Chapter 5: Torts

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CHAPTER 5

Torts

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§ 5.1. Introduction. As past volumes of the Survey have pointed out, Massachusetts law in the tort field has undergone rapid change in the last ten years. The Supreme Judicial Court has turned from a strict stare decisis adherence to old principles and shown an increasing willingness to examine and change old case law.

Judicial decisions in such areas as loss of consortium, post accident safety changes, licensee-invitee status, recovery for fetal death, interfamilial immunity and the malpractice locality rule represent just a partial list of major advancements in the liberalization of substantive rights in personal injury cases. These cases represent a change in the earlier philosophy of the Supreme Judicial Court that court-made law should only be changed by legislative action. With the exception of governmental immunity which the Court continues to refer to the legislature, all other tort doctrines are being updated as particular cases reach the Court.

In this Survey year the Court has not made the dramatic changes as in some past years, but it has indicated it will continue to follow a philosophy of bringing Massachusetts tort law into the mainstream of modern American tort law. The Court, particularly in decisions regarding mental injury¹ and choice of law,² has demonstrated its commitment to reasoned change.

§ 5.2. Standard of Care of Landlord—Duty to Tenants’ Visitors. It has long been the law in Massachusetts that a landlord owes to the guests of his tenants the same duty which he owes to his tenants. That duty is to “use reasonable care to keep the common passageways re-

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¹ See § 5.4 infra.

² See § 5.8 infra.
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remaining in the control of the landlord in the same condition in which they were or appeared to be at the time of the creation of the tenancy.”

This common law rule as to the duty owed tenants’ guests has now been rejected by the Supreme Judicial Court. In Lindsey v. Massios, the Court held that a “landowner’s duty of reasonable care in maintaining property he controls extends to all lawful visitors on his premises . . . including the lawful visitors of his tenants.”

In Lindsey, the plaintiff was a guest of one of the defendant’s tenants. The tenant occupied an apartment on the third floor of the defendant’s building. The plaintiff, who had been visiting the tenant, left the apartment around 7:00 p.m. and discovered that the bulb in the second floor landing light fixture was missing. She continued down the stairs but slipped and fell, injuring her left ankle. Evidence admitted at the trial indicated that the light bulb had been missing for more than a week and that the stairway was in poor repair during the same period.

In determining the landlord’s duty to the plaintiff, the Court examined the reasoning of its opinion in Mounsey v. Ellard. In Mounsey, the Court abolished the common law distinction between “licensees” and “invitees.” In its place, the Court created “a common duty of reasonable care which the occupier [of real property] owes to all lawful visitors.” Finding that the reasoning of Mounsey applied with equal force here, the Lindsey Court stated:

The Mounsey rule and its underlying policy rationally apply to all persons whose only relationship to the premises on which they are injured is that of a lawful visitor. Modern values and the realities of urban living favor protection of personal safety over rights of absolute property control and demonstrate no logical basis for distinguishing among persons who enter private property for various legitimate purposes. Neither the landowner’s conduct in maintaining premises in his control nor the visitor’s need for legal protection of his safety depends on the visitor’s status as business acquaintance, social acquaintance or public official. Similarly, the status of the person visited, landowner or lessee, should not affect the


3 Id. at 384-85, 360 N.E.2d at 634 (citation omitted).

4 Id. at 381, 360 N.E.2d at 633.

5 Id. at 381-82, 360 N.E.2d at 633.

6 Id. at 382, 360 N.E.2d at 633.

7 Id.


9 Id. at 707, 297 N.E.2d at 51.
visitor’s right to personal safety or the landowner’s obligation reasonably to maintain premises in his control.\(^\text{10}\)

In addition to extending a landowner’s duty of reasonable care to all lawful visitors on his premises, including guests of his tenants, the Court in *Lindsey* also held that “violation of a safety statute constitutes evidence of negligence in any action by a person whose only relationship to the premises where the injury occurred is that of a lawful visitor.”\(^\text{11}\) By so holding, the Court refused to follow a line of cases which reached a contrary result on this issue.\(^\text{12}\) The Court reasoned that these older cases, decided at a time when “a landlord’s duty to his tenants’ visitors was defined by the safety conditions which existed at the commencement of the tenancy” should no longer control in light of the new rule announced in *Lindsey*.\(^\text{13}\)

The most interesting issue left open in *Lindsey* concerned the landlord’s duty of care to his tenants. The Court specifically declined to consider or decide whether the duty of reasonable care now recognized as owing to all lawful visitors is owed to tenants as well.\(^\text{14}\) The Court, however, referred to *Perry v. Medeiros*,\(^\text{15}\) where a landlord’s violation of a safety statute was held to be evidence of his negligence in an action by a tenant.\(^\text{16}\) The statute in question in *Perry* concerned the positioning of doors at the top of a stairway. The Court in that case, however, did not depart from the common law rule that a landlord’s duty to his tenant is “to use reasonable care to keep the 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.”\(^\text{17}\) In a *Survey* year case subsequent to *Lindsey*,\(^\text{18}\) the Court again declined to reevaluate the duty running from landlord to tenant, because the issue had not been briefed or argued.\(^\text{19}\)

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\(^\text{11}\) Id. at 386, 360 N.E.2d at 634.


\(^\text{14}\) Id. at 384 n.2, 360 N.E.2d at 634 n.2.


\(^\text{19}\) 1976 Mass. Adv. Sh. at 167-68, 360 N.E.2d at 1046-47. Since the end of the *Survey* year, the issue reserved in *Lindsey* has been decided by the Court. In King v. G & M Realty Corp., 1977 Mass. Adv. Sh. 2372, 370 N.E.2d 413, the Court held that a landlord owes to his tenant the same duty of care that is owed to the tenant’s lawful visitors. *Id.* at 2375-76, 370 N.E.2d at 415.
However, the extension of the duty of reasonable care to tenants would appear impelled by the reasoning of Lindsey and Mounsey. Moreover, such an extension would appear consistent with two recently enacted provisions of the General Laws which appear to have expanded the obligations of certain landlords to their tenants. Section 15E of chapter 186, enacted in 1972, provides:

An owner of a building shall be precluded from raising as a defense in an action brought by a lessee, tenant or occupant of said building who has sustained an injury caused by a defect in a common area, that said defect existed at the time of the letting of the property, if said defect is at the time of the injury a violation of the building code of the city or town wherein the property is situated. Any waiver of this provision in any lease or other rental agreement shall be void and unenforceable.20

The language of this statute clearly indicates that a landlord may no longer rely on the common law defense that a defect causing an injury existed at the time the tenancy began, provided that defect is in violation of the local building code. However, section 15E “apparently cannot be invoked by guests of a lessee, tenant or occupant.”21

In addition, section 19 of chapter 186 requires that a landlord or lessor of any real estate “except an owner-occupied two- or three-family dwelling” exercise reasonable care to correct any unsafe condition on his premises which is not caused by the tenant or other lawful occupant or visitor.22 Although the landlord’s duty to repair under this provision commences with regard to conditions in areas under the tenant’s control only after the landlord receives written notice forwarded by registered or certified mail, no such notice need be given for unsafe conditions in areas not under the tenant’s control.23 Section 19 does not limit the landlord’s duty to repair only to those conditions arising after the tenancy begins, but applies to preexisting unsafe conditions as well. Significantly, failure to exercise reasonable care to correct these defects exposes the landlord to liability in tort to the tenant or other lawful visitor who sustains injury as a result of the defect.24

Sections 15E and 19, though not referred to by the Court in Lindsey, signal a significant departure from the common law rule limiting the landlord’s duty to his tenant, and thus appear compatible with the holding of Lindsey. In addition, sections 15E and 19 appear compatible

20 G.L. c. 186, § 15E.
22 G.L. c. 186, § 19.
23 Id.
24 Id.
with the recognition of a duty of reasonable care running from landlords to tenants themselves as well as to tenants' guests.

§ 5.3. Evidence—Libel—Instructing the Jury on the Meaning of Clear and Convincing Proof in Libel Cases. To prevail in most civil actions brought in Massachusetts courts, the party having the burden of persuasion must prove his case by a preponderance of the evidence, that is the jury must believe that his contention "is more probably true than false." There are a few exceptions to the above standard, however, and some issues require "a degree of belief greater than 'a preponderance' but less than 'beyond a reasonable doubt.'" For example, to establish a gift causa mortis, the proof must be "convincing," and the oral proof of the contents of a lost will must be "strong, positive and free from doubt." Such vague intermediate standards, however, generally are not favored by the Massachusetts courts.

Recent decisions by the United States Supreme Court and the Supreme Judicial Court have added another issue to the relatively short list of those requiring an intermediate level of proof lying somewhere between "a preponderance of the evidence" and "beyond a reasonable doubt." As a matter of constitutional law, in a libel action brought by a public figure against a representative or member of the news media, the plaintiff must show by "clear and convincing proof" either that the defendant made statements knowing that they were false or in reckless disregard of the truth. In Stone v. Essex County Newspapers, Inc., the Supreme Judicial Court attempted to give the phrase "clear and convincing proof" some content by stating that it referred to proof which is "strong, positive and free from doubt" and "full, clear, and decisive."

During the Survey year, the Court was asked to consider the adequacy of an instruction relating to this intermediate level of proof which had been given to the jury in a libel action brought by a public official. In

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25 See note 19 supra.

§ 5.3 1 W. Leach and P. Liacos, Handbook of Massachusetts Evidence 42 (1967).
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Callahan v. Westinghouse Broadcasting Co., Inc., the judge instructed the jury that the phrase "clear and convincing evidence" refers to a standard of proof greater than "by a fair preponderance of evidence" but less than "beyond a reasonable doubt," and added:

[T]he best I could suggest to you, I think, in trying to apply this burden of proof against the plaintiff is: ten of you are going to have to be satisfied that it is highly probable on evidence that is clear to you that [the defendant] personally seriously doubted the truth of some or all of the statements made in the broadcasts

The word "convincing" after the word "clear"... suggests to me that there should not be too much room for argument among reasonable men and women under the standard of clear and convincing proof...

The Court held that the words used by the trial judge to describe this "elusive intermediate level of burden of persuasion in terms which the jury could understand," were not improper. While finding no error in the charge given by the trial judge, the Court suggested that a form of instruction be used "which defines 'clear and convincing proof,' not in terms of the quality of the evidence, but in terms of the state of mind of the trier of facts." As an example of the form of charge it had in mind, the Court offered the following instruction which had been suggested by the Supreme Court of Connecticut:

The burden of persuasion, therefore, in those cases requiring a showing of clear and convincing proof is sustained if evidence induces in the mind of the trier a reasonable belief that the facts asserted are highly probably true, that the probability that they are true or exist is substantially greater than the probability that they are false or do not exist.

The opinion in Callahan indicates that the Court is willing to be somewhat flexible in allowing limited experimentation in this area by the lower courts. The decision does provide two examples of acceptable jury charges on the issue of clear and convincing proof but does not thereby exclude other formulations. Nevertheless, given the difficulty

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2 Id. at 1029, 363 N.E.2d at 242.
3 Id. at 1030, 363 N.E.2d at 243 (emphasis supplied by the Court).
4 Id. at 1031, 363 N.E.2d at 243.
experienced by both appellate and trial courts in their efforts to conceptualize and give content to the standard, lower courts would be wise not to stray very far from the forms of instructions approved by the Court in this case.18

§ 5.4. Recovery for Intentional Infliction of Emotional Harm without Resulting Physical Injury—Recovery for Loss of Consortium. The trend in modern tort law has been to allow recovery in a limited number of extreme cases for the intentional infliction of severe emotional distress. The Supreme Judicial Court indicated its qualified approval of this trend in George v. Jordan Marsh Co.,2 where it held: “One who, without a privilege to do so, by extreme and outrageous conduct intentionally causes severe emotional distress to another, with bodily harm resulting from such distress, is subject to liability for such emotional distress and bodily harm even though he has committed no heretofore recognized common law tort.”3 Whether recovery could be had in a case where intentionally inflicted emotional distress did not result in some physical injury was specifically reserved for future determination.4 While this issue did arise subsequent to George,5 it remained undecided until the Survey year.

In Agis v. Howard Johnson Co.,6 the Court considered the liability of a restaurant company and one of its managers for the mental anguish and emotional distress sustained by the plaintiff who was summarily fired by the defendant manager in the presence of other employees.7 The trial court granted the defendant’s motion to dismiss the complaint pursuant to Massachusetts Rule of Civil Procedure 12(b)(6) on the grounds that even if the allegations in the complaint were true, the plaintiff had not alleged that she suffered physical injuries as a result of the defendant’s acts and that, therefore, she had failed to state a claim upon which relief could be granted.8

On appeal, the Court reversed and held “that one who, by extreme and outrageous conduct and without privilege, causes severe emotional distress to another is subject to liability for such emotional distress even though no bodily harm may result.”9 The Court acknowledged that this

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18 For a further discussion of Callahan, see Ortwein, Constitutional Law, infra § 10.2.


3 Id. at 255, 288 N.E.2d at 921.

4 Id.


7 Id. at 2347, 355 N.E.2d at 316.

8 Id., 355 N.E.2d at 317.

9 Id. at 2351, 355 N.E.2d at 318.
extension of the result in *George v. Jordan Marsh Co.* may well give rise to problems in the area of proof. In particular the Court recognized that mental anguish has been considered by some courts and commentators too "subtle and speculative" to be measured by known legal standards. Moreover, the Court took note of the argument that to allow recovery for such harm would open the doors of the courthouse to a flood of fictitious and trivial complaints.

Responding to these arguments, the Court noted that the possibility of frivolous or collusive suits exists in many areas of the law and that the responsibility for sifting the valid from the invalid properly rests with trial judge and jury. Justice Quirico, writing for the Court, did concede, however, that while he did not consider the difficulties of proof to be insurmountable, the door to recovery in these cases should only be opened "narrowly and with due caution."

Thus, the Court determined that in order to recover under an "emotional distress" theory the plaintiff must establish:

1. that the actor intended to inflict emotional distress or that he knew or should have known that emotional distress was the likely result of his conduct . . . ;
2. that the conduct was "extreme and outrageous," and was "beyond all possible bounds of decency" and was "utterly intolerable in a civilized community" . . . ;
3. that the actions of the defendant were the cause of the plaintiff's distress . . . ;
4. that the emotional distress sustained by the plaintiff was "severe" and of a nature "that no reasonable man could be expected to endure it."

While all four of these elements are important, it would appear that the key to recovery in these cases is the requirement that the plaintiff's distress be "severe." A plaintiff proving only that the defendant's ac-

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10 *Id.* at 2349, 355 N.E.2d at 317-18.
11 *Id.*, 355 N.E.2d at 318.
15 *Restatement (Second) of Torts* § 46, Comment j (1965) provides in part:

Emotional distress passes under various names, such as mental suffering, mental anguish, mental or nervous shock, or the like. It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment,
tions produced simple and brief annoyance or some similar mild emotional upset, will not meet the burden imposed by this requirement. “Complete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people.”

The problem remains, however, that the range of human emotions is broad and a trier of fact faced with evidence of emotional distress is likely to have some difficulty in deciding if and when the threshold of severity entitling the plaintiff to recover has been crossed. The Court’s observation that such distress must be of the type which no reasonable person could endure may offer some guidance, but the jury’s task of measuring the extent of the plaintiff’s emotional injury to determine whether it qualifies as “severe” will, nevertheless, be very difficult.

The use of a “reasonable man” standard to measure the severity of emotional harm appears consistent with the approach of the Restatement. Thus, the Restatement authors note for example, that “the law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it.” In light of the Court’s apparent agreement with the Restatement’s objective standard, the question arises of whether the Court will agree with the Restatement in another significant respect. In particular the Restatement authors have indicated that the issue of whether a reasonable man could endure certain level of pain may not, in all cases, be determinative of liability. Thus, the authors have stated that a plaintiff whose distress is in fact exaggerated or unreasonable may still recover if his injury “results from a peculiar susceptibility to such distress of which the actor has knowledge.” It would appear then, that under the Restatement view, one may recover for mental distress which a reasonable person could endure provided that the plaintiff shows that his own inability to endure was the result of some personal sensitivity of which the defendant had knowledge. The Court’s reliance on the Restatement in both Jordan Marsh Co. and in Agis may indicate that a peculiarly vulnerable plaintiff may be able to recover upon showing the actor’s knowledge of his sensitivity.

It should also be noted that the decision in Agis does not affect the law in Massachusetts as it relates to recovery for negligently inflicted emotional distress unaccompanied by physical injury. At present, no

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anger, chagrin, disappointment, worry and nausea. It is only where it is extreme that the liability arises.

17 Id.
18 Id.
19 Id., Comments j and f.
20 Id. at § 46.
recovery may be had for such harm. The continued validity of this rule was discussed but not decided in Jordan Marsh Co.

The Court in Agis also held that either spouse may maintain an action for loss of consortium "where the acts complained of are intentional, and where the injuries to the spouse are emotional rather than physical." The Court recognized other areas where a claim for loss of consortium has been predicated upon an intentional invasion of the marriage relationship such as alienation of affection or adultery. Consequently, the Court could find no reason to deny a claim based upon "intentional infliction of severe emotional distress."

§ 5.5. Negligence of Parking Garage Operator. The established rule in Massachusetts is that a possessor of lands who holds it open to the public for business purposes owes "a duty to a paying patron to use reasonable care to prevent injury to him by third persons whether their acts were accidental, negligent, or intentional." This principle was affirmed by the Court of Appeals during the Survey year in Parslow v. Pilgrim Parking, Inc. The plaintiff in Parslow had parked her automobile in the defendant's garage. When she returned to the car a short time later she was accosted by a stranger who forced her to leave the garage and then raped her. The plaintiff testified that she had noticed the assailant loitering in the garage when she parked her car, twenty-five minutes prior to the assault. The basis of the complaint was that the defendant had been negligent in not taking reasonable precautions to prevent the attack in question. The jury returned a verdict for the plaintiff.

On appeal, the court noted that, in light of the plaintiff's testimony, the defendant's security guards had "sufficient opportunity to observe the plaintiff's assailant" and held that the trial judge "did not err in permitting the jury to determine whether the owner of the garage took reasonable steps to protect its patrons from injury caused by the foreseeable acts of third persons, even if those acts were intentional."

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25 359 Mass. at 255, 268 N.E.2d at 921.
27 Id., 362 N.E.2d at 934.
28 Id.
The significance of this case lies not in its reiteration of the well-settled principle concerning the duty an owner of business premises owes to paying customers, but in the application of that rule to the facts presented. Most of the cases in which an operator of a business has been held liable for failing to take reasonable steps to prevent intentional harm to a patron by a third person have arisen in connection with injuries sustained in establishments where liquor is served. In such cases, the evidence usually demonstrates quite clearly that the assailant was intoxicated, boisterous, or aggressive and that the defendant or his employees knew of the assailant's condition before the injury to the plaintiff occurred.7

Similarly, operators of a ship have been held liable for harm caused to a passenger by persons who were intoxicated and who had been observed fighting with other passengers just prior to their assault on the plaintiff.8 In Rawson v. Massachusetts Operating Co., Inc.,9 the plaintiff recovered damages from the owner of a movie theater for an intentional injury caused by another patron who, along with several other persons, had been raising a commotion in the theater for more than an hour and a half prior to the incident giving rise to the suit.10 On these facts, the Court held that:

[t]he jury could find that the defendant was remiss . . . in failing to discover and stop the disorder; that the defendant should have known that if it did not take such action, it was to be reasonably anticipated that patrons might undertake to supply the omission; and that if that happened, the authors of the rowdism might resent such unofficial interference . . . and might even commit a cowardly assault in the dark upon a remonstrating patron.11

These cases indicate the willingness of the Massachusetts courts to impose liability on the operators of businesses for the foreseeable harm to their patrons intentionally caused by other individuals on the defendant's premises. In such instances, the assailant's obvious and highly disruptive or aggressive behavior flashed a warning to the business operator or his employees that harm to someone on the premises was almost certain if he did not take immediate steps to quell the disturbance. In

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10 Id. at 560, 105 N.E.2d at 220-21.
11 Id., 105 N.E.2d at 221.
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Negligence—Foreseeability of Harm. In Tibbetts v. Ford Motor Co.,\(^1\) the Appeals Court held that in order to establish a defendant manufacturer's negligence, the evidence must show not only that the defendant manufactured an imperfect product which caused injury to the plaintiff, but also that the manufacturer could have reasonably anticipated that injury would result from the use of its product.\(^2\)

The plaintiff in Tibbetts suffered two deep lacerations in his hand when he unsuccessfully tried to remove one of the wheel covers from his car by sliding his bare fingers through one of the decorative slots on the cover and pulling against it with considerable force.\(^3\) There were burrs on the inside edge of the slots, and the plaintiff's injuries were caused by the pressure he exerted against the edge while trying to remove the cover.\(^4\)

The court examined the wheel covers and found that the burrs were obvious to the touch, and "that one would have to pull one's hand against the inner edge of any of the slots with considerable force and without a glove or other protection in order to break the skin."\(^5\) It concluded that "the burr-covered decorative slot must be classed with a great many other common fixtures, projections, surfaces, corners, and edges found in vehicles and elsewhere as a result of which significant injuries are possible but are not reasonably to be anticipated."\(^6\) Thus, it followed that the defendant was not negligent in failing to discover and remove the burrs.

The court did indicate, however, that a different result might have been justified if the case had involved "sharp burrs on a surface such as a door handle . . . that is intended to be manipulated," or "a wheel cover slot with hidden, sharp edges that could seriously injure someone merely inserting his hand, a use not intended for the slots . . . but


\(^{2}\) Id. at 1290-91, 358 N.E.2d at 462.

\(^{3}\) Id. at 1286, 358 N.E.2d at 460.

\(^{4}\) Id. at 1286-87, 358 N.E.2d at 460-61.

\(^{5}\) Id. at 1289-90, 358 N.E.2d at 462.

\(^{6}\) Id. at 1290, 358 N.E.2d at 462.
which, ... the manufacturer should expect in the course of normal use."

§ 5.7. Negligence—Prima Facie Case—Automobile Collisions. The general rule in actions arising out of a collision of automobiles at an intersection is that the issue of the respective drivers’ negligence is a question of fact to be determined by the jury. This rule "has been applied even in cases where the circumstances have impelled the Supreme Judicial Court to label the cases as 'close,' in determining that directed verdicts should not have been ordered."

There have been rare cases, however, in which the evidence of the parties’ conduct has been so incomplete that a jury would not be warranted in finding that the defendant had been negligent and which, therefore, require that a verdict be directed for the defendant. During the Survey year, the Appeals Court considered one of the rare cases requiring such action by the trial court.

In Hunter v. State Street Garage Corp., the plaintiff was injured when the car in which she was a passenger was involved in a collision with a car operated by the defendant’s employee. The accident occurred at an intersection, and the car in which the plaintiff was riding came to rest after striking a post which supported an elevated railway. The plaintiff argued that the car driven by the defendant’s employee was travelling at an improperly high rate of speed and that it struck the car in which she was riding, propelling it into the post. The plaintiff further contended that as a result of this impact, the plaintiff was thrown into the windshield and sustained serious injuries.

The only evidence presented by the plaintiff relating to the speed of

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7 Id. at 1290, 358 N.E.2d at 462. The court also seemed to indicate that because the wheel cover was neither inherently dangerous nor uncommon and apt to confuse the user, the defendant had no duty to warn of the harm which might result from the improper use of the product. Id. at 1288-89, 358 N.E.2d at 461-62. While this may be too narrow a view of the duty to warn, the court’s comments on this issue must be kept in perspective. The question before the court was whether the defendant had been negligent in failing to discover and eliminate certain flaws in its product. The brief discussion of the duty to warn must, therefore, be considered dictum. In addition, it is not at all clear from the language it used that the court intended to set forth a hard and fast rule excluding such a duty in cases which do not involve inherently dangerous or uncommon and confusing products.

§ 5.7. 1 E. MARTIN & E. HENNESSEY, AUTOMOBILE LAW & PRACTICE § 582 (1967).
2 Id.
5 Id. at 1025-26, 354 N.E.2d at 894-96.
6 Id. at 1027, 354 N.E.2d at 895.
7 Id.
either vehicle was her own testimony that the car in which she was a passenger "came to a slow drive" as it approached the intersection where it was struck in the rear quarter panel on the passenger side by the other vehicle. She offered no evidence as to the speed of the other car; the angle at which the cars impacted; the order in which the two cars entered the intersection; or the presence or absence of traffic lights or stop signs at the intersection. There was nothing to indicate negligence on the part of the defendant's employee in the testimony of other eyewitnesses to the accident.

In light of the scant evidence presented by the plaintiff, the court held that the trial judge had erred in refusing to grant the defendant's motion for a directed verdict and stated: "In no case that we have found applying the general rule concerning intersection collisions has the evidence for the plaintiff been so devoid of detail as the evidence in this case; in none has an inference of the defendant's negligence been left so wholly to conjecture."


A. Choice of Law. Choice of law doctrine in the area of torts has recently undergone significant change in many jurisdictions. The traditional conflicts rule, which requires that the forum apply the substantive law of the place where the tort occurred, has been severely criticized by both the judiciary and legal commentators. Numerous and divergent theories designed to replace the old rule in multi-state tort cases have been proposed. Examples are the Restatement's "most sig-

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8 Id. at 1025-26, 354 N.E.2d at 894-96.
9 Id. at 1028-29, 354 N.E.2d at 895-96.
10 Id. at 1026 & n.2, 354 N.E.2d at 895 & n.2.
nificant relationship” test, Currie’s “governmental interest” analysis and Leflar’s “choice influencing” considerations. While there has been disagreement as to the content of a new conflicts rule, all of the newer approaches seem to agree that “there is a duty imposed on the forum court to undertake an analytical approach to the facts presented in a multi-state tort action to determine what law should govern the substantive rights of the parties.”

Despite the general nationwide trend against the traditional rule, the courts in Massachusetts continued to apply the strict lex loci delictus rule. In Pevoski v. Pevoski, however, the Supreme Judicial Court departed from the traditional rule and adopted a conflicts analysis which requires application of the law of the state with the “strongest interest” in the issue in question.

The plaintiff in Pevoski, a domiciliary of Massachusetts, sued her husband for injuries sustained in a three-car collision in New York. She had been a passenger in the automobile operated by her husband at the time of the accident. All three of the vehicles involved were operated by Massachusetts residents and the Pevoski car was registered, insured and garaged in Massachusetts. The trial court granted the defendant’s motion for summary judgment on the grounds that the defendant was entitled to interspousal immunity.

On appeal, the Court first considered the plaintiff’s contention that the law of New York, which does not recognize interspousal immunity, should control. The Court resolved this choice of law problem by focusing on the “interests” of each state in the particular issue presented. Since the litigation would affect only Massachusetts domiciliaries and a Massachusetts insurer, the Court found that though the accident occurred in New York, the state had “no legitimate interest” in regulating the interspousal relationships of the parties and held that Massachusetts law should govern on this issue.

The Court, while seemingly adopting an “interest analysis” approach,
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was unwilling to depart completely from the traditional lex loci rule. The Court was careful to point out that the traditional rule will "continue to provide a rational and just procedure for selecting the law governing the vast majority of issues in multi-state tort suits."16

Unfortunately, that portion of the Court's opinion concerning the choice of law issue is very brief. It contains very little discussion of the traditional rule, its rationale, or the reasons for its replacement. In addition, the Court does not indicate its own view on the content of the new rule or method. For example, no reference is made therein to the types of factors which should be considered in determining a jurisdiction's interest in a specific issue, and, as a result, no guidance is provided on the question of how various interests should be identified, evaluated and compared.17 As a result, the net effect of the Pevoski case on choice of law questions is uncertain. It is clear, for example, that in multi-state automobile torts, the state where the accident occurred will almost always have the strongest interest in prescribing the rules governing any driver's conduct on its roads and, therefore, the standards of negligence will generally be furnished by that state.18 Therefore, one may view Pevoski as an abandonment of the traditional lex loci approach in favor of the more flexible interest analysis approach with the understanding that the result under the new approach will often be the same as under the traditional rule.

The Court did, however, rely heavily on the leading New York case, Babcock v. Jackson, a decision which is generally thought to be in accord with the Restatement's "dominant contacts" or "most significant relationship approach."19 The authors of the Restatement have set forth a list of principles and contacts to be considered by courts in determining which jurisdiction's law should apply in a multi-state tort action; for example: the need of the interstate and international systems, the relevant policies of the forum, the place where the injury occurred, and the place where the conduct causing the injury occurred.20

16 Id. at 2625, 358 N.E.2d at 417.
17 It has been suggested that simply identifying the interests underlying various state rules is in itself an extremely difficult, if not impossible, task. Reese & Rosenberg note that:

[even simple rules such as those encountered in the guest-host automobile field or limiting recoveries for wrongful death do not stand alone. They are composites of thrusts and counterthrusts of diverse policies. It will be a rare case in which a state can correctly be said to have a singular and unequivocal "interest" in the application of a particular rule to a multi-state fact situation.

Thus, the Restatement will be helpful as a guide to the types of issues the courts should consider in these cases, but it, too, fails to indicate the relative importance of these various principles and contacts.

In *Pevoski*, the Court had little difficulty in finding that New York had no interest at all in providing the law on the question of interspousal immunity because none of the parties involved were residents of that state. It was not necessary, then, for the Court to actually evaluate and compare the interests of each jurisdiction. A different and far more difficult question will be presented in future cases if, after considering all of the facts, the Court finds that each jurisdiction involved has a legitimate interest in the same issue.

Currie argues that if, after careful consideration, a court finds that each state has a valid governmental interest in a given issue, the forum should not attempt to weigh these interests to determine which was stronger, but instead should apply its own law. The authors of the Restatement appear to reject Currie’s forum-favoring approach and present a method requiring the evaluation of all relevant principles and contacts in an effort to determine which jurisdiction has the most significant relationship to the issue in question.

At this point, it may be wise to remember that choice of law theory “is still in its growing period. The effort of every scholar, judicial or academic, who labors in the field is to develop some approach that will take account of and give effect to all the sensible policies and reasons that courts may legitimately consider when they make choice of law decisions.” The Court’s decision in *Pevoski v. Pevoski* represents only the beginning, not the end, of its search for such an approach.

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22 The response of the California Supreme Court to this problem is described in Note, supra note 1, at 143-156. The author of the article writes:
In *Bernhard v. Harrah’s Club*, the California Supreme Court finally found a true conflict, that is, a case in which more than one state was found to have an interest in having its rule applied to the facts of the case. The court adopted a method of resolving true-conflicts cases that, as applied, would justify a court’s ad hoc choice of law of any interested state.

*Id.* at 143. (footnotes omitted) (emphasis in the original).
23 On this point, Currie wrote:

*Fourth*, where several states have different policies, and also legitimate interests in the application of their policies, a court is in no position to “weigh” the competing interests or evaluate their relative merits and choose between them accordingly . . . . Not even a very ponderous Brandeis brief could marshal the relevant considerations in choosing, for example, between the interest of the state of employment and that of injury in matters concerning workmen’s compensation.

*Currie, supra* note 3, at 181-82 (footnote omitted).
24 *Restatement (Second) of Conflict of Laws* § 145 & comments thereto.
25 *Leflar, supra* note 19, at 641.
B. Retroactivity of Lewis v. Lewis. Once the Court decided the conflicts issue in Pevoski in favor of applying the law of the Commonwealth, the Court had to decide if the claim was barred by the doctrine of interspousal immunity. On this issue the Court held that the result in Lewis v. Lewis, abolishing interspousal immunity in automobile accident cases, applies retroactively to claims arising prior to the date of that decision which have not been disposed of by settlement or judgment or by the running of the statute of limitations.

The starting point for the Court’s analysis on the retroactivity issue was the decision in Lewis abolishing the common law rule of interspousal immunity. In Lewis the Court had reasoned that the abrogation of interspousal immunity was “consistent with the general principle that if 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 recovery for injured victims.” The Court in Pevoski found the reasoning of Lewis “equally compelling in the present action.” In what would seem to be additional support for the decision to apply Lewis retroactively, the Court took note of the widespread existence of insurance coverage for interspousal claims. From this the Court concluded that there should be little impact on insureds or insurers.

Justice Quirico concurred in the result in Pevoski, and discussed in detail the relationship between interspousal immunity and insurance. He expressed his view that the question of insurance coverage should be considered irrelevant to the issue of liability not only in interspousal tort actions arising out of automobile accidents but also in such tort actions between parents and their children. The elimination of insurance coverage as a liability-limiting factor in both types of cases is necessary, in his opinion, both to permit the courts to treat the “important subject of familial liability on its own merits” and to prevent future cases in which the courts are “faced with requests to abrogate the doctrine of governmental immunity or the remaining vestiges of the doctrine of...
charitable immunity on the claimed basis of the existence of insurance coverage in each particular case.\textsuperscript{35}

As noted above, a majority of the Court in Sorensen \textit{v. Sorensen}\textsuperscript{36} abrogated the doctrine of parental immunity in automobile tort cases, but only “to the extent of the parent’s automobile liability insurance coverage.”\textsuperscript{37} While the Court has refused to limit liability in interspousal tort cases in this manner,\textsuperscript{38} it remains to be seen in future cases whether a majority of the Court will adopt Justice Quirico’s position and “disavow that part of the Sorensen holding which makes the existence of such insurance coverage a condition precedent to parental liability and limits recovery to the amount of such coverage.”\textsuperscript{39}

It is interesting to note that the decision to apply \textit{Lewis} retroactively made it unnecessary for the Court to even address the choice of law issue in the \textit{Pevoski} case. The accident occurred in New York. New York does not recognize the doctrine of interspousal immunity in tort cases and, therefore, if New York law had been applied, the plaintiff would have been permitted to maintain this action against her husband.\textsuperscript{40} Similarly, since the Court in \textit{Pevoski} held that \textit{Lewis v. Lewis} applied retroactively, the doctrine of interspousal immunity did not apply under Massachusetts law to bar Mrs. Pevoski’s claim. There was, therefore, no real conflict between the laws of New York and Massachusetts in this case, and the Court need not have discussed the choice of law issue at all. That the Court nevertheless considered that issue seemed to indicate that the Court viewed the abrogation of the lex loci rule as a matter deserving its immediate attention.

\textbf{§ 5.9. Informed Consent.} In the wake of a nationwide increase in the number of medical malpractice suits, the doctrine of “informed consent” has, in recent years, received considerable attention from both the courts and legal commentators.\textsuperscript{1} The issue generally arises where the plaintiff alleges that the defendant physician failed to adequately inform him of the risks of or alternatives to a medical procedure which the defendant performed on the plaintiff and which resulted in injury to him. The gravamen of the complaint is that the plaintiff would not have submitted to the procedure if he had known of the risks involved.

The doctrine of informed consent as originally conceived was based

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\textsuperscript{35} Id. (Quirico, J., concurring).


\textsuperscript{37} Id. at 3665, 339 N.E.2d at 909.

\textsuperscript{38} Lewis, 1976 Mass. Adv. Sh. at 1780 & n.4, 351 N.E.2d at 532-33 & n.4.


\textsuperscript{40} Id. at 2625, 358 N.E.2d at 417.

\textsuperscript{1} See, e.g., 2 D. \textsc{Loutell} & H. \textsc{Williams}, \textsc{Medical Malpractice} § 22.08 (1976) [hereinafter cited as \textsc{Loutell} \& \textsc{Williams}].
upon a battery theory whereby it was reasoned that the failure to inform vitiated the consent to the procedure. Gradually, however, courts moved away from a battery theory and towards a negligence theory for informed consent actions. The doctor’s negligence in such an action lies in his failure to adequately inform the patient of the risks attendant upon the proposed procedure. While recovery for lack of informed consent based on negligence rather than on battery may be more in line with the realities of the doctor-patient relationship, this approach is not problem free either. One problem in this area is determining the standard of care to which a doctor should be held in disclosing risks to his patients.

Despite the persistence of difficulties, however, the doctrine has been receiving increasing recognition. The courts in Massachusetts, however, have yet to take a “measured position on ‘informed consent,’ and [have] resist[ed] all temptation to do so.” This resistance was evident in Schroeder v. Lawrence, decided during the Survey year.

In Schroeder, the plaintiff sought to recover damages for injury to one of her vocal cords, allegedly resulting from an operation performed by the defendant during which he removed a tumor from her thyroid gland. The plaintiff charged the defendant with negligence “in recommending an operation while failing to inform [her] of the risks of the surgery or of possible alternative treatments.”

A motion for summary judgment was filed by the plaintiff. She asserted in her affidavit that the defendant had not warned her of the risks involved in the surgery and if she had been so warned, she “would not have then, . . . consented to the operative procedure.” An otolaryngologist affied that he had examined the plaintiff since the operation and found that her left vocal cord was injured; “in his opinion, the condition was permanent and resulted from the operation [in issue].” A general surgeon also submitted an affidavit stating that in his opinion, any operation on the thyroid gland involved an “inherent and well known risk” of the type of injury sustained by the plaintiff.

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2 Comment, Informed Consent in Medical Malpractice, 55 CALIF. L. REV. 1396, 1399 & n.18 (1967).
4 Id. at 70.
5 Comment, Informed Consent in Medical Malpractice, 55 CALIF. L. REV. at 1399-1406 (1967).
8 Id. at 286-87, 359 N.E.2d at 1301-02.
9 Id. at 287, 359 N.E.2d at 1302.
10 Id.
11 Id.
12 Id. at 288, 359 N.E.2d at 1302.
In his affidavit, the defendant stated that his "common practice" was to discuss surgical risks with his patients but he had no record of such a discussion with the plaintiff.\footnote{Id.} He also stated that, while in his opinion, the operation in question involved some risk of injury to the vocal cord, the risk was not high and that in the more than 150 such operations performed by him, no injury of this type had resulted.\footnote{Id. at 289, 359 N.E.2d at 1302.} The court denied the plaintiff's motion for summary judgment; and when the case was called for trial, the plaintiff "invited the entry of judgment for the defendant in order . . . to achieve the finality needed" for appellate review.\footnote{Id. at 290, 359 N.E.2d at 1302.}

On appeal, the Court avoided taking a firm position on the status of "informed consent" as a theory of recovery in this jurisdiction by ruling that:

\begin{quote}
[N]o more than a shallow immersion in the doctrine is needed to dispose of the summary judgment issue against the plaintiff. Whatever the precise definition or scope of the surgeon's duty to provide information to the patient, the patient would be required to show, in order to connect any breach of duty to the ultimate injury, that, had the proper information been provided, he or she would have refused the operation; indeed one can well argue that the patient must go further and establish that in all the circumstances a reasonable person would have refused it . . . . The latter proposition the plaintiff failed altogether to establish in her papers on the motion; as to the former, she likewise failed, since her bare assertion that she would have declined the operation did not carry its own passport of convincingness, despite the sincerity with which she might put it forward long after the event.\footnote{Id. at 291, 359 N.E.2d at 1303.}

The Court also observed that on any view of the doctrine, "a plaintiff must show that the undisclosed risk was material, and that it materialized . . . ."\footnote{Id. at 290, 359 N.E.2d at 1303 (citations omitted).} Here, experts disagreed on the nature of the risk. The factual dispute was fatal to the plaintiff's motion for summary judgment.

The opinion in \textit{Schroeder v. Lawrence} does very little to remove the uncertainty concerning the availability of the doctrine of informed consent as a theory of liability in the Commonwealth. From this general uncertainty stem several specific unanswered questions. For example, what standard of disclosure should be imposed on a physician? Will the plaintiff be required to show that he would not have consented to the

\begin{itemize}
\item \footnote{Id.} Id.
\item \footnote{Id.} Id.
\item \footnote{Id. at 289, 359 N.E.2d at 1302.}
\item \footnote{Id. at 290, 359 N.E.2d at 1303 (citations omitted).}
\item \footnote{Id. at 291, 359 N.E.2d at 1303.}
\end{itemize}
procedure if adequate warning had been given or must he prove that no reasonable person would have consented?

The Court was clear on one issue, however: a case for a summary judgment on the informed consent theory "can be made out only in an exceptional situation." Answers to the other questions must await future decisions in this area.

§ 5.10. Evidence—Admissibility of Subsequently Issued Owner's Manual—Admissibility of Computer Simulation of Automobile Accident. The courts in Massachusetts and other jurisdictions have generally held that evidence of remedial safety measures taken by the defendant after injury to the plaintiff are inadmissible when offered as admissions of negligence or fault. The underlying reason for this principle is the public policy against discouraging the taking of such safety measures. There are, however, numerous exceptions to the rule. For example, proof of subsequent repairs is admissible to show control of the premise if that issue is in question.

The application of this rule to cautionary language contained in an automobile operator's manual was considered by the Court during the Survey year. In Schaeffer v. General Motors Corp., the plaintiff charged the defendant automobile manufacturer with, among other things, negligence in failing to give adequate warning of the hazards associated with a specific type of "controlled differential" installed in certain of the cars it produced. The plaintiff alleged that the operation of this type of differential on wet surfaces caused him to be involved in an accident in which he sustained serious injuries.

At trial, the plaintiff sought to admit into evidence owner's manuals issued by the defendant in 1968, 1969 and 1970 which explained the operating characteristics of the controlled differential and which gave cautionary instructions on its use on slippery surfaces. The plaintiff's

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18 Id.

§ 5.10. 1 C. McCormick, Evidence § 275, at 666-69 (1972) [hereinafter cited as McCormick].

At all events the courts do exclude, when offered as admissions of negligence or fault, evidence of remedial safety measures taken after an injury, such as repairs, changes in construction, installation of new safety devices such as lights, gates, or guards, changes in rules and regulations, changes in the practice of the business, or the discharge of an employee charged with causing the injury.

Id. at 666-67 (footnotes omitted).

2 Id. at 666.

3 W. Leach and P. Liacos, Handbook of Massachusetts Evidence, at 201 (1967); other exceptions to the rule are discussed in McCormick, supra note 1, at 667-68.


5 Id. at 499, 360 N.E.2d at 1064.

6 Id.
The operator's manual he received at that time did not contain cautionary instructions relative to the differential.7

The trial judge admitted the three more recent manuals but "only as evidence of the operating characteristics of the differential and of the defendant's knowledge of the associated risks."8 The manuals were not permitted to go to the jury and the plaintiff was required to omit reference to certain cautionary language contained therein when discussing them in front of the jury.9

On appeal, the Court determined that in so restricting the use of this evidence, the trial judge had committed error.10 In particular, the Court ruled that manuals were also admissible "to prove the practical possibility of giving cautionary warnings," and that the manuals were thus relevant "in determining the defendant's duty to warn the plaintiff of the danger" posed by the differential.11

The result in this case is similar, at least in principle, to that reached in doCanto v. Ametek, Inc.,12 where the Court held that evidence of a safety improvement made by a manufacturer after the sale of a machine but before injury to a plaintiff was admissible to prove the practical possibility of making such an improvement; the defendant's knowledge of the danger at the time of the injury; and the existence of the defendant's duty to warn of the hazard.13

While the Court in Schaeffer deemed it neither necessary nor advisable to consider whether the basic rule, which excludes evidence of subsequent remedial measures when offered as admissions of negligence or fault, has been overwhelmed by the growing number of exceptions thereto,14 it is apparent that these exceptions have significantly reduced the effect of the rule on trial practice in Massachusetts. If this list of exceptions continues to grow, the Court may find it necessary to consider whether, as a practical matter, the rule continues to serve its original purpose of promoting the public policy which favors the taking of remedial measures.

It may be argued that individuals, especially those who produce and distribute their products on a large scale, are motivated to take remedial steps primarily because they recognize that their failure to do so may greatly enlarge their exposure to liability to future purchasers and users.

7 Id. at 502-03, & n.1, 360 N.E.2d at 1065-66 & n.1.
8 Id. at 504, 360 N.E.2d at 1066.
9 Id.
10 Id.
11 Id. at 503, 504, 360 N.E.2d at 1066.
13 Id. at 780-82, 328 N.E.2d at 876-77.
§5.10 TORTS

of their products. It is highly unlikely that the existence of this eroded rule of evidence is the determinative factor in the decision to make repairs or safety improvements. On the contrary, the rule, with all its exceptions, may well have relatively slight impact on those who must make such decisions. If that is the case, then replacement of the traditional rule with one that more accurately reflects the current trend favoring the admission of evidence relating to subsequent remedial measures, at least in products liability cases, will not have the effect of discouraging such measures.

The Court in Schaeffer also discussed the admissibility of the results of a computer simulation of the accident giving rise to the action. Ordinarily, "[j]udicial acceptance of a scientific theory or instrument can occur only when it follows a general acceptance by the community of scientists involved." Since there was disagreement among scientific authorities cited by the parties as to the reliability of computer simulation, the Court indicated that "the standard for admissibility of scientific tests may not have been met in this instance." To guard against the possibility of error if this evidence is offered on retrial of the action, the Court required that the trial judge

(a) conduct a hearing in the absence of the jury on the question whether the tests conducted and results ascribed thereto meet the prescribed standards for the admissibility of such evidence, and
(b) that he put into the record . . . the findings of fact made by him as a basis for the admission or exclusion of the evidence in question.

15 Contra, McCormick, supra note 1, at 668-69.
16 "This evidence purported to show that the differential did not adversely affect the operation of the plaintiff's automobile. The simulation was based on a computer program developed by the Calspan Corporation, serving automobile manufacturers primarily, to predict the behavior of automobiles under a variety of circumstances." 1977 Mass. Adv. Sh. at 505, 360 N.E.2d at 1066.
17 Id. at 506, quoting Commonwealth v. Fatalo, 346 Mass. 266, 269, 191 N.E.2d 479, 481 (1963). This standard of admissibility for "scientific evidence" has been criticized. For example, in McCormick, supra note 1, the author says:

"General scientific acceptance" is a proper condition for taking judicial notice of scientific facts, but not a criterion for the admissibility of scientific evidence. Any relevant conclusions which are supported by a qualified expert witness should be received unless there are other reasons for exclusion. Particularly, probative value may be overborne by the familiar dangers of prejudicing or misleading the jury, and undue consumption of time. If the courts used this approach, instead of repeating a supposed requirement of "general acceptance" not elsewhere imposed, they would arrive at a practical way of utilizing the results of scientific advances.

18 Id. at 491.
20 Id.
21 Id. at 507, 360 N.E.2d at 1067.

http://lawdigitalcommons.bc.edu/asml/vol1977/iss1/8
In light of the above, it is clear that the admission of evidence based upon computer simulation will receive more than cursory review by the Court; and it is, therefore, unlikely that such evidence will be admitted at the trial level in the absence of solid proof that it meets the standard for admissibility as set forth in the *Schaeffer* opinion.