Supreme Judicial Court has consistently adhered to this general rule,⁴ its decisions in recent years have contained some language suggesting possible change.⁵ During the 1971 SURVEY year, the Court again had occasion to reexamine the issue, this time in the context of a case arising under a loophole to the Spade rule. The loophole had been recognized as early as 1899 by Chief Justice Oliver Wendel Holmes in Smith v. Postal Telegraph Cable Co.,⁶ wherein the Chief Justice noted with respect to the Spade rule that

[...] the decisions leave open the question whether, if the harm to the plaintiff was actually foreseen and intended, that would make a difference. It is possible that in some cases motive and actual intent would be more considered in this commonwealth than they would be in England. That question may be left until it arises.⁷

The open question finally came before the Court for decision in 1971. In George v. Jordan Marsh Co.,⁸ discussed in detail later in this chapter,⁹ the Supreme Judicial Court limited the Spade rule by holding that a plaintiff may recover damages for intentionally caused "emotional distress,"¹⁰ even though no other recognized tort was committed.¹¹ The Court carefully noted, however, that in remanding the case for trial on the merits, it was not ruling "on the legal sufficiency of allega-

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³ Id. at 290, 47 N.E. at 89.
⁷ Id. at 578, 55 N.E. at 381.
⁹ See the student comment, §13.20 infra.
¹⁰ The Court indicated that the term emotional distress as used throughout its opinion was "intended to apply to what has been variously called or referred to as mental anguish, mental suffering, mental disturbance, mental humiliation, nervous shock, emotional disturbance, distress of mind, fright, terror, alarm and anxiety." 1971 Mass. Adv. Sh. 563 n.1, 268 N.E.2d 915 n.1.
¹¹ The Court stated: "We start our discussion of this question by holding that the rule laid down in the Spade case does not apply to bar recovery for emotional distress resulting from acts intended to produce such results, or to bar recovery for physical injuries
tions of negligent, grossly negligent, wanton or reckless conduct caus­ing severe emotional distress resulting in bodily injury, or on the legal sufficiency of allegations of distress without resulting bodily injury. 12

§13.12. Damages: Loss of consortium. Over a vigorous dissent, the Supreme Judicial Court decided in Lombardo v. D. F. Frangioso and Co. 1 to adhere to its 60-year-old rule denying both husbands and wives the right to recover for loss of consortium growing out of a defendant's negligent injury to the other spouse. 2 Referring to the contention of the Judicial Council that recognition of the right to recover for consortium would permit "by far the most speculative variety of damages under the sun," 3 and emphasizing that its holding related to negligence claims only, 4 the majority reaffirmed its rule that "there may be no recovery, based on negligence, for loss of a spouse's services, or for loss of consortium, apart from a husband's right (based upon his duty to support) to reimbursement of medical and closely related expenses incurred for the care of an injured wife." 5 Any change or modification of this principle, the majority concluded, "should be accomplished by the Legislature and not by judicial decision." 6

Chief Justice Tauro, joined by Justices Spiegel and Braucher, dissented in a lengthy opinion summarizing and highlighting the illogic of the decisional history of consortium litigation in Massachusetts. The dissenting Justices felt that a complete reexamination of the issue was necessary. Pointing to developments in other jurisdictions 7 and to the action of the American Law Institute 8 in recognizing the right to recovery for loss of consortium by wives as well as by husbands, the dissenters argued that it was improper for the Court to act on the rationale that change should originate in the legislature. They pointed out resulting from emotional distress thus produced. The defendants' contention to the contrary is rejected. Whatever may be said for or against the rule of the Spade case, it has no application to this case." Id. at 567, 268 N.E.2d at 917-918.

12 Id. at 573, 268 N.E.2d at 921.

5 Id. at 874-875, 269 N.E.2d at 875.
6 Id. at 875, 269 N.E.2d at 875.
7 The dissenters noted that in the two decades since the decision of the federal Court of Appeals for the District of Columbia in Hitaffer v. Argonne Co., 183 F.2d 811 (D.C. Cir. 1950) (wife could sue for loss of consortium where injury to husband resulted from negligence of third party), a substantial number of jurisdictions have likewise followed suit and modified their law. At the time of the opinion in the Lombardo case, 43 jurisdictions recognized a right to recover for loss of consortium, and 26 of these permitted recovery by either husband or wife. The cases are collected in the dissent, 1971 Mass. Adv. Sh. 875, 879 n.1, 269 N.E.2d 836, 839-840. n.1.
that the 60-year-old rule denying recovery for consortium was itself a judicial modification of earlier cases,\textsuperscript{9} and that the Court had in the past found it necessary in similar circumstances to act judicially to change existing law without awaiting legislative action.\textsuperscript{10} Since the evolution of the consortium doctrine has been almost exclusively judicial and in Massachusetts results from judicial modification of early cases,\textsuperscript{11} the dissenters felt it was improper "to direct our citizens to look solely to the Legislature for redress."\textsuperscript{12} They also dismissed the often-expressed fear that permitting consortium claims by wives could result in double damages recoveries\textsuperscript{13} as being empirically unsound\textsuperscript{14} and, in any event, easily avoided.\textsuperscript{15}

It should be noted that the Court's decision in \textit{Lombardo} has no affect on its earlier decisions permitting recovery for loss of consortium for intentional interference with the marital relationship in criminal conversation, enticement, or adultery cases.\textsuperscript{16}

\section*{§13.13 \hspace{1cm} False imprisonment: Shoplifting.} In 1958, the General Court permitted merchants to "detain" customers "in a reasonable manner and for not more than a reasonable length of time" without liability "if there were reasonable grounds to believe that the person so detained was committing or attempting to commit larceny."\textsuperscript{17} In \textit{Coblyn v. Kennedy's Inc.},\textsuperscript{2} a merchant who had detained a customer without probable cause was denied the protection of the statute in an action for false imprisonment.

At common law, in an action for false imprisonment the merchant

\hspace{1cm} \textsuperscript{9} See the discussion of cases in 1971 Mass. Adv. Sh. 873, 876-878, 269 N.E. 836, 838-839.

\hspace{1cm} \textsuperscript{10} Id. at 882, 269 N.E.2d at 842.


\hspace{1cm} \textsuperscript{12} 1971 Mass. Adv. Sh. 873, 880, 269 N.E.2d 836, 841. The most recent example of judicial initiative is Colby v. Carney Hosp., 356 Mass. 527, 254 N.E.2d 407 (1970), in which the Court declared, in effect, that the charitable immunity doctrine would be overthrown unless the legislature codified it. Another example of the Court's initiative was the adoption in 1965 of deposition or "oral discovery" procedures, in spite of some longstanding legislative opposition to those procedures.

\hspace{1cm} \textsuperscript{13} Since loss of consortium includes within its scope loss of support, which would be an element of damages implicitly contained in the husband's recovery for diminished earning capacity, it has been argued that a right to recover for loss of consortium might result in a double recovery. See discussion in 1971 Mass. Adv. Sh. 873, 879, 269 N.E.2d 836, 840.

\hspace{1cm} \textsuperscript{14} The experience of the jurisdictions that have recognized the cause of action seems to indicate that no significant problems have resulted. See id. at 883, 269 N.E.2d at 842.

\hspace{1cm} \textsuperscript{15} The Justices felt that proper jury instructions would avoid an untoward result, and they noted further that the problem would be minimized by a joint trial of both the husband's and wife's causes of action, which should be consolidated if filed separately. Id. at 880, 269 N.E.2d at 840.

\hspace{1cm} \textsuperscript{16} Id. at 874 n.1., 269 N.E.2d at 837 n.1.

\hspace{1cm} \textsuperscript{1} G.L., c. 231, §94B, inserted by Acts of 1958, c. 337.

\hspace{1cm} \textsuperscript{2} 1971 Mass. Adv. Sh. 635, 268 N.E.2d 860.
was accorded the defense of probable cause, which was measured by the "reasonable man" standard. The defendant in Coblyn argued that since the statute used the words "reasonable grounds" instead of "probable cause," the legislature intended the change in terminology to indicate that a subjective test as to the merchant's honesty and the strength of his suspicion was to be used in determining the availability of the statutory privilege. Rejecting such an interpretation, the Court noted that the two terms generally were used interchangeably and concluded that the subjective test urged by the defendants would "afford the merchant even greater authority than that given to a police officer."³

During the 1971 Survey year, the legislature amended the detention statute to make it applicable not only to the suspected larceny of the merchant's goods, but also to the larceny of the personal property of employees and customers on the merchant's premises.⁴ The amendment simply enlarges the category of personal property covered by the statute; it does not enlarge the category of persons entitled to the protection of the statutory privilege. Thus, while the property of employees and customers is protected by the statute, the employees and customers themselves may not invoke its protection. The rationale behind the amendment's distinction is probably a recognition that merchants need special tools to combat shoplifting, a problem faced only by merchants, while the ordinary citizen is already protected by his common law right to recapture stolen articles and has no need for special statutory privileges.

§13.14. Defamation: Public figure. For the second year in a row, the Supreme Judicial Court was presented with a defamation case requiring interpretation of the "public figure" defense as expounded by the Supreme Court in Sullivan v. New York Times.¹ Last year the Court refused to expand the public figure category to include an individual who "had been an intermittent candidate for minor elective public office, a seeker of appointment to unimportant public office, and campaign manager for a small minority candidate for mayor of Boston."² During the 1971 Survey year, the Supreme Judicial Court held that one who had become a suspect in the "Great Plymouth Mail Robbery" and who had publicized this fact—largely through his own actions in talking to newspaper reporters and holding press conferences to profess his innocence—had "moved from obscurity to notoriety"³ and could not recover damages for defamation, absent proof of actual malice. The Court likened the case to that of the "Boston Strangler," in which the federal District Court for Massachusetts

¹ Id. at 639-640, 268 N.E.2d at 863.
had held that the "exceptional public interest" in the case and the "extensive publicity surrounding plaintiff as a possible 'Boston Strangler'" precluded an action for defamation or invasion of privacy, absent proof that the publication was "knowingly false or falsely made with reckless disregard for the truth." 4

Great impact upon the future development of the Massachusetts law of defamation was caused by the decision of the United States Supreme Court in *Rosenbloom v. Metromedia, Inc.*, in which the Court held that the First Amendment protects "all discussion and communications involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous." 5 The case arose out of a series of actions brought by the city of Philadelphia to enforce its obscenity laws. In the course of several raids, the police arrested the plaintiff, a distributor of nudist magazines, and seized his inventory of magazines and books warehoused in his home and in a barn. The facts of the raid were reported several times during news broadcasts over the defendant's radio station. Subsequently, plaintiff was acquitted of criminal obscenity charges under instructions of the trial judge that, as a matter of law, the nudist magazines distributed by the plaintiff were not obscene. Thereafter, plaintiff brought a defamation action in federal court against the defendant, alleging that its news broadcasts were libelous per se and otherwise defamatory. From a jury verdict in favor of the plaintiff, the defendant appealed. The Third Circuit Court of Appeals reversed, holding that the public figure defense announced in *New York Times* and developed in later cases 6 shielded the defendant. On appeal to the Supreme Court, the narrow question raised was whether the defendant had any constitutional protection despite the fact that the plaintiff was neither a "public official" nor a "public figure," but only a "private individual." In sustaining the court of appeals, the Supreme Court stated:

If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved or because in some sense the individual did not "voluntarily" choose to become involved. The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety. 7

The *Rosenbloom* decision has already been followed by the Supreme Judicial Court in *Priestley v. Hastings and Sons Publishing Co.*, 8 the Court, relying upon *Rosenbloom*, held that newspaper stories report-

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5 403 U.S. 29, 44 (1971).
7 403 U.S. 29, 43 (1971).
8 1971 Mass. Adv. Sh. 1265, 271 N.E.2d 628. This case is more fully discussed in the student comment, §16.10 infra.
ing allegations of misconduct made at a selectmen's meeting concerning the work performed by an architect in the construction of a school building were not actionable without proof of actual malice. The Court indicated the scope of the new doctrine thusly:

The publication here, as [in Rosenblatt], related to the plaintiff's involvement in an event of public or general concern. In addition, the defendant newspaper here, like the radio station there, performed much the same function of conveying news to the public under time constraints which did not permit the investigative work to which those connected with a magazine or book could more reasonably be held.\(^9\)

§13.15. Proximate cause: Sudden emergency. The case of Wilborg v. Denzel\(^1\) involved an interesting question as to the liability of a motorist who runs out of gas. On its facts, the case was simple. The defendant, who had driven 175 miles on the day in question, was driving uphill when his car ran out of gas. The car came to a halt about 6 inches from the double yellow line in the center of the road, approximately 165 feet from the crest of the hill. Between 15 seconds and 2 minutes after the defendant stopped, another car traveling in the same direction as the defendant pulled over into the other side of the road in order to pass the defendant's stalled vehicle. At the same time, the plaintiff, traveling in the opposite direction, drove over the crest of the hill and saw the headlights of the two cars in front of her blocking both sides of the road. She became terrified and veered to the right off the road, striking a tree at a point about opposite to the defendant's stalled car. The jury returned a verdict in favor of the plaintiff. The defendant appealed, claiming he was entitled to a directed verdict, apparently on the ground that there was no evidence of negligence on his part and that the plaintiff was contributorily negligent.\(^2\) In affirming, the Supreme Judicial Court held that the jury properly could have concluded that the defendant was negligent in running out of gasoline, failing to take advantage of the 30-second "sputtering" warning provided by the engine to pull his car to the side of the road, and in not immediately moving his car to the side of the road after it had stalled. "Since it is reasonably foreseeable that a following car may pass a stalled car,"\(^3\) said the Court, the defendant's negligence could have constituted a proximate cause of the accident.

The more difficult question for the Court concerned the action of the plaintiff, since the collision might not have occurred had she remained on the road. However, the Court found the plaintiff's actions indeterminate, since the plaintiff was faced with a sudden emergency.

\(^9\) Id. at 1269-1270, 271 N.E.2d at 631.


\(^{2}\) The defendant also claimed faulty jury instructions, evidentiary errors, and improper judicial remarks.

The Court relied upon its earlier statement of the sudden emergency doctrine:

"Though in retrospect it may appear that the plaintiff's choice of a course of action was mistaken, we cannot say as a matter of law that at the time he made the choice, in view of the need of speedy decision and action, it was not a prudent one under the circumstances of the case. 'A choice may be mistaken and yet prudent.'" 4

§13.16. Interference with advantageous relationships. For some time, Massachusetts law has followed the rule that "one who, without a privilege to do so, induces or otherwise purposely causes a third person not to . . . enter into or continue a business relation with another" 1 is liable in tort for the harm thereby caused. 2 The validity of the rule has again been affirmed by the Supreme Judicial Court. In Pino v. Trans-Atlantic Marine, Inc., 3 the Court upheld a seaman's claim that an insurer had unlawfully interfered with his employment opportunities by denying insurance coverage to fishing vessels that employed the seaman, under circumstances in which it was reasonably foreseeable that employment opportunities would be lost if vessel owners could not acquire insurance protection against the possible injury claims of the seaman. The insurer's main defense was that it "had the right not to issue protection coverage on individuals [it] did not want to insure in the absence of statutory or other regulations." 4 The Court never reached the validity of the defense. 5 It agreed with the trial court that the insurer's asserted justification that its action was predicated upon the plaintiff's attempt to recover on a baseless claim was itself groundless. In upholding the award of damages and an injunctive decree against the defendants, the Court concluded that it was immaterial that the plaintiff had been employed under a contract terminable at will. The Court stated:

While "malice in common acceptation means ill will against a person . . . in its legal sense it means a wrongful act, done intentionally, without just cause or excuse." . . . The defendants' "motives" may have been "good" from their point of view, in that their conduct may have been financially beneficial to them, but their conduct can still be held "malicious in law." We have held

4 Id. at 599, 268 N.E.2d at 857-858.

§13.16. 1 Restatement of Torts, §766.


4 Id. at 1667, 265 N.E.2d at 586.

5 The defense is ordinarily sound. In the absence of a statutory obligation or a conspiracy, one may refuse to contract with another regardless of motive. For example, in Gordon v. Worcester Telegram Pub. Co., 343 Mass. 142, 177 N.E.2d 586 (1961), a demurrer was sustained in a case in which the defendant newspaper arbitrarily refused to accept plaintiff's advertisements. As the Pino case shows, however, refusal to contract with a third party in order to interfere with a business relationship between the third party and the plaintiff may be actionable.
§13.16. Trademarks: Unfair competition: Passing off. A relatively simple case involving the tort generally known as unfair competition came before the federal District Court for Massachusetts during the 1971 Survey year. The case is noteworthy only because it involves the conduct of a distributor or authorized reseller in “passing off” goods of other manufacturers for those of the plaintiff. In Pic Design Corp. v. Bearings Specialty Co., the plaintiff, a manufacturer of precision industrial components, sought a preliminary injunction against a distributor of precision industrial components. The plaintiff sought to prevent the distributor from filling orders with products of other manufacturers when the orders were for component products identified either by the plaintiff’s name and catalogue number or by plaintiff’s catalogue number alone. An injunction was granted on the ground that irreparable injury would be visited upon the plaintiff, not merely in the loss of sales but also by possible damage to the plaintiff’s goodwill because of allegedly inferior substitute merchandise. The fact that the defendant had begun invoicing the substituted products as “substitutes” was deemed immaterial. The Court reasoned that “[a] purchaser should be told at the time that he is ordering that a substitute article will be sent. Only at that time will the customer’s decision, whether to accept delivery of the substitute or to seek the genuine product, be truly free.”

C. Student Comments

§13.18. Products liability: Privity of contract entombed. On August 18, 1971, Governor Sargent signed the bill that ended the privity defense in products liability actions brought in Massachusetts. The legislature acted after it became clear that the Supreme Judicial Court would not move to abolish the privity doctrine. Anyone who wishes to trace the history of products liability litigation in the Commonwealth should consult the four immediately preceding volumes of the Survey; this comment will examine the new legislation, with particular emphasis on the experience of jurisdictions that have preceded Massachusetts in doing away with the privity defense. The text of the new

http://lawdigitalcommons.bc.edu/asml/vol1971/iss1/16
statute, which is an amendment to the Uniform Commercial Code, is as follows:

Section 1. Chapter 106 of the General Laws is hereby amended by striking out section 2-318, as appearing in section 1 of chapter 765 of the acts of 1957, and inserting in place thereof the following section:

Section 2-318. Lack of Privity in Actions Against a Manufacturer, Seller or Supplier of Goods.

Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer, seller or supplier of goods to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not purchase the goods from the defendant, if the plaintiff was a person whom the manufacturer, seller or supplier might reasonably have expected to use, consume or be affected by the goods. A manufacturer, seller, or supplier may not exclude or limit the operation of this section.

Section 2. Section 2-318 of chapter 106 of the General Laws, as amended by section one of this act, shall apply to sales made on or after the effective date of this act.

The legislation appears to go beyond the traditional scope of the Uniform Commercial Code by including negligence as a basis for recovery in addition to the usual action for breach of warranty. In most situations, however, a plaintiff is likely to find that an action for negligence will be difficult to sustain. For example, as to a manufacturer, the plaintiff would have to prove that there had been negligence in some phase of production, either in design, manufacture, or inspection of the goods which were allegedly defective. A plaintiff may be hard-pressed to present evidence of such fault where a complex production process is involved. For its part, the manufacturer will usually present expert testimony or other substantial evidence as to the care it employs in protecting against defects in its goods.4

A plaintiff will usually have an easier time proceeding under a warranty theory. Implied warranties arise as a matter of law under Sections 2-314 and 2-315 of the Uniform Commercial Code. In order to hold the defendant liable for the breach of an implied warranty, the plaintiff must show that when the goods left the defendant's hands they either were not of merchantable quality5 or were not fit for their intended purpose.6 In the latter case, the plaintiff must also show that the defendant had reason to know the particular purpose for which the goods were to be used. As in strict liability actions, it is still necessary to demonstrate that the goods were defective, that the defect was the proximate cause of the injury, and that the defect is traceable to the

4 See Prosser, The Assault upon the Citadel (Strict Liability to the Consumer), 69 Yale L.J. 1099, 1116 (1960).
5 UCC§2-314.
6 UCC§2-315.
defendant. There is, however, no need to tie the defective product to the defendant's negligence; it is sufficient that the defect can be traced to him.7

The new legislation specifies that manufacturers, sellers, and suppliers of goods may not limit or disclaim the operation of the antiprivity statute. In 1970, the legislature acted in a similar fashion (a) to prevent manufacturers or sellers of consumer goods or services from excluding or modifying any implied warranties which would otherwise attach; and (b) to restrict the circumstances in which a manufacturer of consumer goods may limit or modify a consumer's remedies for breach of the manufacturer's express warranties.8 As a result of the aforementioned actions of the legislature in limiting disclaimers, it is the law in Massachusetts that a seller or manufacturer of consumer goods must honor his implied warranties of merchantability and fitness for a particular purpose.

A first-impression interpretation of an important and broad new law is unquestionably a formidable responsibility for any court. In determining situations to which the new antiprivity statute is applicable, Massachusetts courts will be aided by precedents from other jurisdictions9 that have adopted very similar statutes as part of their commercial codes.10 Among the states that have moved toward more comprehensive products liability, three have enacted statutory provisions very similar to those of Massachusetts: Virginia (1962),11 Arkansas (1965),12 and Maine (1969).13

The heart of G.L., c. 106, §2-318 is the sentence in Section 1 that provides:

8 G.L., c. 106, §2-316A, added by the Acts of 1970, c. 880, provides: “The provisions of section 2-316 shall not apply to sales of consumer goods, services or both. Any language, oral or written, used by a seller or manufacturer of consumer goods and services, which attempts to exclude or modify any implied warranties of merchantability and fitness for a particular purpose or to exclude or modify the consumer’s remedies for breach of those warranties, shall be unenforceable.

“Any language, oral or written, used by a manufacturer of consumer goods, which attempts to limit or modify a consumer's remedies for breach of such manufacturer's express warranties, shall be unenforceable, unless such manufacturer maintains facilities within the commonwealth sufficient to provide reasonable and expeditious performance of the warranty obligations.” For an analysis of Section 2-316A, see 1970 Ann. Surv. Mass. Law §9.2.

It should be noted that the new Section 2-318 is applicable to “suppliers” of goods, as well as to manufacturers and sellers. However, the term suppliers does not appear in Section 2-316A.

9 If a Massachusetts statute being interpreted for the first time is virtually identical to statutes that have been interpreted judicially in other jurisdictions, Massachusetts courts have been willing to follow such interpretations. See, e.g., Abbott Motors, Inc. v. Ralphston, 28 Mass. App. Dec. 35 (1964) (case involving UCC); Kurtiss v. Conrad and Co., 312 Mass. 670, 46 N.E.2d 12 (1942) (case involving Uniform Sales Act).
Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer, seller or supplier of goods to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not purchase the goods from the defendant, if the plaintiff was a person whom the manufacturer, seller or supplier might reasonably have expected to use, consume or be affected by the goods.

The provision quoted above is identical to that in the Maine statute. Virginia and Arkansas have the same kind of provision, except that a "supplier" of goods is not included as a potential defendant.

It may be useful to inquire why the term supplier was included in the code provision of Maine and Massachusetts, for the word is neither defined nor used in the Uniform Commercial Code. However, since products liability is treated in tort as well as commercial law, it is not surprising that the term is used extensively in a chapter of the Restatement of Torts. Chapter 14 of the Restatement deals generally with the liability of "suppliers of chattels." In a note to Chapter 14, which states the rules applicable to all suppliers, it is explained that the rules "are equally applicable to all persons who in any way or for any purpose supply chattels for the use of others or permit others to use their chattels." Gratuitous donors, lessors, and bailors would be included. It seems unlikely that the legislature, in drafting the new Section 2-318, intended this far-reaching definition to attach to the term supplier. The legislators may have been making a policy judgment as to the sources from which implied warranties should arise as a matter of law. However, since the statute appears in the sales article of the Uniform Commercial Code, there should be a strong presumption that it was not intended to apply to such defendants as gratuitous donors, lessors, and bailors. The Restatement itself promulgates rules of liability peculiar to various kinds of suppliers. Since these provisions differentiate categories within the broad class of suppliers, there would seem to be some logical basis for categorizing those suppliers whose transactions in goods would be governed by the Uniform Commercial Code. The next step is to determine the types of suppliers to which Section 2-318 would apply.

In referring to the decision in MacPherson v. Buick Motor Co., Prosser described a general rule limiting the type of supplier liable for harm caused by defective goods: "It has become, in short, a general rule imposing negligence liability upon any supplier, for remuneration, of any chattel." (Emphasis added.) In a footnote to this comment

14 The inclusion of the term supplier is also discussed in §13.3 supra.

15 Restatement of Torts Second c. 14, Topic 1, scope note.

16 Topic 2 of Chapter 14 deals with those rules that determine the liability of persons supplying chattels to be used for their business purposes; Topic 3 deals with manufacturers' liability; Topic 4, vendors; Topic 5, strict liability; Topic 6, independent contractors; Topic 7, donors, lessors, and lessors.

17 217 N.J. 382, 111 N.E. 1050 (1916). The court in the MacPherson case overturned the rule requiring privity in negligence cases.

18 Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer), 69 Yale
there is a further explanation: "Gratuitous lenders, bailors and donors are . . . liable only for failure to disclose defects of which they have knowledge, which may make it dangerous to third persons." 19

Limiting the class of suppliers to those who receive some form of remuneration would appear to be consistent with the Uniform Commercial Code's notion of "seller," which is defined in Section 2-103(d) as "a person who sells or contracts to sell goods." Furthermore, those who are sellers under the code definition are the ones on whom the code imposes warranties, although an implied warranty of merchantability under Section 2-314 will not attach unless the seller is also a merchant 20 with respect to the goods he sells. In understanding the code definition of merchant, it is useful to consider the official comments to Section 2-104 of the Uniform Commercial Code. Comment 1 states that "[t]his Article assumes that transactions between professionals in a given field require special and clear rules which may not apply to a casual or inexperienced seller or buyer." (Emphasis added.) Comment 2 explains that "[t]he professional status under the definition may be based upon specialized knowledge as to the goods, specialized knowledge as to business practices, or specialized knowledge as to both. . . ."

Read as a whole, the new Section 2-318 is strikingly broad in its scope, and the use of the term supplier may serve the important function of demonstrating a legislative intent to liberalize the law of products liability by using language which is amorphous and capable of being interpreted equitably rather than strictly. In construing Virginia's statute, one authority has pointed out the need for flexible interpretation of the term seller: "[T]he statute includes within the classification of a 'seller' any party who is engaged in the business of selling goods such as wholesalers, dealers, distributors and retailers." 21 However, some courts do not agree that the term seller applies to retailers or wholesalers. 22 This may explain why Maine and Massachusetts have made their antiprivity statutes applicable to suppliers, i.e., to extend the list of potential defendants beyond the limits created in some jurisdictions that have restricted the meaning of seller. 23

L.J. 1099, 1102 (1960).

19 Id. at 1102 n.23.

20 UCC §2-104(1) defines merchant as "a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill."


22 See cases cited in Emroch, id. at 986.

23 For a list of potential defendants in cases of negligence without privity, see Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 Minn. L. Rev. 791, 824-817 (1966). Because the antiprivity statute makes no distinction as to the liability of potential defendants in either negligence or warranty cases, the classes of defendants in negligence cases may be included in the list comprising those in breach of warranty cases. Emroch, n.21 supra.

24 For a discussion of the wholesaler's status in products liability cases, see Note, Prod-
Lengthening the list of potential defendants does not in itself guarantee a broader base of remedial rights for purchasers, users, or consumers of defective goods. What was needed to broaden these rights and what was supplied by the new Section 2-318 was a clear abrogation of the requirement that a plaintiff show contractual privity with the defendant. With the privity requirement removed, a new test of plaintiff-defendant association was provided: the plaintiff must be "a person whom the manufacturer, seller or supplier might reasonably have expected to use, consume or be affected by the goods." The language used by the legislature indicates an intent to have the courts apply principles of foreseeability in determining whether the defendant could have expected the plaintiff to come in contact with the allegedly defective product. The question is usually one of fact; however, if the case raises no factual issues, the determination becomes a matter of law. Obviously, it is too early to predict judicial limits that might be placed on the "foreseeable" plaintiff in Massachusetts. Furthermore, it is unlikely that any general rules of foreseeability will emerge, since products liability cases are so varied in factual character.

While recognizing the need for a case-by-case determination of foreseeability, there should also be a recognition by Massachusetts courts of cases from jurisdictions that have adopted strict liability. Other jurisdictions, proceeding under either a strict liability or warranty theory, have allowed recovery to the following classes of plaintiffs: remote purchasers, employees, users or consumers, bailees, lessees, passengers, and rescuers. The most difficult area in which to apply the principle of foreseeability will be in cases where the plaintiff was a bystander—someone other than a user or consumer of a product—who suffered some form of injury. Evidence as to circumstances under which the injury occurred should be relevant. For example, it may be important to determine whether the plaintiff bystander was lawfully at the place where the harm occurred; whether one could reasonably have expected him to be there; and whether, from their nature, the


26 In Mack Trucks v. Jet Asphalt and Rock Co., 246 Ark. 101, 107, 437 S.W.2d 459, 462 (1969), the court, construing Arkansas' antiprivity statute, said that "[n]ot every remote purchaser or user could recover for a breach of implied warranty of fitness for the purpose. Whether it was reasonably foreseeable that such a one would use the product would usually become a question of fact. Here, however, the sale and lease took place approximately one month after the original sale. Repairs were made over a period of months upon the complaints of Jet. Under these circumstances the trial court's holding, as a matter of law, that lack of privity was not a defense, was correct."

27 The important cases are discussed in 2 Frumer and Friedman, Products Liability §16A[4][c] (Supp. 1970).

28 In Carter v. Yardley & Co., 319 Mass. 92, 98-99, 64 N.E.2d 693, 697 (1946), the Supreme Judicial Court indicated that it would limit recovery in negligence actions to plaintiffs who were not trespassers or bare licensees, even though such persons may have been foreseen. The new Section 2-318 places no such limitation on recovery, and thus Massachusetts courts may have to reevaluate the position taken in Yardley.
defective or dangerous goods in question could foreseeably have caused the alleged harm.

An important case allowing bystander recovery under a theory of strict tort liability was decided by the Supreme Court of California in 1969. Elmore v. American Motors Corp. allowed recovery against an automobile manufacturer and a dealer by an injured occupant of an automobile that was struck by the defective car after the improperly connected drive shaft of the defective car had dropped off, causing the vehicle to swerve out of control. The court announced a definite policy as to bystanders: it would follow the public policy rationale of another California case which held, by imposing strict liability, that a manufacturer who has placed a defective product on the market will bear the cost of compensating an innocent plaintiff who is injured by that product. The Elmore court also felt that a manufacturer can often foresee that a bystander may be injured by his product, and that foreseeable bystanders should perhaps be given greater protection than users or consumers, who have the opportunity to inspect and select the goods that they purchase. The court also reasoned that the manufacturer and retailer can adjust their costs so as to account for any potential liability to bystanders.

Cited in the Elmore opinion was the case of Piercefield v. Remington Arms Co., the first case to allow a bystander to recover for injuries under a strict products liability theory. The plaintiff was injured when the barrel of a shotgun, fired by his brother, exploded. He recovered damages against the manufacturer of the shell which was fired and against the wholesaler and retailer of the shell. As in the Elmore case, there is a recognizable policy in Piercefield as to the status of the bystander under the rule of strict products liability:

Take the recent case of Henningsen v. Bloomfield Motors, Inc. as an example of the reason for the rule. Would anyone,

29 The Restatement of Torts Second §402A defines the basis of strict tort liability:

“(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

“(a) the seller is engaged in the business of selling such a product, and

“(b) it is expected to and does reach the consumer without substantial change in the condition in which it is sold.

“(2) The rule stated in Subsection (1) applies although

“(a) the seller has exercised all possible care in the preparation and sale of his product, and

“(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.”

The applicability of cases tried under strict tort liability to cases arising under the antiprivity statute will be discussed infra.


31 Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 879, 27 Cal. Rptr. 697 (1963) (user of defective lathe that threw off a piece of wood was allowed recovery in strict tort liability).


33 375 Mich. 85, 133 N.W.2d 129 (1965).

having read the court’s exhaustive opinion, expect a result reasoned differently had, say the plaintiff been a pedestrian who, when the Henningsen car [veered sharply to the right and crashed into a highway sign and a brick wall], suffered crushed legs as the car struck the wall? Take Spence \(^{35}\) as another example, and assume that the plaintiff there had been a bystander or visitor injured by a crumbling and buckling of some wall of the cottage which had been built of defective blocks. Would our result have been different? Take Hill v. Harbor Steel. \(^{36}\) Would we have denied recovery—on the same theory—to the personal representative of, say, a municipal inspector or buyer of scrap, then lawfully in the yard and killed by the same explosion? \(^{37}\)

The court in *Piercefield* implied that the bystander who is lawfully in the place where the injury occurs should be allowed to hold the defendant strictly liable for his injuries. The cases cited by the court are only a few examples of the many varied situations in which bystander recovery might be allowed.

In the recent case of *Wasik v. Borg*, \(^{38}\) the federal Court of Appeals for the Second Circuit, in allowing bystander recovery of damages for personal injuries, applied the Section 2-318 provision of the Vermont Commercial Code in a rather unusual manner. The plaintiff bystander was injured when the car he was operating was struck from the rear by the defendant’s automobile. The circuit court affirmed the verdict of the district court jury, which held the third-party defendant manufacturer of the car liable to the plaintiff for damages. The jury had found that the accident was due to a dangerous defect in the design or manufacture of the defendant’s automobile, causing sudden acceleration. The circuit court cited Vermont’s adoption of Section 2-318, Alternative B, \(^{39}\) of the Uniform Commercial Code as authority for allowing bystander recovery, concluding that the code change paved the way for applying strict tort liability as it is articulated in Section 402A of the Restatement of Torts Second. Alternative B applies only to recovery for personal injuries resulting from the breach of a seller’s warranty, but it uses the same language of foreseeability as in the Massachusetts statute. The court in *Wasik* anticipated that in the future the Vermont courts would “look to the legislature’s expansion of the

\(^{35}\) The court was referring to Spence v. Three Rivers Supply, 353 Mich. 120, 90 N.W. 2d 873 (1958).

\(^{36}\) The court was referring to Hill v. Harbor Steel and Supply Corp., 374 Mich. 194, 132 N.W.2d 54 (1965).


\(^{38}\) 423 F.2d 44 (2d Cir. 1970).

\(^{39}\) The official text of §2-318 reads as follows: “A seller’s warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.” Alternative B omitted from the first sentence the words “who is in the family or household of his buyer or who is a guest in his home.”
scope of protection under the alternative warranty theory as a guide\textsuperscript{40} by which they could apply strict products liability.\textsuperscript{41}

In evaluating the bystander's status in the products liability area, the cases mentioned above proceeded under the theory of strict tort liability. However, these cases should serve as useful guidelines in determining the classes of persons who should be allowed recovery under the warranty approach of the code because, under both theories, the basic factor which limits recovery is the foreseeability of harm to the plaintiff or to his property.

The new UCC §2-318 and the Restatement of Torts Second §402A establish a framework in which the defendant's negligence is eliminated as a condition to liability,\textsuperscript{42} although the Massachusetts commercial code provision retains negligence as an alternative basis for recovery. Under the warranty alternative, however, the defendant may have some defenses available which he might not otherwise have under a strict liability approach. One such difference is suggested in an official comment to UCC §2-314.\textsuperscript{43} Furthermore, issues involving such matters as the effectiveness of disclaimers, the need to give notice of breach of warranty, or the determination of when the statute of limitations begins to run might be resolved differently under strict tort liability than under the Uniform Commercial Code. It has already been noted that the concern over disclaimer clauses has been ameliorated by the addition of Section 2-316A to the Massachusetts commercial code. The defense, under UCC §2-607(3)(a), that the plaintiff did not give notice of the breach may also be restricted since "it would appear that the notice requirement is limited to contracts for the sale of goods between plaintiff-buyer and defendant-seller."\textsuperscript{44}

Massachusetts courts will soon be hearing actions brought under the commercial code by plaintiffs who were not in privity with the defendant at the time the alleged injury or loss was sustained. A choice will be open to the courts: to borrow tort principles, including strict liability, as the Second Circuit Court of Appeals did in \textit{Wasik}, or to

\textsuperscript{40} 423 F.2d 44, 49 (2d Cir. 1970).

\textsuperscript{41} Many writers have expressed the view that bystanders should be allowed to recover damages when injured by a defective product with which they have come in contact. See, e.g., Note, Strict Products Liability and the Bystander, 64 Colum. L. Rev. 916 (1964); Comment, Cave Adstantem: Bystander Recovery in Products Liability Cases, 2 Creighton L. Rev. 295 (1968). In fact, it has been observed that Kentucky is the only jurisdiction that has adopted strict tort liability but has denied a bystander's right to recover. Comment, Strict Products Liability to the Bystander: A Study in Common Law Determinism, 38 U. Chi. L. Rev. 625, 635 (1971).


\textsuperscript{43} UCC §2-314, Comment 13 states that "evidence indicating that the seller exercised care in the manufacture, processing or selection of the goods is relevant to the issue of whether the warranty was in fact broken." However, under the Restatement of Torts Second §402A(2)(a), strict liability may be imposed even though "the seller has exercised all possible care in the preparation and sale of his product."

\textsuperscript{44} Speidel, n.42 supra, at 835. See also Tomczuk v. Town of Cheshire, 26 Conn. Supp. 219, 217 A.2d 71 (1965) (relieving the plaintiff, not a party to the sales contract, from the need to comply with the notice requirement).
develop and rationalize an expanded recovery for breach of warranty under the code. In making the choice, Massachusetts courts will probably consider the theory of recovery that other states have adopted under antiprivity legislation very similar to the Massachusetts statute.

A decision that liability would be imposed under commercial law rather than under tort law came in the first case to construe the Virginia antiprivity statute. In *Brockett v. Harrell Bros.*, the plaintiff attempted to hold the processor of impure ham liable for damages under an implied warranty of fitness. The Supreme Court of Appeals of Virginia found it unnecessary to decide whether to extend the common law tort principles of food-warranty protection; the legislature, in the court's view, had already assured such protection by passing the antiprivity statute. In determining that contributory negligence was not a proper defense in an action for breach of an implied warranty of fitness, the court held that the action was ex contractu rather than one arising out of a tort. Two recent Arkansas cases, *Mack Trucks v. Jet Asphalt and Rock Co.* and *L. A. Green Seed Co. v. Williams*, have also followed a code-warranty approach. Both cases involved claims for a breach of implied warranties of quality.

The *Mack Truck* case merits scrutiny. The Arkansas Supreme Court affirmed on appeal a judgment granting damages for the breach of an implied warranty of fitness against the defendants, the truck manufacturer and the truck dealer. The plaintiffs were lessees from the persons who had purchased defective diesel trucks from the original buyer, for whom the trucks had been specially manufactured. After the dealer had made several unsatisfactory repairs on the trucks, the plaintiffs purchased replacement parts elsewhere and won their claim for the expense incurred. The result is important because damages for economic loss were held to be within the scope of the antiprivity statute, in addition to damages for injuries to the person or to his property. Similarly, a California decision, *Seeley v. White Motor Co.*, has held that commercial losses are not recoverable under strict tort liability but are recoverable under the provisions of the California sales act or the Uniform Commercial Code.

One writer, citing the *Brockett* and *Mack Truck* decisions, has remarked that the Virginia and Arkansas statutes illustrate a legislative intent to make the commercial code "the exclusive source of liability in nonegligence products-liability cases." Another writer has evaluated Virginia's code provisions as follows:

Virginia has virtually demolished the privity defense and has

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46 Id. at 463, 143 S.E.2d at 902.


49 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

predicated the liability of manufacturers and sellers, in cases where negligence cannot be proved, upon "breach of warranty, express or implied." By this language and the positioning of the antiprivity statute in Article 2 of the Uniform Commercial Code, the General Assembly has clearly directed the courts to use the context and policy of the Sales article to determine the scope of and the conditions imposed upon strict products liability.51

Maine's position on the matter is at present unclear because no case has yet applied its new commercial code provision abolishing privity. There has been a suggestion, however, that the Maine courts may pursue the code-warranty approach.52

Now that the barrier of privity has been removed and the use of disclaimers restricted, if Massachusetts abandons the requirement of notice of breach of warranty for plaintiffs not in privity with the defendant, a source of strict liability under the code would be created that may match or surpass that provided by Section 402A of the Restatement. For example, as noted above in connection with the Seely case, where damages for economic loss alone are sought, the code may be the sole source of recovery.53 If the Massachusetts code-warranty approach is construed to afford a plaintiff essentially the same protection as is offered under strict liability in tort, the label placed on the theory of recovery may have little significance.54

Conclusion. It is clear that a major change in the law of products liability has occurred in Massachusetts. No other state has coupled a broad antiprivity statute with another nonuniform provision as protective of consumers as code Section 2-316A. No longer will a plaintiff be denied recovery solely because of a privity requirement, and disclaimers of implied warranties will pose no threat to recovery when they arise in connection with consumer goods. Where commercial goods are involved, attempts to disclaim warranties as to remote purchasers or users will likewise be ineffective if such warranties were given to the immediate buyer. The requirement of notice of breach of warranty should apply only to the immediate buyer, since any other plaintiff would generally neither have dealings with the seller nor be aware of the technical notice requirement. Where reasonably foreseeable, com-

51 Speidel, n.42 supra, at 817. See also Leavell, The Legal Kaleidoscope—Products Liability, 21 Ark. L. Rev. 301, 320 (1967).
53 In Seely, the California Supreme Court criticized an earlier New Jersey decision, Santor v. Karagheusian, 44 N.J. 52, 207 A.2d 305 (1965), which had held a manufacturer of defective carpeting liable on the basis of strict tort liability for the plaintiff buyer's economic loss. The Santor decision was criticized for having imposed liability without regard to the representations of quality made by the manufacturer. 63 Cal. 2d 17-18, 403 P.2d 145, 151, 45 Cal. Rptr. 17, 23 (1965).
54 Among the states that have imposed strict liability by statute, Prosser mentions Arkansas and Virginia. He refers in a footnote to their respective commercial code antiprivity provisions, but makes no reference to the theory of strict liability that the statutes embody. Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 Minn. L. Rev. 791, 796 (1966).
compensation should be allowed in products liability cases for personal injuries, property damage, and economic loss suffered by the plaintiff. The classes of foreseeable plaintiffs under code Section 2-318 are yet to be determined. However, case law in jurisdictions that have adopted a strict products liability theory suggests that the protected class is broad and may include subpurchasers, users, consumers, passengers, bailees, lessees, employees, bystanders, and even rescuers.

JOSEPH S. SMITH

§13.19. Bailment: Parking facility owners and their customers: Hale v. Massachusetts Parking Authority. 1 The plaintiff was a daily patron of the defendant's parking garage, for which privilege he made monthly payments. His status as a daily patron was signified by a special decal on the window of his new Jaguar and by a parker's plate that he displayed to an attendant each time he left the garage. In addition, each time he entered the garage, he was given a ticket. On November 11, 1964, he left his car in the section assigned to him, locked it, and took the keys with him. On the evening of November 13, someone appeared at the garage exit driving the plaintiff's car. Noticing the special decal on the window of the car, the attendant asked the driver to present his ticket and parker's plate. The driver said he didn't have them. The attendant then directed the driver to pull his vehicle over to one side of the exit lane while he summoned the night manager. There were no devices at the exit to prevent drivers of cars from leaving the garage at will, and before the manager arrived, the person in the plaintiff's car sped away. Neither the manager nor the attendant took further action at that time, the former surmising that the driver was probably the owner. Four hours later, the plaintiff came to the garage to get his car but found it missing. He informed the night manager, who immediately contacted the police. The automobile was never recovered.

Mr. Hale brought an action in tort and contract in the Superior Court of Suffolk County to recover the value of the car. At trial, it was conceded that the defendant had been a bailee of the plaintiff's car at the time it was stolen, 2 and the judge gave the following instructions to the jury at the plaintiff's request:

As to motor vehicles left in the care of a garage keeper, he is a bailee for hire and as such is liable for any loss or damage to the property resulting from his negligence or that of his servants. . . . With reference to such property, he is bound to exercise that degree of care which may reasonably be expected from ordinarily prudent persons under similar circumstances. 3

When the jury returned a verdict for the plaintiff, the defendant filed a

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3 Id. at 8 (citations omitted).
motion for judgment under leave reserved. The court granted the motion, directing a verdict for the defendant. The plaintiff excepted, arguing that since reasonable men could reach different conclusions as to whether the evidence warranted a finding of negligence, the case was properly submitted to the jury and the jury's verdict must stand. The Supreme Judicial Court set aside the verdict for the defendant and held that on the evidence presented, a jury could have found the defendant negligent.

_Hale_ illustrates the approach that courts in this country have uniformly adopted in dealing with actions against commercial parking lot or garage operators for the loss of or damage to their patrons' vehicles. Whether the operator of the parking facility owes the patron a duty of care sufficient to sustain the action has usually depended upon whether the relationship between them can properly be characterized as one of bailment. It is generally agreed that a bailee's duty in this relationship is to "exercise ordinary or reasonable care to preserve and return the car to the owner," although he is not an insurer of the vehicle. After establishing a bailment, the plaintiff must prove that the defendant was negligent in performing his duty. In actions where a bailment is not found, the relationship is generally deemed to be one of licensor-licensee. According to this rationale, the operator-licensor merely rents the space for parking and has only the duty to refrain from willful or wanton injury to the licensee or his property. The burden of proving willful or wanton conduct has the practical effect of barring recovery if the plaintiff is merely a licensee.

Similar in its broad outline to numerous other cases, _Hale_ does not represent a departure from existing law, but the case exemplifies the
continuing failure of the Supreme Judicial Court to articulate the factual criteria that will establish a bailment for hire of a parked automobile.11 This lack of clarification is remarkable when one considers that the existence of a bailment is apparently the sine qua non for recovery in parking cases. The full extent of the Court’s discussion in Hale was the brief statement: “The Superior Court correctly instructed the jury that the defendant was a bailee for hire.”

Of course, the broad outlines of an ordinary bailment have long been settled in Massachusetts12 and elsewhere. Essentially, a bailment is a delivery of property in trust by one party to another for a specific purpose, with an agreement, express or implied, that upon the accomplishment of that purpose, the property will be returned to the original party.13 The general guidelines have been stated thusly:

It is well settled that the relationship of bailor and bailee does not exist unless there is such a delivery of the property that the alleged bailee acquires an independent and temporarily exclusive possession thereof, and unless there is an actual change of legal as well as physical possession of the property from the bailor to the bailee. . . .14

There must, of course, be an acceptance of the goods forming the subject matter of the bailment before a bailor-bailee relationship is formed. Acceptance may be expressed or implied from the transaction.15 Whether a transfer of possession creates a bailment depends upon whether the prospective bailee has assumed control over the vehicle.16 On the precise degree of control necessary to establish a bailment and the factors material to that determination, jurisdictions differ widely, and it is on those issues that Massachusetts courts have been silent. Some courts apply the “temporary and exclusive possession” test strictly, requiring that the parking facility have nearly as much control over the vehicle as its owner ordinarily has and that the management retain the keys and have the right to move the car.17 In other jurisdictions,


14 Southeastern Fair Assn. v. Ford, 64 Ga. App. 871, 872, 14 S.E.2d 139, 140 (1941). Legal possession in this context means a possession that will support an action by the bailee against one who interferes with his possession or negligently destroys the bailed property.


16 Id. §54; 9 Williston, Contracts §1065 n.1 (3d ed. 1967).

the requirements of control are met if the vehicle is within the premises of the parking facility and the management is thus theoretically able to protect it from third parties.\textsuperscript{18} The issuance of parking checks, an important element of control in many cases, has been particularly important where the driver had to present his ticket before he could reclaim his car. According to this view, the parking facility has control even as against the true owner until he produces his claim ticket.

Under a different approach to the issue of control, some courts have looked to all of the circumstances of the parking operation in order to determine whether its operator could reasonably be expected to prevent harm to or theft of the car. If he can safeguard the vehicles entrusted to him, he is considered to have that quantum of control sufficient to be a bailee. Material to this determination are such factors as the number of exits and attendants, the structure of the facility, and the ability of attendants to observe cars and persons in the lot.\textsuperscript{19} Going beyond this approach, some courts will impute control where the alleged bailee has derived some benefit from the transaction other than a parking fee.\textsuperscript{20} Of course, there are variations to each approach, and the weight given to the relevant factors differs from case to case, but jurisdictions generally agree that control is the determinative factor.

The first parking lot case in Massachusetts was \textit{Doherty v. Ernst},\textsuperscript{21} in which the attendant of a small outdoor parking lot watched someone drive over the curbing in the plaintiff's car and did nothing to stop the apparent theft. The Supreme Judicial Court had no difficulty in affirming the trial court's finding of bailment, citing three earlier Massachusetts cases that had involved the bailment of autos elsewhere than in parking lots.\textsuperscript{22} However, the Court did not consider or even acknowledge the factual differences between the earlier cases and the facts in \textit{Doherty}. The Court ineffectively distinguished three cases from other jurisdictions\textsuperscript{23} and failed to discuss the degree of control it considered necessary for a bailment.

Since \textit{Doherty}, many garage or parking lot cases have come before the Supreme Judicial Court,\textsuperscript{24} but in none of them has the existence of a bailment been the principal issue on appeal. This fact may help


\textsuperscript{19} Ex parte Mobile Light and R. Co., 211 Ala. 525, 527, 101 So. 177, 178 (1924). This view seems to confuse the control criteria of a bailment with the considerations that should go toward determining the standard of care that is reasonable to impose once a bailment has been established.


\textsuperscript{21} 284 Mass. 341, 187 N.E. 620 (1933).


\textsuperscript{23} Ex parte Mobile Light and R. Co., 211 Ala. 525, 101 So. 177 (1924); Lord v. Oklahoma State Fair Assn., 95 Okla. 294, 219 P. 713 (1923); Suits v. Electric Park Amusement Co., 213 Mo. App. 275, 249 S.W. 656 (1923).

\textsuperscript{24} See n.11 \textit{supra}.
explain the sketchy treatment heretofore given the bailment question, but the history of the earliest bailed vehicle cases seems to be even more pivotal. The earliest cases involved cars left at garages for repairs.\textsuperscript{25} The nature of a contract for automobile repairs necessitates that the garage keeper take custody of the vehicle, and it was natural for the Supreme Judicial Court to declare such transactions bailments after only cursory analysis. Furthermore, because there was no well-developed law regarding automobile garages in the early part of this century, the Court seems to have derived its approach from the law governing liverymen and warehousemen, who were ordinarily considered bailees of the property that they handled.\textsuperscript{26} Another group of early bailed vehicle cases in Massachusetts involved contracts for “live storage,”\textsuperscript{27} which were similar to the agreement that Mr. Hale had with the Massachusetts Parking Authority. Under this type of contract, a motorist rented space in a garage for an extended period of time during which the car was available for use at his convenience. Unlike the contract in Hale, however, these were usually not impersonal transactions. Neither garages nor automobiles were as plentiful as they are today, and the live storage contract was a person-to-person transaction, sometimes negotiated. Thus, when Doherty was decided in 1933, a number of Massachusetts cases had already found bailments in circumstances where automobiles had been left in the care of a garage owner. The Supreme Judicial Court used the cases as authority for the bailment holding in Doherty, even though Doherty presented different facts. At the time, it may not have seemed necessary to justify or explain the bailment holding beyond citing the older cases; but it seems that in Hale and other recent cases, findings of bailment have been based more on the impetus of Doherty than on an evaluation of present-day conditions. Today we have transactions between motorists and huge parking facilities on a very impersonal basis, creating situations quite different from the early repair and storage cases.

Unlike the Supreme Judicial Court, some of the lower Massachusetts courts have drawn distinctions in parking cases between the licensor-licensee relationship and the bailor-bailee relationship, with the critical consideration predictably being the degree of control exercised by the operator of the parking lot or garage. Two lower court cases involved motel parking lots where the parking was free, drivers could come and go at will, and attendants were not always on duty.\textsuperscript{28} It was held in those cases that the motels merely licensed the use of parking space to their guests. These two cases are not necessarily inconsistent with the


\textsuperscript{26} See, e.g., Hanna v. Shaw, 244 Mass. 57, 59, 138 N.E. 247, 248 (1923).


Supreme Judicial Court opinions finding bailment, since no cases involving so slight a degree of control by the parking facility have come before the Supreme Judicial Court.29 Findings of license in two other lower court cases, Hall v. Lyndon30 and Ravisini v. Auditorium,31 are not so easy to rationalize. In each instance, the driver had entered a parking facility, paid a fee, received a check, and retained his keys. It is difficult to distinguish the facts in these two lower court cases, upon which a license was found, from some Supreme Judicial Court cases in which a bailment was found.32 The Hall opinion, rendered by the Appellate Division of the Boston Municipal Court, recognized the bailment holding in Doherty but attempted to distinguish it: "The evidence in the instant case does not permit of a finding that the defendant ever acquired an independent and temporarily exclusive possession of the plaintiff's automobile which is an essential element of a bailment."33 Although the test of temporary and exclusive possession is common in other jurisdictions, there is no precedent for it in Massachusetts parking cases. Unfortunately, the Hall opinion failed to discuss what was meant by temporary and exclusive possession, and no attempt was made to distinguish or discuss Doherty and other cases in which a bailment had been found. The most important factor in Hall and Ravisini appears to have been the driver's retention of the keys. Nonetheless, as Judge Lewiton pointed out in his concurring opinion in Ravisini,34 the Supreme Judicial Court has twice found bailments where the driver retained his keys.35 Since the decision in Hale, there may have been a change in the approach of the lower courts to the bailment question. The same judge who found a license relationship in Ravisini two years ago recently found bailments in two cases factually similar to both Ravisini and Hall.36 Although he did not distinguish his earlier decision, Judge Adlow reasoned that retention of the keys by the driver did not necessarily indicate that the garage lacked control of the vehicle; he cited Hale and other Massachusetts cases in which a bailment had been

34 42 Mass. App. Dec. 89, 93 (1969). The decision in Ravisini turned on a disclaimer clause printed on the parking check. Judge Lewiton concurred in the result on that basis but disagreed that the relationship in the case was one of license rather than bailment.
35 Greenberg v. Shoppers' Garage, 329 Mass. 30, 105 N.E.2d 839 (1952); D. A. Schulte, Inc. v. North Terminal Garage, Inc., 291 Mass. 251, 197 N.E. 16 (1935). Although the reports of these cases do not mention keys, it should be pointed out that Judge Lewiton sat in the trial court that heard Greenberg. His source for Schulte information is not so clear, although the facts in that case suggest that the plaintiff held the keys.
found even though the drivers had retained their keys. Unfortunately, until the Supreme Judicial Court discusses the bailment issue, lower courts will differ as to the criteria that should be applied in parking cases.

In evaluating the many factors that may be relevant to the question of bailment, it is submitted that the courts or the legislature should begin by realizing that the law of bailment was not fashioned to deal with today's parking lot cases. When adopted in the earliest parking lot cases, it was already a fully developed area of the law, with legal requirements and consequences that had come into being without regard to the interests of the parties in parking cases. Undoubtedly, its adoption was originally intended to distribute equitably the risks involved in commercial parking transactions. If the theory of bailment is to be defended today as suitable for governing actions based on parking transactions, its justification must lie in its adaptability as a method for producing a fair distribution of the risks. No longer should it be necessary to apply a test of temporary and exclusive possession; the parking lot operator should not be required to have the same degree of control over the vehicle that its owner normally has. To qualify as a bailee, the lot or garage owner needs only enough control to be able to ensure that the vehicle will not be treated in a manner other than is ordinarily contemplated in a parking transaction. His ability to exercise that control should be assessed according to the circumstances of his particular parking operation.

Some courts will not look beyond the fact of who retains the keys, reasoning that if the lot owner does not have the keys, he cannot be considered to have control of the car. In fact, however, possession of the keys by one party or the other often has little to do with the potential risks involved in a parking operation. Garage owners who hold drivers' keys usually do so, not to prevent theft or damage, but to be able to move cars in the interest of maximum efficiency. A garage owner cannot deter a professional car thief simply by keeping the driver's keys, for the thief either has his own keys or needs none. As one judge commented in a recent decision, "In a world abounding with car thieves, locks and keys have only a symbolic significance." Nonetheless, in Lee Tire and Rubber Co. v. Dormer, a Delaware court ruled that a parking transaction was not a bailment because the automobile owner had kept his keys. It was the owner's usual practice to leave a set of keys with the management of the facility. On those

37 See Jones, The Parking Lot Cases, 27 Geo. L.J. 162 (1938), where the author complained that the use of the law of bailment in parking cases was an example of trying "to apply settled principles of law to a new problem." Even in 1938, rapid and sweeping social changes were showing up the deficiencies of the bailment approach in parking cases.

38 Coleman v. Chicago Thoroughbred Enterprises, Inc., 102 Ill. App. 2d 400, 243 N.E. 2d 333, 336 (1968), and cases in n.17 supra.


occasions, the court said, his relationship with the management was one of bailment, but on occasions when the keys were not handed over, the control on the part of the management was deemed insufficient to create a bailment. The court did not consider whether the plaintiff’s retention of the keys actually affected the defendant’s ability to store the car in a safe, convenient place. A more sensible application of the keys-control formula can be found in Schwartz v. Miller and Seddon Co.,\(^41\) in which the plaintiff left his car at a garage for repairs but inadvertently kept his key. Because the defendants were unable to move his car into the garage for the night, they were held not liable for the loss of the car. Failure to leave the keys frustrated the purpose of the transaction and thus provided a reasonable basis for a decision precluding bailment.

New York courts have shown a willingness to adapt the law of bailment to achieve a distribution of the risks in parking transactions. A case in point is Klotz v. El Morocco Intl., Ltd.,\(^42\) which involved a nightclub that did not issue parking checks or charge a parking fee. Attendants employed by the club apparently parked the cars on the street wherever space permitted, and the plaintiff’s car was stolen after an attendant had parked it around the corner from the nightclub. Even though the plaintiff had paid no parking fee, the New York court found that the owners of the club owed the plaintiff a duty of ordinary care, on the ground that they had instituted the parking service as a means to attract patrons and had accepted the benefit of the plaintiff’s patronage. In another recent New York decision, as to the issue of whether a delivery of possession sufficient to impose liability on the defendant had taken place, it was determined that this depended upon the intent of the parties, drawn from the particular circumstances of the case, namely, the place, conditions, and nature of the parking transaction.\(^43\)

Another problem area in parking cases involves the use of disclaimers of liability, which are usually printed on the back of parking checks or posted on signs in parking garages. When disclaimers are given full effect, the standard of care that should be required of one who makes money by hiring parking space to others is brushed aside. Fortunately, the general trend is to give only limited effect to disclaimers.\(^44\) New York has gone so far as to void them by statute in parking transactions.\(^45\) Some state courts have held them void in parking cases as

\(^{45}\) “No person who conducts or maintains for hire or other consideration a garage, parking lot or other similar place which has the capacity for the . . . parking . . . of four or more vehicles . . . may exempt himself from liability for damages for injury to person or property resulting from the negligence of such person, his agents or employ-
against public policy\textsuperscript{46} or have held that disclaimers are unilateral and therefore of no effect if not read by the motorist.\textsuperscript{47}

Unfortunately, in Massachusetts it has been held that a disclaimer of liability on a parking check effectively insulates the operator of the parking facility from liability for his own or his servants' negligence, whether or not the disclaimer is read by the motorist.\textsuperscript{48} The only exception to this harsh rule came in a case where the motorist did not read the disclaimer and could reasonably have taken it to be merely a receipt for his car. The Supreme Judicial Court decided that a reasonable man could have assumed that the operator of the garage would take responsibility for the car.\textsuperscript{49}

If rules governing liability in parking cases are to be based on a fair distribution of duty and risk, disclaimers of any kind frustrate that goal and should be disallowed or carefully limited. The chief argument in their favor is that parties to a transaction should be free to negotiate terms between themselves. Modern experience shows that this argument is often specious. In many contemporary urban situations, a motorist is forced to park his car in a commercial garage or lot. Such a motorist, according to one court, is a "captive customer."\textsuperscript{50} A motorist intending to fly out of Logan Airport may have no choice but to leave his car in the Massachusetts Port Authority garage. Similarly, a city dweller who does not have access to a private garage, and who wishes to protect his car from inclement weather and the wear and tear of on-street parking, has little choice but to park his automobile in rented space in a public garage. It is not difficult for thieves to determine that cars are unattended or poorly attended in these situations. It is possible, perhaps, that there is collusion between attendants and thieves in some cases. In \textit{Richard v. Massachusetts Port Authority}, testimony was received that over a period of several weeks, an average of 20 vehicles per week were stolen from the defendant's multilevel garage.\textsuperscript{51} That statistic is appalling, and it becomes more so when, by disclaiming liability, a parking facility can place the loss entirely on the mo-


\textsuperscript{47} Parking Management, Inc. v. Jacobson, 257 A.2d 479 (D.C. 1969); Savoy Hotel Corp. v. Sparks, 57 Tenn. App. 537, 421, S.W.2d 98 (1967).


torist. The Massachusetts policy toward disclaimers should be changed, preferably by legislative action such as that taken in New York.\textsuperscript{52}

Undoubtedly, it is difficult in many cases for garages to prevent theft of or damage to their patrons' vehicles. Eliminating disclaimers may entail significant expenses to lot owners for additional insurance, manpower, and procedures. The cost of parking would probably rise in consequence. However, it is worth pointing out in this regard that in New York, where the standard of care demanded of parking entrepreneurs has been particularly strict in recent years, the parking industry has nevertheless flourished.

\textbf{Richard W. Larkin}

\textsection{13.20.} \textbf{Intentional} infliction of severe mental distress with consequent physical injury: Recognition of an independent tort: George v. Jordan Marsh Co.\textsuperscript{1} The plaintiff's emancipated son purchased goods on credit from the defendant Jordan Marsh Company.\textsuperscript{2} Subsequently, plaintiff alleged, Jordan Marsh, although aware that the plaintiff had in no way guaranteed to pay her son's debt, attempted to collect the debt from her. Mrs. George alleged that in its attempt to collect the debt for which she disclaimed liability, defendant, with intent to cause her great mental distress, "badgered and harassed" her by telephoning her many times late in the evening, by mailing her bills marked "account referred to law and collection department," and by threatening to revoke, and actually revoking, her credit at the Jordan Marsh Company. Plaintiff, after allegedly suffering great mental anguish, deterioration of health, and a heart attack as a result of defendant's actions, retained an attorney. Plaintiff's counsel advised the defendant to cease its harassing tactics immediately because Mrs. George did not owe the debt in question and because her health was being adversely affected by the collection tactics. Mrs. George claimed that the defendant nonetheless continued to employ the same collection tactics, and that, as a result, she suffered a second heart attack.

At trial in superior court, defendant's demurrer was sustained. The Supreme Judicial Court reversed and remanded the case for trial on the merits, declaring that

one who without a privilege to do so, by extreme and outrageous conduct intentionally causes severe emotional distress to another, with bodily harm resulting from such distress, is subject to liability

\textsuperscript{52} In New York, even before the antidisclaimer statute was enacted, some courts had invalidated attempts at disclaimer as against public policy.

\textsection{13.20.} \textsuperscript{1} 1971 Mass. Adv. Sh. 563, 268 N.E.2d 915.
\textsuperscript{2} Plaintiff named three defendants in her complaint: Jordan Marsh Company and two individuals who, plaintiff alleged, represented themselves to her as employees of Jordan Marsh. Since the plaintiff made the same allegations against each of the named defendants, the word \textit{defendant} will be used in this casenote to refer to all three named defendants.
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for such emotional distress and bodily harm even though he has committed no heretofore recognized common law tort.\(^3\)

To understand the step taken by the Supreme Judicial Court in *George*, one must consider the prior rule that had existed in Massachusetts since the Court’s 1897 decision in *Spade v. Lynn & Boston R.R.*\(^4\) In that case the plaintiff, a passenger on the defendant’s train, alleged great mental distress and consequential bodily injury as a result of an altercation, in her immediate presence, between the defendant’s conductor and two intoxicated passengers. There was, however, no physical impact to her person contemporaneous with the altercation, and the Supreme Judicial Court held that

there can be no recovery for fright, terror, alarm, anxiety, or distress of mind, if these are unaccompanied by some physical injury; and if this rule is to stand, we think it should also be held that there can be no recovery for such physical injuries as may be caused solely by such mental disturbance, where there is no injury to the person from without.\(^5\)

In the *George* decision, the Supreme Judicial Court asserted that the *Spade* rule does not apply to cases involving *intentionally* inflicted mental distress. Except for eight cases cited in a footnote,\(^6\) the Court did not rely on decisions from other jurisdictions, choosing instead to draw heavily on the writings of legal scholars as authority for its decision.\(^7\)

Many jurisdictions have for years recognized intentional infliction of severe mental distress as an independent cause of action;\(^8\) but until this “new tort”\(^9\) was recognized in Massachusetts,\(^10\) plaintiffs and the

\(^3\) 1971 Mass. Adv. Sh. 565, 573, 268 N.E.2d 915, 921. The Court also pointed out that there might be a possible remedy under Acts of 1970, c. 883, §1, amending G.L., c. 93, §49 (pertaining to unfair, deceptive, or unreasonable collection procedures). The plaintiff in the *George* case did not raise a claim under the statute.


\(^5\) Id. at 290, 47 N.E. at 89.


\(^7\) Restatement of Torts Second §46; Prosser, The Law of Torts §9 (3d ed. 1964); Harper and James, Torts §9.1 (1956); Magruder, Mental and Emotional Disturbance in the Law of Torts, 49 Harv. L. Rev. 1033 (1936).

\(^8\) See cases cited in treatises and article, n.7 supra.


\(^10\) It should be noted that in an opinion rendered in 1959, the federal District Court for Massachusetts suggested that the Supreme Judicial Court, if faced with the issue, would allow recovery for an intentional infliction of severe mental distress even without consequential bodily injury. Cohen v. Lion Products Co., 177 F. Supp. 486 (D. Mass. 1959).
courts often struggled to find a recognized tort to which a claim for severe mental distress and resultant bodily injury could be attached. In rejecting Jordan Marsh's contention that there should be no recovery because a precedent did not exist in Massachusetts, the Supreme Judicial Court said:

It would indeed be unfortunate, and perhaps disastrous, if we were required to conclude that at some unknown point in the dim and distant past the law solidified in a manner and to an extent which makes it impossible now to answer a question which had not arisen and been answered prior to that point. The courts must, and do, have the continuing power and competence to answer novel questions of law arising under ever changing conditions of the society which the law is intended to serve.

Although the new cause of action is obviously not limited to the debtor-creditor confrontation, it is likely to arise frequently in situations similar to that in George. Therefore, while this casenote will consider the general dimensions of the new cause of action, its effects on the debtor-creditor relationship will be emphasized.

Although George is unquestionably a significant decision, it is also arguably a very narrow one. First of all, the Supreme Judicial Court made it clear that it was not overruling its Spade decision. More importantly, the Court limited its discussion to cases of intentional infliction of severe mental distress with consequential bodily injury, brought about by extreme and outrageous conduct. The first limitation established by the Court is that severe mental distress must be intentionally inflicted. The George decision does not reveal how the word intentionally is to be defined; for the purposes of the demurrer, the defendant had already admitted intent to cause severe mental distress.

11 Although Massachusetts has long allowed recovery of damages for mental distress, the awards were always made as parasitic damages. See, e.g., Frewen v. Page, 238 Mass. 499, 131 N.E. 475 (1921); Stiles v. Municipal Council of Lowell, 233 Mass. 174, 123 N.E. 615 (1919); Fillebrown v. Hoar, 124 Mass. 580 (1878).


13 In other jurisdictions, the first cases in which recognition was given to a cause of action for intentional infliction of mental distress have often been collection cases. See, e.g., Duty v. General Fin. Co., 154 Tex. 16, 273 S.W.2d 64 (1954); Barnett v. Collection Service Co., 214 Iowa 1303, 242 N.W. 25 (1932). Such cases present the courts with complete documentary evidence of the alleged wrong.

14 Although Spade has been much criticized (see, e.g., Brody, Negligently Inflicted Psychic Injuries: A Return to Reason, 7 Vill. L. Rev. 232 (1961) ), the Supreme Judicial Court specifically declined to overrule it. However, the Court noted that it was not ruling on the legal sufficiency of "allegations of negligent, grossly negligent, wanton or reckless conduct"; and the opinion indicates a possible willingness to reconsider Spade. To the same conclusion, see Stashio, George v. Jordan Marsh Co., Middlesex B.Q. (Aug. 1971). Changes in the neighboring jurisdictions of New York and Maine, where decisions very similar to Spade have been overruled, may also put pressure on the Supreme Judicial Court to reconsider Spade. See Batalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961), overruling Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896); Wallace v. Coca-Cola Bottling Plants, Inc., 269 A.2d 117 (Me. 1970), overruling Herrick v. Evening Express Publ. Co., 120 Me. 138, 113 A. 16 (1921).
A look at other jurisdictions, however, suggests that the word intentionally may be interpreted in several ways. A very narrow interpretation would require the plaintiff to prove that the defendant actually acted with the specific intent to cause the plaintiff severe mental distress. Although there are cases in which such an intent is virtually self-evident, such a narrow interpretation would tend to limit recovery. A broader interpretation of intentionally would include instances where the defendant did not actually intend to cause severe mental distress, but should have realized that his acts could reasonably be expected to cause such distress. In Savage v. Boies, for example, the defendant, a police officer, attempted to lure the plaintiff to a hospital for psychiatric tests by telling her that her husband and child had been involved in an automobile accident. The plaintiff, believing the officer's story, suffered extreme mental anguish. The Arizona Supreme Court allowed recovery on the ground that the officer should have realized the probable consequences of his conduct. Since Massachusetts recognizes, as a general rule, that one is presumed to have intended the natural result of his acts, it seems likely that Massachusetts courts would agree with the reasoning in Savage v. Boies. However, considering the Supreme Judicial Court's requirement of consequential bodily injury, there is a question whether the term natural result would embrace bodily injury as well as severe mental distress.

A very broad interpretation of the word intentionally might include wanton or reckless conduct by the defendant, as in Blakeley v. Shortal's Estate, where Shortal committed suicide by cutting his throat in the plaintiff's kitchen. Although intent might be found in such an act, it would seem more appropriate to describe the act as utterly without regard for possible consequences. In George, the Court declined to decide whether an allegation of wanton or reckless conduct would constitute a cause of action. Nevertheless, it should be noted that the Spade decision, which the Court emphasized in George, contained dictum excluding wanton or reckless acts.

Massachusetts courts will also have to decide how to deal with acts directed toward one person that actually cause severe mental distress to another. The doctrine of transferred intent has apparently been applied strictly in only one case involving mental distress, but some

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15 In State Rubbish Collectors Assn. v. Siliznoff, 38 Cal. 2d 330, 240 P.2d 282 (1952), there was evidence that members of the association had threatened to attack Siliznoff physically and destroy his trucks.
18 236 Iowa 787, 20 N.W.2d 28 (1945).
19 "Nor do we include cases of acts done with gross carelessness or recklessness, showing utter indifference to such consequences, when they must have been in the actor's mind." 168 Mass. 285, 290, 47 N.E. 88, 89 (1897).
20 Lambert v. Brewster, 97 W. Va. 124, 125 S.E. 244 (1924). Defendant, unaware of plaintiff's presence or pregnancy, attacked plaintiff's father. Plaintiff suffered severe mental distress and a subsequent miscarriage. This application of the doctrine of transferred intent seems a bit strained; the defendant was completely unaware of the daughter's presence, and no threat of any kind was directed at her. Prosser has described the deci-
courts have allowed recovery on the theory that the defendant's acts were such as to make it substantially certain that the plaintiff would suffer severe mental distress.\(^{21}\) Prosser, however, takes a rather strict view: "However extreme and outrageous the conduct may have been toward the third person, in the absence of any direct intention to affect the plaintiff, some violation of a legal obligation to him must be found before there can be liability."\(^{22}\) The Restatement of Torts Second takes a slightly broader position than that taken by Prosser: "Where [the extreme and outrageous] conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress . . . to any other person who is present at the same time. . . ."\(^{23}\)

The second limitation which the Supreme Judicial Court placed on recovery under the George rule is that the mental distress must be severe. The purpose of the requirement is elimination of claims for transitory mental distress resulting from petty insults and mere hurt feelings. However, beyond distinguishing between the extremes of transitory hurt feelings and genuine extreme mental distress, a quantitative definition of severe mental distress is difficult. Prosser would ask whether the mental distress alleged was what the "reasonable man" of "ordinary sensibilities" would undergo under the same circumstances.\(^{24}\) The Restatement provides a more complete guideline:

The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it. The intensity and the duration of the distress are factors to be considered in determining its severity. Severe distress must be proved; but in many cases the extreme and outrageous character of the defendant's conduct is in itself important evidence that the distress has existed.\(^{25}\)

Case law in other jurisdictions appears to follow the Restatement position that "severe" will often be defined in terms of the outrageousness of the defendant's acts.\(^{26}\)

The third limitation which the Supreme Judicial Court placed on recovery under the George rule is that the severe mental distress must produce consequential bodily injury. In other jurisdictions which require consequential bodily injury, the courts have generally taken a rather liberal view of what is a physical consequence of severe mental

\(^{21}\) E.g., Knierim v. Izzo, 22 Ill.2d 73, 174 N.E.2d 157 (1961). Defendant told plaintiff that he would kill her husband, and subsequently did so.

\(^{22}\) Prosser, Insult and Outrage, 44 Calif. L. Rev. 40, 56 (1956).

\(^{23}\) Restatement of Torts Second \S46.


\(^{25}\) Restatement of Torts Second \S46, Comment j.

\(^{26}\) See, e.g., Duty v. General Fin. Co., 154 Tex. 16, 273 S.W.2d 64 (1954). Defendant continually telephoned plaintiff; sent threatening letters; spoke to neighbors, co-workers, and plaintiff's employer; sent special delivery letters and telegrams late at night; and called plaintiff's relatives collect, demanding payment of plaintiff's debt.
distress. The heart attacks suffered by Mrs. George would certainly satisfy even a restrictive standard; the problem arises when headaches, loss of sleep, nervousness, crying spells, etc., are alleged as physical consequences. The Court of Appeals for the First Circuit has said:

The term “physical” is not used in its ordinary sense for purposes of applying the “physical consequences” rule. Rather, the word is used to indicate that the condition or illness for which recovery is sought must be one susceptible of objective determination. Hence, a definite nervous disorder is a “physical injury” sufficient to support an action for damages. . . . [Emphasis added.]

Such a standard seems desirable because its requirement of “objective determination” allows for advances in diagnostic medical technology and provides a rational basis for evaluating alleged injuries.

Under the George rule, the plaintiff must show not only that the mental distress alleged was severe, and that the consequential injury alleged was physical, but also that there was a causal relationship (a) between the conduct of the defendant and the alleged severe mental distress, and (b) between the alleged severe mental distress and the alleged bodily injury. Although producing objective scientific proof of the existence and cause of severe mental distress is often difficult, convincing a jury may not, as a practical matter, be quite so difficult. As Chief Justice Traynor of the California Supreme Court has pointed out, jurors can generally determine from their own experience what acts could reasonably be expected to cause severe mental distress in an ordinary person. Further, if it can be shown that the defendant actually intended to cause the plaintiff severe mental distress, the causal relationship is easily established. A complication may be added if the


28 Petition of United States, 418 F.2d 264, 269 (1st Cir. 1969). Although this case was an admiralty action alleging negligence on the part of the Coast Guard in towing a disabled vessel, the definition of “physical consequences” enunciated by the court could be applied to cases of intentional infliction of mental distress.

29 The medical profession has historically taken a much stricter view of the meaning of the word cause than has the legal profession. For a thorough discussion of the difference between the viewpoints of the two professions and some suggestions for resolution of the conflict, see Averbach, Causation: A Medico-Legal Battlefield, 6 Clev.-Mar. L. Rev. 209 (1957); Small, Gaffing at a Thing Called Cause: Medico-Legal Conflicts in the Concept of Causation, 31 Texas L. Rev. 630 (1953).

30 See Wasmuth, Medical Evaluation of Mental Pain and Suffering, 6 Clev.-Mar. L. Rev. 7 (1957).

plaintiff is, for some reason, extremely susceptible to psychic stimuli. In such a situation, most courts would probably agree that if the defendant intended to cause the plaintiff severe mental distress, he cannot defend on the ground that he could not have succeeded without the plaintiff’s unknown extreme susceptibility. If the defendant did not actually intend to cause severe mental distress, the plaintiff should be required to prove that the defendant was aware of plaintiff’s extreme susceptibility and acted with that knowledge.

Proving the second link of causation, between the alleged mental distress and the alleged physical injury, can be especially difficult. There seems to be little doubt that severe mental distress can have certain physical consequences, but “[d]espite impressions prevalent in some quarters, psychic stimuli such as fright do not usually produce physical injury or disability in an average person.” The fact that severe mental distress may be only a “trigger” for a preexisting disorder does not preclude recovery, but may place a definite burden on the plaintiff:

Plaintiff should be required to prove that physiological changes generated by emotional stimulus in the opinion of science can injuriously affect the particular organ of his body or aggravate his particular preexisting impairment as alleged. Furthermore, proof that the injury could result from the stimulus, is only one step in proving that it probably did do so. Affirmative corroboration of probable causation is important, and causation by adequate independent causes should be negatived.

Perhaps of greatest importance is the threshold question of whether a given emotional stimulus can cause the physical injury alleged; yet scientific support for a particular claim will vary. For example, there seems to be sufficient scientific evidence to support a claim that an attack of angina pectoris can be caused by severe mental distress, but some authorities have questioned whether abortion (miscarriage) can ever be caused by severe mental distress.

35 Smith, Relation of Emotion to Injury and Disease, 30 Va. L. Rev. 193, 302 (1944).
36 See also Moritz, Pathology of Trauma 16-17 (1954).
38 Note, 15 U. Chi. L. Rev. 188 (1947); Smith, Relation of Emotion to Injury and Disease, 30 Va. L. Rev. 193, 295-296 (1944).
Proof of causation between mental distress and physical injury will usually involve expert medical testimony, which can be very difficult for the laymen on a jury to evaluate. Perhaps as a result of the complexity of the medical evidence, many cases seem to have been decided largely on the basis of probabilities. Three interesting suggestions have been offered to meet the problem of evaluating complex medical testimony. One suggestion would involve an expanded use of judicial notice:

The antidote requires recognition that "conflict of expert testimony" at trial is no guarantee that the evidence is scientifically sufficient to support a verdict. Under existing practice, the chief corrective is for courts to employ the doctrine of judicial notice freely in determining whether the evidence satisfies scientific criteria of proof expounded on behalf of the medical profession by accredited writers.

Such an expansion of judicial notice should be weighed carefully, since it is unlikely that most judges would have any greater medical competence than would the jury. The court would be dealing with "facts which are 'verifiable' by the Court, but only by its investigation and assessment of data beyond the personal competence of the Court to evaluate." Unless the court is supplied with expert and impartial assistance in evaluating data and relating it to the fact proposed for judicial notice, it seems that formal proof should be required.

Another suggestion for dealing with the problem of complex medical testimony is that "[v]erdicts should be directed against persons having the burden of proof in all cases where the evidence is insubstantial and speculative." This suggestion is based on the assumption that the judge is in a better position than is the jury to evaluate the proffered medical testimony, an assumption which is surely questionable. In Massachusetts, the judge must assure himself of the qualifications of all witnesses offered as medical experts. If the witnesses offered by both the plaintiff and the defendant qualify as experts, the question of

39 See, e.g., Caputzal v. Lindsay Co., 48 N.J. 69, 222 A.2d 513 (1966) (no recovery for heart attack allegedly suffered as a result of seeing brown water flow from water softener); Darrin v. Capital Transit Co., 90 A.2d 823 (D.C. Mun. Ct. App. 1952) (insufficient medical evidence to link with nervous shock the plaintiff's inability to grasp tightly with either hand); Doherty v. Mississippi Power Co., 178 Miss. 204, 173 So. 287 (1937) (extreme nervousness, physical pain, and near miscarriage not "natural and probable" result of disconnection of electric service for alleged nonpayment of bills); St. Louis, I.M. & S. Ry. v. Bragg, 69 Ark. 402, 64 S.W. 226 (1901) (nervous prostration not "natural and probable" result of being let off train 40 or 50 feet from lighted public crossing at night). The cases noted above were all cast as negligence actions by the courts. Apparently, in cases involving intentional infliction of mental distress, courts have not been so concerned with positive proof that the alleged severe mental distress did cause the alleged bodily injury as they have been in cases involving negligent infliction of mental distress.


43 Smith, Relation of Emotion to Injury and Disease, 30 Va. L. Rev. 193, 305 (1944).

causation must go to the jury unless one of the expert witnesses fails to base his opinion on "facts proved or assumed, sufficient to enable the expert to form an intelligent opinion," or unless he fails to form any opinion at all, "however cautiously stated." 45

A third suggestion for dealing with complex medical testimony involves the convening of an impartial panel of medical experts. 46 These experts would examine the plaintiff and offer impartial testimony in regard to causation. The purpose of such a plan is to avoid the clashing of expert opinion, which can confuse a lay jury. The merits of such a plan have been hotly debated by members of both the medical and legal professions. 47 Although the impartial expert witness approach has its attractions, it does create problems where a valid difference of opinion still exists within the medical community.

The three suggestions noted above appear to be motivated by a fear that a lay jury grappling with complex medical evidence may base its decision more on the ability of counsel to arouse sympathy than on scientific criteria. 48 Although the court is presumably less likely to be swayed by counsel than is the jury, the court has, at present, no greater medical expertise than the jury. Perhaps the solution to the problem of complex medical evidence is not to diminish the role of the jury, nor to eliminate the conflict of expert testimony, but to eliminate the absolute requirement of consequential bodily injury. The rationale advanced for the requirement of consequential bodily injury is that it is evidence of the existence and severity of the alleged mental distress. 49

This rationale is drawn somewhat into question when some of the physical consequences which have been accepted by the courts are examined. It would seem arguable that just as the impact requirement in actions for negligent infliction of mental distress was often circumvented by allowing the slightest impact to satisfy the requirement, 50 so has the consequential physical injury requirement, in some cases, been virtually nullified. 51

45 Id. §326.
48 See Puhl v. Milwaukee Auto. Ins. Co., 8 Wis. 2d 343, 99 N.W.2d 163 (1959). Plaintiff, 12 weeks pregnant, was injured in an automobile accident caused by defendant's negligence. Plaintiff subsequently gave birth to a Mongoloid child. The jury awarded $50,000 for the impairment of the child. The Wisconsin Supreme Court held that the evidence of causation was inadequate as a matter of law. The Court's opinion suggested that "[a] scientific theory is not legally validated simply because a physician is willing to base an opinion on it." In the Puhl case, however, neither the plaintiff's doctor nor the defendant's doctor was qualified as an expert in the area of causation of Mongolism. The case was discussed in Note, 110 U. Pa. L. Rev. 554, 598 (1962).
51 See n.27 supra.
The Restatement adopts the position that an absolute requirement of consequential physical injury is not necessary. Since the Supreme Judicial Court in George relied heavily on the Restatement, it is possible that in subsequent cases the Court will be inclined to adopt the entire Restatement position. Perhaps, as Prosser suggests, the most satisfactory rule is one which relates the necessity of showing consequential physical injury to the outrageousness of the defendant's conduct:

Probably the conclusion to be reached is that where physical harm is lacking the courts will properly tend to look for more in the way of extreme outrage as an assurance that the mental disturbance claimed is not fictitious; but that if the enormity of the outrage itself carries conviction that there has in fact been severe and serious mental distress, which is neither feigned nor trivial, bodily harm is not required.

The fourth limitation which the Supreme Judicial Court placed on recovery under the George rule is that the conduct of the defendant must be "extreme and outrageous." Prosser suggests that the conduct must go beyond all bounds of decency—that it must be "atrocious, and utterly intolerable in a civilized community." The Restatement guideline suggests that "[g]enerally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!' " The first cases recognizing a cause of action for intentional infliction of severe mental distress involved unquestionably reprehensible conduct. Cases in the specific area of debt collection, however, have shown a trend toward the use of a "reasonableness" standard, even though there is still reference to the standard of "extreme and outrageous" conduct.

This emerging reasonableness standard seems to be comprised of three factors: (1) consideration of the debtor's susceptibility to emotional distress resulting from the creditor's collection efforts (the creditor must have actual or apparent power over the debtor); (2) consideration of the legitimacy and collectibility of the debt; and (3) consideration of the intent of the creditor. Although the reasonableness

52 "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." Restatement of Torts Second §46.

54 Prosser, Insult and Outrage, 44 Calif. L. Rev. 40, 44 (1956).
55 Restatement of Torts Second §46, Comment d.
standard is a stricter standard viz-a-viz the creditor than is the "extreme and outrageous" standard, no creditor would be denied the right to collect a valid debt by reasonable, legal means.\(^59\) In a recent Iowa case, the court announced that "[i]f there is an undisputed amount owed and the debtor refuses to pay, tactics used to collect might well be more drastic than those permissible where no debt is owed or its existence is disputed."\(^60\) The Supreme Judicial Court may have been considering the foregoing line of reasoning when it referred in George to the possibility of the creditor having a certain privilege ("one who, without privilege to do so"). The reasonableness standard would create a qualified privilege\(^61\) protecting the creditor so long as he uses reasonable, legal means to pursue a legitimate and collectible debt.

The use of the words *extreme and outrageous* in the Restatement was intended to exclude recovery for the petty insults and upsets of our modern society.\(^62\) Arguably, individuals still need the freedom to blow off steam without fear of legal liability.\(^63\) It is suggested, however, that in the limited area of debtor-creditor relations, a reasonableness standard, as outlined above, would be more appropriate than the Restatement position. In a society that places such great emphasis on credit and credit ratings, the debtor can be at a great disadvantage when dealing with an overreaching or unscrupulous creditor. The reasonableness standard would protect the debtor against unreasonable intrusions by creditors, and at the same time would protect the legitimate interests of creditors.

The *George* decision invites several subsidiary questions, the first of which concerns the matter of notice to the defendant. Must the plaintiff always inform the defendant of the consequences which the defendant’s conduct is allegedly producing, and must such notice include claims of physical injury as well as severe mental distress? In *George*, the Supreme Judicial Court emphasized the fact that Jordan Marsh continued its collection efforts in the face of notice by the plaintiff that she did not owe the debt and that she was suffering severe mental and physical anguish as a result of Jordan Marsh’s conduct. Courts in other jurisdictions seem to agree that notice is required only when the defendant did not actually intend to cause harm and could not be expected to know that his conduct would be likely to cause harm.\(^64\) The


\(^60\) *Beneficial Fin. Co. v. Lamos*,—Iowa—, 179 N.W.2d 573, 584 (1970).


\(^62\) Restatement of Torts Second §46, Comment d.


\(^64\) Reading together the cases of *Duty v. General Fin. Co.*, 154 Tex. 16, 273
Restatement has adopted a similar position.65 As to the content of the notice, it would seem that notice of consequential bodily injury should be required only in jurisdictions which require consequential bodily injury as a prerequisite to recovery. Perhaps the emphasis on notice in the George decision arises from the Supreme Judicial Court's feeling that the harassment alleged may not have been outrageous unless viewed in the context of the defendant's refusal to heed the plaintiff's notice that the debt was not owed and that the collection tactics were causing her severe mental and physical distress.

It seems clear that a creditor need not cease reasonable collection efforts simply because he has received an unverified notice that his collection tactics are causing the debtor severe mental and physical suffering. If, upon the receipt of such notice, the creditor were obliged to cease all collection efforts, he could be faced with financial hardship, and the debtor would be able to delay payment of a valid debt. Arguably, in order to protect the creditor from such a burden, it should be realized that "[t]he debtor has voluntarily chosen to join the modern trend toward credit living and, in so doing, has impliedly assented to pressure from those who have a legitimate interest in the timely payment of his debts."66 The Restatement is in accord with this view: "The actor is never liable, for example, where he has done no more than to insist on his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress."67 (Emphasis added.) A different situation may arise, however, if the creditor receives substantial verification that his collection efforts have caused actual physical distress.

A different question may also be posed where there is the possibility that the debtor may not be liable for the debt. In its brief for the Supreme Judicial Court, Jordan Marsh argued:

[At Jordan Marsh Company,] collection procedures are handled by individual employees who have no knowledge of the particular customer, no way of knowing the particular facts and circumstances concerning the purchases charged to the customer's ac-

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65 Restatement of Torts Second §46, Comment f.
67 Restatement of Torts Second §46, Comment g.
count, and no direct financial interest in whether or not a given overdue account is collected. These merely carry out a routine procedure from the time an account becomes overdue until such time as the account is paid, charged off as worthless, or referred to an attorney for redress through the courts.68

The argument reflects the apparent inability of Jordan Marsh’s credit machinery, like that of many other businesses, to respond to notice that a debt is not owed. Use of credit is increasing rapidly in our society. In view of the fact that almost all major credit problems are reported to central files available to all member creditors, and in view of the fact that loss of credit at a store such as Jordan Marsh may mean impairment or loss of all credit, it would not seem unreasonable to require the creditor to investigate allegations of non-liability for debts. Although debtors could take advantage of such a requirement, perhaps the burden on creditors should be weighed against the harassment and impairment of credit that a person may be subjected to because of clerical or mechanical error.

Creditors who retain collection agencies to collect debts for them should ascertain what methods the agencies use in pursuing the debt, since the creditor could be held liable for the extreme and outrageous conduct of its collector on an agency theory.69 Where a collection agency is employed by the creditor, notice to the agency would, under agency principles, be notice to the creditor.

A second subsidiary question raised by the George decision is whether the new cause of action will survive the death of the plaintiff, assuming that the death is not itself traceable to the defendant. The answer to the question depends on the interpretation given to the survival statute: “In addition to the actions which survive by the common law, the following shall survive: . . . (2) actions of tort (a) for assault, battery, imprisonment or other damage to the person. . . .”70 Massachusetts courts have in the past interpreted the phrase “damage to the person” to mean actual bodily injury, rather than emotional distress,71 and the Massachusetts survival statute has apparently been uniformly interpreted to preclude survival of actions where the injury alleged was to the plaintiff’s feelings.72 In Cohen v. Lion Products Co.,73 which is the only case to date dealing with the effect of the Massachusetts survival statute on the tort of intentional infliction of mental distress, the federal District Court for Massachusetts concluded that the

68 Brief for Defendant at 13-14, George v. Jordan Marsh Co.
69 It is not within the scope of this casenote to discuss the liability of a creditor who sells his uncollected bills to a collection agency.
70 G.L., c. 228, §1.
cause of action would not survive the death of the plaintiff.\textsuperscript{74} The rule adopted by the Supreme Judicial Court in \textit{George v. Jordan Marsh Co.} is narrow and carefully worded, leaving the Court with flexibility in deciding future cases on the merits. There is room in the rule for expansion, even to the point of dropping the requirement of consequential bodily injury in cases of particularly reprehensible conduct by a defendant. On the other hand, the Court has charted a difficult path for plaintiffs claiming under the \textit{George} rule and has set up formidable barriers against fraudulent claims. Massachusetts was relatively late in recognizing a cause of action for intentional infliction of severe mental distress with consequential physical injury; the courts of the Commonwealth are in a position, therefore, to benefit from the experience of other jurisdictions.

\textbf{William H. Lyons}

\textsuperscript{74} Id. at 490. Although Judge Wyzanski’s conclusion is not binding on Massachusetts state courts, his reasoning seems persuasive. Perhaps only legislative action to amend G.L., c. 228, §1 will allow survival of the cause of action. For a general discussion of the concept of survival of causes of action, see Note, 48 Harv. L. Rev. 1008 (1935).