Chapter 5: Torts

James W. Smith
CHAPTER 5

Torts

JAMES W. SMITH*

§5.1. Introduction. Most of the 1976 Survey year developments in Massachusetts tort law were judicial. By far, the most significant was the abolition of interspousal1 and parent-child immunity2 from negligence claims arising out of motor vehicle accidents. This area is separately treated in detail in this volume.3 In other areas, the Commonwealth's appellate courts ruled on such matters as: the extent of an attorney's privilege in a libel action;4 whether a nuisance claim may exist for conduct having legislative approval;5 the degree of certainty required in proving damages in an action for interference with contractual relations;6 and whether the common law duty of ordinary care, established in Mounsey v. Ellard,7 extends to the guest in an automobile.8 Also receiving judicial attention were problems of "no-fault,"9 proximate cause,10 and landlord and tenant.11

§5.2. Libel: Attorney's Absolute Privilege. The basis for privilege in libel is that the right of the individual not to be defamed must occasionally give way to a greater social need. A privilege is either absolute or conditional depending upon the importance of the particu-

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

3 See § 5.10 infra.

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lar need. If absolute, the privilege protects even the malicious publisher; when conditional, malice destroys the privilege. Statements by a party, counsel, or witness in the institution of, or during the course of, a judicial proceeding are absolutely privileged provided such statements relate to that proceeding. A statement may relate to the proceeding, and thereby remain privileged, even though the speaker knows the statement is false.

In a case decided during the Survey year, *Sriberg v. Raymond*, the Supreme Judicial Court held that this absolute privilege incident to the institution and conduct of judicial proceedings extends to an attorney’s statement made in a letter threatening the commencement of litigation. The plaintiff in *Sriberg* was president and majority stockholder of a corporation that contracted to buy stock in a corporation represented by the defendant-lawyer. Upon the plaintiff’s refusal to complete the transaction, the defendant-lawyer sent an allegedly defamatory letter threatening litigation to the plaintiff and to the Shawmut Credit Corporation, an escrow agent. The plaintiff commenced an action for libel in the United States District Court for the District of Massachusetts, which court certified the following question to the Supreme Judicial Court: “Is an allegedly defamatory statement absolutely privileged under the law of Massachusetts when it is contained in a communication mailed by an attorney to a person against whom, the communication indicates, the attorney is threatening to bring a lawsuit?”

In answering the question in the affirmative, the Supreme Judicial Court in *Sriberg* adopted the view of the Restatement of Torts, that “[a]n attorney at law is absolutely privileged to publish false and defamatory matter of another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as part of a judicial proceeding in which he participates as counsel, if it has some relation thereto.” The Court tempered its finding

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5 *Id.* at 964, 345 N.E.2d at 883.
6 *Id.* at 962, 256 N.E.2d at 882-83.
7 The defendant-lawyer’s letter stated in part: Your persistence, against this backdrop, of a meritorious basis for repudiation is a sham. Your conduct in this respect is reckless, willful and malicious. . . . It is quite obvious that you now are attempting to appropriate [my client’s] business without payment. . . . If these demands are not met, suit will be instituted . . . .
8 *Id.*
9 *Id.* at 961-62, 256 N.E.2d at 882.
10 *Id.* at 964, 256 N.E.2d at 883, quoting *Restatement of Torts* § 586 (1938). The *Restatement (Second) of Torts* § 586 (Tent. Draft No. 20, 1974), retains essentially
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of absolute immunity slightly, however, by also adopting the reasoning of a comment to the Restatement (Second) of Torts that the communication must have some relation to a proceeding that is contemplated in good faith and under serious consideration. Comment e to the Restatement (Second) states that "[t]he bare possibility that such a proceeding might be instituted is not to be used as a cloak to provide immunity for defamation when the possibility [of instituting such a proceeding] is not seriously considered." The absolute privilege, requiring as it does the individual to surrender an important right even in the face of malice, should be sparingly granted. In the case of a judicial proceeding, the ultimate procedure in our society for the settlement of disputes, it is critical that every effort be exerted to reach the truth. Witnesses and counsel should not hold back out of fear that their statements may lead to defamation suits. This social goal necessitates an extreme measure, the absolute privilege. The extension of the absolute privilege, however, to prelitigation statements seems unwarranted. What takes place prior to litigation is not a controlled procedure for arriving at the truth but a joust, often involving a great deal of bluffing, where reputations may be lost by the attempts of the unscrupulous to obtain a favorable position for settlement purposes. Statements made in pleadings, depositions, answers to interrogatories, affidavits, or during trial are subject to control. Judicial presence deters the unscrupulous attorney from taking advantage of his absolute privilege. No such protection exists with respect to communications made prior to the commencement of an action.

The Sriebreg result raises several questions. First, what persons have a sufficient interest in the threatened litigation to be entitled to receive a copy of the defamatory statements? In Sriebreg, for example, a copy of the allegedly defamatory letter was sent to the Shawmut Credit Corporation. The Court's implicit conclusion that the defendant-lawyer did not thereby forfeit his absolute immunity is probably justified because Shawmut, as an escrow agent and potential defendant, was interested in the threatened lawsuit. There is a danger, however, that in another situation an attorney, enjoying ab-

the same language as the earlier version, although for some unknown reason the word "false" has been deleted.


12 Restatement (Second) of Torts § 586, comment e.

13 Mass. R. Civ. P. 11(a) requires that every pleading of a party represented by an attorney be signed by a Massachusetts attorney. Such signature constitutes a certificate by the attorney that he has read the pleading and that to the best of his knowledge, information, and belief there is a good ground to support it. An attorney may be subject to disciplinary action for a willful violation of the rule.


15 Id. at 962, 256 N.E.2d at 883.

16 Id. at 963, 256 N.E.2d at 883.
solute immunity from suit, and uncontrolled by any judicial presence, will send copies of defamatory suit-threatening letters to persons with borderline interests in the matter in order to coerce a settlement. Second, does the person defamed also enjoy an absolute privilege in his or her response to the attorney's defamatory statements? Finally, why is the social policy of permitting attorneys complete freedom of expression in their efforts to secure justice for their clients any more important when litigation is contemplated than when it is not?

§5.3. Nuisance: Legislative Authority Defense. In Hub Theatres, Inc. v. Massachusetts Port Authority, the Supreme Judicial Court reconsidered the impact of legislative authorization of defendants' activities upon the availability of nuisance actions. In 1955 the owner of property in East Boston constructed a drive-in theatre approximately 2,500 feet away from Logan Airport. Subsequently, the land and theatre were leased to Hub Theatres, Inc. In 1959 the Massachusetts Port Authority took control of Logan Airport and, pursuant to statutory authority, expanded the airport. This expansion resulted in the presence of low flying aircraft over the theatre. The inevitable noise, vibrations, and fumes forced Hub Theatres, Inc. to discontinue its operations. Hub Theatres, Inc. sued the Massachusetts Port Authority on a nuisance theory. The complaint was dismissed by the superior court and an appeal taken. The Supreme Judicial Court affirmed the entry of judgment for defendant on the ground that generally the Legislature may authorize activities that would otherwise be a nuisance.

To prevail in a nuisance action in Massachusetts a plaintiff must establish that the defendant's conduct which interferes with plaintiff's use and enjoyment of his property is (1) intentional and unreasonable, or (2) actionable under the tort theories of negligence or strict liability based upon ultrahazardous conduct. When a nuisance action is based upon a claim that defendant's activity is intentional and unreasonable, unreasonableness does not require proof of negligence. Rather, the court, assuming the defendant's conduct is intentional, determines the existence or nonexistence of a nuisance and sets the appropriate

6 Id. at 1034, 346 N.E.2d at 373.
7 When the Legislature directs or allows that to be done which would otherwise be a nuisance, it will be valid, upon the ground that the Legislature is ordinarily the proper judge of what the public good requires, unless carried to such an extent that it can fairly be said to be an unwholesome and unreasonable law.

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remedy by balancing three general considerations: (1) the suitability of the area for the type of activity that defendant is conducting; (2) the social utility of defendant's conduct; and (3) the gravity of the harm to plaintiff. The "intentional" nature of defendant's conduct merely requires a finding that he was aware that the invasion was resulting or was substantially certain to result from his activity.

The Hub Theatres decision will have no effect on nuisance actions based on negligence or strict liability. The Court stated that the plaintiffs did not allege that the Port Authority had been negligent in carrying out its business at Logan Airport. In addition, the operation of an airport is not ultrahazardous activity leading to strict liability. With respect to nuisance actions based on intentional and unreasonable activity, however, the essence of the holding in Hub Theatres seems to be that the Legislature had made a decision that the activity, on balance, was reasonable. Thus, absent a showing that the Legislature had exceeded its authority by enacting a clearly unreasonable, and therefore unconstitutional, statute, or that the activity was carried out in a negligent or ultrahazardous fashion, the judiciary cannot interfere with the Legislature's decision by declaring the activity a compensable nuisance.

While the result in Hub Theatres barred recovery by the plaintiff-lessee, the Court indicated that the owner of the property affected is not necessarily without remedy. In this context, the Court pointed out that if the interference with the plaintiff's land was sufficiently substantial to constitute a taking or condemnation of the property, he could recover reasonable compensation. An opposite result in Hub Theatres might well have allowed the nuisance action to circumvent limitations in the eminent domain laws. The unfairness of requiring

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8 See Restatement of Torts, ch. 40, introductory note, at 223-24 (1938).
10 Restatement of Torts § 825, comment a (1938).
14 For example, a nuisance action would avoid the procedural and evidentiary restrictions placed on eminent domain actions by G.L. c. 79, §§ 22 & 35. Section 22 requires that an eminent domain action be heard in the first instance by a judge sitting without a jury. Section 35 bars the use of tax assessments as evidence of real estate's value unless there has been a comprehensive revaluation of the town's real estate within the five
plaintiff to bear the loss of his business to satisfy the needs of the flying public, however, suggests the need for legislation shifting the loss to that segment of the public that obtains the direct benefits from the airport's presence.

§5.4. Interference with Contractual Relations: Measure of Damages. Traditionally, damages recoverable for interference with contractual relations are tort in character—the loss of advantage to plaintiff resulting from the interference. On the other hand, an unjust enrichment measure of damages—the benefit to defendant from his wrongful conduct—has long been recognized for such business torts as unfair competition and trade name, trademark, and copyright infringement. In the Survey year decision of National Merchandising Corp. v. Leyden, the Supreme Judicial Court approved the unjust enrichment measure of damages as appropriate for an action for interference with contractual relations.

In National Merchandising, the defendant, plaintiff's business competitor in the advertising business, knowingly employed plaintiff's former employees to solicit advertising in the New England area in violation of an injunction prohibiting the employees from then engaging in such activity. The injunction had issued earlier because the employees, after leaving plaintiff's employ, were violating a noncompetition agreement with plaintiff. The superior court awarded damages to the plaintiff calculated on the basis of ten percent of defendant's tainted gross income. One of defendant's arguments on
appeal was that the damages were excessive because they were based on the defendant's increased profits, which was an unjust enrichment measure of damages, rather than on the plaintiff's lost profits, which was a tort measure of damages.\textsuperscript{7}

Initially the Court in \textit{National Merchandising} examined the damages, viewed as tort in character, and held that there was nothing unreasonable in the trial judge's taking the defendant's profit as the amount that plaintiff would have been capable of generating had defendant not tortiously interfered.\textsuperscript{8} In light of the rule that a reasonable approximation of damages suffices where defendant's conduct creates the difficulty in proving damages,\textsuperscript{9} the trial judge's premise appears a proper one. However, rather than simply approving the premise used by the trial court in assessing tort damages—that defendant's profit approximated plaintiff's loss—the Court in \textit{National Merchandising} went on to uphold the damages on an independent ground: that defendant must pay plaintiff the amount the defendant gained by its wrongful conduct even if it exceeded the amount of plaintiff's loss.\textsuperscript{10} Otherwise, the Court reasoned, an intending tortfeasor might "be prompted to speculate that his profits might exceed the injured party's losses, thus encouraging commission of the tort."\textsuperscript{11}

While there are not numerous cases in point, the unjust enrichment measure of damages has been applied in other jurisdictions in interference with contract cases.\textsuperscript{12} It has also been applied, albeit rarely, in cases involving trespass to chattels\textsuperscript{13} and trespass to land.\textsuperscript{14} It has been unsuccessfully argued in defamation actions\textsuperscript{15} and invasion of privacy actions where the claimed right was of a purely personal nature.\textsuperscript{16} Some progress has been made for such a measure of damages in land advertising sales during the period it was employing plaintiff's former employees in violation of the injunction. \textit{Id.}, 348 N.E.2d at 775.

\textsuperscript{7} \textit{Id.} at 1476, 1477-80, 348 N.E.2d at 773, 774-75.

\textsuperscript{8} \textit{Id.} at 1479, 348 N.E.2d at 774-75.

\textsuperscript{9} See note 1 supra.

\textsuperscript{10} See 1976 Mass. Adv. Sh. at 1480-82, 348 N.E.2d at 775-76.


\textsuperscript{14} Edwards \textit{v. Lee's Administrator}, 265 Ky. 418, 423-28, 96 S.W.2d 1028, 1030-32 (1936).


those actions for invasion of privacy that involve the appropriation of some element of plaintiff's personality for commercial purposes, no doubt as a result of the close similarity between that category of invasion of privacy and the torts involving unfair competition.

§5.5. No-Fault: Persons Entitled to Workmen's Compensation. The Massachusetts "no-fault" statute allows an injured party to recover against the insurer for his medical expenses and for seventy-five percent of his lost wages, calculated on the basis of his average weekly wage. Total recovery cannot exceed $2,000. After listing the persons entitled to recovery, the statute reads: "unless any of the aforesaid is a person entitled to payments or benefits under the provisions of chapter one hundred and fifty-two ...." Chapter 152 of the General Laws is the Massachusetts Workmen's Compensation Act.

In the Survey year decision of Flaherty v. The Travelers Insurance Co., plaintiff was injured while operating a truck within and during the course of his employment and was therefore entitled to workmen's compensation benefits. Plaintiff's average weekly wage was $220. He was out of work for eight and one-half weeks, receiving $95 per week under workmen's compensation. Under "no-fault" insurance, plaintiff would have received approximately $165 per week. Plaintiff brought an action against defendant, the insurer of the truck, to recover "no-fault" benefits. He was denied recovery in the district court on the basis that the "no-fault" statute expressly excludes persons entitled to benefits under workmen's compensation. This decision was affirmed by both the Appellate Division of the District Courts and ultimately by the Supreme Judicial Court.

Plaintiff's principal argument for his position—that despite the exclusionary language in the "no-fault" statute, he was nevertheless entitled to "no-fault" benefits—was that such language was designed only to prevent double recovery of medical expenses and not to limit the injured party's right to reimbursement of wages in an amount equal

17 For a good discussion of this area, see generally York, Extension of Restitutional Remedies in the Tort Field, 4 U.C.L.A. L. REV. 499 (1957).
18 G.L. c. 214, § 3A, provides for injunctive relief and damages for this category of invasion of privacy. The damage provision permits recovery "for any injuries sustained by reason of such use" (emphasis added). This would appear to be a tort measure of damages, perhaps precluding a court from adopting an unjust enrichment approach.

§5.5. 1 G.L. c. 90, § 34A ("Personal injury protection").
2 Id.
4 Id. at 1011, 340 N.E.2d at 889-90.
5 Id., 340 N.E.2d at 890.
6 $165 is 75% of the plaintiff's average weekly wage of $220.
8 Id. at 102, 340 N.E.2d at 890.
9 Id.
to up to seventy-five percent of his weekly wage. He buttressed this claim with the argument that inequities could result if an injured workman was deprived of the three-fourths of his wages under "no-fault," and thereby had to accept the markedly lesser amount provided by workmen's compensation.

In rejecting plaintiff's argument, the Court, in addition to relying on the "unambiguous" language of the statute, also pointed out that other differences exist between "no-fault" insurance and workmen's compensation. For example, under workmen's compensation, the Court observed, had plaintiff's injury been caused by the negligence of a third party, plaintiff could have recovered his entire lost wages in an action against the third party. Under "no-fault," however, the negligent third party would have been exempt from liability up to $2,000. Under neither plan could recovery be had for pain and suffering, unless the provisions of section 6D of chapter 231 of the General Laws applied.

The Court's decision in Flaherty is obviously correct in light of the language of section 34A of chapter 90 of the General Laws. The question remains, however, whether the Flaherty result should be altered by an amendment to section 34A. Such an amendment would be called for if the Flaherty situation, namely, the inability of an injured party covered by workmen's compensation to recover lost wages under "no-fault," results from either legislative oversight or unsound policy.
It is highly unlikely that the Legislature was unaware of the large difference in the amount recoverable per week for lost wages under "no-fault" and workmen's compensation. Further, it is submitted that the legislative decision to exclude recipients of workmen's compensation from the "no-fault" plan was sound. Both workmen's compensation and "no-fault" attempt to provide compensation to an injured party without proof of fault and regardless of the injured person's fault. Each operates within a certain enterprise. Premiums under the plan are set on the basis of experience (i.e., benefits paid out in prior years). When a person, such as the plaintiff in Flaherty, happens to be involved in both enterprises, there is no reason why legislative policy should allow him to select the plan that awards him the larger benefits, or one supplemented by the other. Suppose, for example, that the plaintiff in Flaherty had been unable to work for an entire year. Certainly he would not be satisfied with the $2,000 maximum amount awarded under "no-fault." Further, there is no reason why a workman receiving an injury while operating a truck should receive more compensation than one who is injured, for example, while working in a factory. Therefore, the Flaherty result would not seem to suggest the need for any amendment to the "no-fault" statute.

§5.6. No-Fault: Common Carriers. Section 6D of chapter 231 of the General Laws provides that there can be no recovery for pain and suffering, including mental suffering, resulting from an automobile accident unless the medical expenses exceed $500 or the injury causes either death, loss of a body member, permanent and serious disfigurement, loss of sight or hearing, or consists of a fracture. The purpose of section 6D is to preclude a circumvention of one of the primary goals of the "no-fault" statute, namely, the avoidance of personal injury claims having only nuisance value. For the third time in as many years, a question of the application of section 6D was presented to the Supreme Judicial Court.

The plaintiff in Scandura v. Trombly Motor Coach Service, Inc. was injured while a passenger aboard a bus whose common carrier owner was covered by "no-fault" insurance. The plaintiff herself had no personal injury protection benefits ("no-fault") available to her

§5.6. 1 Limiting damages for pain and suffering avoids nuisance suits because potential plaintiffs cannot use such damages to bring their claims above $2,000, which is the limit of a defendant's exemption under G.L. c. 90, § 34M. See Pinnick v. Cleary, 360 Mass. 1, 28-29, 271 N.E.2d 592, 609-10 (1971), discussed in Wadsworth & Ryan, Insurance Law, 1971 ANN. SURV. MASS. LAW § 11.18, at 244-47.


4 Id.

5 Id. at 1752, 351 N.E.2d at 203.
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through a vehicle owned by her or by a member of her household.\(^6\) Plaintiff advanced two arguments for the nonapplication of section 6D, both based upon the fact that defendant was a common carrier. First, the plaintiff pointed out that in the 1974 decision, *Chipman v. Massachusetts Bay Transportation Authority*,\(^7\) the Supreme Judicial Court had allowed a plaintiff who was injured while boarding a bus to recover in negligence against the defendant-common carrier without the application of section 6D.\(^8\) Second, the plaintiff argued that since she was suing the defendant-common carrier on a contract theory, section 6D should have no application.\(^9\) The Supreme Judicial Court rejected both arguments.\(^10\)

With respect to the argument based upon *Chipman*, the Court in *Scandura* pointed out that *Chipman* was decided on the basis that neither plaintiff nor defendant had any connection with the “no-fault” insurance system.\(^11\) Thus in *Scandura*, where the defendant was covered by “no-fault” insurance, the fact that the defendant was a common carrier did not render section 6D inapplicable.\(^12\) In rejecting the plaintiff’s second argument, the Court pointed out that there appeared to be no showing that the Legislature intended that passengers in vehicles for hire should be treated any differently from those in private vehicles.\(^13\) On the contrary, the Court reasoned that to allow a circumvention of section 6D in actions against carriers for hire on the theory that plaintiff’s action sounds in contract would frustrate in part the purpose of the “no-fault” statute.\(^14\)

*Scandura*’s message is clear: section 6D of chapter 231 of the General Laws will apply in all cases except where neither plaintiff nor defendant has any connection with “no-fault.” The status of plaintiff or defendant makes no difference.\(^15\) Additionally, the fact that plaintiff did not in fact benefit from “no-fault” is not a relevant consideration.\(^16\)

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\(^6\) *Id.* at 1753, 351 N.E.2d at 203. The plaintiff, however, as an “authorized ... passenger” of the defendant was entitled to recover for her medical expenses from the defendant’s insurer. *See* G.L. c. 90, § 34A. The plaintiff’s medical expenses were $128.

\(^7\) 1974 Mass. Adv. Sh. at 1754, 351 N.E.2d at 204.

\(^8\) *See* 1976 Mass. Adv. Sh. at 1754 n.4, 1758-59, 351 N.E.2d at 204 n.4, 205.

\(^9\) *See id.* at 1754 n.4, 1760-62, 351 N.E.2d at 204 n.4, 206-07. The plaintiff’s argument appears to have been based on § 6D’s first line which states that § 6D is applicable “in any action of tort . . . .” G.L. c. 231, § 6D (emphasis added).


\(^11\) *See id.* at 1758-59, 351 N.E.2d at 205.

\(^12\) *Id.* at 1759, 351 N.E.2d at 205.

\(^13\) *Id.* at 1762, 351 N.E.2d at 206.

\(^14\) *Id.* at 1761-62, 351 N.E.2d at 206-07.


\(^16\) *See Cyr v. Farias*, 1975 Mass. Adv. Sh. 1508, 327 N.E.2d 890 (§ 6D applied even though out of state plaintiffs were not entitled to any “no-fault” benefits).
§5.7. Guest in Motor Vehicle: Duty Owed. In 1971, the Massachusetts Legislature enacted section 85L of chapter 231 of the General Laws, which section increased the duty of the operator of a motor vehicle to his guest from merely the avoidance of gross negligence to the exercise of ordinary care. The 1971 legislation took effect on January 1, 1972 and was to apply only to causes of action arising after that date. Mounsey v. Ellard, decided in 1973, held that the owner or occupier of land owed a duty of ordinary care to all lawful visitors on the property irrespective of whether they were business invitees, social guests, or licensees. During the Survey year, in Paduano v. Teft, the Supreme Judicial Court was called upon to decide whether the Mounsey principle applied to motor vehicle guests for accidents occurring before January 1, 1972, the effective date of section 85L of chapter 231 of the General Laws. The Court held that it did not.

In Paduano, the plaintiff-appellant argued that the Mounsey principle “should extend also to efface the distinction between guest passengers and passengers for hire in actions to enforce an operator's duty of care; and should, moreover, be given retroactive effect . . . .”

§5.7. 1 Acts of 1971, c. 865, § 1. 2 In the 1917 decision, Massaletti v. Fitroy, 228 Mass. 487, 118 N.E. 168 (1917), the Supreme Judicial Court held that the guest in a motor vehicle was not entitled to a duty of ordinary care. The basis for this rule was that one who renders services gratuitously should not be under the same duty of care to the recipient as one who renders such services for pay or other benefits. Id. at 510, 188 N.E. at 177. Subsequent cases established the rule that the duty owed to a guest, defined as one whose presence in the motor vehicle confers no benefit upon the operator other than a social benefit, Taylor v. Goldstein, 329 Mass. 161, 165, 107 N.E.2d 14, 16 (1952), was to avoid gross negligence. E.g., Wheatley v. Peirce, 354 Mass. 573, 576, 238 N.E.2d 861, 868 (1968).

§5.7. Acts of 1971, c. 865, § 85L, states:
In an action of tort for personal injuries, property damage or consequential damages caused by or arising from the operation of a motor vehicle in which the plaintiff was a passenger in the exercise of due care, the plaintiff may recover in an action against the operator upon proof that said operator was guilty of ordinary negligence resulting in said injuries or damages. 

4 365 Mass. 693, 297 N.E.2d at 51.
9 1976 Mass. Adv. Sh. at 1745, 351 N.E.2d at 211. Two months before deciding Paduano, the Supreme Judicial Court in Kolofsky v. Heath, 1976 Mass. Adv. Sh. 1179, 346 N.E.2d 863, affirmed the trial judge’s grant of a directed verdict motion in a case involving a pre-1972 accident, on the ground that the evidence failed to warrant a finding of gross negligence. Id. at 1179, 346 N.E.2d at 863. In Kolofsky, the Court stated: “The plaintiff does not ask us to reexamine the rule (the avoidance of gross negligence to a guest in the motor vehicle) in light of Mounsey . . . . and we do not.” Id., 346 N.E.2d at 863-64 (citation omitted).

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The Court, however, declined to discuss the issue of whether the Mounsey principle should apply to the field of motor vehicle torts, taking the position that the provision of section 2 of chapter 865 of the Acts of 1971, setting out the effective date of section 85L of chapter 231 of the General Laws, "is to be read as assuming and confirming the existence of the traditional rule . . . (the avoidance of gross negligence) and changing it only as from January 1, 1972." This, the Court concluded, "excludes any possibility that might otherwise exist for bringing the Mounsey principle to bear on a case like the present where the accident antedated the January 1, 1972, deadline."

The statement by the Court in Paduano that the effective date language for section 85L confirms the common law rule of gross negligence for accidents antedating the statute's effective date seems unduly restrictive. It is doubtful that the Legislature intended to codify a common law rule for facts occurring prior to the effective date of a statute abolishing the common law rule. Absent clear language in a statute to the contrary, the Court has the authority to change the common law and make it consistent with a statute for situations occurring prior to the statute's effective date. Whether this ought to be done should be decided in each particular case on considerations similar to those involved when the issue is the retroactivity of a change in the common law. In this context, consideration should be given to the degree of unfairness involved in the application of the old rule to the particular party weighed against the unfairness of applying the new rule to a party (or his insurer) who may have relied upon the old rule to shape his conduct (or, in the case of an insurer, in setting its insurance rates).

12 Id.
13 In fact there is Massachusetts precedent to the contrary. See Warner v. Whitman, 353 Mass. 468, 472, 233 N.E.2d 14, 16-17 (1968) (Rule against Perpetuities); Selby v. Kuhns, 345 Mass. 600, 607, 188 N.E.2d 861, 865-66 (1963) (effect of release of one joint tortfeasor on the other).
14 See cases cited in note 13 supra.
Paduano will not affect the result of many future cases involving guests in automobiles because the statute will now cover most situations. However, the issue left open in Paduano, whether the Mounsey principle applies in other relationships, is still critical. What effect, for example, does the Mounsey principle have on the duty of a landlord to his tenant? 17

§5.8. Negligence: Proximate Cause. In H.P. Hood & Sons, Inc. v. Ford Motor Co., defendant, Ford Motor Co., negligently manufactured a truck, resulting in injury to the plaintiff-operator, an employee of H.P. Hood & Sons, Inc. In the plaintiff-operator's action against Ford, Ford moved for a directed verdict on the ground that Ford, after discovering a steering defect with the particular model of truck, notified Hood of the truck's likely defective condition and offered free of charge to remedy the defect, and that Hood negligently failed to take advantage of this opportunity. The trial judge denied Ford's motion and the jury returned a verdict for the plaintiff.

17 See §5.9 infra for discussion of this issue. After the close of the Survey year, the Supreme Judicial Court in Lindsey v. Massios, 1977 Mass. Adv. Sh. 381, 360 N.E.2d 631, held that a landlord owes a duty of reasonable care to his tenant's guests in maintaining the property which the landlord controls. The Court overruled prior cases holding that a landlord owes to his tenant's visitors the same duty he owes to his tenants concerning the maintenance of property under his control.


2 Ford's negligence concerned the faulty installation of a "right front spring hanger bracket." Defective rivets allowed the bracket to separate from the truck's frame which caused the truck to turn over onto its side. See id. at 912-13, 345 N.E.2d at 686. On appeal, Ford did not dispute the jury's finding that Ford was negligent in manufacturing the truck. Id. at 913-14, 345 N.E.2d at 687.

3 Id. at 909, 345 N.E.2d at 685.

4 Hood also brought suit against Ford for damages to the truck, its contents, and refrigerating equipment installed in it. Id. at 910, 345 N.E.2d at 685. The jury found for Ford in this action, apparently based on Hood's own negligence. Id. at 918, 345 N.E.2d at 688.

Ford brought a third party action against Hood in contract for indemnification for any damages recoverable by the plaintiff-operator. Id. at 910, 345 N.E.2d at 685. Ford claimed that it and Hood had contracted to have Hood accomplish the repairs and, impliedly, to hold Ford harmless for its negligence. Id. at 918, 345 N.E.2d at 688. The Supreme Judicial Court affirmed the trial judge's grant of Hood's directed verdict motion on the ground that Ford failed to establish the existence of a contract between it and Hood. Id. at 918-21, 345 N.E.2d at 688-90.


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operator in the sum of $21,500.\textsuperscript{7} Affirming the trial judge’s refusal
to grant Ford’s directed verdict motion, the Supreme Judicial Court
held that Hood’s negligent\textsuperscript{8} handling of the matter after receiving
Ford’s notice did not, under the circumstances of the case, relieve
Ford of liability to the plaintiff-operator as a matter of law.\textsuperscript{9}

Massachusetts requires a manufacturer or seller of an unsafe or de­
defective product, upon discovering the danger in the product’s use, to
warn the purchasers of the product.\textsuperscript{10} Failure to warn may constitute
a basis for liability.\textsuperscript{11} The \textit{Hood} case deals with the extent to which a
timely warning provided by a manufacturer to a purchaser-employer
avoids liability when an employee of the purchaser-employer is
harmed despite the warning. The issue is one of superseding cause
and foreseeability.\textsuperscript{12} A purchaser-employer’s failure to have a de­
defective product repaired after having received notice of a defect may be
so outrageous as to constitute as a matter of law, the sole legal cause of
an employee’s injury.\textsuperscript{13} More often, however, it is a jury question
whether the manufacturer might reasonably anticipate that the em­
ployer will fail to have the defect remedied prior to use by its
employees.\textsuperscript{14}

Prime considerations in determining whether to submit the case to
the jury are the character and position of the employer who has been
warned, his relationship to the defendant or to the plaintiff, and the
likelihood that the employer will or will not exercise proper care.\textsuperscript{15}
Other considerations, however, do exist. Where, for example, the
manufacturer’s notice sets a charge for improving the product’s
safety, it is more likely that the employer will refuse or delay accept­
ance of the offer than where the service is offered free of charge.
Consequently, that fact usually warrants submitting to the jury the
question of whether the manufacturer should have reasonably

\textsuperscript{8} The Court stated that Hood’s negligence could be implied from the jury’s finding
See note 4 supra.
\textsuperscript{9} 1976 Mass. Adv. Sh. at 918, 345 N.E.2d at 688.
\textsuperscript{10} \textit{See}, e.g., \textit{Haley v. Allied Chemical Corp.}, 353 Mass. 325, 330, 231 N.E.2d 549, 553
(1967).
\textsuperscript{12} \textit{Fredericks v. American Exports Lines, Inc.}, 227 F.2d 450, 453-54 (2d Cir. 1955).
\textsuperscript{13} \textit{See}, e.g., \textit{Stultz v. Benson Lumber Co.}, 6 Cal. 2d 688, 693-95, 59 P.2d 100, 103
(1936) (manufacturer of defective plank not liable for injuries sustained by employee in
collapse of scaffold where employer built scaffold with knowledge of defect); \textit{cf.} Ford
Motor v. Wagoner, 183 Tenn. 392, 192 S.W.2d 840 (1946) (manufacturer of car not li­
liable for injuries sustained by driver where previous owner refused to have defective
hood latch replaced).
\textsuperscript{14} \textit{See} \textit{Balido v. Improved Mach., Inc.}, 29 Cal. App. 3d 633, 645-49, 105 Cal. Rptr.
\textsuperscript{15} \textit{See} \textit{RESTATEMENT (SECOND) OF TORTS} § 452(2), comment f (1965).
foreseen that the employer would not have the defect remedied prior to use.\textsuperscript{16}

By affirming the denial of Ford’s directed verdict motion, the court in \textit{Hood} determined that a jury could find that Ford should have anticipated Hood’s negligent delay in remediying the defective trucks. It is unclear from the \textit{Hood} opinion, however, exactly what circumstance appearing in the evidence warranted such a finding. The letter to Hood made it clear that no charge was involved.\textsuperscript{17} There is some discussion in the opinion concerning negotiations between Ford and Hood relative to the repairs being done by Hood’s mechanics with Ford supplying the repair kits and reimbursing Hood for the labor, and that the repair kits supplied by Ford were incomplete.\textsuperscript{18} The opinion does not indicate, however, whether Hood informed Ford concerning the incompleteness of the repair kits or what interval of time elapsed between the receipt of the incomplete repair kits by Hood and the date of the accident. Over two months elapsed between the notification of the defect by Ford and the accident.\textsuperscript{19} If Ford had been informed of the incompleteness of the repair kits and had not supplied the deficiency by the date of the accident, or had just shortly before the accident supplied the deficiency, a jury could find Ford negligent. On the other hand, if Hood failed to inform Ford of the deficiency or if Ford had supplied the deficiency long prior to the accident, and thus assumed that the trucks were being repaired, the finding of Ford’s negligence seems unsupported.

\textbf{§5.9. Negligence: Landlord and Tenant.} In the Survey year decision of \textit{Perry v. Medeiros},\textsuperscript{1} the Supreme Judicial Court held: first, that a landlord’s violation of a safety ordinance can serve as evidence of the landlord’s common law negligence in the maintenance of common areas;\textsuperscript{2} and second, that section 19 of chapter 84 of the General Laws, which extends the “snow and ice” statute’s\textsuperscript{3} thirty-day notice period\textsuperscript{4}

\textsuperscript{17} 1976 Mass. Adv. Sh. at 915 n.4, 345 N.E.2d at 687 n.4.
\textsuperscript{18} \textit{Id.} at 917-18, 345 N.E.2d at 688.
\textsuperscript{19} The notification was sent on March 27, 1968, and the accident occurred on June 7, 1968. \textit{Id.} at 912, 915 n.4, 345 N.E.2d at 686, 687 n.4.

\textsuperscript{5} \textit{Id.} at 626-27, 343 N.E.2d at 862.
\textsuperscript{3} G.L. c. 84, §§ 17-21. In general, the “snow and ice” statute bars a person from recovering damages caused by snow or ice unless the person obligated by law to clear away the snow and ice is notified of the accident within thirty days. \textit{Id.} The purpose of the statute is to give the potential defendant a reasonable chance to collect evidence before the snow or ice melts. See \textit{Urban v. Simes}, 259 Mass. 336, 337-38, 156 N.E. 697, 698 (1927).
\textsuperscript{4} G.L. c. 84, § 18, provides in part: A person [injured by reason of snow or ice] ... shall, within thirty days thereafter, give to the ... person by law obliged to keep said way in repair, notice of the name and place of residence of the person injured, and the time, place and cause of said injury or damage . . . .
in cases of physical or mental incapacity,\textsuperscript{5} applies only where the plaintiff's incapacity results from the "loss of the faculties of the mind, or from a lack of power to use the mind because of the loss or impairment of the organs of the body."\textsuperscript{6}

In \textit{Perry}, plaintiff-tenant sustained injuries when she fell down a common stairway outside defendants' apartment house.\textsuperscript{7} Plaintiff alleged that the stairs were negligently maintained, having an accumulation of snow and ice.\textsuperscript{8} Further, plaintiff claimed that she lost her footing when the storm door slammed shut against her as she stepped out on the top step.\textsuperscript{9} The storm door, which was closed by an attached spring arrangement, had been installed after the commencement of plaintiff's tenancy.\textsuperscript{10} Plaintiff attempted to introduce in evidence section 6.08 of the Taunton Building Code, which provided that "[n]o exit door shall open immediately on a flight of stairs [without] ... a landing ... [being] provided ..."\textsuperscript{11} Although defendants' stairway did not have such a landing, the trial judge excluded the evidence of the building code.\textsuperscript{12}

Plaintiff, who was hospitalized for approximately thirty days following the accident, notified the defendants of the accident fifty-two days following the accident,\textsuperscript{13} rather than within thirty days as required by section 18 of chapter 84.\textsuperscript{14} At the trial and on appeal, plaintiff claimed that she was physically incapacitated within the meaning of section 19 of chapter 84\textsuperscript{15} and, therefore, that her notice was timely.\textsuperscript{16} The trial judge rejected the applicability of section 19 and instructed the jury that if they found that plaintiff's injuries were "caused by, or contributed to, in whole or in part, by an accumulation of snow and

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\textsuperscript{5} \textit{Id.} § 19, provides in part: "If by reason of physical or mental incapacity it is impossible for the person injured to give the notice within the time required, he may give it within thirty days after such incapacity has been removed . . . ."


\textsuperscript{7} 1976 Mass. Adv. Sh. at 622, 343 N.E.2d at 861.

\textsuperscript{8} \textit{Id.}

\textsuperscript{9} \textit{Id.} at 624, 343 N.E.2d at 861.

\textsuperscript{10} \textit{Id.}


\textsuperscript{12} 1976 Mass. Adv. Sh. at 626, 343 N.E.2d at 862.

\textsuperscript{13} \textit{See id.} at 623, 343 N.E.2d at 861.

\textsuperscript{14} For the text of § 18, see note 4 supra. By Acts of 1973, c. 1085, the following sentence was added to G.L. c. 84, § 18: "Failure to give such notice for such injury or damage sustained by reason of snow or ice shall not be a defense under this section unless defendant proves that he was prejudiced thereby." This amendment did not apply to the present case where the injury occurred on December 31, 1967. 1976 Mass. Adv. Sh. at 629 n.5, 343 N.E.2d at 863 n.5.

\textsuperscript{15} For the text of § 19, see note 5 supra. Plaintiff claimed that she suffered a fractured sacrum in the fall and as a result was strapped to a fracture board while in the hospital. 1976 Mass. Adv. Sh. at 631 n.6, 343 N.E.2d at 864 n.6.

ice, they must find for the defendants.”17 The jury returned a verdict for the defendants.18 Plaintiff appealed.

The Supreme Judicial Court in Perry held that the trial judge erred in excluding the building code from evidence, since a jury could find negligence from a violation of the code.19 In so holding, the Court has decided an issue explicitly left undecided in Dolan v. Suffolk Franklin Savings Bank.20 In Dolan, the Court admitted evidence of a landlord’s violation of an ordinance where a tenant alleged the landlord was negligent in allowing an unsafe condition in a noncommon area.21 The Court stated, however, that “we need not here reconsider the line of cases ... holding that violation of a statute or ordinance is not evidence of negligence ... where common areas are involved.”22 In Perry, the ordinance that was admitted in evidence related to the condition of a common stairway.23 The Court’s only reference in Perry to the older line of cases suggests that those cases will be either limited to their facts or overruled.24

On the other hand, the Court held that the trial judge ruled correctly that plaintiff’s notice failed to satisfy the “snow and ice” statute’s thirty-day notice requirement.25 The Court stated that the physical or mental incapacity which enlarges the notice period under section 19 means an inability of the plaintiff to give the notice due to a loss of the faculties of the mind, or from a lack of power to use the mind because of the loss or impairment of the organs of the body. Mere physical inability to move or be moved about or to write are not evidence of mental or physical incapacity.27

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17 Id. at 629, 343 N.E.2d at 863.
18 Id. at 621, 343 N.E.2d at 860.
19 Id. at 626-27, 343 N.E.2d at 862.
21 355 Mass. at 669, 246 N.E.2d at 800.
24 In Perry, 1976 Mass. Adv. Sh. at 627, 343 N.E.2d at 863, the Court stated that “reliance on [the rule of Richmond v. Warren Institution for Savings, 307 Mass. 483, 30 N.E.2d 407 (1940), see note 22 supra] is misplaced since the rule would have no application to the facts of the case before us, assuming it would still be followed on facts similar to those in the Richmond case.” After the close of the Survey year, the Supreme Judicial Court in Lindsey v. Massios, 1977 Mass. Adv. Sh. 381, 360 N.E.2d 631, admitted into evidence a landlord’s violation of a safety statute in an action by a tenant’s visitor for negligence in the maintenance of a common area. Id. at 385-86, 360 N.E.2d at 634.
26 G.L., c. 84, § 19. For the text of § 19, see note 5 supra.
27 1976 Mass. Adv. Sh. at 630, 343 N.E.2d at 864, quoting Goodwin v. City of Fall River, 228 Mass. 529, 533, 117 N.E. 796, 797 (1917). Goodwin involved the interpreta-

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Since the plaintiff in *Perry* had not lost the power to use her mind,\textsuperscript{28} the Court found that section 19 was inapplicable and, therefore, that the plaintiff would be barred from recovering if her injuries resulted in whole or in part from snow and ice.\textsuperscript{29} Insofar as it was not possible to determine whether the jury had found that (a) the defendants were not negligent, or (b) that they were negligent, but that plaintiff’s injury resulted in whole or in part from snow or ice, the Court concluded that plaintiff was entitled to a new trial.\textsuperscript{30}

The hazardous condition in *Perry* was a result of the landlord’s installation of the storm door after the commencement of the plaintiff’s tenancy.\textsuperscript{31} Thus, apart from the snow and ice, the landlord’s alleged negligence would have been a breach of his traditional duty to exercise reasonable care to maintain common areas “in as good a condition as that in which they were or appeared to be at the time of the creation of the tenancy.”\textsuperscript{32} The Court in *Perry* therefore had no occasion to consider a pressing issue—namely, whether a landlord’s duty to his tenant, which is the use of reasonable care to keep common areas in as good a condition as they were or appeared to be at the creation of the tenancy,\textsuperscript{33} should be changed to the use of reasonable care to maintain such areas in a reasonably safe condition. It appears likely that in the very near future, the Supreme Judicial Court will impose upon landlords a general duty of reasonable care toward their tenants based on the reasoning of *Mounsey v. Ellard*.\textsuperscript{34} In *Mounsey*, the Supreme Judicial Court held that the owner or occupier of land owed a duty of ordinary care to all lawful visitors on the property.\textsuperscript{35}
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Sargent v. Ross, the Supreme Court of New Hampshire, citing language from the Mounsey opinion, held that the landlord's duty to his tenants is the exercise of reasonable care. It is unlikely that the Supreme Judicial Court will hold in future cases that tenants are the only class of person lawfully on the property to whom the owner does not owe a common law duty of ordinary care.

STUDENT COMMENT

§5.10 The Abrogation of Parent-Child and Interspousal Immunity in Massachusetts. During the Survey year the Supreme Judicial Court decided two cases involving immunity from tort liability. These cases, Sorensen v. Sorensen and Lewis v. Lewis, abolished in certain circumstances, parent-child and interspousal immunity respectively. Sorensen arose out of an automobile collision between Paul Sorensen and Marlene Norton. Sorensen's two year old daughter, Jessica, a passenger in his car, was seriously injured in the accident. Through her mother as next friend, Jessica brought suit against both drivers for personal injuries, conscious suffering and medical expenses. In her complaint against defendant Sorensen, the plaintiff charged negligence and gross negligence resulting in injuries

In deciding Lindsey, 1977 Mass. Adv. Sh. at 384 n.2, 360 N.E.2d at 634 n.2, the Court was careful to point out that "[w]e do not consider or decide today the extent of a landowner's duty to his tenants in this area . . . ."

4 Brief for Plaintiff-Appellant at 2.
5 1975 Mass. Adv. Sh. at 3662 & n.1, 339 N.E.2d at 908 & n.1. In deciding that an action could be maintained between parent and child on the facts of the Sorensen case, the Court did not discuss whether as a minor, Jessica could recover for her medical expenses. See discussion in the notes and text at notes 220-26 infra.
6 1975 Mass. Adv. Sh. at 3663, 339 N.E.2d at 908. It was necessary for the plaintiff to plead gross negligence because at the time the injury arose, May 29, 1971, Agreed Statement for Plaintiff-Appellant at 1, Massachusetts recognized the guest rule, a common law rule which prevented recovery by a guest passenger in an automobile absent a showing of gross negligence. See Massaletti v. Fitzroy, 228 Mass. 487, 510, 118 N.E. 168, 177 (1917) (establishes guest rule in Massachusetts); brief for Defendant-Appellee at 11. In 1971 the Massachusetts Legislature abrogated the guest rule prospectively for causes of action arising after January 1, 1972. G.L. c. 231, § 85L. This statute provides for recovery by a passenger in an automobile against the operator upon a showing of ordinary negligence. In holding that there could be recovery against a parent for the negligent operation of an automobile, the Court in Sorensen did not mention the guest statute. See 1975 Mass. Adv. Sh. at 3665, 339 N.E.2d at 909. While the guest statute represents a potential barrier to recovery in the parent-child area, it is not insurmountable. For example, the Supreme Court of Virginia, when it overruled parent-child immunity for injuries arising out of automobile accidents, avoided its guest statute by determining

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amounting to $10,000. The defendant received a judgment on the pleadings in the trial court, and the Supreme Judicial Court on its own motion transferred the appeal directly from the Appeals Court. The plaintiff argued before the Supreme Judicial Court that since defendant Sorensen was insured for the amount of damages sought, the real defendant in interest was his liability insurer, and therefore, any immunity based on family harmony should not bar her action. In addition, the plaintiff asked the Court to reexamine the principles underlying parent-child immunity, urging that contemporary conditions no longer warranted immunity in automobile negligence actions.

In a unanimous decision, the Supreme Judicial Court HELD: An action for negligence may be maintained by an unemancipated minor against a parent for injuries arising out of an automobile accident and recovery may be obtained to the extent of the parent’s automobile liability insurance. In reaching its decision, the Court had to overcome the two policies supporting parent-child immunity previously adopted by the Court—that suits between family members would be a source

that a child under fourteen years of age was incapable of having the volitional intent to become a guest. Smith v. Kauffman, 212 Va. 181, 187, 183 S.E.2d 190, 195 (1971).

7 Brief for Plaintiff-Appellant at 3.
9 Id. at 3663, 339 N.E.2d at 908. The Court transferred the appeal directly pursuant to G.L. c. 211A, § 10, which provides:

Without regard to whether review is by appeal, bill of exceptions, report otherwise, appellate review of decisions made in the superior, land or probate courts, if within the jurisdiction of the appeals court, shall be in the first instance by the appeals court except in the following cases in which appellate review shall be directly by the supreme judicial court without the necessity of any prior hearing or decision by the appeals court on the merits of the issues sought to be reviewed:

(A) whenever two justices of the supreme judicial court issue an order for direct review by the supreme judicial court in any case on appeal, either at the request of one of the parties or at the court’s own initiative, upon finding that the questions to be decided are: (1) questions of first impression or novel questions of law which should be submitted for final determination to the supreme judicial court; (2) questions of law concerning the Constitution of the commonwealth or questions concerning the Constitution of the United States which have been raised in a court of the commonwealth; (3) questions of such public interest that justice requires a final determination by the supreme judicial court.

(B) Whenever the appeals court as a body or a majority of the justices of the appeals court considering a particular case certifies that direct review by the supreme judicial court is in the public interest.

In each case where appellate review is not within the jurisdiction of the appeals court, appellate review shall be directly by the supreme judicial court, unless such case is transferred by the supreme judicial court to the appeals court for determination in accordance with section twelve of this chapter.

10 Brief for Plaintiff-Appellant at 12.
11 Id.
13 Id. at 3665, 339 N.E.2d at 909.
of disharmony in the family unit\textsuperscript{14} and that suits between family
members promote fraud and collusion.\textsuperscript{15}

The Court rejected the disharmony rationale on four grounds.\textsuperscript{16}
First, the Court reasoned that the possibility of domestic strife arises
from the injury itself and not from the institution of the lawsuit to re­
cover damages for the injury.\textsuperscript{17} On the contrary, once an injury has
occurred, the allowance of recovery when there is insurance to assist
the injured party will help preserve the family unit by easing family
financial difficulties.\textsuperscript{18} Second, the Court recognized that when an ac­tion
is brought by a child against a parent, it will be done with the
parent's consent with a view toward recovery from the insurer. As a
result, if there is no insurance, the chances of suit being brought are
small.\textsuperscript{19} Third, the Court noted that the common law has long permit­
ted actions between parent and child in the contract and property
areas\textsuperscript{20} and reasoned that negligence actions would generate no more
acrimony or disharmony than those actions which have already been
allowed.\textsuperscript{21} If, as the Court previously stated, the family disruption
arises from the adversary nature of the suit itself rather than from the
particular conduct which led to the suit,\textsuperscript{22} the disruptive effect would
appear to be the same irrespective of whether the suit is a negligence
or property action. Fourth, the Court noted that any unsettling in­
fluence that litigation between a parent and child might have had has
largely been dissipated by the widespread existence of liability in­
surance.\textsuperscript{23} The Court reasoned that child and parent in such an action
would not truly be adversaries but would both be looking toward the
insurance to provide the means for medical care and support for the
child.\textsuperscript{24} This finding would appear to be an acceptance by the Court

\textsuperscript{14} See Luster v. Luster, 299 Mass. 480, 481, 13 N.E.2d 438, 439 (1938).
\textsuperscript{15} See id. at 483, 13 N.E.2d at 440. See also Oliveria v. Oliveria, 305 Mass. 297, 299, 25
N.E.2d 766, 767 (1940).
\textsuperscript{17} Id. The case that created the parent-child immunity doctrine in the United States,
Hewlett v. George, 68 Miss. 703, 9 So. 885 (1891), a case arising out of intentional con­
duct by the parent which justified the immunity solely on the basis of protecting the
harmony of the home. Id. at 711, 9 So. at 887.
\textsuperscript{19} Id. at 3676-77, 339 N.E.2d at 913.
\textsuperscript{20} Id. at 3678, 339 N.E.2d at 914. While there are no Massachusetts cases specifically
recognizing parent-child suits in contract or property actions, it appears that actions in­
volving property or contract rights have traditionally been allowed, thus indicating a ju­
dicial view that property or contract actions are less threatening to the family than tort
actions. See, e.g., Lamb v. Lamb, 146 N.Y. 317, 41 N.E. 26 (1895) (property action);
King v. Sells, 193 Wash. 294, 75 P.2d 130 (1938) (action for money had and received).
See also McCurdy, Torts Between Persons in Domestic Relation, 43 HARV. L. REV. 1030,
1057-58 (1930); Note 33 ST. JOHN'S L. REV. 310, 310 (1959).
\textsuperscript{22} See discussion at note 17-18 supra.
\textsuperscript{24} Id. at 3679, 339 N.E.2d at 914.
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of plaintiff's contention that the real party in interest is the defendant's insurer. 25

Having disposed of the family harmony rationale, the Court then examined the second policy in support of parent-child immunity—fraud and collusion. The Court recognized that when the parties to an action cannot truly be said to be adversaries, the process "becomes peculiarly liable to abuse through collusion." 26 A suit between parent and child is susceptible of collusion because the parent will benefit both indirectly by the child's recovery in seeing that his child is provided for, and directly by being relieved of that burden himself.

The Court found three problems with the collusion argument. First, the Court reasoned that the possibility of fraud and collusion is present in any action and the judicial system relies heavily upon the judge and jury to weed out fraudulent suits. 27 In this context, the Court noted that the fact that the litigants in a particular case are members of the same family would serve to make juries more alert for improper conduct than they would be if the parties to a suit were strangers. 28 Second, the Court found that the insurance company could protect itself from fraudulent actions by means of a cooperation clause. 29 Finally, the Court acknowledged that while some fraudulent claims might succeed, such a possibility should not be sufficient to deny recovery in all cases. 30

After rejecting the family harmony and collusion arguments in support of parent-child immunity, the Court abrogated the doctrine in certain specific circumstances. First, under Sorensen, parent-child immunity was abrogated only in suits for injuries arising out of automobile accidents. 31 This was so because such conduct did not come within an area of parental discretion. 32 Second, recovery in a suit between parent and child was limited to the amount of the parent's liability insurance. 33 Third, recovery was limited to injuries arising out of

25 See text and note at note 10 supra.
28 Id. at 3680-81, 339 N.E.2d at 915.
29 Id. at 3681, 339 N.E.2d at 915. Under such a clause, if the insured was found not to be dealing in good faith, the insurer may disclaim liability. Id. The Court suggested that a showing of lack of cooperation would be particularly easy in automobile cases because of the requirement of prompt reporting of accidents to the registry of motor vehicles and prompt investigation by insurance companies. Id. at 3682, 339 N.E.2d at 915.
30 Id. at 3682-83, 339 N.E.2d at 915.
31 Id. at 3685, 339 N.E.2d at 909.
32 "Neither parental authority and discipline nor parental discretion is called into question by an automobile accident case." Id. at 3683, 339 N.E.2d at 915. For a discussion of the limitation to automobile accidents, see text at notes 61-72 infra.
33 1975 Mass. Adv. Sh. at 3665, 339 N.E.2d at 909. While the Court did not state why it was limiting recovery to the amount of insurance, the case suggests two possible reasons. The plaintiff's ad damnum in the action against her father was limited to the amount of his insurance policy, Brief for Plaintiff-Appellant at 3, and the Court in
negligent actions. Finally, immunity was abrogated only in actions by a child against a parent.

Seven months after the *Sorensen* decision, the Supreme Judicial

*Sorensen* was generally reluctant to decide anything more than what was presently before it. See 1975 Mass. Adv. Sh. at 3683-86, 339 N.E.2d at 916-17. Also, since insurance was an important element in the Court's rejection of the family harmony rationale, *id.* at 3676-79, 339 N.E.2d at 913-14, the Court may not have wanted to decide when *Sorensen* was before it whether family harmony would be a sufficient reason for maintaining immunity in situations where there was no liability insurance. The Court, however, has declined to apply the insurance limitation to the abrogation of interspousal suits. In *Lewis v. Lewis*, 1976 Mass. Adv. Sh. 1764, 1780 n.4, 351 N.E.2d 526, 533 n.4, the Court said that the logic of *Sorensen* did not require such an application. See note 55 infra. *Lewis* would seem to indicate that the abrogation of immunity does not depend upon there being insurance equal to the possible judgment. Most recently in *Pevoski v. Pevoski*, 1976 Mass. Adv. Sh. 2624, 358 N.E.2d 416, Justice Quirico in his concurring opinion strongly urged the Court to expressly disavow the insurance limitation of *Sorensen*. *Id.* at 2630, 358 N.E.2d at 418-19.

34 1975 Mass. Adv. Sh. at 3665, 339 N.E.2d at 909. Since actions for intentional torts are already allowed in many jurisdictions, *see*, e.g., Emery v. Emery, 45 Cal.2d 421, 430, 289 P.2d 218, 224 (1955); Wright v. Wright, 85 Ga. App. 721, 727, 70 S.E.2d 152, 156 (1952); Cowgill v. Boock, 189 Ore. 282, 301, 218 P.2d 445, 455 (1950); *see also* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 122, at 866 & n.n. 83, 84 (4th ed. 1971), the Court's limitation to negligence actions should not be interpreted to mean that immunity will apply in cases of intentional conduct. It would be illogical to impose liability for conduct which is negligent while at the same time protecting torts. Massachusetts has never determined the effect of immunity on intentional conduct. In *Luster v. Luster*, 299 Mass. 480, 13 N.E.2d 438 (1938), the Court declined to decide the issue. *Id.* at 484, 13 N.E.2d at 440.

35 1975 Mass. Adv. Sh. at 3665, 339 N.E.2d at 909. As in the insurance limitation, this final limitation may have been a function of the Court's reluctance to decide anything more than what was necessitated by the facts presently before it. *Id.* at 3683-86, 339 N.E.2d at 916-17. See discussion at note 33 supra. It would appear that the reasoning of *Sorensen* would apply with equal force to a suit by a parent against a child. In *Oliveria v. Oliveria*, 305 Mass. 297, 298-99, 25 N.E.2d 766, 767 (1940), the Supreme Judicial Court applied the policy rationale in support of domestic harmony enunciated in *Luster v. Luster*, 299 Mass. 480, 13 N.E.2d 438 (1938), to bar recovery by a parent against a child for injuries arising out of an automobile accident. In *Sorensen*, the Court disposed of the rationale used in both *Luster* and *Oliveria* and said that both decisions were overruled to the extent to which they were inconsistent with *Sorensen*. 1975 Mass. Adv. Sh. at 3665, 339 N.E.2d at 909. The *Sorensen* reference to both *Luster* and *Oliveria* would seem to indicate that the Court will allow recovery on the basis of *Sorensen* regardless of whether the injured party is a parent or a child. It would be inconsistent to allow a child to recover for a parent's negligent driving and to deny recovery by a parent against a child in like circumstances.


There is no comparable limitation raised by the Court in its abrogation of interspousal immunity in *Lewis v. Lewis*, 1976 Mass. Adv. Sh. 1764, 351 N.E.2d 526, because instead of referring to suits by a wife against her husband, the Court generally referred to suits by one spouse against the other. *Id.* at 1779, 351 N.E.2d at 532.
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Court in *Lewis v. Lewis*\(^{36}\) examined the immunity between husband and wife. In *Lewis*, an automobile accident case, a wife sued her husband for personal injuries sustained while she was a passenger in the car he was driving.\(^{37}\) The defendant’s motion for summary judgment was granted\(^{38}\) on the grounds of common law interspousal immunity and section 6 of chapter 209 of the General Laws.\(^{39}\) The Supreme Judicial Court granted direct appellate review.\(^{40}\) On appeal the respondent argued that interspousal immunity, unlike parent-child immunity, was codified by the Legislature in section 6 of chapter 209 of the General Laws,\(^{41}\) which section gives a married woman the right to sue as if she were single, with the limitation that the section does not “authorize suits between husband and wife except in connection with [certain] contracts . . .”\(^{42}\) The respondent contended that by inclusion of such a limitation with respect to a married woman’s right to sue, the Legislature meant to bar tort actions between spouses.\(^{43}\)


\(^{37}\) Id. at 1765, 351 N.E.2d at 527.

\(^{38}\) Id.

\(^{39}\) Section 6 provides: “A married woman may sue and be sued in the same manner as if she were sole; but this section shall not authorize suits between husband and wife except in connection with contracts entered into pursuant to the authority contained in section two.”


\(^{41}\) G.L. c. 209, § 6. For the text of § 6 see note 39 supra.

\(^{42}\) Id.

\(^{43}\) 1976 Mass. Adv. Sh. at 1771-73, 351 N.E.2d at 529-30. The claim that G.L. c. 209, § 6 codifies interspousal immunity seems particularly ironic in view of the statute’s history. Interspousal immunity for tort actions was one aspect of a married woman’s general legal disability. At common law a married woman had no legal identity of her own and all legal action had to be taken by her husband. As such, the courts found it anomalous to allow actions between husband and wife because in order for a wife to sue her husband, the husband would literally have to bring an action against himself. L. KANOWITZ, WOMEN AND THE LAW 76-77 (1969). Even if such suits were allowed, any recovery obtained by the wife would, with the rest of her property, be subject to the control of the tortfeasor husband. Id. at 77. Beginning in 1839, Married Woman’s Acts in various forms were passed in all jurisdictions of the United States. Id. at 40. See, e.g., N.J. STAT. ANN. § 37:2-6 (1968) (West); VT. STAT. ANN. tit. 15, § 66 (1976); VA. CODE § 55-36 (1974). While there was a variation in wording and scope of the statutes among jurisdictions, they generally dealt with a woman’s right to contract, to sue and be sued without her husband, to own and dispose of property and to control her own earnings. In short, the Married Woman’s Acts gave a woman her own separate legal identity. See KANOWITZ, supra at 40. Because the statutes were not uniform, the interpretation of their effect upon a woman’s right to sue her husband for personal injury varied among jurisdictions. Early interpretations of the statutes generally held, for the public policy reason of domestic tranquility, that such statutes were to be strictly construed against permitting spouses to sue each other for personal torts. Note, 38 HARV. L. REV. 383, 384 (1925). Massachusetts Married Women’s Act was passed in 1845 and concerned only property rights. See *Lewis*, 1976 Mass. Adv. Sh. at 1772 n.2, 351 N.E.2d at 529 n.2. The language which respondent in *Lewis* contended was a legislative codification of interspousal immunity was added by Acts of 1875, c. 184, § 3: “A married woman may sue and be sued in the same manner and to the same extent as if she were sole, but
Therefore, the court was precluded from abolishing interspousal immunity since any change in the rule must come from the Legislature.\textsuperscript{44} The Court disagreed with this interpretation of section 6, finding instead that the statute, while evidencing an intent to preclude interpretation of the statute as authorizing such suits, fell short of expressly forbidding suits between husband and wife.\textsuperscript{45} The Court noted a previous interpretation of the statute as consistent with this reading.\textsuperscript{46} The Court further determined that the same policy considerations that had supported the immunity between parent and child—preserving family harmony and preventing fraudulent suits,—had also served to support interspousal immunity.\textsuperscript{47} As the Court had considered and rejected these arguments in Sorensen in what it termed "the analogous context of parental immunity,"\textsuperscript{48} it did not repeat its reasoning in Lewis.\textsuperscript{49} Nothing herein contained shall authorize suits between husband and wife." The language of the present statute containing an express exception for suits concerning contracts was added in 1963 when the Legislature enacted G.L. c. 209, § 2 (1958), which expressly authorized contracts between husband and wife. In effect, the respondent was claiming that the statute, which was enacted to sever a woman's legal identity from that of her husband, instead made a common law disability statutory.\textsuperscript{44,49} 1976 Mass. Adv. Sh. at 1777, 351 N.E.2d at 529-30.

\textsuperscript{45} 1976 Mass. Adv. Sh. at 1774-75, 351 N.E.2d at 520-31. The defendant also argued that such a longstanding rule should be changed by the Legislature rather than by the courts. Id. at 1777, 351 N.E.2d at 531. The Court rejected this contention noting that when a judicially created rule is no longer attuned to the needs of society, the courts have both the authority and the duty to change the rule. The nature of the common law requires this constant process of revitalization. Id. at 1777-79, 351 N.E.2d at 531-32.

\textsuperscript{46} Id. at 1775-76, 351 N.E.2d at 531, noting e.g., Frankel v. Frankel, 173 Mass. 214, 53 N.E. 398 (1899). Frankel involved an equitable action between husband and wife to compel the return of property obtained by fraud. The Court said that the Married Women's statute "does not forbid suits between husband and wife but simply provides that it shall not be construed to authorize them." Id. at 215, 53 N.E.2d at 398.

\textsuperscript{47} Id. at 1770, 351 N.E.2d at 529.

\textsuperscript{48} Id.

\textsuperscript{49} Id. at 1770-71, 351 N.E.2d at 529. The policy rationales underlying immunity considered and rejected in Sorensen were the disruption of family harmony and the possibility of fraudulent and collusive suits being brought in order to recover from an insurer. Sorensen, 1975 Mass. Adv. Sh. at 3674-83, 339 N.E.2d at 912-15. As was the case in parent-child suits, id. at 3675, 339 N.E.2d at 913, in interspousal suits the source of disruption to the family would come not from the suit between husband and wife but from the injury which precipitated the suit. If, as the Court reasoned in Sorensen, a suit would not be brought unless there were insurance to cover the judgment, id. at 3677, 339 N.E.2d at 913, it would be contrary to the best interests of the family to deny the recovery which would restore health to the injured party and peace to the family. Id. at 3677, 339 N.E.2d at 913. While there is a possibility of collusion when parties are related, the Court in Sorensen noted that it is the function of the judicial system to weed out fraudulent from meritorious claims. When the parties are parent and child, judges and juries will be more alert to the possibility of collusion. Id. at 3680-81, 339 N.E.2d at 915-16. There is no reason to believe judges and juries will be less vigilant in interspousal suits. Finally, insurers may protect themselves by means of a cooperation clause which would allow them to disavow liability if the insured spouse did not cooperate. See note 29 supra.
Thus, in a unanimous decision, the Court, HELD: Interspousal immunity will no longer bar an action for injuries arising out of an automobile accident. As in Sorensen, the Court in Lewis limited the abrogation of interspousal immunity to suits arising out of automobile accidents. In establishing this limitation, the Court noted that some activities that would be tortious between strangers may not be so between husband and wife "because of the mutual concessions implied in the marital relationship." The Court, however, refused to impose the Sorensen requirement that recovery be limited to the amount of the tortfeasor's insurance policy for actions between husband and wife.

The decisions in Sorensen and Lewis add Massachusetts to the growing list of states that have abrogated, either in whole or in part, the family immunity rule. Generally, the jurisdictions that have abro-

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52 [W]e are mindful that the rights and privileges of husbands and wives with respect to one another are not unaffected by the marriage they have voluntarily undertaken together. Conduct, tortious between two strangers, may not be tortious between spouses because of the mutual concessions implied in the marital relationship. For this reason we limit our holding today to claims arising out of motor vehicle accidents.
53 Id. at 1790 n.4, 351 N.E.2d at 532 n.4. The Court did not indicate why it was not applying the insurance limitation to interspousal suits. However, in a later case, Pevoski v. Pevoski, 1976 Mass. Adv. Sh. 2624, 358 N.E.2d 416, Justice Quirico in his concurring opinion noted the absence of the insurance limitation in Lewis and urged the Court to disavow this limitation expressly. Id. at 2629-30, 358 N.E.2d at 419.

The Court did not limit its holding to claims arising out of automobile accidents but did not specifically refer to negligent conduct as was done in Sorensen. See text and footnote at note 35 supra. The decision in Lewis is applicable to suits by husbands against their wives because the Court spoke generally of suits between husbands and wives rather than specifically about suits by wives against their husbands. Compare Sorensen at note 35 supra.

54 Restatement (Second) of Torts, Explanatory Notes §§ 895G, H, at 72-74, 81-82 (Tent. Draft No. 18, 1972). At the time of the writing of Tentative Draft 18 of the Restatement, fifteen jurisdictions had abrogated parent-child immunity and twenty-one had abolished interspousal immunity. Id. Since that time the following jurisdictions have abrogated parent-child immunity to some extent: Sorensen v. Sorensen, 1975 Mass. Adv. Sh. at 3665, 339 N.E.2d at 909. Plumley v. Klein, 388 Mich. 1, 199 N.W.2d 169, 172-73 (1972) (abrogated for acts of ordinary negligence not involving the reasonable exercise of parental authority or discretion); Bahr v. Bahr, 478 S.W.2d 400, 402, (Mo. 1972) (abrogated to the extent that suit will not disrupt the tranquility of domestic establishment or subvert parental control and discipline); Rupert v. Stienne, 90 Nev. 397, 405, 528 P.2d 1013, 1018 (1974) (abrogated entirely); Felderhoff v. Felderhoff, 473 S.W.2d 928, 933 (Tex. 1971) (abrogated for acts of ordinary negligence not involving the reasonable exercise of parental authority or discretion). For a discussion of the limitations on the Massachusetts abrogation, see the text and notes at notes 33-35 supra. Since the writing of Tentative Draft 18, interspousal immunity has also been abrogated in the following jurisdictions: Brooks v. Robinson, 259 Ind. 16, 284 N.E.2d 794, 798 (1972) (abrogated entirely); Lewis v. Lewis, 1976 Mass. Adv. Sh. 1764, 1780, 351 N.E.2d 526, 532, (for a discussion of the limitations of the Massachusetts abrogation, see the text and notes at notes 52-53 supra.); Rupert v. Stienne, 90 Nev. 397, 404, 528 P.2d 345, 348 (1973) (abrogated for actions arising out of automobile accidents); Flores v. Flores, 84 N.M. 601, 604, 506 P.2d 345, 348 (1973); Freehe v. Freehe, 81 Wash. 2d
gated family immunity have done so because, as was the case with the Massachusetts Court, they no longer found the family harmony or fraud and collusion arguments to be compelling reasons for denying recovery in the case of tortious injury.55 There have been few jurisdictions, however, that have entirely abolished either parent-child or interspousal immunity.56 The Supreme Judicial Court in both Sorensen and Lewis, while restricting their holdings to automobile accidents, specifically left open the question of future application of the abrogation of family immunity to other kinds of conduct.57 This note will look at three issues raised by the abrogation of family immunity and will suggest, in light of both the Court's reasoning in Sorensen and Lewis and the experiences of other jurisdictions in this area, what course the Court should adopt in future cases. More particularly, this note will first examine whether the holdings in Sorensen and Lewis should be limited to recovery for injuries arising out of automobile accidents. In this context, the Court's concern for parental discretion58 and the mutual concessions of marriage59 will be examined in order to determine whether and to what extent an extension of the the right of recovery to situations not involving automobile accidents is justifiable. Next, this note will examine whether the holding in Sorensen should be made retroactive or prospective.60 Finally, the impact of

183, 192, 500 P.2d 771 (1972) (abrogated entirely).
For lists of jurisdictions in which, as of 1972, parent-child and interspousal immunity were still intact, see Restatement (Second) of Torts, Explanatory Notes §§ 895G, H, at 76-78, 82 (Tent. Draft No. 18, 1972).


Family harmony and fraud and collusion are the major, but not the sole, arguments in favor of immunity. Two other arguments in the parent-child area are that the action by a child against a parent would deplete the family exchequer to the detriment of other children, and that if the child died the parent would be heir to his own judgment. See McCurdy, Torts Between Parent and Child, 5 Vill. L. Rev. 521, 528-29 (1960). Two arguments in the interspousal area are that there is an adequate remedy in divorce and criminal laws, and that allowing such actions would flood the trial courts with marital disputes. Freehe v. Freehe, 81 Wash. 2d 183, 187-88, 500 P.2d 771, 774-75 (1972).

56 For examples of jurisdictions which have not limited their abrogation of immunity, see Klein v. Klein, 58 Cal. 2d 692, 694, 376 P.2d 70, 72, 26 Cal. Rptr. 102, 104 (1962) (complete abrogation of interspousal immunity); Petersen v. City & County of Honolulu, 51 Haw. 484, 486, 462 P.2d 1007, 1008 (1969) (no restriction on the right of a child to sue a parent); Brooks v. Robinson, 259 Ind. 16, 284 N.E.2d 794, 798 (1972) (complete abrogation of interspousal immunity).

For examples of jurisdictions which have adopted limited abrogations of both immunities, see cases cited at note 54 supra.


60 The Court has already decided that Lewis should be applied retroactively, see Pevoski v. Pevoski, 1976 Mass. Adv. Sh. 2624, 2628, 358 N.E.2d 416, 418; see also discussion in note 176 infra.
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*Sorensen* and *Lewis* on the right of a parent or spouse to recover medical expenses incurred by an injured child or spouse will be evaluated.

### I. Extensions of Liability Within the Family

The Supreme Judicial Court, in abolishing parent-child and interspousal immunity, limited its holding to injuries arising out of automobile accidents.61 Massachusetts is not the only jurisdiction which when abrogating these immunities has so limited its holding.62 While the limitation of recovery to automobile accident claims can be supported by several considerations,63 it does not follow that the au-

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61 *Sorensen*, 1975 Mass. Adv. Sh. at 3365, 3683, 339 N.E.2d at 909, 916; *Lewis*, 1976 Mass. Adv. Sh. at 1780, 351 N.E.2d at 532. This would seem to indicate a determination by the Court that the operation of a motor vehicle is outside the scope of the family relationship as a matter of law, and thus may never be considered an act of parental authority or discretion or an act within the mutual concessions of marriage. This view of the automobile in relation to family life is not universally accepted. Some courts have refused to hold that the operation of a motor vehicle is outside the family relationship as a matter of law, contending instead that it is a factual question whether under the circumstances the parent was exercising parental discretion or authority. See *Johnson v. Myers*, 2 Ill. App. 3d 844, 846, 277 N.E.2d 778, 779-80 (1972). Other courts have attempted to determine whether driving a car was within the scope of the family function by looking at the purpose or destination of the trip. See *Stevens v. Murphy*, 69 Wash. 939, 947, 421 P.2d 668, 673 (1966) (driving children to visit their grandmother was an act of parental discretion precluding recovery for injuries sustained during the trip).


63 The Court's decision to limit the holdings to the facts of the present cases seems particularly appropriate due to the concern that there are areas of family life which should be free from judicial intrusion. See *Lewis*, 1976 Mass. Adv. Sh. at 1780, 351 N.E.2d at 532; *Sorensen*, 1975 Mass. Adv. Sh. at 3683-84, 339 N.E.2d at 916. Other jurisdictions which have abrogated immunity have restricted the scope of their holdings to the cases presently before them, explicitly leaving further definition of the scope of the abrogation to future cases. See cases cited in note 62 supra.

Some of the policy considerations which support the abrogation of immunity may be lacking in areas other than automobile accidents. For example, the availability of insurance was a major consideration of the Court in overcoming the argument that suit for tortious injury would disrupt family harmony. *Lewis*, 1976 Mass. Adv. Sh. at 1770, 351 N.E.2d at 529; *Sorensen*, 1975 Mass. Adv. Sh. at 3678-79, 339 N.E.2d at 914. Before extending recovery to other areas where there is no compulsory insurance, the Court may wish to consider the effect of a suit on family harmony when there may be no insurance to cushion the effect of a judgment on the family's resources. Further, in the automobile area the possibility of bringing frivolous claims is reduced by the existence of "no-fault" insurance, which allows recovery of $2000 regardless of fault. See G.L. c. 90, § 34A. See generally Kennedy and McCarthy, "No-Fault" in Massachusetts Chapter 670, *Acts of 1970, A Synopsis and Analysis*, 55 Mass. L. Q. 23, 24 (1970). It would also seem more difficult to manufacture a claim with damages over $2000, which would lessen the probability of fraudulent suits.
tomobile limitation should be a permanent one. In both Sorensen and Lewis, the Court enunciated a strong public policy favoring a right of recovery for injured parties. In light of such a policy, the Court noted that it was not adopting a permanent limitation on the right to recover, but instead was deferring any extension of the abrogation of immunity to later cases where there would be a specific factual situation upon which to base the decision.

The Court's refusal to define the parameters of the abrogation of immunity leaves future plaintiffs at a loss with respect to whether recovery will be allowed in their particular case. This confusion could have been mitigated by the adoption of a distinction between the kinds of situations that will give rise to a right to recover and those that will not. The analytical tools for drawing such a distinction were provided in both Sorensen and Lewis when the Court spoke in terms of protecting areas of parental discretion and the mutual concessions of marriage.

In this section, it will be suggested that the appropriate distinction is one that turns on the source of the duty the parent or spouse has breached in causing the injury in question. If the duty would only arise within the family, then there should be no recovery for negligence. On the other hand, if the conduct in question is a breach of a duty owed to the world at large, such as the duty to drive carefully, then the fact that a family member rather than a stranger was injured should not prevent recovery. Because there are different judicial concerns regarding the nature of the parent-child and interspousal relationships, the appropriate extensions of tort liability beyond au-

64 In Sorensen, 1975 Mass. Adv. Sh. at 3674, 351 N.E.2d at 412, the Court stated: "Children enjoy the same legal right to protection and to legal redress for wrongs done them as others enjoy. Only the strongest reasons, grounded in public policy, can justify limitation or abolition of those rights." In Lewis, 1976 Mass. Adv. Sh. at 1779, 351 N.E.2d at 552, the Court stated: "[I]f there is tortious injury there should be recovery, and only strong arguments of public policy should justify a judicially created immunity for tortfeasors and bar to recovery for injured victims."

65 In Sorensen, 1975 Mass. Adv. Sh. at 3683-84, 339 N.E.2d at 916, the Court stated: We are mindful that there may be parental exercises of discretion and authority which should be immune from scrutiny in a court of law. However, we are not here confronted with such cases and we need not speculate as to the scope of our holding. That scope will be determined by following the logic and policy of the present decision (footnote omitted).

In Lewis, 1976 Mass. Adv. Sh. at 1780, 351 N.E.2d at 532-33, the Court stated: "Further definition of the scope of the new rule of interspousal tort liability will await development in future cases."

66 See language quoted in note 65 supra.


69 Recovery in any negligence action is predicated upon there being a breach of duty. The duty that lies at the base of any negligence action is an obligation to act in such a way as to avoid unreasonable risk to others. W. Prosser, HANDBOOK OF THE LAW OF TORTS §§ 30 at 143 & 53 at 324-27 (4th ed. 1971).

70 In the parent-child area, judicial concern centers around a fear that judicial inter-
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Tomobile injury will be analyzed separately for each relationship. The analysis of the parent-child area will examine the solutions developed in Wisconsin, New York, and California, and will then suggest a new approach. The analysis in the interspousal area will focus on defining conduct that is unique to the marriage relationship and which therefore should still be protected from judicial intervention.

A. EXTENSION OF THE RIGHT TO RECOVER BETWEEN PARENT AND CHILD

In limiting its holding in Sorensen to claims arising out of an automobile accident, the Court noted that allowing recovery in such an action “[n]either undermines ‘parental authority and discipline’ . . . nor threatens substitution of judicial discretion for parental discretion in the care and rearing of minor children. Neither parental authority and discipline nor parental discretion in child care is called into question by an automobile accident case.” In attempting to strike a balance between protecting the right of an injured party to recover and protecting the family processes from undue judicial interference, three approaches have been developed.

1. The Wisconsin Approach. Wisconsin was the first jurisdiction to
abrogate parent-child immunity. In *Goller v. White*, the Wisconsin Supreme Court abolished the immunity except:

(1) Where the alleged negligent act involves an exercise of parental authority over the child [hereinafter the "parental authority exception"] and (2) where the alleged negligent act involves an exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care [hereinafter the "parental discretion exception"].

Both of these exceptions have been developed in subsequent cases by Wisconsin and other jurisdictions which have adopted the Wisconsin approach.

The first exception refers specifically to parental authority and has been variously interpreted to mean both discipline and supervision. The Supreme Court of Wisconsin has indicated that the first exception "embraces the area of discipline," but has not further defined the kind of parental conduct which would be considered an exercise of discipline. In Michigan, where the *Goller* exceptions have been adopted, the state court of appeals determined that the parental authority exception, while including discipline, is more accurately described as encompassing aspects of supervision. The appeals court recognized that a parent’s authority over a child is intertwined with a parent’s general duty to protect the child and to teach the child to be aware of dangers himself, and that some elements of discipline were involved in this general duty. The Michigan court also recognized that performance of this duty was to a large extent dictated by a parent’s unique knowledge and understanding of its child’s needs. The court labelled this general duty as supervision and concluded that parental authority encompassed both discipline and supervision.

In Wisconsin, the parental discretion exception has been interpreted

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73 20 Wis.2d 402, 122 N.W.2d 193 (1963). In *Goller*, the injury arose out of the father's operation of a farm tractor. The child was injured while he was riding on the drawbar of the tractor while his father was driving. *Id.* at 404, 122 N.W.2d at 193.

74 *Id.* at 413, 122 N.W.2d at 198. Wisconsin originally stated that both exceptions related to activities that are "essentially parental." Lemmen v. Servais, 39 Wis.2d 75, 79, 158 N.W.2d 341, 344 (1968). Wisconsin has since expressly rejected that definition. Cole v. Sears, Roebuck & Co., 47 Wis.2d 629, 632-33, 177 N.W.2d 866, 868 (1970). For a discussion of the current Wisconsin definitions of the two exceptions, see the text and notes at notes 76, 82-87 infra.


79 *Id.* at 484, 233 N.W.2d at 48-49.

80 *Id.* 233 N.W.2d at 49.

81 *Id.*
as referring to a parent’s performance of legal duties. For example, the Wisconsin court after *Goller* held that failure to teach a child how properly to get off a school bus is the type of activity encompassed in the parental discretion exception, thus precluding recovery, but that failure to supervise a child while he played on a swing set is not protected under the second exception, thus allowing recovery against the parents. The court distinguished the two factual situations by stating that the parents’ conduct in the school bus case was related to furtherance of a legal duty to educate their child, and in the swing set case no such duty existed.

While Wisconsin has interpreted the parental discretion exception as being limited to a performance of a parent’s legal duties, the Minnesota Supreme Court, which has adopted the *Goller* exceptions, did not adopt Wisconsin’s legal duty standard. The Minnesota court has applied the parental discretion exception to two cases involving injury within the home. One case involved a child’s injuries from a fall on a defective stairway, and the other concerned injuries to an infant when she put an electrical cord in her mouth. In both cases, the

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83 Lemmen v. Servais, 39 Wis.2d 75, 78, 158 N.W.2d 341, 343 (1968).
84 Cole v. Sears, Roebuck & Co., 47 Wis.2d 629, 634, 177 N.W.2d 866, 869 (1970). The Court did not determine at that time whether parental supervision might be considered a protected activity under the first exception. However, the Wisconsin Court’s dicta in Thoreson v. Milwaukee & Suburban Transp. Corp., 56 Wis.2d 231, 246, 201 N.W.2d 745, 753 (1972), seems to preclude that finding as it specifically stated that the first exception relates to discipline. But see Paige v. Bing Constr. Co., 61 Mich. App. 480, 484, 233 N.W.2d 46, 48 (1975).
85 Cole v. Sears, Roebuck & Co., 47 Wis.2d 629, 635, 177 N.W.2d 866, 869 (1970). Cole involved a third party complaint against the parents for contribution by the manufacturers of the swing set on which the child was injured alleging the parents’ negligence in failing to supervise the child. Id. at 631, 177 N.W.2d at 867. In most cases, a parent’s supervision of a child will only be an issue in such an action. See, e.g., Paige v. Bing Constr. Co., 61 Mich. App. 480, 481-82, 233 N.W.2d 46, 47 (1975); Ourada v. Knahmuhs, 301 Minn. 131, 132, 221 N.W.2d 659, 659 (1974); Thoreson v. Milwaukee & Suburban Transp. Corp., 56 Wis.2d 231, 233, 201 N.W.2d 745, 747 (1972).
88 See text and note at note 82 supra.
91 Cherry v. Cherry, 295 Minn. 93, 94, 203 N.W.2d 352, 353 (1972). Housing is of course closely tied to the family’s economic status and the type of housing which a parent provides will ultimately depend upon what he is able to afford. See Badigian v. Badigian, 9 N.Y.2d 472, 480-81, 174 N.E.2d 718, 721-22, 215 N.Y.S.2d 35, 42 (1961) (Fuld, J., dissenting).
Minnesota court found that the conduct involved fell within Goller's parental discretion exception, and hence there could be no recovery. These cases involved different types of discretionary acts by the parent, one being concerned with a parent's choice of the dwelling itself and the other with the relatively minor decision of whether or not to use an extension cord. In light of the quite liberal manner in which Minnesota has approached such cases, there does not seem to be any activity within the home which could not be included in the scope of parental discretion.

There are several problems with the Goller approach. The Wisconsin interpretation of the parental authority exception as relating to discipline is too narrow for two reasons. First, discipline, as administered by a parent, may be defined as the use of reasonable force in order to control, educate, or train a child. A parent already has a legally recognized privilege to discipline irrespective of the doctrine of parental immunity. Therefore, restricting the parent-child immunity exception to discipline has the practical effect of making the exception meaningless. Second, it seems contradictory on the part of the Goller court to formulate an exception to the abrogation of immunity in terms of negligent conduct, and then to define the exception solely in terms of discipline, which would seem to constitute intentional rather than negligent conduct. The Michigan interpretation of the first exception which includes parental supervision seems more realistic. However, the Michigan court has not yet defined the parameters of the first exception. Rather, it has approached the definition on a case by case basis. There is no clear indication, therefore, of what kinds of conduct besides supervision will be included in the Michigan interpretation of the exception. The problem with this result is that the term "supervision" itself provides no clear guidelines with respect to the type of conduct which will be protected.

With respect to the parental discretion exception, the Wisconsin view that that exception is limited to the exercise of legal duties is too restrictive because it allows the parent's judgment concerning the best course for his child to be supplanted by that of the jury in areas

92 Cherry v. Cherry, 295 Minn. 93, 95, 203 N.W.2d 352, 353 (1972); Ourada v. Knahmuhs, 301 Minn. 131, 133, 221 N.W.2d 659, 660 (1974).
94 See Cherry v. Cherry, 295 Minn. 93, 95, 203 N.W.2d 352, 353 (1972).
95 Id. at § 147, comment b at 266.
96 Restatement (Second) of Torts § 147 (1965).
97 Restatement (Second) of Torts, Explanatory Notes § 895H, comment j at 89 (Tent. Draft No. 18, 1972).
98 20 Wis.2d at 413, 122 N.W.2d at 198.
that do not constitute legal duties, to-wit, areas comprised of what may be still uniquely parental functions. For example, under the Wisconsin interpretation, a parent may be liable for failing to supervise his child because the second exception "does not extend to the ordinary acts of upbringing . . . ."101 Parental supervision, however, goes to the heart of the parent-child relationship and the amount of supervision a child needs is something which only a parent can determine.102 Therefore, it is the type of conduct that should be free from judicial scrutiny and to which the immunity should apply.

While the Wisconsin interpretation of the parental discretion exception seems too limited to protect adequately conduct which is unique to the family—such as supervision, the Minnesota interpretation is too broad. Denying recovery for all accidents within the home103 protects conduct for which the parent would be liable to a stranger. Minnesota, however, purports to endorse a distinction between obligations generally owed all people and those occurring within the family.104 If the Minnesota court had actually applied this distinction it would seem that recovery should have been allowed in the stairway case105 because the duty to keep property safe is one "which the law imposes upon everyone in all his relations to his fellow men, and for the breach of which it gives a remedy."106 However, in the case of the extension cord,107 it would seem that since there was no allegation of a defect in the apparatus,108 the concern was really over the parent's failure to supervise, and thus would be conduct unique to the parent-child relationship.

These problems indicate the varying interpretations that may be given to Goller. Under Goller, courts purportedly applying the same exceptions have reached different and sometimes contradictory re-

101 Id. at 246-47, 201 N.W.2d at 753.
103 See Ourada v. Knahmuhs, 301 Minn. 131, 133, 221 N.W.2d 659, 660 (1974); Cherry v. Cherry, 295 Minn. 93, 95, 203 N.W.2d 352, 353 (1972).
104 While it is beyond the scope of this article to examine in detail the changes in property law regarding the duty to repair premises as between a landlord and tenant, it would seem unrealistic in any case to place a greater burden on the property owner toward his family than he has generally toward others entering the premises. Cherry v. Cherry, 295 Minn. 93, 95, 203 N.W.2d 352, 353 (1972).
107 Cherry v. Cherry, 295 Minn. 93, 203 N.W.2d 352 (1972). See text at notes 90-94 supra.
108 Cherry v. Cherry, 295 Minn. 93, 94, 203 N.W.2d 352, 353. The facts of the case stipulated that there was no defect in the lamp, cord, or socket. The mother's alleged negligence seemed to be centered around the fact that she left the child alone in the room knowing that the child had on occasion played with the cord. See id.
suits. The terminology is ambiguous and is therefore difficult for courts to apply to particular factual situations. A rule that allows such contradictory interpretations would seem to offer very little guidance to courts expected to apply it.

2. The California Approach. The California Supreme Court when abrogating its forty year old doctrine of parent-child immunity in *Gibson v. Gibson* was also concerned with the need to protect parental authority and discretion. The court approved of the *Goller* approach in that *Goller* recognized that in some respects a parent-child relationship is unique, and that "traditional concepts of negligence cannot be blindly applied to it." The court declined, however, to adopt *Goller* for two reasons. First, the California court objected to the Wisconsin formulation because it would entail drawing distinctions between those particular classes of conduct that would give rise to liability between parent and child and those that would not. The court found such a procedure to be inherently arbitrary. Second, the California court wanted to avoid adopting a standard that would allow a parent to act negligently with impunity once he had succeeded in bringing himself within the range of protected conduct.

The test for recovery adopted by the California court is "what would an ordinarily reasonable and prudent parent have done in similar circumstances?" Under this approach, no conduct is per se exempted from liability because it relates to discipline or some other arguably parental function. In addition, all conduct, even that which is clearly nonparental, appears to be subject to the same test. Presumably, this test would avoid the problems that the California court found in *Goller* because there would be no need to make any distinction between parental and nonparental conduct, and there would be no sphere within which a parent could act negligently with impunity.

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111 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971). The facts of the case, while essentially arising out of an automobile accident, also involved elements of parental discretion. The complaint alleged that the father, driving a car while towing a jeep, negligently stopped on a highway at night and told his minor son to go out and straighten the wheels of the jeep. As the son was performing this task, he was struck by another vehicle and was injured. *Id.* at 916, 479 P.2d at 648-9, 92 Cal. Rptr. at 288-89, (1971).
112 *Id.* at 921, 479 P.2d at 652, 92 Cal. Rptr. at 292.
113 *Id.*
114 *Id.* at 922, 479 P.2d at 653, 92 Cal. Rptr. at 293. The Court did not explain why the *Goller* exceptions would result in arbitrary distinctions.
115 *Id.*
116 *Id.* at 921, 479 P.2d at 653, 92 Cal. Rptr. at 293 (emphasis in original).
117 Otherwise, in order to trigger the reasonable parent standard, the court would still have to make a threshold determination as to whether the conduct was parental.
118 See *Gibson*, 3 Cal. 3d at 922, 479 P.2d at 653, 92 Cal. Rptr. at 293.
The California approach is unsatisfactory because it fails adequately to protect from judicial scrutiny the performance of parental duties. In an attempt to avoid what is considered to be the arbitrary distinctions in *Goller*\(^{119}\), the California court has thrown open every detail of family life to judicial inspection. Thus under the California approach, while liability will be imposed only upon a determination that a parent has acted unreasonably, in order to make such a determination the actions of every parent, whether or not later found to be reasonable, are potentially reviewable by judges and juries. Furthermore, a parent's decision as to what course of action to follow for his child is often based on facts peculiarly within a parent's knowledge and cannot be measured by an objective standard.\(^{120}\) For example, a parent's determination of the amount of supervision required by a particular child is based upon the parent's knowledge of the child's needs and habits. Moreover, the California court did not define what would constitute "acting negligently with impunity," and thus gave no indication of the kind of conduct with which the court was concerned.\(^{121}\) However, there are two ways to delineate the conduct in question. First, it would seem that such conduct which would qualify as acting negligently with impunity would come very close to being willful and wanton and, if so, would not be protected by parental immunity.\(^{122}\) Second, if the court was reluctant to protect parental conduct which was more than ordinarily negligent, such a limitation could have been expressly applied. This way, the court would have avoided subjecting every aspect of the parent-child relationship to judicial scrutiny.

3. **The New York Approach.** The approach taken by New York with respect to the abolition of parent-child immunity [hereinafter the "fortuitous facts" approach] was first enunciated by the Court of Appeals in *Holodook v. Spencer*\(^{123}\). Although the doctrine of parent-child immunity had first been abolished in *Gelbman v. Gelbman*\(^{124}\), it was not until the later development in *Holodook* that the contours of the New York approach took shape.

In *Gelbman*, a suit arising out of an automobile accident, a mother recovered for personal injuries from her driver-son.\(^{125}\) In *Holodook*,

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\(^{119}\) See id.

\(^{120}\) See text and note at note 113 supra. See also Cannon v. Cannon, 287 N.Y. 425, 429, 40 N.E.2d 236, 238, 32 N.Y.S.2d 424, 429 (1942), where the Court stated that:

[I]n the wide scope of daily experiences common to the upbringing of a child a parent may be subjected to a suit for damages for each failure to exercise care commensurate with the risk—for each injury caused by inattention, unwise choice or even selfishness—a new and heavy burden will be added to parenthood.

\(^{121}\) 3 Cal. 3d at 921, 479 P.2d at 653, 92 Cal. Rptr. at 293.

\(^{122}\) See note 34 supra.


\(^{125}\) Id. at 436, 245 N.E.2d at 192, 297 N.Y.S.2d at 529.
the court had to decide whether Gelbman should be extended to allow a child to recover from a parent because of a parent's negligent supervision.126 In reaching its decision, the Holodook court first noted that Gelbman did not make any exceptions for the exercise of parental authority or discretion.127 The court distinguished the facts in Gelbman, which supported recovery, from the circumstances in Holodook. In the former case the conduct giving rise to recovery was a breach of a duty to drive carefully, a duty owed to the whole world; while in Holodook, the conduct, parental supervision, would only arise within the family relationship and "goes to its very heart."128 The court suggested that another way of looking at the distinction between conduct giving rise to recovery and that which does not is to ask how important the parent-child relationship was to the particular conduct.129 If the relationship was simply a "fortuitous fact,"130 then recovery should be allowed. If, on the other hand, the circumstances were such that they would only arise in the parent-child relationship, recovery should be denied.131

The Holodook approach was applied by an intermediate appellate New York court in Agin v. Likens.132 In that case, a child's guardian brought negligence actions against the mother's estate and against the driver of an automobile who struck and injured the child as the mother carried the child across the street.133 The court denied recovery against the mother's estate, finding that the decision to pick a child up and carry her across the street comes within the Holodook sphere of immunity and should not be reviewed by the court.134 Furthermore, the court found that the circumstances of the particular case would arise rarely, if at all, outside of the parent-child relationship. Thus, it could hardly be said to be a fortuitous fact that the child was being carried by her mother rather than a stranger.135

The New York approach developed in Holodook is most satisfactory because it focuses on the particular parental conduct that the court wants to protect rather than predating recovery upon judicial concepts either of parental discretion and authority136 or of the reasonable parent.137 The Holodook principle will only protect conduct

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126 36 N.Y.2d at 39, 324 N.E.2d at 339, 364 N.Y.S.2d at 862. Holodook was a consolidation of three cases in which children sustained injuries while under the care of their parents. Id.
127 Id. at 43-44, 324 N.E.2d at 342, 364 N.Y.S.2d at 865.
128 Id. at 51, 324 N.E.2d at 346, 364 N.Y.S.2d at 871.
129 See id.
130 Id.
131 See id.
133 Id. at 690, 366 N.Y.S.2d at 799.
134 Id. at 692, 366 N.Y.S.2d at 800.
135 Id.
136 See text at notes 73-108 supra.
137 See text at notes 116-22 supra.

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unique to the parent-child relationship. Once the conduct involves actions for which a parent would be liable to a stranger, the parent-child relationship becomes irrelevant for purposes of determining liability.\(^\text{138}\) This approach is unambiguous because it simply requires the court to determine whether the parent-child relationship was essential to the conduct in question or whether it was simply a fortuitous fact. There is no problem of extensive judicial interference with the family because that conduct which is unique to the family would be exempt from judicial scrutiny. The New York approach also parallels the approach suggested early in this note,\(^\text{139}\) which would allow recovery when the conduct involved was a breach of a duty owed to the world at large. If a duty of care is owed to the world at large, then the fact that the breach results in injury to a family member may be said to be fortuitous and irrelevant to a determination of liability.

4. Proposed Massachusetts Approach. Massachusetts should model any extension of the rule in Sorensen on the approach taken by New York.\(^\text{140}\) The Court in Sorensen declined to determine the scope of its holding.\(^\text{141}\) When this scope is defined, it should be done in a way which will best effectuate the three basic policy considerations that led the Court in Sorensen to abrogate the immunity. First, the Court recognized that injured children have a right to recover for their negligently inflicted injuries, regardless of whether the tortfeasor was a stranger or a parent.\(^\text{142}\) Here, the Court seems to indicate that generally the right of recovery against a family member should correspond to the right of recovery that would exist against a stranger. Second, balanced against the Court’s concern for a child’s right of recovery is the necessity perceived by the Sorensen Court of preserving an area of parental discretion and authority “immune from scrutiny in a court of law.”\(^\text{143}\) In this context, the Court must define a sphere of activity involving conduct unique to the parent-child relationship which should

\(^{138}\) In Holodook, 36 N.Y.2d at 50, 324 N.E.2d at 346, 364 N.Y.S.2d at 871, the court stated: “Of course, where the duty is ordinarily owed, apart from the family relation, the law will not withhold its sanctions merely because the parties are parent and child.” Holodook’s fortuitous fact approach was criticized by an intermediate appellate court in Allstate Ins. Co. v. Reliance Ins. Co., 85 Misc.2d 734, 380 N.Y.S.2d 925 (1976). The Court was dissatisfied with the Holodook test, which denied recovery against a parent for negligent supervision, and stated that this result “is by no means a firm platform to base a more general deprivation of rights by demonstrably injured children.” Id. at 736, 380 N.Y.S.2d at 925. The Allstate case involved an action by a daughter against her mother for injuries sustained when the mother gave the car to the unlicensed daughter. Id. at 737, 380 N.Y.S.2d at 926. The Court in Allstate, applying the Holodook test, allowed recovery because, in the court’s opinion, the conduct involved in entrusting a dangerous instrumentality to someone is in no way dependent on the family relationship. Id. at 740, 380 N.Y.S.2d at 929.

\(^{139}\) See text at notes 69-70 supra.

\(^{140}\) See text and notes at notes 123-39 supra.


\(^{142}\) Id. at 3674, 339 N.E.2d at 912. See supra note 64.

not be subject to review by the courts. Finally, because the Court indicated that in most suits within the family the parties will be looking to insurance to create a fund for recovery, the Court must provide some kind of reliable standard that will permit parents to purchase adequate insurance and that will allow insurers to adjust their premiums and policies in preparation for future liability. These policy considerations can best be served by adopting the following test for recovery: recovery should be allowed between parent and child when the duty breached is one which could arise even in the absence of a family relationship. If the cause of action would not arise but for the family relationship, no recovery should be allowed. Such a rule would give the injured family member the same right to recover that all other parties would have, thereby promoting the expressed policy in Sorensen that children have the same rights to "protection and to legal redress for wrongs done them as others enjoy.” At the same time, conduct unique to the family situation would be protected from judicial intervention, thereby promoting the second policy consideration of preserving an area of parental authority and discretion free from extrafamilial scrutiny. For example, under this proposed test a parent's failure to supervise a child properly will not result in recovery because supervision is generally conduct that arises only within the family. Finally, since the right to recover between parent and child would correspond to the right to recover between strangers, insurers could gauge the extent of future liability on the basis of past experience. Thus, the Court's third policy consideration of providing a reliable standard of liability for both insurers and insured would be satisfied. The Court may wish to make a further distinction regarding gross negligence, so that a parent who negligently orders his or her child

144 Id. at 3678-79, 339 N.E.2d at 914.
145 The need for a stable standard precludes a case by case weighing of factors in order to determine whether on the particular facts recovery should be allowed. This was the approach chosen by Missouri in Bahr v. Bahr, 478 S.W.2d 400, 402 (Mo. 1972), after rejecting the approaches in Goller, Gibson and Gelbman.
147 See text at note 143 supra.
148 While this approach will limit insurers' liability to the type of conduct for which they are presently writing policies, it should not be assumed that parent-child liability will be problem-free from an actuarial point of view. The incidence of parent-child injury may be greater than the incidence of injury between strangers because one is more likely to be driving with a family member than a stranger. On the other hand, parents might take greater care in activities in which their children are involved. As a result, insurers may need time to adjust their rates. This issue is relevant to a determination of the retroactive application of Sorensen. See discussion at notes 201-203 infra.
149 See text at notes 152-53, 144-45 supra.
150 This view of gross negligence involves conduct in which the actor has failed to exercise even slight care but which lacks the element of willfulness necessary to make the conduct intentional and thus unprotected by immunity. See generally W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 34, at 183-86 (4th ed. 1971).
to perform a particularly hazardous task may not shield such conduct by saying that it could only arise in the context of the parent-child relationship. Parents must be given a good deal of discretion in determining how to bring up their children. Society as a whole, as well as individual family members, benefits from a system that prohibits excessive outside interference because such a system allows each family unit to develop according to the needs of its members. Acts of ordinary negligence may not be an abuse of the discretion which society gives the family. A parent who is grossly negligent, however, cannot be said to be acting in the child’s best interests and his conduct no longer merits protection.

B. EXTENSIONS OF THE RIGHT TO RECOVER BETWEEN SPOUSES

The Court in Lewis, as it had done in Sorensen, chose not to extend its holding to situations not involving automobile accidents. The Lewis Court reasoned that “[c]onduct, tortious between two strangers, may not be tortious between spouses because of the mutual concessions implied in the marital relationship.”151 The Court did not elaborate, however, upon the kind of conduct that might be included within such mutual concessions. Therefore, the Court did not explicitly indicate what, if any, type of conduct besides that presented by the facts of Lewis would justify the abrogation of interspousal immunity.

In Lewis, recovery was allowed for the negligent operation of a motor vehicle.152 The duty to drive carefully exists regardless of the relationship between the tortfeasor and the injured party. Lewis, therefore, suggests that injured spouses should be placed on the same footing as injured strangers.153 Certain limitations, however, to such a

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151 1976 Mass. Adv. Sh. at 1780, 351 N.E.2d at 532. Some states have abrogated interspousal immunity entirely. See, e.g., Klein v. Klein, 58 Cal.2d 692, 694, 376 P.2d 70, 72, 26 Cal. Rptr. 102, 104 (1962); Brooks v. Robinson, 259 Ind. 16, 284 N.E.2d 794, 798 (1972); Hosko v. Hosko, 385 Mich. 39, 44, 187 N.W.2d 236, 238 (1971). But see Immer v. Risko, 56 N.J. 482, 495, 267 A.2d 481, 488 (1970) (abrogation limited to automobile accidents). It should be noted that except for Klein, which involved injuries sustained by a wife when she slipped on the deck of a pleasure boat, all of the cases abrogating interspousal immunity arose out of automobile accidents. Thus, few courts have had to apply the abrogation to other circumstances. When other factual circumstances are presented, courts that have abrogated the immunity entirely in automobile accident cases may decide to limit the abrogation in other situations. See Paiewonsky v. Paiewonsky, 446 F.2d 178, 181 & n.4 (3d Cir. 1971).


153 For example, the Court’s holding in Lewis could be applied to a property owner’s duty to make his property reasonably safe for all lawful visitors. Mounsey v. Ellard, 363 Mass. 693, 707, 297 N.E.2d 43, 51 (1973). If a property owner creates or allows a dangerous condition to exist on the property and one’s spouse rather than a stranger is injured, there is no concession based upon the marriage which should bar recovery. While there is no case law on this point, it is interesting to note that Klein v. Klein, 58 Cal.2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962), the case which abrogated interspousal immunity in California for negligent torts, arose out of an accident on the husband’s pleasure boat and the plaintiff-wife took great care to establish the fact that the
broad suggestion must be considered. Thus, before adopting a blan­
et abrogation of interspousal immunity one must inquire whether
the relationship mandates a more restrictive approach than was taken
in the parent-child area. In adopting a rule of recovery in the in­
terspousal area, it is not sufficient to say that suits between husbands
and wives will be allowed for any conduct which would have provided,
a cause of action against a stranger because there are rights which are
protected from interference by third parties that have as their founda­
tion the marriage relationship. To allow interspousal action of those
rights would be to bring judicial scrutiny into the heart of the mar­
riage. For example, the right to recover for loss of consortium155 and
interference with a marriage156 gives a spouse a cause of action
against a third party when he loses the society, affection, and compan­
ionship of his spouse through the negligent or intentional conduct of
that third party.157 The rights protected by these actions exist only be­
because of the marriage relationship. The affection and companionship
attendant to a marriage are given freely without legal compulsion.158
The law protects a spouse's right to the benefits of a marriage from
tortious interference by third parties, but because the duty to provide
consortium benefits springs, if at all, from the marriage relationship, a
spouse should not be liable for negligently or intentionally withhold­
ing them.159 Allowing recovery for the breach of such duties by a
spouse would bring judicial intervention into the very basis of the
marriage.160 Such a result seems contrary to Lewis' recognition that
some "[c]onduct, tortious between two strangers, may not be tortious

husband owned the boat prior to the marriage and that she had no interest in it. Id. at
693, 376 F.2d at 71, 26 Cal. Rptr. at 103. Considerations of the spouse's own possible
contributory negligence in allowing the condition to exist is beyond the scope of this ar­
ticle. However, it should be noted that any interpretation of mutual concessions of mar­
rriage as involving a kind of assumption of the risk by the parties to a marriage would
seem to be precluded by G.L. c. 231 § 85 which abolished the defense of assumption of
(Cadena, J., concurring) ("I have full faith in the ability of our judiciary to fashion what
may be loosely described as a doctrine of 'assumed risk' applicable to husband-wife re­
lations.").

154 See text at notes 140-150 supra.
157 Unlike Sorensen, the Lewis decision contained no language indicating a restriction
of the holding to negligent torts. See text and note at note 53 supra.
158 See Plain v. Plain, Min. , 240 N.W.2d 330, 331-32 (1976) (husband's action
against his wife for loss of consortium due to her negligent driving denied).
159 Id. at , 240 N.W.2d at 332. See also Lippman, The Breakdown of Consortium, 30
COLUM. L. REV. 651, 652 (1930) ("As between the parties to the marriage, consortium
plays no part.").
160 See Paiewonsky v. Paiewonsky, 446 F.2d 178 (3d Cir. 1971), where the court de­
nied recovery by a wife against her husband for fraudulently inducing her to enter into
a marriage. Although the court decided the case on the basis of the jurisdiction's Mar­
rried Woman's Act, it also noted that the circumstances of the case presented a claim
"going to the basis of the marital relationship." Id. at 181 n.4.
between spouses because of the mutual concessions implied in the marital relationship." The "mutual concessions" referred to by the Court in Lewis should be interpreted as referring to those rights and duties accruing to marriage partners because of their relationship. Thus, the Court should decline to extend the abrogation of interspousal immunity to allow legal enforcement of such rights and duties.

The test for recovery in the interspousal area should focus on whether the "duty" breached, giving rise to the injury for which recovery is sought, exists solely because of the marital relationship. If the particular duty, for example consortium, is found only within the marital relationship, then recovery should be denied. If, on the other hand, the duty breached would afford the injured spouse recovery against a stranger, then the fact that the tortfeasor is a spouse should not bar recovery. Besides allowing recovery in all cases where the conduct does not arise out of the marital relationship, this approach would also effectuate the policy considerations underlying the abrogation of immunity which the Court enunciated in Sorensen in the parent-child area. Such a result is desirable in light of the Court's conclusion in Lewis that the two immunities are "analogous." Further, this test would give spouses the same rights as others to recover for their injuries while at the same time it would protect those rights unique to the marriage. This approach would also give insurers a reliable indication of the scope of their potential liability because recovery would be allowed between husband and wife for the same conduct for which the insurer presently writes policies. This approach supports the public policy enunciated in both Sorensen and Lewis supporting recovery by injured victims without encroaching on conduct which is unique to the family.

162 See text and note at note 69, supra.
163 See McGlothlin v. McGlothlin, 476 S.W.2d 333, 335 (Tex. Civ. App. 1972) (Cadena, J., concurring) ("I would affirm the [dismissal] ... solely on the ground that the 'duty' allegedly breached by defendant springs from the existence of the marital relationship .... ").
164 See text supra at notes 142-45.
165 1976 Mass. Adv. Sh. at 1770, 351 N.E.2d at 529. The Court referred to the "analogous" context of the two immunities in regard to the policies which had supported them. It would appear then that the same considerations would apply in determining limitations on abrogation.
166 This approach would parallel the approach taken in the parent-child area where activities which would not have been carried out but for the parent-child relationship are still protected by the immunity. See text at notes 140-150 supra.
167 See text at note 148 supra.
Traditionally changes in the common law were retroactive, but within the last fifty years the courts have developed prospective overruling to protect parties who have relied upon the old law. In Sorensen, the Court specifically declined to decide the issue of retroactivity, stating: "We need not decide whether [our] ... holding is to be given retroactive or prospective effect; we leave consideration of that question to a future case where the issue is fully argued by the parties." In Lewis the issue of retroactive versus prospective application was not mentioned. However, in a case decided after Lewis,

170 The retroactive application of judicial decisions is based on the notion that the law itself is unchanging and that the new rules which judges expound are simply the results of the judicial effort to find that law. See Levy, Realist Jurisprudence and Prospective Overruling, 109 U. PA. L. REV. 1, 2 (1960) [hereinafter cited as Levy].

171 Levy, supra note 170 traces the origin of the concept to an address given by George F. Canfield in 1917. Levy, supra note 170 at 7.

172 The concept of prospective overruling has generated a great deal of scholarly discussion. See Levy, supra note 170, at 16-21. "Pure" prospective overruling allows a court, when confronted with a rule which is outdated or unjust, to decline to overturn the rule in the present case, but announce that a new rule will be applied in all future cases. See Colby v. Carney Hosp., 356 Mass. 527, 528 254 N.E.2d 407, 408 (1969) (Massachusetts application of purely prospective overruling to charitable immunity); Schaefer, The Control of "Sunbursts": Techniques of Prospective Overruling, 42 N.Y.U. L. REV. 631, 638-40 (1967). Two of the major problems with pure prospective overruling are (1) the new rule would be mere dictum, and (2) that plaintiffs would be disinclined to appeal if they could not reap the benefits of their effort. Levy, supra note 170, at 19. Since the Court in both Sorensen and Lewis abrogated the immunity doctrines as to those cases, pure prospective overruling is not an issue. For the purposes of this section, prospectivity will refer to the method of overruling by which a court in overruling a doctrine applies the new rule to both the present case and to cases arising in the future. See Baits v. Baits, 273 Minn. 419, 434, 142 N.W.2d 66, 75 (1966). (The defense of parent-child immunity "is abrogated in all actions by a parent against a child arising out of torts committed from and after this date.").


174 Declining to decide the retroactivity of a new rule at the same time the Court adopts the rule would seem to have two beneficial results. The Court mentioned the first result in Sorensen when it noted that at a future date the issue of retroactivity would be fully argued. 1975 Mass. Adv. Sh. at 3686, 339 N.E.2d at 917. This is an especially important consideration in the immunity area. The existence of liability insurance was an important factor in the Court's determination that immunity was no longer necessary to protect the family. Lewis, 1976 Mass. Adv. Sh. at 1770, 351 N.E.2d at 519; Sorensen, 1975 Mass. Adv. Sh. at 3675-76, 339 N.E.2d at 913. Retroactive application of the holdings in Sorensen and Lewis will affect not only the right of individual plaintiffs to recover but also will affect the obligation of their insurers. By withholding the decision on retroactivity, the Court will allow insurers to present, through amicus briefs, the effect that retroactivity will have on their obligations and rates and will thus present the Court with a fuller picture of the ramifications of retroactivity. The second
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Pevoski v. Pevoski, the Supreme Judicial Court determined that the holding in Lewis should be applied retroactively. While Pevoski settles the issue of retroactivity in interspousal actions, it does not settle the issue in the parent-child area. This section will focus on whether the Court’s decision in Sorensen should be made retroactive.

A. THE POTENTIAL EFFECT OF RETROACTIVITY

In Massachusetts, the effect of the retroactive application of changes in tort law has been restricted by the operation of the statute of limitations. For example, in Bouchard v. De Gagne, the Supreme Judicial Court, in giving retroactive effect to the rule that a landowner owes all lawful visitors a duty of reasonable care, stated: “Where the claim for the physical injuries has been concluded by ... the running of the statute of limitations prior to the rendering of this opinion, the [new rule] is not to be regarded as in any way benefitting or reviving a plaintiff’s action.” Therefore, the number of claims that could be brought under a retroactive application of the abrogation of parent-child immunity would appear to be limited to those claims arising within three years prior to the date on which retroactivity was decided. There are, however, two factors that would seem to indicate that the statute of limitations is not an absolute bar.

Under the Massachusetts Rules of Civil Procedure, a plaintiff can join a cause of action with a pending case and have the new claim relate back to the date of the original pleading, thereby avoiding the stat-

benefit of the Court’s action in declining to decide retroactivity is that it mitigates the abruptness of a sudden change of established common law doctrine. It would serve to put all parties on notice that the new rule may be retroactively applied in the future and gives them the chance to prepare for that eventuality.

176 Id. In Pevoski, the Court held that Lewis would apply to claims arising from automobile accidents “which have not been disposed of by settlement or judgment or the running of the statute of limitations.” Id. at 2628, 358 N.E.2d at 418. The Court noted that by limiting retroactivity to “existing” claims there would be no unfair impact on those who relied on the old rule. Id. This seems to indicate a belief that retroactivity will not result in an inordinate number of claims being brought.
177 Schwartz v. U.S. Rubber Corp., 112 N.J. Super. 595, 601, 272 A.2d 310, 314 (1972) (“there may be valid reasons for applying a prospective-only rule to child versus parent tort cases and not to husband-wife litigation . . . .”).
178 G.L.c. 260, § 2a provides: “Except as otherwise provided, actions of tort, . . . shall be commenced only within three years next after the cause of action accrues.”
181 See note 178 supra.
182 MASS. R. CIV. P. 15(c), provides: “Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth . . . in the original pleading, the amendment (including an amendment changing a party) relates back to the original proceeding.” See SMITH & ZOBEL, 6 MASS. PRACTICE, § 15.9 (1974).
ute of limitations. For example, in the event of an automobile accident between two cars in which the child of one driver is injured, the injured child could bring suit against the nonparent driver, but not against the parent driver because of the immunity bar. If while that suit is pending the Court abrogates parent-child immunity, the plaintiff could then join the cause of action against the driver-parent even if the three year statute of limitations period had run.\(^{183}\)

Moreover, in the parent-child area, there is further evidence that the statute of limitations might not be an absolute bar to suits brought after the running of the statutory period. The statute of limitations is tolled for minors until they reach majority.\(^{184}\) Consequently, a retroactive application of *Sorensen*, coupled with the tolling of the statute, would allow suits in which the cause of action accrued over twenty years ago.\(^{185}\) Thus, the retroactive application of *Sorensen* could result in a substantial number of cases being brought because they either fall within the statute of limitations or they avoid the statute by joinder or by tolling.

### B. POLICY CONSIDERATIONS

Several policy considerations have been developed to facilitate the determination of whether to apply any new judicial rule retroactively.\(^{186}\) These considerations are: (1) whether retroactivity will better promote the purpose of the holding;\(^{187}\) (2) whether there has been reliance upon the old rule;\(^{188}\) and (3) whether retroactivity will have a deleterious effect on court administration.\(^{189}\)

The first factor to be considered in resolving the issue of retroactivity with respect to parent-child immunity is whether the purpose of the abrogation will be better promoted by a retroactive or prospective application.\(^{190}\) Simply stated, the purpose of *Sorensen* is to allow recov-

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184 G.L.c. 260, § 7, provides: "If the person entitled thereto is a minor, . . . when a right to bring an action first accrues, the action may be commenced within the time herein before limited after the disability is removed." Even though the statute of limitations is tolled, a minor may not avoid the immunity bar by bringing suit when he reaches majority because the immunity bar will apply to all injuries which occurred while he was unemancipated. *Cf.* Tucker v. Tucker, 395 P.2d 67, 70 (Okla. 1964).

185 *See* Rigdon v. Rigdon, 465 S.W.2d 921, 923 (Ky. 1970).


187 *Id.* at 942-44.

188 *Id.* at 944-50.

189 *Id.* at 950-51.

190 *See* text and note at note 187 *supra*. 
ery for negligently inflicted injuries between family members. Such a purpose could best be effectuated by an application of the rule that would allow the greatest number of injured parties to recover. A retroactive application of *Sorensen* would seem to have that effect.

A second policy consideration concerns whether the parties have in some way relied on the old immunity rule. The reliance value of the old rule should not be measured solely in terms of the parties to a particular action presently before the court, but with respect to all future potential parties who may be affected by the new rule. Reliance on the parent-child immunity rule may be manifested in three ways. First, the parents may have shaped their conduct because of their knowledge that they were immune from suit. Second, the parties may have relied on immunity in determining their insurance needs. Third, insurers may have relied on the rule in setting rates and investigating and settling claims.

In decisions concerning property rights or contracts, reliance is more explicit and direct. In these situations, the parties normally make an effort to find out the status of the law affecting the transaction before entering into a contract or buying land. As such, the parties' justified expectations regarding the effect of their actions should not be disappointed. Where the conduct in question is negligent, however, it cannot reasonably be proposed that parties act negligently in reliance on the belief that immunity will protect them. For example, one does not drive carelessly because a family member is in the car and the driver knows he is immune from suit. Even if that were the case, it is not the type of conduct that courts should encourage.

While parents probably do not rely on the presence of immunity in shaping their conduct, they may, however, rely on immunity in obtaining adequate liability insurance. In the family immunity area, even this aspect of reliance is not a compelling reason for adopting a

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191 See text at note 188 *supra*.

192 See, e.g., *Bouchard v. DeGagne*, 1975 Mass. Adv. Sh. 1856, 329 N.E.2d 114, where the Supreme Judicial Court, in determining the retroactive application of a rule establishing a landowner's duty of ordinary care to all lawful visitors, recognized that they had to measure the effect of a change on all landowners and noted: "The precautionary conduct of this or almost any other landowner almost certainly was not based on any appreciation of the subtle distinction between invitees, and social guests, and licensees." *Id.* at 1862-63, 329 N.E.2d at 116.


194 The reliance argument, when first enunciated, led some courts to believe that in order to justify prospective application of a rule, reliance upon the old rule must actually be shown. See, e.g., *Wangler v. Harvey*, 41 N.J. 277, 286, 196 A.2d 513, 518 (1963). *But see Comment, Prospective Overruling and the Retroactive Application in the Federal Courts*, 71 YALE L.J. 907, 945-46 (1962) (in most cases reliance is not a factor because a majority of people operate in blissful ignorance as to the actual state of the law).

195 *Haney v. Lexington*, 386 S.W.2d 738, 742 (Ky. 1964).

prospective approach. The Court in Sorensen noted that recovery from an insurer will be the main objective of most intrafamilial suits.\textsuperscript{197} Where insurance coverage is inadequate or nonexistent, suit will probably not be brought.\textsuperscript{198} Realistically, the only instance where an uninsured parent might be sued would be in an action for contribution by a third party tortfeasor.\textsuperscript{199} Taken alone, however, this instance does not seem to be a sufficient basis for a finding of reliance by parents since these cases would be an exception to the general circumstances of the insurer being the real party in interest.\textsuperscript{200}

On the part of the insurer, however, there may have been substantial, justified reliance.\textsuperscript{201} This reliance may be manifested in several ways. In setting rates to meet potential liability, insurance companies may have relied on the fact that no recovery could be had by an immediate family member.\textsuperscript{202} Allowing recovery retroactively would probably cause insurance companies to compensate for the unexpected loss by increasing the cost of today's insurance.\textsuperscript{203} Further, insurers may have failed adequately to investigate accidents involving a parent and child, or even if they have investigated may have failed to keep adequate records.\textsuperscript{204}

The possibility of raising old and stale claims involves a third policy consideration, namely, the effect of retroactivity upon court administration.\textsuperscript{205} A retroactive application of abrogation of immunity in the parent-child area coupled with the tolling of the statute of limitations

\textsuperscript{198} Id. at 3677, 339 N.E.2d at 913.
\textsuperscript{199} See discussion of effect of contribution infra at note 219.
\textsuperscript{201} In some instances the reasonableness of the insurer's reliance on a common law rule is questionable if there have been numerous exceptions to or circumventions of the rule. The Supreme Judicial Court found this to be the case in Bouchard v. DeGagne, 1975 Mass. Adv. Sh. at 1862-63, 329 N.E.2d at 116-17, where the Court gave retroactive effect to the rule requiring a landowner to exercise reasonable care to all lawful visitors. In the family immunity area, Massachusetts has recognized only one exception to the immunity rule—namely, allowing recovery under the wrongful death statute by a mother against her son while she was acting as administratrix of the father's estate. Oliveria v. Oliveria, 305 Mass. 297, 300, 25 N.E.2d 766, 768 (1940). Thus, the insurer's reliance on parent-child immunity seems more reasonable than was the similar reliance on the old rule in Bouchard.
\textsuperscript{202} Darrow v. Hanover Township, 58 N.J. 410, 416, 278 A.2d 200, 203 (1971). It should also be noted that children are already governed by their parents' no-fault insurance benefits. See G.L. c. 90, § 34a. See also Kenney & McCarthy, "No-Fault in Massachusetts Chapter 670, Acts of 1970: A Synopsis and Analysis, 55 Mass. Law Q. 23, 26 (1970). It is only when injuries exceed the amount allowed under no-fault that the insurer could actually be relying on immunity.
\textsuperscript{203} Schwartz v. U.S. Rubber Corp., 112 N.J. Super. 595, 599, 272 A.2d 310, 313 (1970). This is an especially important consideration in the parent-child area where the combination of retroactivity and the tolling of the statute of limitations would result in substantially older claims being brought. See text at notes 178-185 supra.
\textsuperscript{204} Rigdon v. Rigdon, 465 S.W.2d 921, 923 (Ky. 1970); Felderhoff v. Felderhoff, 473 S.W.2d 928, 933 (Tex. 1971).
\textsuperscript{205} See text at note 189 supra.
for minors could result in claims being brought for actions that have arisen over the previous twenty years.\textsuperscript{206} The total effect of these claims suddenly being brought would place a substantial burden on the judicial system. Old claims, brought under retroactive application of the new immunity rule, would depend upon investigative reports that may not be thorough due to past reliance on immunity. As a result, the courts may be inundated with stale and meritless claims, some of which might well succeed.\textsuperscript{207}

In light of these three policy considerations, the final question is how to balance the purpose of \textit{Sorensen} which supports retroactive application and the considerations of reliance and judicial administration which militate against it. In determining how much weight to give the possible reliance value of the old rule, several factors must be considered.

First, while the purpose of the abrogation of immunity is to give children the same right to legal protection and redress that others enjoy,\textsuperscript{208} the abrogation was based on a finding by the Court that a total immunity is no longer necessary in today’s society.\textsuperscript{209} Such a finding would seem to make the argument in favor of retroactivity less compelling because in the parent-child area a retroactive abrogation of immunity could result in very old claims being brought relating to injuries that may have occurred when immunity was still necessary for family life.\textsuperscript{210}

In terms of reliance, while parents may not have relied on immunity in determining either their conduct or insurance needs, the insurers may have relied on immunity in determining their potential liability in order to establish their rates, as well as relying on immunity to set the manner in which they investigated claims. This type of reliance ordinarily might not be sufficient to turn the balance in favor of prospectivity. However, in the parent-child area, the fact that the statute of limitations is tolled during a child’s minority increases the number of claims that may be brought under a retroactive application of \textit{Sorensen}.\textsuperscript{211} Such an increase may be enough to give retroactivity the substantial impact which the Court has found to be lacking in the interspousal area.\textsuperscript{212}

Finally, one must consider the effect of opening the courts to claims

\textsuperscript{206} See text at notes 184-185 supra.
\textsuperscript{207} Rigdon v. Rigdon, 465 S.W.2d 921, 923 (Ky. 1970).
\textsuperscript{208} See note 64 supra.
\textsuperscript{209} The Court stated: “We believe that an absolute parental immunity to actions in negligence is not consistent with contemporary conditions and is no longer required by the necessities of modern family life.” \textit{Sorensen}, 1975 Mass. Adv. Sh. at 3364-65, 33 N.E.2d at 908-09.
\textsuperscript{210} Among the factors concerning family life that have changed in the last twenty years are the widespread existence of insurance, the greater use of the automobile and the corresponding increase in the number of accidents.
\textsuperscript{211} See text at notes 205-07 supra.
that have arisen over the last twenty years. Only the most compelling reasons for retroactivity can justify such an additional burden on the courts. While a retroactive application of *Sorensen* theoretically would open the courthouse doors to very old claims, it seems doubtful as a practical matter whether many parents will undertake the financial burden of pursuing such claims. Just as the judicial system depends upon judge and jury to weed out fraudulent and collusive claims,\(^{213}\) they may also be depended upon to weed out meritless claims and may be expected to be particularly vigilant when a very old claim is brought which suffers from witnesses' poor memories and the fact that no investigation was made at the time of the injury.

The effect of retroactivity on insurers due to their reliance upon the old rule will also be minimal for the same reasons; while their potential liability may be great if it is allowed to span the last twenty years, as a practical matter, the incidence of old claims being brought will probably be slight and therefore does not merit a blanket denial of recovery to all parties whose injuries arose prior to *Sorensen*.\(^{214}\)

III. The Effect of the Abrogation of Immunity on the Right to Recover Medical Expenses

The abrogation of family immunity focuses attention upon the right to recover medical expenses within the family. In a suit by a minor or a married woman, the cause of action is split between the right to recover for medical expenses and the right to recover for personal injuries.\(^{215}\) Generally, the former belongs to the father or husband,

\(^{213}\) See text at note 27 *supra*.

\(^{214}\) If the Court determines that the potential for bringing very old claims under a retroactive application of *Sorensen* constitutes sufficient impact to distinguish the parent-child area from the result reached in *Pevoski*, 1976 Mass. Adv. Sh. at 2628, 358 N.E.2d at 418, concerning interspousal suits, an alternative to an absolute prospective or retroactive application of *Sorensen* would be to apply the decision in *Sorensen* from the date of the injury rather than from the date of the decision. In *Sorensen* this would allow claims to be brought which arose after May 29, 1971. See Agreed Statement for Plaintiff-Appellant at 4. This would limit the retroactive impact of *Sorensen* to a period of less than five years and would avoid the hardship of a prospective application which would deny recovery to parties whose injuries arose after the injury in the decided case but before the Court's decision. In *Sorensen*, immunity was abolished because the Court was ready to reexamine the principles of immunity in light of the conditions of modern life. In light of that circumstance, it seems unfair to deny recovery in cases arising after the date of the injury in *Sorensen* because it was the *Sorensen* fact situation rather than some other case which provided the basis for the Court's reexamination of immunity. For example, if the day after Jessica Sorensen was injured another accident involving a parent and child occurred and suit was brought, it would be unfair to deny recovery to the second plaintiff because the *Sorensen* case was the first such fact situation to reach the Supreme Judicial Court. Two jurisdictions have applied the abrogation of immunity to injuries arising after the date of the injury in the case being decided. *Rigdon* v. *Rigdon*, 465 S.W.2d 921, 923 (Ky. 1971); *Felderhoff* v. *Felderhoff*, 473 S.W.2d 928, 933 (Tex. 1973). See generally R. Keeton, *Venturing to Do Justice* 36-38 (1969).

\(^{215}\) "[T]he law splits the cause of action arising from the personal injury to the minor or married woman and gives each the right to recover for personal injuries, and gives
and the latter to the injured party. Where the cause of action is so divided and the party who may recover medical expenses is also the party who is responsible for the injuries, medical expenses will be reduced by the amount of the father's or spouse's negligence. The practical effect of such a reduction is that the amount of money available for an injured party's medical expenses in an action against a negligent father or spouse may be diminished or eliminated entirely.

The abrogation of immunity raises several interesting issues concerning the right to contribution among joint tortfeasors. Ordinarily, as contribution only concerns the rights among joint tortfeasors it has no effect on the right of an injured plaintiff to recover. See G.L.c. 231, § 85, recovery would be reduced in an amount corresponding to the husband's negligence, as long as he was not more than 50% negligent. 

The Court's holding in Sorensen, which limited recovery to the amount of the insurance policy, 1975 Mass. Adv. Sh. at 3665, 339 N.E.2d at 916, may also affect contribution rights. In the Sorensen case, there was another driver involved. If the Court applies the insurance limitation to the right of contribution, the other driver will be solely liable for any amount recovered by the child. For example, in the Sorensen case, there was another driver against whom suit was brought. Recovery by the child against the father was limited to the amount of the father's insurance policy ($10,000). If that limitation also applied to actions for contribution by the other driver, once the insurer paid the policy limits to the child, there would be nothing left for a joint tortfeasor to recover.
lem arises. If full recovery by the injured party is allowed while the legal duty to pay medical expenses still rests with the father or spouse, the father or spouse may be obligated to pay the injured party for medical expenses as well as the medical bills themselves. The problem is therefore one of allowing recovery directly by the injured party without exposing the injuring party to the risk of having to pay the expenses twice.

A child has no recognized right in Massachusetts to recover any medical expenses. In a suit against a negligent father, therefore, total recovery of medical expenses may be denied. Under the Sorensen view of parent-child actions, where both parties are looking toward the insurance to provide a fund to aid in the injured child's recovery, such a result may substantially limit the child's ability to obtain the medical care necessary to make a full recovery. It seems unfair that insurance which the parent has purchased for such a circumstance may be made available to help a stranger but not the insured's own child. In order to mitigate the harshness of this rule, one alternative might be to allow either parent to recover medical expenses. Payment of these expenses, while nominally belonging to the father as head of the household, is in reality a burden on the family exchequer and as such either parent should be allowed to recover. Under such an alternative, it would be necessary to insure that the nonnegligent parent be entitled to recover. Therefore, the ability to make a full recovery would depend first on there being another parent to collect the expenses and on the nonnegligent parent being knowledgeable enough to incur the obligation. Another approach would be to give the child the right to collect future medical expenses. Awarding a child his future medical expenses would insure that a child receives the necessary medical care because there would be funds available to pay for it. There is no danger that a

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221 See text at notes 23-24 supra.

222 See text at notes 230-232 infra.

223 See, e.g., Clarke v. Eighth Ave. R.R., 238 N.Y. 246, 250, 144 N.E. 516, 517 (1924).

224 "A recovery in the child's action for a personal injury, for prospective medical services, where the fund recovered is usually preserved through a guardian or in other ways, will be most likely to secure such services when needed." Cuming v. Brooklyn City R., 109 N.Y. 95, 100, 16 N.E. 65, 67 (1888). In Sorensen, the Court stated "In case of a settlement or award, it would be most appropriate that a guardian ad litem be ap-
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child will be denied medical care by allowing a parent to recover past expenses because these expenses relate to care which the child has already received.

The award for future expenses could be deposited in an account for the child and funds could only be withdrawn with the approval of the court.\(^{225}\) Under this approach a parent who actually pays for the future medical expenses may be reimbursed for that amount from the fund.\(^{226}\) Payment may also be had directly from the fund itself. Either method would avoid the problem of having a child's full recovery depend upon whether the tortfeasor was a stranger or a parent and would prevent the parent from having to pay medical expenses twice.

Just as the earlier consideration of the liability between husband and wife focused on the legal implications of a woman's marital status, a woman's ability to incur and discharge her financial obligations has also depended upon whether she was married. Under the common law, the entire cause of action for injuries to a married woman belonged to her husband.\(^{227}\) The Married Woman's Act gave married women the right to recover for their personal injuries but the husband, as "nominal and legal head" of the family, remained liable for any medical expenses.\(^{228}\) A wife, however, may recover her own past medical expenses if she makes herself liable for them\(^{229}\) and is entitled to recover future medical expenses in any case.\(^{230}\) Therefore, when a husband negligently causes injury to his wife, a full recovery of medical expenses may still be had provided that the parties have the foresight to have the wife incur the obligation to pay the medical bills.\(^{231}\) It would seem that once the wife has agreed to incur these expenses the husband's liability ceases.\(^{232}\)

pointed to protect and maintain the proceeds of the settlement or award for the benefit of the injured child." 1975 Mass. Adv. Sh. at 3679 n.15, 339 N.E.2d at 914 n.15.

\(^{225}\) See Clarke v. Eighth Ave. R.R., 238 N.Y. 246, 250, 144 N.E. 516, 517 (1924).

\(^{226}\) See id. at 252, 144 N.E. at 518.

\(^{227}\) Thibeault v. Poole, 283 Mass. 480, 483-84, 186 N.E. 632, 634 (1933).

\(^{228}\) Id.


\(^{231}\) The New Jersey Supreme Court found this approach unsatisfactory in Patusco v. Prince Macaroni, Inc., 50 N.J. 365, 235 A.2d 465 (1967), on the ground that it was irrelevant who incurred the medical expenses. In that case, the husband was found negligent and the wife was allowed to recover full medical expenses from another tortfeasor regardless of who actually incurred them. "Under this view, only the uninformed would make the mistake of using the husband's credit or resources." Id. at 372, 235 A.2d at 469. The Massachusetts Supreme Judicial Court specifically declined to follow Patusco in Dane v. Cormier, 362 Mass. 853, 853, 285 N.E.2d 451, 452 (1972) and found that the husband's negligence precluded his recovery of the wife's medical expenses and the wife could only recover upon a showing that she actually incurred them.


[It is elementary that the husband is responsible, generally, under the law, for such items of medical expenses as are shown in the instant case. This rule is not applicable where such expenses are charged to the wife at her request and she
One's ability to take advantage of this situation, however, rests with the state of one's legal knowledge for the wife must actually incur the debt herself.\textsuperscript{233} The problem in interspousal suits, therefore, is not one of allowing the wife to recover medical expenses, but one of making that recovery turn on the wife's foresight and knowledge of the law so that she actually incurs the expenses. This is not a realistic approach. When an injury occurs, the emphasis is on obtaining medical help rather than establishing the wife's obligation to pay for medical services. The concern in this area, then, should be focused upon allowing the wife to recover her medical expenses and not upon which spouse has the legal obligation to pay them. In most cases if the wife recovers her medical expenses, the money will be used to pay medical bills and the husband's liability for his wife's medical bills will as a practical matter cease. Once the wife recovers these expenses, the husband's legal responsibility for those expenses should also cease. If the wife may expressly assume liability for her medical bills,\textsuperscript{234} her action to recover medical expenses should be viewed by the court as an assumption of those responsibilities and the husband's liability should cease.

In light of the problems and considerations just mentioned, the most viable approach in the case of a child would be to place any award for medical expenses in a trust fund that would only be used for medical expenses. Such an arrangement would insure that the funds were put to their intended use. In the case of a wife, she would be allowed to recover her medical expenses regardless of whether she has previously acted to assume these expenses. Once she recovers her medical expenses, the husband's responsibility should cease.

While the abrogation of parent-child and interspousal immunity did not create the problems that exist when medical expenses are recovered by someone other than the injured party,\textsuperscript{235} it will serve to focus the courts' attention on such problems because the abrogation of immunity will undoubtedly result in more suits brought against parents and spouses. The recovery of medical expenses by a parent or spouse, and the corresponding reduction in recovery when that party is negligent seems contrary to the intent of the Court in Sorensen and Lewis to give children and spouses the same rights of recovery that others enjoy.\textsuperscript{236} This right of recovery includes not only the right to maintain promises to pay such expenses herself instead of her husband paying them. \textit{Id.} at 765, 90 S.E.2d at 88.

\textsuperscript{234} See text at note 229-230 supra.
\textsuperscript{235} The problem was created by splitting the cause of action between the injured party and the parent or spouse. This practice arose long before immunity was abolished. See e.g., Rodgers v. Boynton, 315 Mass. 270, 281, 52 N.E.2d 576, 577 (1943). The abrogation of immunity accentuates the problem because it allows suit where the parent or spouse is the only tortfeasor and thus even under comparative negligence there would be a 100% reduction in recovery of medical expenses. See note 218 supra.
\textsuperscript{236} See note 64 supra.
an action against a parent or spouse, but also to make a full monetary recovery, including medical expenses, for the injuries incurred.

CONCLUSION

Massachusetts has wisely decided to abolish the common law immunities that bar recovery for tortious injury between parent and child and husband and wife. While the limitation to injuries arising out of automobile accidents is justified by the Court's reluctance to decide anything more than that which was presently before it, there will undoubtedly be parties in the future who will seek to apply the reasoning in Sorensen and Lewis to nonautomobile injuries. When the Court is confronted with such a case, it will be necessary to balance the policies of Sorensen and Lewis in favor of recovery by injured parties against the possibility of excessive judicial interference in the family. The major difficulty in achieving such a balance is to develop a guide for recovery broad enough to protect the rights of injured parties but narrow enough not to encroach upon activities unique to the family. The New York courts seem to have achieved the proper balance by focusing on the importance of the family relationship to the conduct in question. Massachusetts should follow the New York approach and should allow recovery except where the conduct in question would not have arisen but for the family relationship. Such a standard for recovery can be applied to both parent-child and interspousal suits.

The Court also reserved for future consideration the question of whether the holding in Sorensen should be made retroactive or prospective. A retroactive application would allow a greater number to recover. On the other hand, since the statute of limitations is tolled for suits by minors, a retroactive application of Sorensen would allow very old and possibly meritless claims to be brought. On balance, however, it is submitted that the court should apply Sorensen retroactively as it did with Lewis. The actual effect in terms of the number of cases brought is not sufficient to deny recovery to everyone whose injuries arose prior to Sorensen. If the Court is convinced that retroactivity would result in an inundation of old claims because of the tolling of the statute of limitations, it could, as an alternative, apply Sorensen from the date of the injury. This alternative would avoid very old claims from being brought yet would allow recovery to those people whose injuries arose after the date of the injury in Sorensen but before the Court's decision.

Finally, suits by a child against a parent or a wife against her husband for tortiously inflicted injuries will raise questions concerning the right of a parent or husband to recover medical expenses for an

injured child or wife. The ability to be fully compensated for injuries should not be lessened by the fact that the tortfeasor was a parent or spouse. Both children and wives should be allowed to make a full recovery of medical expenses with the understanding that children's awards for medical expenses be placed in a trust and used solely for that purpose. A wife's recovery of her medical expenses should be viewed as her assumption of the obligation to pay those expenses, thus relieving the husband of future liability for payment of those expenses.

Judith A. Malone