Chapter 1: Torts

James W. Smith
§1.1. Overruling Established Common Law: Retroactivity. In a case decided during the Survey year, Bouchard v. DeGagne, the Supreme Judicial Court held that the rule established in the 1973 decision of Mounsey v. Ellard is to be applied retroactively. In Mounsey, the Supreme Judicial Court overruled a long-standing common law rule that distinguished among business invitees, social invitees, and licensees as regards the duty of care owed them by an owner or occupier of land. The Court in Mounsey held that an owner or occupier of land owes a duty of reasonable care to all lawful visitors on the land, but did not change the rule that a trespasser is owed only the lesser duty of avoiding willful and wanton conduct. The Court did not express an opinion on whether the rule should be applied retroactively or merely prospectively.

The accident that resulted in the injuries to the plaintiff in Bouchard occurred after the date of the injury in the Mounsey case but before the Court's decision in Mounsey. The plaintiff in Bouchard argued that since the Court applied the new rule retroactively in favor of the plaintiff in Mounsey, the rule should be applied retroactively at least as far back as the date of the injury in Mounsey. Although the Court rejected the plaintiff's suggestion that retroactive application necessarily followed from the Court's applying the new rule in Mounsey itself, it concluded that retroactive application was appropriate because of the absence of substantial reliance on the old rule.

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

5 Id. at 1861, 329 N.E.2d at 116.
6 Id. at 1861-62, 329 N.E.2d at 116.
7 Id. at 1862-63, 329 N.E.2d at 116.
Whenever an appellate court re-examines an established common law rule and finds it wanting, it is faced with a second question: has the party opposing the change (and others similarly situated) relied upon the established rule in shaping his conduct so that a retroactive application of the new law would operate unfairly?8 Four options are available to the court. First, the court may apply the old, established rule to the case at bar but issue a warning in its opinion that the court looks with disfavor on the established rule.9 The warning is often accompanied by a statement of intent to abolish the established rule at some future time.10 This threat may be a conditional one, where, for example, the court seeks a legislative solution to the problem.11 Second, the court may actually purport to overrule the established rule but refuse to apply the new rule to the case at bar or to transactions or occurrences that took place prior to the announced change. This so-called "prospective overruling" approach12 has withstood a constitutional attack in the United States Supreme Court.13 Third, the court may apply the new rule to the case at bar but refuse to apply it to other transactions or occurrences that took place prior to the announced change.14 This approach meets an objection to the first and second approaches that, unless litigants who have incurred the expense involved in changing the established rule obtain the benefit of that change, outmoded common law rules will be perpetuated.

8 Reliance is particularly a problem in the property area (including the area of wills and trusts) where titles to property are involved, and in the contract area where the parties have deliberately shaped their conduct in reliance on the established rule. It is usually less of a problem in the torts area, particularly in negligence cases. But see Colby v. Carney Hospital, 356 Mass. 527, 254 N.E.2d 407 (1969), discussed in Smith, Medical Malpractice, 1972 Ann. Surv. Mass. Law § 15.3, at 375; Higgins v. Emerson Hospital, 1975 Mass. Adv. Sh. 1499, 328 N.E.2d 488, discussed in § 1.4, infra.


12 For a comprehensive treatment of this subject, see Levy, Realist Jurisprudence and Prospective Overruling, 109 U. Pa. L. Rev. 1 (1960).


through lack of incentive to change them.15 Fourth, when the court finds little or no reliance on the established rule, it may apply the new rule retroactively. Tort cases most often fall in this category.16

Thus, in taking the fourth approach in Bouchard, the Court reasoned that the "precautionary conduct of this or almost any other landowner almost certainly was not based on any appreciation of the subtle distinctions between invitees, and social guests and licensees."17 The Court also concluded that the problems of insurance coverage were almost certain to be minimal, partially because "the heavy burden of proof imposed under the gross negligence requirement of the old rule had been substantially undermined by a large number of cases which held that an economic benefit had been conferred on the landowner by the presence and purpose of his guest."18

§1.2. Product Liability: Evidence of Post-Sale, Pre-Accident Improvements. In doCanto v. Ametek, Inc.,1 the Supreme Judicial Court considered the admissibility in a negligence action of evidence of design improvements that were made in a machine's safety features after an unimproved machine was sold to the plaintiff's employer, but before the plaintiff was injured by that machine. The Court upheld the lower court's admission of the post-sale, pre-accident improvements for three purposes: "(1) to demonstrate the feasibility of redesign of the machine's safety features; (2) to show [the defendant-manufacturer's] knowledge, if any, of inadequacies in the 'existing safety features' of the [machine]; and (3) to establish [the defendant-manufacturer's] duty to warn purchasers of the [machine] of any deficiency in the [machine's] safety features."2 The jury had been instructed that the evidence of safety improvements was not in and of itself evidence of negligence.3

The plaintiff in doCanto was injured when her hand was caught in a commercial ironer manufactured by the defendant. Although the electricity that powered the ironer shut off when the plaintiff's hand activated the safety mechanism, the momentum of the rollers in the ironer (described as overtravel) caused her hand to be pulled farther into the machine.4 The plaintiff was allowed at trial, over the defendant's objections, to introduce evidence of an improvement in

15 For an extreme application of this approach in a mass injury tort case, see Molitor v. Kaneland Community Unit Dist. No. 302, 29 Ill. App. 2d 471, 476-77, 173 N.E.2d 599, 602 (1961), where the court applied the new rule to some, but not all, of the victims of the same accident. Fortunately, this decision was ultimately reversed by the Illinois Supreme Court. 24 Ill. 2d 467, 470, 182 N.E.2d 145, 146-47 (1962).
17 Id. at 1862-63, 329 N.E.2d at 116.
18 Id. at 1863, 329 N.E.2d at 117.
2 Id. at 1594, 328 N.E.2d at 876.
3 Id.
4 Id. at 1592, 328 N.E.2d at 875.
the ironer that reduced the overtravel and moved the safety bar further from the rollers. The plaintiff's action against the manufacturer of the machine rested upon negligence in the design of the machine and the manufacturer's failure to inform purchasers of the machine: (1) of the risk created by the negligent design, and (2) that, subsequent to the sale, it had developed an improvement in the machine that eliminated the overtravel.

The Court's holding that the evidence of the improvement was admissible on the issue of defendant's negligence in failing to inform purchasers of the risk and subsequent improvement seems correct. There was evidence at trial that the overtravel in the ironer was known to the defendant's designer and there was testimony by the designer that the improvement could have been incorporated into the old ironers at a small cost. Even if there had not been any negligence in the design of the original machine, a case of negligence would seem to be proved by the failure of the manufacturer to notify purchasers of the original machine that a safety improvement could be incorporated into the machine at a small cost.

The admission of the evidence of the improvement on the issue of negligence in the original design is questionable. On this issue, the trial judge admitted the evidence for the purpose of showing "the feasibility of redesign of the machine's safety features." By "feasibility," the trial judge and the Court apparently meant the practical possibility of defendant's making the improvement.

The Supreme Judicial Court established the admissibility of evidence of subsequent repairs to show practical possibility in 1907, in Beverley v. Boston Elevated Railway Co. The Court held that evidence of post-accident improvements was admissible to prove the practical possibility, with regard to the conduct of defendant's business, of making such a safety improvement where defendant's counsel refused to concede such. The Court in Beverley stated: "For this purpose, under this condition of the evidence and of the contentions made by the defendant, the evidence was competent."

Five years later, in Coy v. Boston Elevated Railway Co., the Supreme Judicial Court, without citation of authority on the point, held that evidence of a subsequent improvement (a fence) was admissible to show practical possibility, with regard to the defendant's business, even though defendant's counsel conceded that the improvement was possible. Subsequently, in the 1917 decision of Conry v. Boston &

---

5 Id. at 1598-99, 328 N.E.2d at 877.
6 Id. at 1599, 1602, 328 N.E.2d at 877, 878.
7 Id. at 1061-62, 328 N.E.2d at 878.
8 Brief for Plaintiff at 9, doCanto.
10 194 Mass. 450, 458, 80 N.E. 507, 508 (1907).
11 Id. at 458, 80 N.E. at 508 (emphasis added).
Maine Railroad, the Court sustained defendant's objection to the admission of a subsequent improvement (again a fence) "because there was no evidence that the defendant contended that it was either impossible or impracticable to erect and maintain the fence as it was in fact erected." The Court distinguished Beverley on this point and made no reference to Coy. The issue has lain dormant since Conry until doCanto.

On appeal in doCanto, the defendant, citing Beverley, argued that the evidence of the improvement should be inadmissible since the defendant had conceded that the improvement was practical. The Court disagreed, citing Coy, and held that the evidence of the improvement in the ironer did not become inadmissible simply because defendant conceded that the design improvement was feasible; further, the Court rejected "any suggestion to the contrary in Conry v. Boston & Maine R.R." The Court's admission of the evidence of the improvement for the purpose of showing practical possibility is unsound. Practical possibility is a factor in balancing the burden on the defendant of avoiding harm to the plaintiff against the risk and gravity of that harm. With a technological development, as opposed to a fence, however, the question of practical possibility does not even arise until it is established that the development was known or discoverable at the time of the original design. The improvement in doCanto was made after the ironer that injured the plaintiff was sold to her employer. There was no expert testimony that this improvement device was discoverable by the exercise of ordinary care at the time the original ironer was manufactured. Technological developments are not the same as fences and ought to be treated differently. This is not to say that a jury, in an appropriate case, would be unable, based upon its own knowledge and experience, to conclude that a manufacturer was negligent in placing in the market a machine that carried a certain degree of risk. Rather, what appears improper is allowing a jury to reach the question of practical possibility without expert help on the discoverability question. The mere fact of a subsequent improvement does not establish that the improvement was discoverable at the time of the original manufacture. Nor, even if discoverability were conceded, would the fact of subsequent improvement necessarily establish practical possibility. Whether, if discoverability were conceded, the jury should be allowed to determine practical possibility without expert testimony would depend upon the nature of the improvement. The precedent

14 Id. at 414, 116 N.E. at 754.
15 Id.
is even more devastating when applied to the breach of warranty area.\textsuperscript{18}

The Court's decision is also questionable as a matter of policy. In Massachusetts, as in most states, evidence of post-accident repairs or improvements is inadmissible to prove negligence.\textsuperscript{19} Exclusion of this evidence for that purpose rests upon the belief that a contrary rule would discourage owners from correcting property defects following an accident out of fear that such correction would amount to an admission of prior negligence.

On appeal in \textit{doCanto}, the defendant argued that the policy behind the exclusion of evidence of subsequent repairs and improvements applied with like force to pre-injury improvements. The Court disclaimed a parallel policy issue on the basis that in pre-accident situations there is no vested tort claim inhibiting such improvements and that other economic factors (\textit{e.g.}, reduction of potential future tort claims) will tend to encourage such improvements.\textsuperscript{20} On the other hand, unlike the usual repair situation involving only one item (\textit{e.g.}, stairs), a manufacturer's improvement will relate to items that are in the hands of numerous users. The admission in evidence of a pre-accident improvement, developed after the original items had been sold, to establish that such improvement was feasible at the time of the original design, may tend to discourage the development of such improvement in the same manner that the subsequent repair of an isolated item after an accident would be discouraged by the rejection of the subsequent repairs rule.

\section*{B. Immunity}

\textbf{§1.3. Immunity: Commonwealth of Massachusetts.} In the 1973 decision of \textit{Morash \& Sons, Inc. v. Commonwealth,}\textsuperscript{1} the Supreme Judicial Court pointed out persuasive reasons for abolishing state and municipal immunity, but refrained from doing so judicially, concluding that such a sweeping change could better be accomplished by the Legislature.\textsuperscript{2} Although no legislation abolishing or limiting sovereign immunity has been enacted in the two years following \textit{Morash}, in \textit{Hannigan v. New Gamma-Delta Chapter of Kappa Sigma Fraternity, Inc.,}\textsuperscript{3}

\begin{flushright}
\textsuperscript{1} See G.L. c. 106, § 2-318, which extends the scope of a seller's liability for breach of his express or implied warranty. \\
\textsuperscript{19} National Laundry Co. v. City of Newton, 300 Mass. 126, 127, 14 N.E.2d 108, 109 (1938); Shinners V. Proprietors of Locks & Canals on Merrimack River, 154 Mass. 168, 28 N.E. 10 (1891). Such evidence has, however, been admitted for other purposes, as for example, to establish plaintiff's control over the area of the accident. Finn v. Peters, 340 Mass. 622, 625, 165 N.E.2d 896, 898 (1960). \\
\textsuperscript{20} 1975 Mass. Adv. Sh. at 1596 n.3, 328 N.E.2d at 876 n.3.
\end{flushright}
§1.4 Torts

decided during the Survey year, the Court again refrained from abolishing the doctrine. Noting that since Morash, legislation has been filed and has been referred to the Judicial Council, the Court stated that it would continue to refrain from abolishing sovereign immunity until the Legislature acts or until events demonstrate that it does not intend to act.\(^4\)

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

§1.4. Charitable Immunity: Non-Retroactivity. In two decisions during the Survey year, Higgins v. Emerson Hospital\(^1\) and Johnson v. Wesson Women's Hospital,\(^2\) the Supreme Judicial Court applied the doctrine of charitable immunity to torts occurring in the interim period between the Court's 1969 decision in Colby v. Carney Hospital\(^3\) and the enactment in 1971 of section 85K of chapter 231 of the General Laws.

In Colby, the Supreme Judicial Court, impatient with the Legislature's failure to abolish or limit the doctrine of charitable immunity, declared its intention to abolish the doctrine judicially at the next opportunity.\(^4\) By the time the next opportunity occurred in 1972, in Ricker v. Northeastern University,\(^5\) the Legislature had responded, by enacting section 85K of chapter 231 of the General Laws, which abolishes the doctrine of immunity but limits the liability of charities for their torts to $20,000.\(^6\) Because of this legislative action, the Supreme Judicial Court applied the charitable immunity doctrine in Ricker;\(^7\) the Court also refused to give any retrospective effect to the statute.\(^8\) It should be noted, however, that the tort in Ricker occurred before the Colby warning; on a reliance concept, therefore, the Ricker result was correct.

Two questions remained unanswered after Ricker: (1) is the doctrine of charitable immunity applicable for interim cases, where the alleged tort occurred after the Colby warning but prior to the effective date of the statute limiting charitable immunity; and (2) does the fact that the defendant-charity carried liability insurance at the time the tort

\(^4\) Id. at 1421-22, 327 N.E.2d at 885.
\(^4\) Id.
\(^6\) G.L. c. 231, § 85K.
\(^8\) Id. at 301-02, 279 N.E.2d at 673.
occurred (perhaps in reliance on the Colby warning), have any relevance to the issue of its liability?

The Court in Higgins and Johnson applied the doctrine to post-Colby torts, and in Johnson held that the presence of liability insurance has no effect on the operation of the doctrine.\(^9\)

Although the torts in Higgins and Johnson occurred after the Colby warning, the Court's refusal to abolish the doctrine of charitable immunity appears correct.\(^{10}\) Although precedent exists for the judicial abolition of a common law doctrine in anticipation of the effective date of a statute abolishing the doctrine,\(^{11}\) practical difficulties militated against following such precedent in Higgins and Johnson. The legislative response to the Colby warning was not a total abolition of the doctrine; rather, it limited the liability of a charity for its torts to $20,000. Abolition of the doctrine in interim cases would have imposed unlimited liability on charities, frustrating rather than enhancing the clear legislative purpose to provide charities a limited immunity. Also, such abolition could have had devastating results to a charity that had acquired liability insurance based upon the $20,000 limitation of liability set out in the statute.

The second question left unanswered after Ricker was raised in the Johnson case: whether the defendant-charity's purchase of a liability insurance policy covering the period when the alleged tort occurred constituted a waiver of the defense of charitable immunity. The Court answered this question in the negative. This ruling also seems correct. As the Court in Johnson points out,\(^{12}\) no inference of a waiver is warranted by the purchase of insurance. Likewise, in the absence of legislation so indicating, no such presumption is warranted.

On the other hand, legislation adopting a presumption of waiver of limited liability where the charity is insured in excess of $20,000 would appear advisable. The insurance company, which is the interested party in such cases, should be estopped by its acceptance of premiums covering liability over $20,000 from attempting to limit the insured's liability to $20,000. Perhaps legislation could require that a liability policy covering a charity for over $20,000 contain a statement that the insured and insurer waive the defense of charitable immunity up to the amount of the coverage in the policy.\(^{13}\)

---


\(^{10}\) It is unlikely that the Supreme Judicial Court lost any credibility as the result of its refusal to carry out the Colby warning. A fair reading of Colby does not indicate that the Court has prospectively overruled the doctrine of charitable immunity; rather, it reveals that a legislative response to the problem would stay the Court's hand. This is what occurred.


\(^{13}\) To protect the insured charity and the victim in the event that the insurer sought to assert the defense despite the contract provision, it would seem advisable, in view of the current doubt as to the enforceability of third party beneficiary contracts in Massachusetts, see Bettencourt v. Bettencourt, 1972 Mass. Adv. Sh. 1071, 1079, 284 N.E.2d 238, 244, to also enact a provision providing that the victim may maintain an action on the policy in his own name. Cf. G.L. c. 175, § 11.
Alternatively, section 85K of chapter 231 of the General Laws could be amended so as to impose tort liability on charities up to $20,000 or the amount of liability insurance carried by the charity, whichever amount is greater. There are, no doubt, many charitable institutions that, if given a choice, would prefer, through the purchase of adequate liability insurance, to have the victims of their torts fully compensated. The $20,000 limitation in the present legislation, however, protects primarily the self-insured charity and in effect prevents a charity from carrying insurance that would, at minimal expense to the charity, allow it to compensate adequately the seriously injured victims of its torts.

C. Motor Vehicles

§1.5. Pain and Suffering: Proof of Medical Expenses. In Victum v. Martin, the Supreme Judicial Court addressed the question whether proof of medical expenses by means of plaintiff's testimony and itemized medical bills, admitted in evidence as authorized in section 79G of chapter 233 of the General Laws, is sufficient to establish that a plaintiff's medical expenses exceed the jurisdictional limit of five hundred dollars that section 6D of chapter 231 of the General Laws imposes as a prerequisite to recovery of damages for pain and suffering. Rejecting defendant's argument that section 6D imposes a new and higher degree of proof than is generally required to establish medical expenses, the Court held that plaintiff's testimony and bills submitted in accordance with section 79G are sufficient to surmount the jurisdictional hurdle of section 6D. The Court noted that a trial judge's discretion to require additional evidence in cases of suspect expenses would sufficiently protect the policies embodied in section 6D.

Section 6D of chapter 231 of the General Laws precludes recovery for conscious pain and suffering where plaintiff's injury resulted from an automobile accident, unless either the reasonable and necessary medical expenses incurred in treating the injury exceed five hundred dollars, or one of five other conditions relating to the nature of the injury are satisfied. Section 6D was enacted as part of the reform of liability insurance carried by a charity. The jury would merely determine liability and damages; the court thereafter would apply the formula. Cf. Sorenson v. Sorenson, 1975 Mass. Adv. Sh. 3662, 3665, 339 N.E.2d 907, 909, where the court abrogated the doctrine of parental immunity for a tort action for negligence arising from an automobile accident to the extent of the parent's automobile liability insurance coverage.

For the insured charity, the amount of premiums involved in raising its coverage from $20,000 to, for example, $200,000, is minimal. Insurance expense is primarily in the first $10,000 to $20,000 of coverage.

2 Id. at 1039, 326 N.E.2d at 16.
3 Id. at 1041, 326 N.E.2d at 17.
motor vehicle insurance legislation commonly known as the “no-fault” law.\(^4\) Elimination of nuisance claims for pain and suffering from minor personal injuries was the purpose of section 6D’s enactment; such elimination was essential to a plan designed in part to reduce liability insurance premiums.\(^5\)

Section 79G of chapter 233 of the General Laws allows an itemized medical bill, sworn to by the physician, dentist, or the agent of the institution rendering the medical services, to be used in “an action for tort or contract” as evidence “of the necessary, fair and reasonable charge for such services.” Prior to a 1974 amendment to section 79G,\(^6\) the word “necessary” was not in the statute, and the statute specifically limited its operation to tort actions for personal injury.\(^7\)

The defendant in *Victum* contended that section 79G, even as amended, was not intended by the legislature to apply to satisfy section 6D’s requirement of proof that the necessary medical expenses incurred in treating the injury exceed five hundred dollars; only medical testimony at the trial could satisfy that burden.\(^8\) The defendant argued that the fact that the charges were necessary, fair and reasonable did not establish that the services were necessary.\(^9\) Although the Supreme Judicial Court said it had no opinion on the defendant’s assertions, it did imply that a plaintiff seeking recovery for pain and suffering in an automobile accident case may utilize the method prescribed by section 79G to prove that the reasonable and necessary medical expenses incurred in treating his injury exceeded five hundred dollars, whether the injury occurred after the 1974 amendment to section 79G or, as was the case in *Victum*, before the amendment.\(^10\)

There is no doubt that the 1974 amendment\(^11\) to section 79G was intended to have the section apply to proof of medical expenses under the “no-fault” provisions. The amendment was enacted in response to a lower court decision that had disallowed its use in such situations on the basis that an action seeking medical expenses under the “no-fault” provisions sounded in contract rather than in tort.\(^12\) The added word “necessary” merely tracks the language of the “no-fault” statute. A claim for pain and suffering, however, is not a “no-fault” claim; it is a common law claim. It appears, therefore, that as regards legislative intent, the 1974 amendment to section 79G had no

\(^{4}\) Acts of 1970, c. 670 (codified in G.L. c. 90, § 34A et seq.).
\(^{9}\) Id.
\(^{10}\) See *id.* at 1039, 326 N.E.2d at 16.
\(^{11}\) Acts of 1974, c. 442.
direct bearing on the issue before the Court in *Victum*. Section 79G, both before and after its amendment, had to apply to section 6D simply because an opposite conclusion would have brought about the absurd result of a plaintiff in a personal injury action recovering a large amount of damages for past medical expenses on a jury finding that such expenses were necessary and reasonable but being barred from recovering for pain and suffering because of his failure to prove by competent medical testimony that his necessary and reasonable medical expenses exceeded five hundred dollars.

The danger that the use of sworn itemized medical statements to satisfy the five hundred dollar limit of section 6D might frustrate the purpose of that section should be handled, not by a rule of general application requiring a stricter degree of proof under section 6D than is allowed generally to establish medical expenses, but, as the *Victum* opinion indicates, by the trial judge exercising his authority to require additional evidence, including in some instances, competent medical testimony in cases where abuse seems apparent.13

§1.6. Pain and Suffering: Non-Resident Drivers. In *Cyr v. Farias*,1 the Supreme Judicial Court held that section 6D of chapter 231 of the General Laws applies to a claim for pain and suffering brought by a non-resident automobile operator injured through the negligence of a Massachusetts operator.

Section 6D of chapter 231 of the General Laws precludes recovery for conscious pain and suffering where plaintiff’s injury resulted from an automobile accident unless either the reasonable and necessary medical expenses incurred in treating the injury exceed five hundred dollars, or one of five other conditions relating to the nature of the injury are satisfied. Section 6D was upheld by the Supreme Judicial Court in 1971 against constitutional attack, the Court emphasizing that the elimination of minor claims for pain and suffering through use of an objective standard was a necessary corollary to the legislature’s attempt, by the Personal Injury Protection Statute (the “no-fault” law),2 to reduce motor vehicle tort litigation.3

In the 1974 decision of *Chipman v. Massachusetts Bay Transportation Authority*,4 the plaintiff was injured while boarding the defendant’s bus as the result of the defendant’s negligence. She was not covered by any of the “no-fault” provisions because neither she nor any member of her household owned a motor vehicle and the defendant public transportation authority was exempt from the no-fault provisions.5 In


2 Acts of 1970, c. 670 (codified in G.L. c. 90, § 34A et seq.).
5 Vehicles operated by the MBTA are relieved of the compulsory insurance requirements of chapter 90. G.L. c. 90, § 1A.
her personal injury action, the plaintiff was allowed recovery for pain and suffering even though she did not fulfill any of the conditions of section 6D, the Court holding that since plaintiff had no recourse to "no-fault" benefits and since the defendant was exempt, section 6D did not apply to her claim for pain and suffering.6 Anticipating other cases arising where plaintiffs are not entitled to "no-fault" benefits, the Court in Chipman stated that its decision was not determinative of any other situation.7

The plaintiff in Cyr, relying on Chipman, argued that since, as a nonresident operator, he was not entitled to "no-fault" benefits, section 6D should have no application to his pain and suffering claim. The Court rejected this contention, holding that the defendant in Cyr, unlike the defendant in Chipman, had borne the burden of compulsory insurance.8 Further, since the defendant in Chipman was self-insured, application of the pain and suffering exemption of section 6D would in no way further the legislative purpose of reducing premiums.9

While Cyr dealt directly only with the situation of the nonresident operator, the distinctions that the Court drew between Chipman and Cyr lead to the conclusion that the Court held that section 6D will apply in any claim for pain and suffering where the defendant is not exempt from the compulsory insurance requirements of chapter 90 of the General Laws, irrespective of whether the plaintiff, under the particular circumstances, is entitled to "no-fault" benefits.10

The "no-fault" provisions had two related purposes: the reduction of court congestion and a hoped-for reduction in automobile insurance premiums. The Supreme Judicial Court in Chipman and Cyr overemphasizes the latter. Since the defendant in Chipman was self-insured, the non-application of section 6D does not affect the latter purpose. An opposite result in Cyr would affect, albeit minutely, the latter purpose, since recovery for pain and suffering would be covered by defendant's compulsory liability insurance. Obviously the former purpose is unaffected, irrespective of which result is reached, since the plaintiff, not being covered by "no-fault" is bound to bring an action for his personal injury whether or not section 6D applies. The real issue therefore is whether the slight effect that an opposite

7 Id. at 1453-54, 316 N.E.2d at 729.
9 Id. The Court in Cyr also rejected the plaintiff's contention that the application of § 6D constituted an invidious discrimination against nonresidents. Id. at 1513-15, 327 N.E.2d at 893. The Court pointed out that § 6D also applies where a resident brings an action against a nonresident operator arising out of a Massachusetts accident. Id. at 1514, 327 N.E.2d at 893. Thus, the nonresident obtains the benefits, as well as the burdens, of § 6D.
10 Thus, for example, a person who is precluded from recovering "no-fault" benefits because he is entitled to payments under G.L. c. 152, § 15 (workmen's compensation) is probably limited by the conditions set out in § 6D in his action against a negligent third party.
result in *Cyr* might have on insurance premiums warrants depriving
the nonresident plaintiff of recovery for pain and suffering without
his receiving the *quid pro quo* available to residents, namely, recovery
up to $2000 irrespective of fault, a corresponding exemption from
liability up to $2000, and the hoped-for reduction of premiums.\(^\text{11}\)

It might be noted that, in upholding the validity of the "no-fault"
provisions, including section 6D, in *Pinnick v. Cleary*, the Supreme
Judicial Court, analogizing the situation to workmen's compensation
legislation, examined whether the "no-fault" provisions provided a
reasonable substitution for prior rights.\(^\text{13}\) As regards pain and suffering, no such substitution is available to the nonresident operator.
Principally because pain and suffering does not constitute an out-of-
pocket loss, it is highly unlikely that the distinction drawn between
*Chipman* and *Cyr* has any unconstitutional infirmity; it merely seems
unfair, and unnecessary to accomplish the legislative purposes in
enacting the "no-fault" law.

### D. Defamation

#### §1.7. Libel: Application of *Gertz* Doctrine.

In *Stone v. Essex County Newspapers, Inc.*, the Supreme Judicial Court reconsidered its
1974 decision in the same case\(^\text{2}\) in light of the decision of the United
States Supreme Court in *Gertz v. Robert A. Welch, Inc.*\(^\text{3}\) and, in remand-
ing the case for a new trial, announced a new standard for recovery
of damages for defamation where the plaintiff is neither a public fig-
ure nor a public official. The Court in *Stone* held that such a plaintiff
may recover damages for a defamatory falsehood upon proof of negligence\(^\text{4}\) and that such damages may not include punitive damages,
but are limited to compensatory damages for actual injury only.\(^\text{5}\) A
plaintiff who is a public figure or public officer may likewise recover
only compensatory damages, but must prove that the defendant pub-
lished the defamatory falsehood with actual malice—that is, knowl-
dge of its falsity or reckless disregard of its falsity;\(^\text{6}\) moreover, the
Court read *Gertz* as requiring that actual malice be established by clear
and convincing evidence.\(^\text{7}\)

\(^{11}\) Although it is true, as the Court in *Cyr* points out, see note 9, *supra*, that a negli-
gent nonresident defendant may benefit from section 6D's application in an action
brought by a Massachusetts resident or a subrogating insurer, this benefit is minor
when compared with the overall benefits that "no-fault" was intended to provide.


\(^{13}\) Id. at 21-24, 271 N.E. 2d at 605-07.


121-25.


\(^{5}\) Id. at 1705-06, 330 N.E.2d at 164.

\(^{6}\) Id. at 1705, 330 N.E.2d at 164.

\(^{7}\) Id. at 1706, 330 N.E.2d at 164.
In the 1971 plurality decision of *Rosenbloom v. Metromedia, Inc.*, the United States Supreme Court discarded the "public figure" test for the application of the *New York Times Co. v. Sullivan* rule and held that the First Amendment privilege applied where the defamatory matter involved an issue of public or general concern, irrespective of whether the person defamed was public or private. In the 1974 *Stone* decision, the Supreme Judicial Court applied *Rosenbloom*, granting the plaintiff a new trial since the trial judge had incorrectly instructed the jury that the constitutional limitations were not applicable. The Court found that a public issue was involved where the defendant newspaper had incorrectly reported that the plaintiff was a defendant in a criminal trial for drug possession. Shortly after the 1974 decision, the United States Supreme Court announced its decision in *Gertz*. *Gertz* retained the *New York Times* standard for public officials and public figures, but held that the states may establish a lesser standard, short of strict liability, where private persons are defamed. The United States Supreme Court also held, however, that where plaintiff relies on the lesser standard, damages may be recovered only for actual injury. Although such damages were not necessarily limited to out-of-pocket damages, they did not include any presumed damages. Following *Gertz*, the Supreme Judicial Court agreed to re-hear the *Stone* case. The 1975 *Stone* opinion established the following rules in Massachusetts defamation cases. First, the *New York Times* actual malice standard (knowledge of falsity or reckless disregard for truth) will be applied where the plaintiff is a public official or public figure, but a negligence standard will be applied where the defamed plaintiff is a private person.

Second, to satisfy the burden of proof on the issue that defendant made the defamatory falsehood with knowledge of its falsity or with reckless disregard for its truth, the usual standard in civil cases (a preponderance of the evidence) is not sufficient; the plaintiff's evi-

---

**Footnotes:**

8 403 U.S. 29, 43-44 (1971).
9 376 U.S. 254, 279-80 (1964). The *Times* ran a political advertisement endorsing civil rights demonstrations by black students in Alabama and impliedly condemning the performance of local law-enforcement officials. The plaintiff established in state court that certain misstatements in the advertisement referred to him and that they constituted libel *per se*. The *Times* was thus left with only the defense of truth, as neither good faith nor reasonable care would protect the *Times* from liability under state law. The United States Supreme Court held that a public official may not recover for defamation relating to his official conduct unless the defendant made the statement with "actual malice"—that is, knowledge of its falsity or reckless disregard for its truth or falsity. *Id.*
11 418 U.S. at 347.
12 *Id.* at 348-50.
13 *Id.*
Torts

1.7

Evidence must be clear and convincing. This standard applies not only to the jury instruction that must be given but also to the determination by the judge whether to submit the issue to the jury; that is, the judge must determine whether the jury would be warranted in concluding that malice was proved by clear and convincing evidence. The obvious danger of this approach is that the “clear and convincing” standard relates not only to the kind of evidence presented but also to its individual reliability. The judge, it would seem, in ruling on a motion for a directed verdict, could not avoid choosing between conflicting evidence, and judging the credibility of the witnesses. In fact, one federal court judge has taken the position that, in ruling on a defendant’s motion for a directed verdict on the issue of knowledge of falsity or recklessness, the court should judge the credibility of witnesses and draw its own inferences from the evidence.

Third, punitive damages are not recoverable in any defamation action on any state of proof, whether based on negligence or wilful conduct. This approach is more strict than Gertz, which allows imposition of punitive damages where plaintiff proves, under the New York Times standard, wilful or reckless defamation. The disallowance of punitive damages in any defamation action was the law of Massachusetts even prior to Gertz.

15 Id. at 1735, 330 N.E.2d at 174-75. While this burden is not as onerous as the standard in criminal cases (beyond a reasonable doubt), it is more onerous than the usual burden in a civil case.
16 Id., 330 N.E.2d at 175.
17 Id. In a concurring and dissenting opinion, Judge Quirico takes the position that it was not the intent of the United States Supreme Court in using the language “clear and convincing” to impose a different burden of proof on this issue than on other issues in a civil case: “I, however, view this language as little more than confusing rhetoric—words which have been given no content by the United States Supreme Court.” Id. at 1738-40, 330 N.E.2d at 176 (dissenting and concurring opinion).
18 In his concurring and dissenting opinion, Judge Quirico states:

Despite the court’s disclaimer of an intention to do so, it appears inevitable that, by reason of the statement that the trial judge must make a preliminary determination whether the jury could find the evidence on the malice issue clear and convincing, the judge must to some degree evaluate the weight and credibility of possibly conflicting and ambiguous evidence and draw his own inferences therefrom.

Id. at 1746-47, 330 N.E.2d at 178-79.
19 Wasserman v. Time, Inc., 424 F.2d 920, 922 (D.C. Cir.) (Wright, J., concurring), cert. denied, 398 U.S. 940 (1970). See also Vandenburg v. Newsweek, Inc., 507 F.2d 1024 (5th Cir. 1975), granting judgment notwithstanding the verdict where plaintiff failed to establish malice by clear and convincing evidence, defined as “more than a preponderance.” Id. at 1026. Other courts have held that a plaintiff is entitled to go to the jury on the issue of actual malice where he has made a showing of facts from which an inference of malice may be drawn. Carey v. Hume, 590 F. Supp. 1026, 1030 (D.D.C. 1975); Local 1581, A.F.T. v. Israel, 492 F.2d 438, 441 (9th Cir. 1975).
21 418 U.S. at 549.
Fourth, compensatory damages are limited to actual injury, which includes recovery for mental suffering, harm to reputation, and any specific harm alleged to have resulted from the defamation.\textsuperscript{23} The Court, in setting forth this rule, stated that it constitutes a reaffirmation of controlling principles in the Commonwealth.\textsuperscript{24} Under prior Massachusetts law, actual injury has included the mental suffering and loss of reputation assumed to flow from slander \textit{per se}\textsuperscript{25} and libel.\textsuperscript{26} In \textit{Gertz}, however, the Court held that where a plaintiff establishes liability on a standard less demanding than \textit{New York Times}, compensatory damages could not be had for presumed damages, but only for “actual injury.”\textsuperscript{27} Therefore, although the Supreme Judicial Court asserts that in limiting damages to actual injury, it is reaffirming controlling principles of Massachusetts law, in fact the law of the Commonwealth has been changed at least to this extent by \textit{Gertz}. The Supreme Judicial Court did not indicate whether a plaintiff who does meet the \textit{New York Times} standard may recover presumed damages, as \textit{Gertz} would allow. Since presumed damages have been the rule in Massachusetts, and since the Court has indicated that it wishes to reaffirm past precedent, it may be expected that the Court will follow the prior rule except to the extent that \textit{Gertz} precludes it from doing so.

One critical question left unanswered by both \textit{Gertz} and \textit{Stone} is whether a plaintiff may recover at least nominal damages for loss of reputation in the case of slander \textit{per se} or libel, without the necessity of producing witnesses who will testify that they held or now hold the plaintiff in less esteem because of the defamatory statement. At least one justice on the United States Supreme Court interprets the \textit{Gertz} requirement of “competent” proof of actual injury, together with the proof-of-fault requirement, as virtually precluding the opportunity for most persons to vindicate their reputations “by securing a judgment for nominal damages, the practical effect of such judgment being a judicial declaration that the publication was indeed false.”\textsuperscript{28}

If failure to plead or prove actual damages will result in dismissal of a plaintiff’s case, then limiting compensatory damages to actual injury may place an unwarranted impediment in the way of plaintiffs who are more concerned with vindicating their reputation than with recovering money damages. While the nonmalicious defamer of private persons deserves constitutional protection against the recovery of excessive damages, such protection does not require that one defamed be denied the opportunity to restore his reputation by recovery of nominal damages simply because no witness testifies that he held such person in lower esteem because of the defamation. Certainly experi-

\begin{footnotes}
\item[24] \textit{Id}.
\item[27] 418 U.S. at 350.
\item[28] \textit{Id} at 376 (White, J., dissenting).
\end{footnotes}
ence demonstrates "that some publications are so inherently capable of injury, and actual injury so difficult to prove,"\textsuperscript{29} that vindication through a judgment for at least nominal damages should be allowed without the production of such witnesses.\textsuperscript{30} Furthermore, in a case in which only nominal damages are sought, it is unnecessary to impose even a negligence standard. A sensible compromise would allow plaintiff to recover nominal damages for loss of reputation on a strict liability standard and allow recovery of damages for such items as mental suffering on a state-established standard short of strict liability.

In discussing the application of the new rules, the Court in \textit{Stone} made the following observations. First, as with the case of privilege generally, the determination of whether plaintiff is a public figure or public official is a question of law.\textsuperscript{31} If the facts bearing on plaintiff's status are in dispute, the judge will submit the issue to the jury after instructions "on the applicable law and on what facts must be found to constitute the plaintiff a public official or a public figure."\textsuperscript{32}

Second, the mere fact that the plaintiff is a government employee is not determinative of whether he is a public official, for government employees in the lower ranks are not public officials for purposes of the rule. "[T]he designation of public official applies at least to government employees who have, or publicly appear to have, substantial responsibilities for control of public affairs."\textsuperscript{33} "The employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy."\textsuperscript{34}

Finally, the standard for determining whether defendant or his servant acted recklessly is subjective. That information was available that would cause a reasonably prudent person to entertain serious doubts is \textit{not} sufficient; to find recklessness, the jury must find that such doubts were in fact entertained by the defendant or his servant.\textsuperscript{35} Obviously, the jury may reach this conclusion on the basis of inference drawn from objective evidence, since rarely would the defendant admit having had serious unresolved doubts.\textsuperscript{36}

\begin{footnotes}
\item[29]\textit{Id.}
\item[32]\textit{Id.} at 1723, 330 N.E.2d at 170-71.
\item[33]\textit{Id.} at 1724, 330 N.E.2d at 171.
\item[36]1975 Mass. Adv. Sh. at 1731, 330 N.E.2d at 173. On the facts of \textit{Stone}, the Court held that a jury could find recklessness on the subjective standard. Defendant's news editor allowed the story to be printed despite serious doubts as to its accuracy. He knew plaintiff to be an "excellent citizen" and admitted that he was surprised by the story. He knew the reporter who submitted the story was inexperienced. Further, a full day was available to the editor to check the story prior to its publication. \textit{Id.} at 1734-35, 330 N.E.2d at 174.
\end{footnotes}
Two critical issues are unresolved by either Gertz or Stone. First, may a public figure recover on a standard less than malice if the defamatory statement concerns a matter that is purely private? Neither New York Times, nor Rosenbloom applied to purely private matters. The Supreme Judicial Court in Stone leaves open the possibility of such recovery. In a footnote, the Court observed that the 1975 tentative draft of the Restatement of Torts would allow recovery by a public official or public figure on a negligence standard where the defamation relates to a private matter.

The second unresolved issue is whether the standards set out in Gertz apply only to the media (freedom of press), or to any defendant in a defamation case (freedom of speech). Neither New York Times, Rosenbloom, nor Gertz answers this question. In a 1975 federal decision, Davis v. Schuchat, however, the court of appeals held that private persons and the media are equally protected by the New York Times standard. The court observed that the First Amendment speaks equally of freedom of speech and of the press and reasoned that if the press were given more protection than private speech, persons would be encouraged to rush allegations into wide publication.

E. MEDICAL MALPRACTICE

§1.8. Medical Malpractice: Preliminary Determination of Sufficiency of Evidence. In response to the critical problem of the rising cost of medical malpractice insurance, the Massachusetts Legislature enacted chapter 362 of the Acts of 1975. The declared purpose of chapter 362 is “to guarantee the continued availability of medical malpractice insurance . . . .” Section 5 of chapter 362 imposes restraints on the maintenance of medical malpractice actions; these provisions are designed to reduce the costs of litigation to the insurer by

---

38 Restatement (Second) of Torts § 580B, (Tent. Draft No. 21, 1975), which was formulated after the Gertz case came down, reads as follows: “One who publishes a false and defamatory communication concerning a private person, or concerning a public official or a public figure in relation to a private matter, is subject to liability, if, but only if, he (a) knows that the statement is false and that it defames the other, (b) acts in reckless disregard of these matters, or (c) acts negligently in failing to ascertain them.” (emphasis supplied).
40 Id. at 754 n.3.
41 Id. Contra, Roemer v. Retail Credit Co., 44 Cal. App. 3d 926, 934-35, 934-35, 119 Cal. Rptr. 89, 87 (1975). Roemer involved a nonmedia defendant and a purely commercial communication (a mercantile agency that submitted false investigative reports to plaintiff’s prospective employers).

3 G.L. c. 231, § 60B-E, amending G.L. c. 231.
discouraging the bringing of frivolous actions. The provisions apply to actions against providers of health care and not merely physicians.\(^4\)

Section 5 of chapter 362 provides that every malpractice action against a provider of health care shall initially be heard by a tribunal consisting of a justice of the superior court, a physician representing the field of medicine in which the alleged injury occurred,\(^5\) and a Massachusetts attorney.\(^6\) At the hearing, the plaintiff shall present an offer of proof and the tribunal shall determine if the evidence presented, if properly substantiated, is sufficient to raise a legitimate question of liability appropriate for judicial inquiry.

The hearing shall be held within fifteen days after the defendant's answer has been filed.\(^7\) The tribunal has the power to summon or subpoena individuals or records in order to substantiate or clarify any evidence which has been presented before it.\(^8\)

If a finding is made for the defendant, the plaintiff may pursue the claim through the courts only upon filing bond in the amount of two thousand dollars with the clerk of the appropriate court, payable to the defendant for costs assessed, including witness's and expert's fees and attorney's fees, if the plaintiff does not prevail in the final judgment.\(^9\) The bond, which may be increased by the superior court justice (or reduced in the case of an indigent plaintiff), must be posted within thirty days of the tribunal's finding; otherwise the action shall be dismissed.\(^10\)

The statute also provides that the complaint in a medical malpractice case shall not contain an ad damnum.\(^11\)

This statute is ill conceived. It is the classic case of swatting a fly with a sledge hammer. Rather than wasting time and money with the tribunal approach, the statute should merely require a pre-trial

\(^{4}\) Acts of 1975, c. 362, § 5. A provider of health care shall mean: a person, corporation, facility or institution licensed by the commonwealth to provide health care or professional services as a physician, hospital, clinic or nursing home, dentist, registered or licensed nurse, optometrist, podiatrist, chiropractor, physical therapist or psychologist, or an officer, employee or agent thereof acting in the course and scope of his employment.

\(^{5}\) Id.

\(^{6}\) The physician shall be selected by the superior court justice from a list submitted by the Massachusetts Medical Society. The list shall consist only of physicians who practice medicine outside the county where the defendant practices or resides or if the defendant is a medical institution or facility, outside the county where such institution or facility is located. Where the defendant is a person who is not a physician, the physician's position on the tribunal shall be replaced by a representative of that field of medicine in which the alleged malpractice occurred. Id.

\(^{7}\) Id.

\(^{8}\) Id.

\(^{9}\) Id.

\(^{10}\) Id.

\(^{11}\) Id.
hearing\textsuperscript{12} in all medical malpractice cases and authorize the trial judge to require the posting of the bond where plaintiff is uncooperative at the hearing or where, based upon the hearing, the trial judge concludes that plaintiff's claim lacks substance. If, due to the expert nature of an issue in the claim, expert assistance is needed, the judge may require the parties to file affidavits of experts in the field to assist the judge in determining whether experts agree or disagree on that issue. The statute should also provide that upon the motion of a party, with appropriate time for preparation, the hearing may be converted into the hearing on a motion for summary judgment.\textsuperscript{13}

F. Interest on Damages

\textsection1.9. Interest on Damages. In 1974, the Legislature changed the interest rate on damages from 6\% to 8\%.\textsuperscript{1} The amendment did not indicate whether the increase applied to pending actions.\textsuperscript{2} In Porter \textit{v. Clerk of the Superior Court},\textsuperscript{3} the Supreme Judicial Court held that the 8\% figure did apply to pending actions, but only from the effective date of the amendment; interest should be calculated at 6\% from the date of the commencement of the action up to August 14, 1974 and thereafter at 8\%.\textsuperscript{4}

The result in \textit{Porter} is correct. Interest is meant as compensation for delay.\textsuperscript{5} A fully retroactive application of the amendment would require defendants to pay the 8\% rate for periods when 6\% was appropriate, while a purely prospective application would have put a premium on delaying commencement of an action until the amendment's effective date.

\textbf{Student Comment}

\textsection1.10. Wrongful Death: \textit{Mone v. Greyhound Lines, Inc.}\textsuperscript{1} Plaintiff, Michael E. Mone, brought an action as administrator against defendant, Greyhound Lines, Inc., for the wrongful death of his decedent, Dennis Brelsford, Jr., a viable\textsuperscript{2} eight and one-half month fetus,\textsuperscript{3}

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{12} Mass. R. Civ. P. 16 authorizes pre-trial conferences.
  \item \textsuperscript{13} Mass. R. Civ. P. 56 sets out the procedures for the motion for summary judgment.
  \item \textsuperscript{1} Acts of 1974, c. 224, \textsection1.
  \item \textsuperscript{2} For a discussion of Acts of 1974, c. 224, \textsection1, see Smith, \textit{Torts}, 1974 ANN. SURV. MASS. L\textsection 6.4, at 110.
  \item \textsuperscript{3} 1975 Mass. Adv. Sh. 2326, 331 N.E.2d 916.
  \item \textsuperscript{4} Murphy's Case, 352 Mass. 633, 637, 165 N.E.2d 912, 915 (1960); Parks v. Boston, 32 Mass. (15 Pick.) 198, 208 (1834).
  \item \textsuperscript{5} The Supreme Judicial Court has defined a "viable child" as "a fetus so far formed and developed that if then born it would be capable of living." Keyes v. Constr. Serv., Inc., 340 Mass. 633, 637, 165 N.E.2d 912, 915 (1960). Viability is generally considered to be reached 24-28 weeks after conception. Roe \textit{v. Wade}, 410 U.S. 113, 160 (1973); Mitchell \textit{v. Couch}, 285 S.W.2d 901, 905 (Ky. Ct. App. 1955).
  \item \textsuperscript{6} 1975 Mass. Adv. Sh. 2326, 331 N.E.2d 916.
  \item \textsuperscript{7} 1975 Mass. Adv. Sh. 2326, 331 N.E.2d 916.
  \item \textsuperscript{8} 1975 Mass. Adv. Sh. 2326, 331 N.E.2d 916.
\end{itemize}
\end{footnotesize}
suant to section 2 of chapter 229 of the General Laws. The fetus was found dead in its mother's abdominal cavity during emergency surgery following a collision between the automobile in which the mother was riding and a Greyhound bus. The mother died shortly after the operation. The superior court dismissed the action, relying upon the 1972 decision of *Leccese v. McDonough*, which denied a right of action for the wrongful death of a fetus that, although viable at the time of injury, was not born alive. The Supreme Judicial Court, overruling *Leccese*, reversed the superior court's decision and held: an eight and one-half month unborn viable fetus is a person for purposes of the Massachusetts wrongful death statute and the administrator of its estate has a right of action for its wrongful death. Three justices dissented.

*Mone* thus altered Massachusetts law to afford a right of action for negligent conduct causing the stillbirth of a viable fetus. The majority of jurisdictions that have considered the issue employ the viability test to determine the availability of fetal wrongful death actions. This body of precedent was one factor that the Court mentioned to support its rejection of the live birth requirement. In addition, the Court reasoned that legislative and judicial treatment of fetal wrongful death actions in Massachusetts did not preclude judicial alteration of the cause of action. Moreover, use of appropriate procedural rules could overcome the danger of speculation and difficulty of administration of a viability test. Therefore, the Court reinterpreted the Massachusetts wrongful death statute to include a "viable fetus" within the definition of "person."

This note will first review the historical evolution of Massachusetts

---

4 *Id.* at 2327, 331 N.E.2d at 917.
5 *Id.* at 2328, 331 N.E.2d at 917.
6 *Id.* at 2327, 331 N.E.2d at 916-17.
8 *Id.* at 193, 279 N.E.2d at 341.
9 *Mone* was decided under a former version of the Massachusetts wrongful death statute, G.L. c. 229, § 2, as amended through Acts of 1971, c. 801, § 1, which read: "A person who (1) by his negligence causes the death of a person in the exercise of due care ... shall be liable in damages in the sum of not less than five thousand, nor more than one hundred thousand dollars, to be assessed with reference to the degree of his culpability ...." Since the Court in *Mone* did not limit its analysis to the former version of the wrongful death statute which was punitive in nature, the holding should equally cover actions arising under the 1973 amended version of the statute which is compensatory in nature. G.L. c. 229, § 2 (originally enacted as Acts of 1973, c. 699, § 1).
11 *Id.* at 2337-45, 331 N.E.2d at 920-23.
12 *Id.* at 2335-36, 331 N.E.2d at 920.
15 *Id.* at 2331-32, 331 N.E.2d at 918-19. See notes 43-62 infra.
16 *Id.* at 2332-34, 331 N.E.2d at 919.
17 *Id.* at 2335-36, 331 N.E.2d at 920.
law on fetal deaths. The majority and minority opinions in *Mone* will be analyzed and the effect of the decision on Massachusetts law will be evaluated. The different views expressed by legal commentators and courts on the criteria to be applied to fetal wrongful death actions, as well as the rationales advanced in support of the various criteria, will then be considered, and the argument will be advanced that although "viability" is a more satisfactory test than "live birth," it is open to strong criticism. A potential solution through expansion of the damages recoverable in the common law action for miscarriage will be offered. In conclusion, it will be submitted that the Massachusetts courts should abolish all restrictions on the right to bring an action for the wrongful death of a fetus or, in the alternative, should allow compensation for parental loss from the death of any fetus in the action for miscarriage.

Three separate causes of action arising from negligent infliction of injury to a pregnant woman have been involved in the evolution of the Court's position on fetal death: the mother's action for miscarriage, the child's action for prenatal injuries, and the parents' action for wrongful death. Each action has distinct elements and proof requirements. A prenatal injury action may be brought by a child for actionable injury to him while *in utero*. Live birth is required to maintain the suit, since recovery is for the benefit of the child. A prenatal injury award is compensatory, similar to any other recovery by a live person for harm inflicted by a tortfeasor.

Unlike recoverable damages in a prenatal injury action, recovery in a wrongful death action is only for the benefit of certain statutory beneficiaries. There is a split of authority as to whether live birth is required for maintenance of the action. This is predominantly a matter of statutory construction. The majority of jurisdictions that have considered this action now allow recovery for the death of a viable fetus *in utero*. Some jurisdictions, however, retain the requirement of live birth. No jurisdiction denies a right of action for the death due to prenatal injuries of a child born alive. Even though independent of each other, the Massachusetts Court has occasionally treated the prenatal injury and wrongful death actions as interchangeable where fetal death resulted from the prenatal injury. Thus, the history of Massachusetts law on fetal death includes both causes of action.

The third cause of action, a suit by the mother for miscarriage, affords recovery exclusively for the mother's own injuries, without com-

---

18 The parents can bring an action as statutory beneficiaries. See G.L. c. 229, § 2.
20 *Id.* at 636, 165 N.E.2d at 915.
21 *E.g.*, G.L. c. 229, §§ 1, 2.
23 *Id.* at 453.
24 *Id.* at 459.
§1.10 TORTS

Compensation for death of the fetus.\(^{25}\) Age of the fetus and live birth are irrelevant to the action, and no compensation is included for the father's loss.\(^{26}\)

The wrongful death action, unlike the other two actions, is statutory in origin.\(^{27}\) In 1884, the Court, in *Dietrich v. Inhabitants of Northampton*\(^{28}\) (the earliest and most frequently cited American case dealing with fetal death), construed an early, limited version of the wrongful death statute\(^{29}\) to exclude a cause of action for the death of a four- to five-month-old fetus who died a few moments after its premature birth. The mother had fallen on a defective highway and miscarried immediately. In denying recovery for the death, the Court rejected the rationales advanced by the plaintiff for maintenance of either a prenatal injury or wrongful death action. The Court cited the lack of precedent to support an action by a live child for prenatal injuries.\(^{30}\) In addition, the Court held that the child, although born alive, did not have a separate existence at the time of injury, and so was not a "person" within the meaning of the wrongful death statute.\(^{31}\) Thus, on the theory that an unborn child is part of its mother, the Court held that damages were recoverable only for the mother's personal injuries.\(^{32}\)

At common law, the mother could maintain an action for personal injury to her not causing her death, regardless of the cause of the injury.\(^{33}\) If the injury resulted in her death, however, no action could be maintained.\(^{34}\) Responding to this anomalous situation of liability for infliction of nonfatal injury and nonliability for injury causing death, except in the narrow circumstances defined in *Dietrich*,\(^{35}\) the Massachusetts legislature in 1898 enacted its first general wrongful death statute. This quasi-criminal statute was applicable to negligently caused death, and used a culpability standard as the measure of recoverable damages.\(^{36}\) The punitive model controlled in Massachusetts

\(^{28}\) 138 Mass. 14 (1884).
\(^{29}\) Pub. St. c. 52, § 17 (Acts of 1881, c. 199, §§ 4, 5). This statute allowed the executor to maintain a cause of action against a town for his decedent's death caused by a defective highway.
\(^{30}\) 138 Mass. at 15-16.
\(^{31}\) Id. at 17.
\(^{32}\) Id.
\(^{35}\) See note 29 supra.
\(^{36}\) Acts of 1898, c. 565.
until 1973, when significant amendments altered the statute to allow recovery of compensatory damages.\(^{37}\)

Until 1960, the Massachusetts Court repeatedly refused to recognize a cause of action for prenatal injury or fetal wrongful death.\(^{38}\) However, a major alteration in the prenatal injury action had occurred earlier in many jurisdictions. In 1946, the United States District Court for the District of Columbia granted recovery to a live child for its prenatal injuries in *Bonbrest v. Kotz.*\(^{39}\) Thereafter, the majority of jurisdictions reversed their prior stances and followed the *Bonbrest* decision.\(^{40}\) Courts could readily accept that justice demanded sustaining a child’s action for prenatal injuries when the child was forced to live with the effects of a tortfeasor’s negligence.\(^{41}\) Acceptance of fetal wrongful death actions was more difficult to rationalize, however, since recovery does not accrue to the benefit of a harmed child.\(^{42}\)

In 1960, the Court in *Keyes v. Construction Service, Inc.*\(^{43}\) finally devitalized the *Dietrich* doctrine as it pertained to prenatal injury actions. The Court held that a viable fetus becomes a human being upon live birth and has a right of action for prenatal injuries occurring during the viability stage.\(^{44}\) Although this was a conservative holding in light of the positions of other jurisdictions,\(^{45}\) it effected a major alteration in Massachusetts law. A viable fetus became an entity with legally protected interests.

Three reasons were advanced in *Keyes* for allowing the child’s right of action: (1) “natural justice” requires protection of a child’s right to be born without defects caused by the negligence of a tortfeasor; (2) a wrong should be redressed; and (3) an unborn child is regarded as a legal entity in property and criminal law.\(^{46}\) In dicta, the Court ob-

\(^{37}\) Acts of 1973, c. 699, § 1, amending G.L. c. 229, § 2. The 1973 amendments revised the statute to reflect a compensatory model. This model is used by the majority of jurisdictions in their wrongful death statutes; however, “[t]he language of the statutes varies, and no general rule can be stated for their construction.” Restatement (Second) of Torts § 869, at 178 (Tent. Draft No. 16, 1970).


\(^{41}\) E.g., *Bonbrest*, 65 F. Supp. at 141-42.


\(^{44}\) Id. at 636-37, 165 N.E.2d at 915.


\(^{46}\) 340 Mass. at 635, 165 N.E.2d at 914.

http://lawdigitalcommons.bc.edu/asml/vol1975/iss1/5
served that no recovery would have been granted if live birth had not occurred.\textsuperscript{47}

In 1967, the Court in \textit{Torigian v. Watertown News Co.},\textsuperscript{48} a wrongful death action, extended the \textit{Keyes} decision on prenatal injuries. The Court in \textit{Torigian} allowed a wrongful death action for a five- to six-month-old fetus that died two and one-half hours after birth. Two months prior to birth, the mother was involved in an automobile accident that was subsequently found to be the cause of her fetus's premature birth and death. The Court rejected its previous grounds for denying recovery\textsuperscript{49} and held that a live-born fetus was a person under the wrongful death statute, reasoning that there was then adequate precedent for extending the cause of action as well as ample procedural safeguards against speculative and fraudulent claims.\textsuperscript{50}

Since the infant in \textit{Torigian} happened to be born alive, the Court was not confronted with the issue of whether live birth was required for recovery. Nor did the Court directly deal with the question, although it did favorably cite \textit{Keyes},\textsuperscript{51} in which the Court would have denied an action for prenatal injuries in the case of a stillborn fetus.\textsuperscript{52} The stage of fetal development at death was also deemed irrelevant since live birth had occurred.\textsuperscript{53} Thus, the Court was able to avoid the difficult medical issue of whether the five- to six-month-old fetus was viable at the time of death.

The United States District Court for Massachusetts foreshadowed the next development in Massachusetts law. In 1969, the court, in \textit{Henry v. Jones},\textsuperscript{54} interpreted the holdings of \textit{Keyes} and \textit{Torigian} to require live birth for maintenance of a wrongful death action for a viable fetus.\textsuperscript{55} Although the Supreme Judicial Court in \textit{Torigian} had not expressly addressed the live birth requirement, the federal district court reasoned, from the facts of \textit{Torigian}, that live birth was indeed a prerequisite to recovery for wrongful death.\textsuperscript{56} The court did not find it relevant that the fetus in \textit{Henry} was viable at its death.

Three years later, the Supreme Judicial Court, in \textit{Leccese v. McDonough},\textsuperscript{57} sustained this interpretation, holding that a stillborn viable fetus was not a "person" within the meaning of the Massachusetts wrongful death statute.\textsuperscript{58} In this action, plaintiffs alleged that negligent treatment by the doctor caused the stillbirth of a viable seven-

\textsuperscript{47} Id. at 637, 165 N.E.2d at 915.
\textsuperscript{49} See Dietrich, 138 Mass. at 17.
\textsuperscript{50} 352 Mass. at 448-49, 225 N.E.2d at 927.
\textsuperscript{51} Id. at 447-48, 225 N.E.2d at 927.
\textsuperscript{52} 340 Mass. at 637, 165 N.E.2d at 915.
\textsuperscript{53} 352 Mass. at 448-49, 225 N.E.2d at 927.
\textsuperscript{55} Id. at 727.
\textsuperscript{56} Id.
\textsuperscript{58} Id. at 193, 279 N.E.2d at 341.
month-old fetus. The Court presented three reasons for requiring live birth. First, the requirement creates a "sensible and easily administered rule." Second, a fetus born alive is theoretically capable of surviving and enduring the consequences of its prenatal injury. Finally, any alteration in the test applied to the statute is more properly made by the legislature.

These reasons were subsequently rejected in Mone wherein the Court adopted the viability test and sustained the plaintiff's right to bring an action for the wrongful death of a viable fetus en ventre sa mere. The Court began by observing that the majority of jurisdictions no longer use the "live birth" test, but look instead to viability as the determinative factor for protection under their wrongful death statutes. The Court then reasoned that since the legislature did not indicate the intended meaning of "person," judicial interpretation of the term is appropriate. By joinder or consolidation of actions and precise jury instructions, a court could control the dangers of speculative damage awards and double recoveries in actions based on a stillbirth. Moreover, stillbirth after viability would not render the measure of damages any less capable of precise calculation than live birth followed soon by death. The Court thus concluded that it is unreasonable and unjust to condition a right of action for wrongful death on live birth.

The dissenting judges agreed that the live birth criterion should be rejected, but would also have rejected the viability test because viability is an amorphous concept that depends on many individual maternal factors. The dissenters' rejection of both the live birth and viability tests suggests that they would allow a cause of action for fetal death in any stage of pregnancy.

59 Id. at 191, 279 N.E.2d at 340. The Court did not label the suit as either a prenatal injury or wrongful death action.
60 Id. at 193, 279 N.E.2d at 341.
61 Id.
62 Id. at 193-94, 279 N.E.2d at 341.
64 Id. at 2330, 331 N.E.2d at 918.
65 Id. at 2332, 2334 n.8, 331 N.E.2d at 919, 919 n.8.
66 Id. at 2333, 331 N.E.2d at 919. Double recovery occurs when the plaintiff receives compensation for the same injuries in different actions. For example, stillbirth of a fetus may give rise to actions for personal injury, miscarriage, and fetal wrongful death. Thus, the mother potentially could receive three awards for the same injuries. Consolidation of these actions in a single suit would prevent double recovery since the jury would be instructed to consider the injuries sustained and make a single award of damages.
67 Id. at 2334, 331 N.E.2d at 919.
68 Id., 331 N.E.2d at 920.
69 Id. at 2337, 2344-45, 331 N.E.2d at 920, 923.
70 Id. at 2345, 331 N.E.2d at 923.
71 The dissenters rejected the live birth test ("we should not follow the Lecese case"), id. at 2343, 331 N.E.2d at 922, and also rejected the viability test ("There is of course no virtue in 'viable' .... It is .... a very unsatisfactory test.").
As a result of Mone, the present law in Massachusetts allows a right of action for the wrongful death of a stillborn viable fetus. A number of issues regarding fetal wrongful death actions remain unresolved, however. One important question is whether Mone replaces the live birth test with the viability test, or whether it merely extends the wrongful death action to the viability stages of pregnancy, with live birth still raising a conclusive presumption of existence as a person under the statute. If the former, then an action based on the facts of Torigian may now fail even though the fetus was born alive. In Torigian, the fetus was nonviable at the time of injury and the Court did not ascertain whether it was viable at the time of birth. If the latter—viability and live birth both support a fetal wrongful death action but neither depends upon the other—then even if the fetus in Torigian was nonviable at birth, the holdings in Torigian and Mone can be reconciled, because both the live birth of a nonviable fetus and the stillbirth of a viable fetus would sustain a wrongful death action.

A second issue left unresolved by Mone is whether an action may be maintained for the wrongful death of a viable fetus who died in the womb as a result of injuries inflicted while nonviable. It is submitted that a right of action would probably exist for this situation under the Massachusetts wrongful death statute. In Mone, the Court construed the word "person" in the wrongful death statute to include a fetus that is viable at that time; injury would thus appear unimportant. In addition, justice would seem to require such a result since the effect of the tortfeasor's negligence—death of a viable fetus—is the same regardless of when the injury is inflicted.

at 923. However, they contended that the Court should depart from the live birth criterion of Leccese only for cases arising on or after January 1, 1974, the effective date of the compensatory version of the wrongful death statute. Id. at 2337, 2343, 331 N.E.2d at 920, 922. The Court summarily dismissed this retroactivity argument by commenting that since the statute is of a civil nature, there is no valid objection to retroactive overruling. Id. at 2329 n.4, 331 N.E.2d at 917-18 n.4. It can also be argued, contrary to the minority's position, that the fact that the legislature gave the compensatory wrongful death statute prospective application should have no bearing on the Court's action in Mone. The Court was not applying the compensatory wrongful death statute retroactively. The only issue presented and resolved was whether "person," as used in the former wrongful death statute, includes a viable fetus.

72 If the action is based on willful, wanton, or reckless acts, a second statutory requirement must be met to maintain a wrongful death action. That requirement is the ability of the deceased to recover damages for injuries if death had not resulted. G.L. c. 229, § 2. The fetal wrongful death action would meet this prerequisite, since most courts and legal commentators recognize the separate existence of a fetus at the time of injury and thus hold that a cause of action for prenatal injuries arises when the injury is inflicted. E.g., State v. Sherman, 234 Md. 179, 183, 198 A.2d 71, 73 (1964); see Noonan, Constitutionality of the Regulation of Abortion, 21 Hastings L.J. 51, 55 (1969); Recent Developments, 70 Mich. L. Rev. 729, 737 (1972). However, there is some authority for the proposition that fetal injury gives rise to a conditional cause of action and liability attaches only if the child is born alive. Drabbels v. Skelly Oil Co., 155 Neb. 17, 21, 50 N.W.2d 229, 231 (1951); Padillow v. Eldrod, 424 P.2d 16, 17 (Okla. 1967); Howell v. Rushing, 261 P.2d 217, 218 (Okla. 1953).
Finally, the Court did not discuss the status of a fetus killed in utero while nonviable. Since the Court considered only the events of live birth and viability, it appears to have impliedly rejected maintenance of a wrongful death action for a stillborn nonviable fetus. The dissenters, however, seemed to favor allowing the right of action.\textsuperscript{74}

Nonetheless, \textit{Mone} has significantly altered Massachusetts law on fetal wrongful death. Review of the history of the law in Massachusetts shows a progressive expansion of the causes of action based on fetal injury and death: the Supreme Judicial Court first denied all recovery for injury or death of the unborn; then recognized a cause of action for prenatal injuries brought by a live child; later accepted an action based on the death of a fetus following its live birth; and finally in \textit{Mone} sustained an action for the death of a viable fetus in utero. This development of the law presents a pattern that is paralleled in the majority of other jurisdictions. Only a minority of jurisdictions that have considered the issue still retain the live birth requirement.\textsuperscript{75} A comparison of the arguments encountered with regard to each of these tests will demonstrate, however, that while the viability test is preferable to the live birth requirement, it is still a distant second to no developmental requirement at all.

The major reasons advanced to support continued adherence to early precedents demanding live birth are:\textsuperscript{76} statutory interpretation,\textsuperscript{77} intestacy laws,\textsuperscript{78} control of speculative and fraudulent claims,\textsuperscript{79} and ease of administration.\textsuperscript{80} The Court in \textit{Mone} expressed the prevailing criticisms of these rationales by declaring that judicial reinterpretation

\begin{itemize}
  \item \textsuperscript{74} See note 71 \textit{supra}.
  \item \textsuperscript{75} Jurisconsultus, \textit{7} \textsc{Houst. L. Rev.} 449 (1970).
  \item \textsuperscript{76} With regard to Massachusetts, see text at notes 57-62 \textit{supra}. The Court had adopted the live birth test without elaboration of the theoretical basis for this position. See text at notes 77-80 \textit{infra} for the basis of the live birth test as reasoned in other jurisdictions.
  \item \textsuperscript{78} Only a child born alive has a legal existence independent of its other. Drabbels v. Skelly Oil Co., 155 Neb. 17, 22, 50 N.W.2d 229, 232 (1951); Hogan v. McDaniel, 204 Tenn. 235, 243, 319 S.W.2d 221, 224 (1958). Without a separate legal existence, a fetus cannot have an estate that may receive a damage award. Endresz v. Friedberg, 24 N.Y.2d 478, 485, 488 N.E.2d 901, 905, 301 N.Y.S.2d 65, 70 (1969); Carroll v. Skloff, 415 Pa. 47, 49, 202 A.2d 9, 11 (1964); Hogan v. McDaniel, 204 Tenn. 235, 244, 319 S.W.2d 221, 225 (1958).
  \item \textsuperscript{79} Live birth allows for greater certainty in determining whether the injury was the proximate cause of death than does stillbirth, since stillbirth may have been caused by an independent, spontaneous abortion. Endresz v. Friedberg, 24 N.Y.2d 478, 484, 248 N.E.2d 901, 903, 301 N.Y.S.2d 65, 69 (1969); Gay v. Thompson, 266 N.C. 394, 400, 146 S.E.2d 425, 428 (1966); Carroll v. Skloff, 415 Pa. 47, 49, 202 A.2d 9, 11 (1964).
\end{itemize}
of undefined statutory terms is appropriate, the courts have recognized a fetus as a separate entity (thus negating the conclusion that a fetus cannot have an estate), consolidation of actions and precise jury instructions can control the danger of speculative damage awards and considerations of justice have priority over convenience in judicial administration.\footnote{81}

That viability should be the determining factor was first suggested in 1900 by Judge Boggs in his dissenting opinion to the Illinois Supreme Court’s decision in Allaire v. St. Luke’s Hospital.\footnote{82} Against the court’s conclusion that an infant could not maintain an action for its prenatal injuries because it was an inseparable part of its mother at the time of injury, Judge Boggs argued that a viable fetus and its mother are not an indivisible entity, since death of the mother would not necessarily terminate the fetal life.\footnote{83} After reaching the viability stage, the fetus is capable of “independent and separate life.”\footnote{84} Therefore, he reasoned, recovery should be allowed when injuries were sustained during the viability stage.\footnote{85} Judge Boggs did not distinguish between prenatal injury and wrongful death actions.

The first court to accept viability as a significant factor was the Minnesota Supreme Court in the 1949 decision in Verkennes v. Corniea.\footnote{86} Defendant doctor’s negligence allegedly caused the stillbirth of the fetus during normal delivery.\footnote{87} The Court held that a wrongful death action could be maintained on behalf of the next of kin of a deceased child who was viable at the time of death.\footnote{88}

Four years later, the Illinois Supreme Court in Amann v. Faidy adopted Judge Bogg’s reasoning and expressly overruled Allaire, holding that an action may be maintained for the wrongful death of a live child who died as a result of prenatal injuries inflicted during the viability stage.\footnote{89}

At present, the viability test, as adopted in Mone, is applied by the majority of jurisdictions that have considered the issue.\footnote{90} The rationales advanced in support of allowing recovery for the stillbirth of a viable fetus are: (1) the ability of a viable fetus to sustain inde-
dependent existence, legal acceptance of the viable fetus as a separate entity and constitutional protection of this potential life, judicial recognition of a duty of care owed to the fetus, similarities of proof in actions based on stillbirth and live birth, similarities in damages suffered as a result of stillbirth or death immediately after birth, and considerations of justice.

The soundness of these premises underlying the viability test makes the viability criterion preferable to the live birth test. Nonetheless, many of the reasons supporting rejection of the live birth test in favor of the viability test apply equally to support rejection of the viability test, in favor of allowing a cause of action for wrongful death at any stage in the pregnancy.

First, the argument based on considerations of justice applies to an action brought for the wrongful death of a viable or a nonviable fetus, since the conduct is equally tortious whatever the age of the victim. The tortfeasor would be unjustly rewarded with immunity where his
negligence caused the death of a nonviable fetus if an action would lie only for the death of a viable fetus\textsuperscript{99} and no other cause of action could be maintained.\textsuperscript{100}

Second, problems with proof of causation should not bear on the right to bring an action for the wrongful death of a viable or a nonviable fetus\textsuperscript{101} nor should fear of fraudulent claims justify exclusion of legitimate claims.\textsuperscript{102} Expert medical testimony will be needed to prove causation, regardless of fetal age; an autopsy can be performed equally as well on a deceased nonviable fetus, viable fetus, or newborn.\textsuperscript{103} In addition, the difficulties of proof depend on the facts of each case: they are unrelated to the distinction between viability and nonviability.\textsuperscript{104} Furthermore, problems of proof of causation in any prenatal death action are no greater than those involved in the well-recognized maternal action for miscarriage.\textsuperscript{105}

Third, the difficulty of measuring the damages for the death of a nonviable fetus is indistinguishable from the measuring problem in an action for the death of a viable fetus. It is unlikely that age of the fetus—whether viable or nonviable or newborn—will significantly affect an assessment of its mental capacities and capabilities.\textsuperscript{106} Moreover, evidence of damages in an action for wrongful death of a stillborn viable fetus may be identical to evidence used in a case involving a nonviable fetus. In \textit{Gullborg v. Rizzo},\textsuperscript{107} an action for the wrongful death of a stillborn viable fetus, the Court of Appeals for the Third Circuit considered the Pennsylvania wrongful death statute, which mandates assessment of damages based on a decedent’s prospective earnings for the period of life expectancy after reaching the age of 21, less the anticipated expense of maintaining the decedent during his minority.\textsuperscript{108} The evidence presented showed that: (1) the child’s father was a college graduate who was earning substantial income; (2) the child was normally developed for a six and one-half

\textsuperscript{99} Comment, 1970 ANN. SURV. MASS. LAW § 2.21, at 55.
\textsuperscript{100} See text at notes 130-33 infra.
\textsuperscript{102} Recent Developments, 70 Mich. L. Rev. 729, 741 (1972).
\textsuperscript{103} S. SPIESER, supra note 95, § 4:33, at 359.
\textsuperscript{105} \textit{Id. at} 577; Legislation, 18 Vand. L. Rev. 847, 853 (1965).
\textsuperscript{106} S. SPIESER, supra note 95, § 4:33, at 359.
\textsuperscript{108} 331 F.2d at 560.
month fetus; and (3) until the accident, the mother was experiencing a normal pregnancy.\(^{109}\) The relevance of this type of evidence is certainly not limited to situations involving viable fetuses.

Thus, the very arguments used to support the viability standard illustrate the arbitrariness of that standard, and suggest that a cause of action for the wrongful death of a fetus should be allowed at any stage of pregnancy. Additional medical factors demonstrate the soundness of this view.

Biologically, the fetus is a separate entity from the time of conception.\(^{110}\) Medical terminology no longer classifies the fetus as viable or nonviable; descriptions are based on fetal weight.\(^{111}\) Thus, "viability" is now strictly a legal term, relevant only in the courtroom. It is most difficult for expert medical witnesses to testify whether the fetus was viable at the time of injury or death when an assessment of nonviability was not made during normal prenatal examinations of the mother.

In addition, unlike the arrival of "quickening" (when the first recognizable movements of the fetus occur),\(^{112}\) the onset of fetal viability goes unnoticed by the mother.\(^{113}\) Nor can the arrival of the viability stage be fixed at the same point for every pregnancy; it is influenced by fetal and maternal factors including health and nutrition.\(^{114}\) Indeed, some medical authorities maintain that it is impossible to determine the time when viability is reached.\(^{115}\) For this reason, the requirement of viability may defeat legitimate claims where causation is recognized, but viability is not established with certainty.\(^{116}\)

A number of jurisdictions have accepted the biological individuality of a nonviable fetus, to allow recovery in a prenatal injury action.\(^{117}\) In \textit{Kelly v. Gregory}, the New York Court of Appeals held that the fetus is biologically separate from the mother at conception and thus is an independent legal entity to whom a duty of care is owed.\(^{118}\) The Court rejected the viability criterion: "That [the fetus] may not live if

\(^{109}\) \textit{Id.} at 560-61.


\(^{112}\) \textit{Dorland's Illustrated Medical Dictionary} 1261 (24th ed. 1965). Quickening usually occurs between the 16th and 18th week of pregnancy. \textit{Id.}

\(^{113}\) Todd v. Sandidge Constr. Co., 341 F.2d 75, 79 (4th Cir. 1964) (dissenting opinion).

\(^{114}\) \textit{See generally M. Ashley-Montagu, Prenatal Influences} 57-112 (1962).


\(^{118}\) \textit{Id.} at 543-44, 125 N.Y.S.2d at 697.
§1.10 TORTS

its protection and nourishment are cut off earlier than the viable stage of its development is not to destroy its separability; it is rather to describe conditions under which life will not continue. 120

The viability criterion can also be attacked on the ground that the stage of fetal development is unrelated to the results of a tortfeasor's action. Both the injury to the fetus and the loss to the parents are the same whether or not the fetus was viable. 121 Moreover, distinctions based on fetal development lack justification when viewed in the context of the damages recoverable under the Massachusetts wrongful death statute. Prior to 1973, the Massachusetts statute was punitive in nature: 122 recovery was based solely on the degree of the defendant's culpability. The current Massachusetts wrongful death statute 123 is compensatory. Recovery is determined by tangible and intangible loss to the statutory beneficiaries. 124 Commentators predict that damages based exclusively on parental loss of companionship and comfort will be awarded in prenatal wrongful death actions. 125 This loss is certainly not affected by a subsequent determination of whether the fetus was viable at death.

Despite the increasing number of legal commentators who advocate allowing a right of action for wrongful death irrespective of fetal age, 126 only the Georgia courts have allowed a cause of action for the wrongful death of a nonviable fetus. 127 In Porter v. Lassiter, 128 the Georgia Court of Appeals set "quickening" as the factor determinative of protection under the statute. 129 Although the quickening test is preferable to the viability test, it also creates an arbitrary and unjustifiable limitation on the right to recover for the wrongful death of a fetus.

Although it would be preferable for the Court simply to recognize a

120 Id. at 544, 125 N.Y.S.2d at 697.
122 G.L. c. 229, § 2, as amended through Acts of 1971, c. 801, § reads: "A person who (1) by his negligence causes the death of a person in the exercise of due care . . . shall be liable in damages . . . to be assessed with reference to the degree of his culpability . . . ."
124 The statute provides for "damages in the amount of: (1) the fair monetary value of the decedent to the persons entitled to receive the damages recovered . . . including but not limited to compensation for the loss of the reasonably expected net income, services, protection, care, assistance, society, companionship, comfort, guidance, counsel and advice of the decedent . . . ." G.L. c. 229, § 2.
125 Railroad Law, 32 Atl.L.J. 628, 630 (1968); Recent Important Tort Cases, 30 Nacca L.J. 188, 192-98 (1964).
128 Id.
129 Id. at 716, 87 S.E.2d at 103.
cause of action for the wrongful death of a fetus irrespective of its age, an alternative and less revolutionary means of compensating parental loss is an expansion of the damages recoverable in the common law action for miscarriage. This may present less difficulty to the judiciary than expansion of the wrongful death action, since an action for miscarriage is not encumbered with the definition of "person."

Massachusetts courts have recognized a woman's cause of action against a tortfeasor for injury inflicted upon her that proximately caused a miscarriage.\(^{130}\) Awards in such personal injury actions are for general and special damages, including pain and suffering.\(^{131}\) The action excludes recovery for the death of the fetus regardless of age.\(^{132}\) In addition, no compensation for the father's loss is included.\(^{133}\)

To expand the damages recoverable in an action for miscarriage to include compensation for loss of the fetus, the jury could be instructed to consider in its award the elements of recovery in the statutory wrongful death action. These include assessment of the loss of "companionship and comfort" of the decedent. The jury would consider the fetal age in making a determination of the emotional anguish of the mother due to the miscarriage. The stage of fetal development would also bear on the probability of normal birth and postnatal development had the tort not occurred. The age of the fetus would be one factor for the jury to consider; it need not be controlling. Moreover, the viability or nonviability of the fetus would be irrelevant unless the mother chose to present testimony on the issue. Considering these factors, the jury could arrive at a sum sufficient to compensate the mother for the fair monetary value of the fetus as well as the emotional and physical trauma of its loss. Thus, the mother could recover the same type of damage award in an action for miscarriage as in an action for wrongful death, without the necessity, as under the present Massachusetts wrongful death statute, of proving viability of the fetus at time of death.\(^{134}\)

Death of the mother prior to the commencement of the action will not defeat recovery. Under section 1 of chapter 228 of the General Laws, the common law right to recover damages for personal injuries


\(^{134}\) It is possible to hypothesize extenuating circumstances which would warrant a damage award in an action for miscarriage that is equal to or greater than the sum which would be awarded in an action for fetal wrongful death. For example, the mother may be unable to become pregnant again due to the injuries she sustained in the accident. Such personal injuries would not be considered in a wrongful death action.
survives an injured person's death. In effect, this could compensate the father for his loss from the fetal death. If the mother does not die, the court alternatively may recognize a derivative action by the father. This would, however, require a radical expansion of the common law action for miscarriage, since the obvious purpose would be to compensate the father for death of the fetus.

Regardless of the form of the action brought, no constitutional objections preclude allowing recovery based on the death of a nonviable fetus. *Roe v. Wade* 135 might appear to require imposition of the viability criterion since the United States Supreme Court there held that the state acquires a compelling interest in preserving the fetal life from voluntary termination by the mother only when the fetus reaches the stage of viability. 136 There are, however, important distinctions between abortion laws and actions for miscarriage or fetal wrongful death.

Although the state's interest may arise upon viability of the fetus, it does not follow that the mother's interest in preserving the fetal life from involuntary termination by a tortfeasor arises at the same time. In addition, abortion laws are criminal in nature and govern the relative rights of the mother, fetus, and state. The action for wrongful death and the common law action for miscarriage, on the other hand, are civil in nature, and do not govern such relative rights. Recovery is solely to vindicate the parents' interests. 137 While some prospective parents may choose to abort, and thus terminate their expectations of the services and companionship of children, this should not prevent recovery by persons who wanted and expected the benefits of parenthood and genuinely suffered from the loss. 138

It is submitted that the holding in *Mone* allowing a cause of action for death of a viable fetus is an enlightened decision in view of prior case law in Massachusetts. Nevertheless, the cause of action for fetal wrongful death is still overly restrictive. Compensation should be available for parental loss caused by death of the fetus, regardless of its age. It is suggested that expansion of the damages recoverable in the common law action for miscarriage or elimination of the fetal age requirement in wrongful death actions be effected in future Massachusetts cases.

ELLEN MILLER WACHTEL

136 *Id.* at 163-64.
137 The Supreme Court in *Roe* specifically drew this distinction between wrongful death actions and the abortion situation. 410 U.S. at 162.