Chapter 10: Torts

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§ 10.1. Governmental Immunity—Tort Claims Act—Public Duty Doctrine. For the third time in four years the Supreme Judicial Court has had to determine the relationship of the public duty doctrine\(^1\) to the Massachusetts Tort Claims Act.\(^2\) In its first decision after enactment of the act,\(^3\) the Supreme Judicial Court held, in *Dinsky v. Framingham*,\(^4\) that a homeowner could not recover from a municipality for damages sustained as a result of a negligently issued and enforced building permit. Under the building code, the *Dinsky* Court reasoned, the municipality’s duty was owed to the general public and not to specific inhabitants of the municipality in their individual capacity as homeowners.\(^5\) Applying the public duty doctrine, the Court held that liability would not exist “in the absence of a special duty owed to the plaintiffs, different from that owed to the public at large.”\(^6\) Two years later, in *Irwin v. Ware*,\(^7\) the Court limited the *Dinsky* holding to its special facts. Recognizing the “special relationship” existing between travelers on the public ways and the police, the *Irwin* Court held a municipality liable to travelers injured by intoxicated motorists negligently allowed to remain on the highway.\(^8\) In distinguishing *Dinsky*, the Court noted that *Dinsky* involved a “relatively leisurely course of events” whereas “the risk created by the negligence of [the] municipal employee [in *Irwin* was] of immediate and foreseeable personal injury to persons who [cannot] reasonably protect themselves from it.”\(^9\) Obviously, *Irwin* narrowly interpreted the public duty doctrine that formed the basis of the *Dinsky* holding. During this

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² G. L. c. 258.


⁵ *Dinsky*, 386 Mass. at 810, 438 N.E.2d at 55.

⁶ *Id.* at 810, 438 N.E.2d at 56.


⁸ *Id.* at 762, 467 N.E.2d at 1303–04.

⁹ *Id.* at 756, 467 N.E.2d at 1300.
Survey year, the Court addressed the issue whether both the *Dinsky* and *Irwin* precedents could continue to exist in harmony under the Tort Claims Act. On the basis of a factual record presenting the negligent enforcement of the state building code and related statutes, the Court concluded that both *Dinsky* and *Irwin* continue to have precedential value under the act.

In *Ribeiro v. Granby*, the plaintiff's decedent perished in his second floor apartment from smoke inhalation and asphyxiation. The plaintiff alleged the death occurred as a result of the negligence of town officials in failing to compel the landlord to construct a second means of egress from each floor of the building as required by the building code and related statutes. The building had a history of health code violations and the landlord was specifically notified of the egress violation in 1981. The letter of notification specified what type of exit would be acceptable and ordered that the work be done within ten days. The death of the decedent occurred approximately one year after the landlord had given assurances at a meeting of the town's board of health that a second exit would be constructed. The second exit was never built.

In denying liability, the town argued that *Ribeiro* was "another inspection" case controlled by *Dinsky* and that no "special duty" existed because "there was no intention in the statutes or the State building code to create private causes of action on behalf of purchasers of premises which were developed in violation of governmental requirements." On the other hand, the plaintiff argued that *Irwin* was the controlling precedent because "injury and death followed from the failure of public authorities to take affirmative action after discovering the danger in pursuance of their statutory duties." Moreover, while *Dinsky* involved only property damages, *Ribeiro* involved personal injuries as foreseeable as those in *Irwin*.

The Court agreed that *Dinsky* was not controlling merely because *Ribeiro* was another "inspection case." The Court also agreed that the statutes on which the plaintiff relied "contain[ed] language which, like

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11 A provision of the building code required that "[a]ny existing building shall provide at least two (2) means of egress serving every story which are acceptable to the building official." 780 Code Mass. Regs. § 2203.7
12 G. L. c. 143, §§ 6, 9.
14 *Id.*
15 *Id.*
16 *Id.*
17 *Id.* at 611, 481 N.E.2d at 468.
18 *Id.* at 612, 481 N.E.2d at 468.
19 *Id.* at 611–12, 481 N.E.2d at 468.
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the relevant legislation in Irwin, indicat[ed] that the Legislature intended to protect individual members of the public." Nonetheless, the Court determined that Irwin was not controlling and affirmed the dismissal of the action against the town. The Court stated that Irwin was inapposite because "the case before us, while tragic, presents a 'relatively leisurely course of events.'" In Ribeiro, "[t]he danger was discernible for many months before the harm occurred" and during this time "the occupants themselves could have taken measures to rectify or avoid the danger." In contrast, in Irwin, the threat (intoxicated driving) was "immediate" and "short-lived" and the motoring public "had no chance to protect themselves." Finally, the Court noted that "public agencies lack 'the resources necessary to police the entire housing sector.'" Thus, despite the statutes, the Court concluded no special duty existed.

While the Court's application of the public duty doctrine precluded the plaintiff's recovery in the first of this year's cases, the doctrine was held inapplicable in the second. In Doherty v. Belmont, the plaintiff was injured when she tripped over a bump in a median strip in a public parking lot in which she had parked her automobile. The "bump" in actuality was the protruding remains of a parking meter post which had not been leveled. Upholding a jury verdict for the plaintiff, the Court rejected Dinsky and instead found Irwin controlling. The Doherty Court reasoned that the town's duty did not arise from the "general language of a regulatory or criminal statute, but rather from the town's status as a landowner." In its capacity as a landowner, the Court explained, the municipality was indistinguishable from a private landowner and, therefore, owed a duty of reasonable care to all persons lawfully upon its premises. Since the plaintiff was lawfully upon the premises—indeed, even a paying patron of the parking lot—there was no error in submitting to the jury the question whether the town had violated its duty of care toward her.

20 Id. at 612, 481 N.E.2d at 468 (citing Irwin v. Ware, 392 Mass. 745, 756, 467 N.E.2d 1292, 1300 (1984)).
21 Id.
22 Id.
23 Id. at 611, 481 N.E.2d at 469 (quoting Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 192, 293 N.E.2d 831, 839 (1973)).
25 Id. at 272, 485 N.E.2d at 184.
26 Id. at 273, 485 N.E.2d at 185 (citing G.L. c. 258, § 2 (1984 ed.), providing that municipalities are liable "in the same manner and to the same extent as a private individual under like circumstances.").
27 Id. at 273, 485 N.E.2d at 185 (citing Mounsey v. Ellard, 363 Mass. 693, 297 N.E.2d 43 (1973)).
§ 10.2. Governmental Immunity—Tort Claims Act—Discretionary Functions. Under the Tort Claims Act, public employers retain immunity from claims based upon the performance of discretionary acts.¹ Last year, in Irwin v. Ware,² the Supreme Judicial Court held that not every act that involves an element of discretion is immunized from liability by the discretionary function exemption.³ Rather, the Court explained, the exemption is limited to the formulation of policy and planning as contrasted with acts executing previously established policies or plans.⁴ Applying the policy-implementation distinction, the Irwin Court held that a police officer’s decision whether to remove an intoxicated driver from the highway was not a discretionary act, but rather, the execution of a legislative policy.⁵ During the year, in Doherty v. Belmont,⁶ the Court again defined a “discretionary function” by what it is not. It remains to be seen what are policy and planning decisions which will be protected by the exception.

In Doherty, the town had redesigned its parking lot, switching from an individual parking meter system to a single parking ticket dispenser at the entrance to the lot.⁷ The town contended that it was immune from liability for any negligence in effectuating this change because “the decision to effect certain repairs in a public parking lot is a discretionary function within the meaning of [the act].”⁸ Disagreeing, the Court stated that the issue was not whether the decision to remove the parking meters constituted a discretionary function, but rather whether the maintenance of the parking lot in the furtherance of this decision falls within the exemption from liability.⁹ The Court concluded that it did not: “[A]ny negligence in performing, or failing to perform, the ministerial task of maintenance does not rise to the level of ‘public policy or planning’ decisions warranting protection under G.L. c. 258, § 10(b).”¹⁰

§ 10.3. Governmental Immunity—Tort Claims Act—Relationship to Other Immunity Statutes—Standards of Negligence. In enacting the Tort Claims Act, the Legislature abolished governmental immunity as the general rule and provided that public employers were to be liable “in the

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¹ G.L. c. 258, § 10(b).
³ Id. at 753, 467 N.E.2d at 1298.
⁴ Id. at 753, 467 N.E.2d at 1298–99.
⁵ Id.
⁷ Id. at 272, 485 N.E.2d at 184.
⁸ Id. at 276, 485 N.E.2d at 186.
⁹ Id.
¹⁰ Id. at 276, 485 N.E.2d at 187.
same manner and to the same extent as a private individual under like circumstances."\(^1\) The Tort Claims Act expressly stated, however, that it does not "supersede or repeal" General Laws chapter 84 sections 15–24\(^2\) which make municipalities liable in an amount not exceeding $5,000 for certain defects in "public" ways. Under *Dakin v. Somerville*,\(^3\) however, this liability does not extend to "park" roads. In its 1984 decision in *Intriligator v. Boston*,\(^4\) the Appeals Court addressed the question whether immunity for defects in private ways survived enactment of the Tort Claims Act. Reading the statutes literally, the Appeals Court held that park roads fell within the coverage of the Tort Claims Act since they were not covered by chapter 84. In reaching this conclusion, the Court relied upon the mandate of the construction clause of the Tort Claims Act\(^5\) that it "shall be construed liberally for the accomplishment of the purposes thereof . . . ."\(^6\) As a consequence of the Appeals Court opinion, a person injured on a park road could recover up to $100,000 in damages under the Tort Claims Act, while a person injured on a public way would be limited to $5,000 in damages under chapter 84. During the Survey year, the Supreme Judicial Court reversed the Appeals Court,\(^7\) finding its literal approach "not faithful to the general intent of the Tort Claims Act."\(^8\)

The *Intriligator* plaintiff was injured when she slipped and fell on an accumulation of snow and ice on a sidewalk stipulated to constitute a park way. Had she slipped on a public way, the Supreme Judicial Court noted, she would not have been able to recover for her injuries because chapter 84, section 17 precludes liability "for an injury or damage sustained on a public way by reason of snow or ice thereon." The Court was unable to perceive how the Legislature could have intended that municipalities should have a $5,000 limit for most injuries caused by defects in public ways, no liability at all for injuries caused by snow and ice on public ways, and yet "suddenly . . . should be potentially liable in a far greater amount" under the Tort Claims Act "for injuries negligently caused by snow and ice on park roads."\(^9\) Faced with this quandary, the Court concluded it "should fashion 'an adjunct to [chapters 84 and

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\(^{\text{1}}\) G.L. c. 258, § 2 (1984 ed.).  
\(^{\text{5}}\) G.L. c. 258, § 18, inserted by St. 1978 c. 512, § 18.  
\(^{\text{8}}\) *Id.* at 491, 480 N.E.2d at 1003.  
\(^{\text{9}}\) *Id.* at 492–93, 480 N.E.2d at 1004.
258] called for by the sense of (those) section(s) in relation to the legis­
alation as a whole.'"10

In fashioning its adjunct to the statutes, the Court relied upon Mailot 
v. Travelers Insurance Co.,11 in which a person claiming personal injury 
benefits under the no fault motor vehicle law12 also claimed benefits for 
the same injury under the worker's compensation law.13 The no fault 
statute was silent concerning the effect of other coverage.14 Instead of 
allowing the plaintiff to recover benefits from both sources, the Court 
fashioned an adjunct to the no fault statute.15 The Mailot Court justified 
its judicial legislation with the statement that "casual overstatements and 
understatements, half answers, and gaps in the statutory provisions" 
require the courts "to interweave the statute with decisions answering 
the difficulties and composing, as far as feasible and reasonable an har­
monious structure faithful to the basic design and purpose of the Legis­
lature."16

In arriving at the conclusion that a municipality should not be liable 
for injuries caused solely by snow and ice whether on a public or a park 
road,17 the Court utilized an additional line of reasoning. The Court's 
starting point was that while the Tort Claims Act "eliminated govern­
mental immunity" in many instances, it did not "create liability."18 To 
determine whether a public employer will be held liable in the same 
manner and to the same extent as a private individual under like circum­
stances, therefore, it must first be determined whether a private individual 
would be liable under the same circumstances. Reasoning that "[t]he 
Legislature has expressed a policy that no municipality shall be liable for 
injuries caused solely by snow and ice on a public way"19 and that "the 
common law rule should bar recovery for injuries caused in circum­
stances that are substantially identical,"20 the Court concluded that no 
liability should exist for injuries caused solely by snow and ice on a park 
road.21

10 Id. at 493, 480 N.E.2d at 1004 (citing Mailot v. Travelers Ins. Co., 375 Mass. 342, 348, 
377 N.E.2d 681, 684 (1978)).
12 G.L. c. 90, § 34A.
13 G.L. c. 152.
14 Mailot, 375 Mass. at 348, 377 N.E.2d at 684.
15 Id.
16 Id. at 493, 480 N.E.2d at 1004.
17 Intriligator, 395 Mass. at 493, 480 N.E.2d at 1004.
18 Id. at 493, 480 N.E.2d at 1004 (quoting Dinsky, 386 Mass. at 804, 438 N.E.2d at 51, 
53 (1982)).
19 Id. at 494, 480 N.E.2d at 1004.
20 Id. at 494, 480 N.E.2d at 1005.
21 Id. at 489, 480 N.E.2d at 1003.
Intriligator leaves many questions unanswered. As written, it addresses only the question of snow and ice liability. The broader issue of determining the relationship between the Tort Claims Act and chapter 84, together with the anomalous park road-public way distinction created by that relationship, remains unanswered. In a final footnote the Court urged the Legislature to address this issue even if it agreed with the Intriligator result.

Doherty v. Belmont\textsuperscript{22} presented another aspect of the relationship between chapter 84 and the Tort Claims Act. In that case, the Supreme Judicial Court addressed the issue whether cases decided under chapter 84, section 15, would be controlling in determining standards of negligence under the Tort Claims Act. The Court decided that they would not.

In Doherty, the Court noted that it had previously been decided under chapter 84, section 15, that "extremely minor imperfections on public ways did not constitute actionable defects."\textsuperscript{23} In one case, for example, the Court held that no defect existed where a sidewalk slab tilted three-fourths of an inch above the rest of the sidewalk.\textsuperscript{24} In another, the Court held that no actionable defect existed where a cement sidewalk had separated one inch from the granite curbing.\textsuperscript{25} In Doherty, the remains of the parking meter over which the plaintiff tripped protruded only one-half to three-fourths of an inch above the median strip.\textsuperscript{26} Based upon the chapter 84 precedents, the town argued that this minimal protrusion could not, as a matter of law, constitute a negligent defect.\textsuperscript{27} The Court, however, disagreed.

Unlike the plaintiffs in the chapter 84 precedents, the Doherty plaintiff was not injured on a public way. Accordingly, the Court held common law standards of negligence, and not precedent under chapter 84, section 15, controlling.\textsuperscript{28} Furthermore, the Court found the chapter 84 precedents "unpersuasive even by way of analogy" because "the policy considerations underlying [them] . . . [were] not present in the case at bar."\textsuperscript{29} Decisions designed to protect municipalities from liability "for slight or trivial imperfections in public ways which might be caused by weather conditions or traffic patterns," the Court stated, have no relevance to

\textsuperscript{22} 396 Mass. 271, 485 N.E.2d 183 (1985).
\textsuperscript{23} Id.
\textsuperscript{24} Velante v. Watertown, 300 Mass. 207, 208, 14 N.E.2d 955, 956 (1938).
\textsuperscript{26} Doherty, 396 Mass. at 276, 485 N.E.2d at 186.
\textsuperscript{27} Id. at 274, 485 N.E.2d at 185.
\textsuperscript{28} Id. at 274, 485 N.E.2d at 186 (citing Gallant v. Worcester, 383 Mass. 707, 714, 421 N.E.2d 1196, 1199 (1981)).
\textsuperscript{29} Id. at 275, 485 N.E.2d at 186.
situations where the accident producing defect was “caused by a human act or omission, and not by extraneous factors beyond the town’s control.”

On the issue of negligence itself, the Court admitted that even at common law a defect might be so trivial that it would not constitute negligence. The test is whether a “defect is so minor or insubstantial that a reasonable person would not have anticipated injury and guarded against it.” Applying this test, the Court held that the metal stub was not so insubstantial that it could not constitute negligence as a matter of law. A jury question was posed because the town knew that pedestrians walked on the median and that the parking meter stubs posed a risk to members of the public and yet failed to take steps to eliminate the risk.

§ 10.4. Governmental Immunity—Tort Claims Act—Private Nuisance.
Prior to the passage of the Tort Claims Act, the Supreme Judicial Court held in Morash & Sons v. Commonwealth that “the commonwealth is not immune from liability if it creates or maintains a private nuisance which causes injuries to the real property of another.” During the Survey year, in H. Sacks & Sons, Inc. v. Metropolitan District Commission, the plaintiff brought an action against the MDC to recover for damage to personal property as a result of the negligence of the Commission in the operation of a dam. The trial court entered judgment on the pleadings dismissing the negligence action because the events transpired before the passage of the Tort Claims Act. Following leave to amend, the plaintiff added a nuisance count to his complaint, but this proved unsuccessful. The Court granted summary judgment for the MDC, this time on the grounds that the plaintiff was suing for injury to personal property and Morash expressly authorized suit only for “injury to the real property of another.” In reversing and remanding the case for trial, the Appeals Court concluded that the trial court had read the Morash opinion too restrictively.

30 Id.
31 Id. at 276, 485 N.E.2d at 186.
32 Id. (citing Pastrick v. S. S. Kresge Co., 288 Mass. 194, 192 N.E. 485 (1934)).
33 Id.
35 Id. at 46, 477 N.E.2d at 1067–68. The damage occurred on January 19, 1977, while the Tort Claims Act did not become effective until August 16, 1977. Acts of 1978, c. 512 was approved July 20, 1978, and by § 16 made effective upon passage and applicable to all causes of action on or after August 16, 1977.
37 Id.
The court first noted that the question whether the Commonwealth was liable in nuisance for damage to personal property remained open and was not precluded by Morash. Since Morash involved only damage to realty, the Morash Court "did not need to address a question of damage to personal property . . . ." The Sacks Court then observed that the decision to extend liability to cover personal property "is nothing more than a logical extension of the decision in Morash."7

In finding the state liable, the Morash Court was influenced by the fact that municipalities already had been held liable for private nuisances.8 The Court could see "no logical reason why the Commonwealth should not be similarly liable."9 The precedential significance of Morash,10 therefore, lay not in some unfortunate language pertaining to the type of property that had been damaged, but in the Court's willingness to make state responsibility coextensive with that of the municipalities. It is clear that "[t]he liability of a municipality as owner of land or of a building for a private nuisance is the same as that of a natural person."11 Natural persons are liable to tenants12 and recovery is allowed for personal, as well as real, property.13 Hence, it was no defense that the Sacks plaintiff was only a tenant upon property owned by the MDC or that the only property damaged was personal. Since the liability of a private person in nuisance extends to personal property, it follows that governmental liability for nuisance also extends to personal property.14 The public policy is clear. "There [must] be no oases of nonliability where a private nuisance may be maintained with impunity."15

§ 10.5. Governmental Immunity—Tort Claims Act—Statute of Limitations—Presentment—Minors. The Tort Claims Act requires that claims be presented to the executive officer of a public employer within two

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6 Id. at 47 n.2, 477 N.E.2d at 1068 n.2.
7 Id. at 48 n.3, 477 N.E.2d at 1069 n.3.
8 Id. at 47, 477 N.E.2d at 1068.
12 Id. at 47, 477 N.E.2d at 1069 (citing United Elec. Light Co. v. Deliso Constr. Co., 315 Mass. 313, 321, 52 N.E.2d 553, 358 (1943); Sherman v. Fall River Iron Works Co., 2 Allen (84 Mass) 524, 526 (1861)).
13 Id. at 47, 477 N.E.2d at 1069 (citing United Elec. Light Co. v. Deliso Constr Co., 315 Mass. at 319, 52 N.E.2d at 557).
14 Id. at 47, 477 N.E.2d at 1068-69.
years, and suit be commenced within three years after the cause of action arises. During the Survey year, the Supreme Judicial Court had the opportunity to determine the applicability of these provisions to the tort claims of minors. After determining that they were distinct requirements, the Court applied them in a seemingly inconsistent manner. In Hernandez v. Boston, the Court held that General Laws chapter 260, section 7, the general tolling statute applicable to actions by minors, would also apply under the Tort Claims Act. In contrast, in George v. Saugus, the Court ruled that the presentment requirement was not affected by chapter 260, section 7, even though the plaintiff had not attained the age of majority.

In Hernandez, suit was not commenced until five years after the minor was struck by a motor vehicle allegedly operated by a police officer in a negligent manner. The municipality moved to dismiss because suit was not instituted within the three year period of the Tort Claims Act. The minor sought the protection of General Laws chapter 260, section 7, the general tolling statute, which provides that: "If the person . . . is a minor . . . when a right to bring an action first accrues, the action may be commenced within the time provided by the statute upon which the cause of action is based after the disability is removed." However, the scope of this protection is curtailed by the additional provision of chapter 260, section 19, which provides that "[i]f a special provision is otherwise made relative to the limitation of any action, any provision of this chapter inconsistent therewith shall not apply." Ruling that section 4 of the Tort Claims Act was such a "special statute," the trial court dismissed the suit. The trial judge also ruled that the tolling provision "does not apply to [the Tort Claims Act] since the action herein is not a common law action but rather is an action created by the Legislature." The Supreme Judicial Court granted direct appellate review and reversed.

The Court first decided that, in enacting the Tort Claims Act, the Legislature did not intend to provide for a shortened statute of limitations for minors. Such an intent was clear in other statutes such as the medical

§ 10.5. 1 G. L. c. 258, § 4, inserted by St. 1978, c. 512, § 15.
2 Id.
5 Hernandez, 394 Mass. at 46, 474 N.E.2d at 166.
6 Id.
7 Id.
8 Id.
9 Id. at 45–46, 474 N.E.2d at 167.
10 Id. at 47, 474 N.E.2d at 167. The Court relied upon its decision last year in Irwin v. Ware, 392 Mass. 745, 770 n.11, 467 N.E.2d 1292, 1308 n.11 (1984) ("[T]he Legislature did not provide a shortened statute of limitations for minors . . . . Thus, G.L. c. 260, § 7,
malpractice statute of limitations established for minors which was expressly made applicable “notwithstanding the provisions of” chapter 260, section 7.\textsuperscript{11} The medical malpractice statute, not the Tort Claims Act, the Court found, “epitomizes the ‘special provision’ contemplated in G. L. chapter 260, section 19.”\textsuperscript{12} The Court also reasoned that the adoption of the same limitation period in the Tort Claims Act as in chapter 260, section 4, indicated that a special shortened limitation period was not intended.\textsuperscript{13} On this reasoning the Court distinguished its previous ruling in \textit{Weaver v. Commonwealth},\textsuperscript{14} that “[w]here a cause of action is created by a statute which also places a limitation on the existence of the right, the tolling provisions of the general statute of limitations (General Laws chapter 260), do not apply.”\textsuperscript{15} The short answer, said the Court, is that the adoption of the same three-year period in both statutes shows that the Legislature did not intend any special shortened limitation period.\textsuperscript{16} Thus, the Court again ruled that “a special provision” to the contrary does not exist under chapter 260, section 19, unless it is “made relevant” to chapter 260 by the legislature. Attempting to offer a practical policy reason for adopting a shortened limitation period, the city also argued in \textit{Hernandez} that it would not be able to plan effectively for unknown future liability if the three-year limitation period were tolled.\textsuperscript{17} In light of its decision the same day in \textit{George} that the two-year presentment requirement must be met regardless of the age of the claimant, the Court found this argument unavailing.\textsuperscript{18}

In \textit{George}, the Court concluded that the presentment period and the limitation period were two distinct temporal requirements. Because chapter 260 was addressed to limitation periods and was not expressly applicable to the presentment requirement of chapter 258, the issue before the Court was whether it should apply by analogy.\textsuperscript{19} In concluding that it should not, the Court first noted that the Tort Claims Act had two principal purposes: (1) providing for recovery for valid tort claims against governmental entities; and (2) providing a mechanism to ensure that only

\textsuperscript{11} G.L. c. 231, § 60D requires that a medical malpractice action by a minor be brought within three years unless the minor is under six years of age, in which case the minor may initiate suit until such time as he attains the age of nine.
\textsuperscript{12} \textit{Hernandez}, 394 Mass. at 47, 474 N.E.2d at 168.
\textsuperscript{13} \textit{Id.} at 48, 474 N.E.2d at 168.
\textsuperscript{14} 387 Mass. 43, 50, 438 N.E.2d 831, 836 (1982).
\textsuperscript{15} \textit{Hernandez}, 394 Mass. at 48, 474 N.E.2d at 168.
\textsuperscript{16} \textit{Id.}
\textsuperscript{17} \textit{Id.}
\textsuperscript{18} \textit{Id.}
\textsuperscript{19} \textit{Id.}
valid claims are paid.\textsuperscript{20} In accommodating these divergent goals, the Court had "to strike 'a)n appropriate balance \ldots between the public interest in fairness to injured persons and in promoting effective government.'\textsuperscript{21} Tolling of the presentment requirement could defeat the second purpose. The receipt of untimely notice of a claim could make it impossible for a municipality to investigate adequately and defend against unmeritorious claims.\textsuperscript{22} In concluding that it was not unfair to hold a minor to the presentment requirement, the Court reiterated its position that "[t]he Legislature may assume 'that the interest of minors will be protected by their guardians, or by others who are near to them.'\textsuperscript{23} Neither Hernandez nor George explains why this argument should be deemed compelling in the case of presentment but not in the case of limitation. Obviously, both requirements are intended to protect parties from stale claims. One is left to wonder why staleness under one statute is more important than staleness under the other. The Court did not attempt to answer this question except to say that notice requirements under other statutes have been found "not unfair as applied to minors."\textsuperscript{24}

\textbf{§ 10.6. Negligence—Medical Malpractice—Physician’s Duty to Disclose.}\n
Three years ago in \textit{Harnish v. Children’s Medical Center},\textsuperscript{1} the Supreme Judicial Court concluded that "a physician owes to his patient the duty to disclose in a reasonable manner all significant medical information that the physician possesses or reasonably should possess that is material to an intelligent decision by the patient whether to undergo a proposed procedure." \textit{Harnish} adopted an objective standard of "materiality" defining it as "the significance a reasonable person, in what the physician knows or should know is the patient’s position, would attach to the disclosed risk or risks in deciding whether to submit or not to submit to

\begin{itemize}
\item \textsuperscript{20} George, 394 Mass. at 40, 474 N.E.2d at 172.
\item \textsuperscript{21} Id. at 42, 474 N.E.2d at 171 (citing Vasys v. M.D.C., 387 Mass. 51, 57, 438 N.E.2d 836, 841 (1982)).
\item \textsuperscript{22} Id. at 44, 474 N.E.2d at 172.
\item \textsuperscript{23} Id. at 43, 474 N.E.2d at 171 (quoting Cioffi v. Guenther, 374 Mass. 1, 4, 370 N.E.2d 1003, 1005 (1977)).
\item \textsuperscript{24} Id. at 43, 474 N.E.2d at 171. Plaintiff’s estoppel argument in George was equally unsuccessful. She argued that since settlement negotiations had begun within the limitation period, the town was estopped from relying upon her untimeliness in presenting her claim. \textit{Id.} at 40, 474 N.E.2d at 172. The Court again disagreed stating that for estoppel the plaintiff must show that the conduct of the defendant had induced her to do something different from what she otherwise would have done. \textit{Id.} Since the plaintiff did not make contact with the town’s insurers until several months after the two year limit, no action by the defendant could possibly have caused her to delay presentment of her claim. \textit{Id.}
\end{itemize}
surgery or treatment."

This Survey year, in *Precourt v. Frederick*, the Court had to decide the factual predicate upon which a particular risk could be found to be material and hence a risk that should have been disclosed.

In *Precourt*, the plaintiffs brought a negligence action against an ophthalmic surgeon for negligently prescribing the drug Prednisone after two eye operations. The drug allegedly damaged the patient's hip causing aseptic necrosis, an irreversible musculoskeletal side effect of the drug which involves the death of the bones of the joint. Alleging that the doctor knew or should have known of the drug's side effects, the plaintiffs alleged that it was negligent for the doctor to prescribe the drug without informing them of the risk of aseptic necrosis. Verdicts were returned for the plaintiffs and the doctor appealed the denial of his motion for judgment notwithstanding the verdicts. The Supreme Judicial Court took the case on its own motion and reversed the judgment for the plaintiffs ruling "as a matter of law" that the risk of aseptic necrosis was not "material," because the plaintiffs had failed to show that "the likelihood" of aseptic necrosis "was other than negligible."

The Court arrived at this conclusion despite the testimony of medical experts that aseptic necrosis was a known side effect of the drug and that the patient should have been warned about it. The defendant testified that he had practiced ophthalmology since 1963, and had prescribed Prednisone in fifty to seventy-five percent of his surgical cases without incident. However, he also admitted that he "knew from reading, attending conferences and meetings, and discussions with colleagues, of an association between Prednisone and aseptic necrosis."

The significance of these admissions was developed in other testimony. An ophthalmologist testified that, "in his opinion, before prescribing Prednisone for a patient a physician should inform the patient of the major risks of Prednisone use" and that "aseptic necrosis was one of those risks." The same doctor also testified that because the patient "had hypertension and arthritis and a history of alcohol consumption as well as kidney stones," [he] should have been informed that the Predn-
sone 'could cause additional complications to those systems . . . [and that] the musculoskeletal system . . . could have been made worse with osteoporosis or [aseptic] necrosis.' 12 Another doctor, an internist, testified that "a physician 'is obliged to make warning statements regarding possibilities that the medicine may alter or change' medical conditions such as those contained in [the plaintiff's] history." 13 He further testified that "patients who have [the] associated medical conditions [of the plaintiff], such as alcohol consumption or other such metabolic conditions," constitute "a high risk for the development of . . . aseptic necrosis of the bone or hip." 14 This same expert testified that "the side effects of Prednisone relates [sic] directly to the amount of Prednisone taken and the length of time that the patient takes it [and that] [the plaintiff’s] treatment included a 'high dose, long course of therapy,' and that, in his opinion, the cumulative effect of the courses of Prednisone that [the plaintiff] took caused [the plaintiff] to develop aseptic necrosis." 15

This last testimony characterizing the plaintiff’s dosage of Prednisone as "high" and his treatment as "long," in combination with the other testimony of the "cumulative effect" of the drug, the Court ruled, "does not permit the inference that [the defendant physician] reasonably should have recognized the possibility that [the plaintiff] would develop aseptic necrosis was material to [the plaintiff’s] decision to undergo treatment." 16

Without citing any medical bases for its position, the Court dismissed the expert testimony that "the risk was 'high,'" stating: "'High' is a relative word. It could mean one in ten, but it could just as well mean one in a million." 17

The expert medical testimony that the defendant "‘should have’ made a disclosure that he did not make" was similarly dismissed as an "essentially legal conclusion." 18 Finally, the Court ruled that the plaintiff could not reasonably have taken the doctor's statement that he had "everything to gain and nothing to lose" as meaning that the proposed treatment was risk free. 19

The Precourt decision seems clearly wrong. It is impossible to reconcile it with the Court's statement of its duty to "construe the evidence most favorably to the plaintiff and [to] disregard that favorable to the defendant" in reviewing the denial of a judgment notwithstanding the

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12 Id. at 693–94, 481 N.E.2d at 1148.
13 Id. at 694, 481 N.E.2d at 1148.
14 Id.
15 Id.
16 Id. at 696, 481 N.E.2d at 1149.
17 Id.
18 Id.
19 Id.

http://lawdigitalcommons.bc.edu/asml/vol1985/iss1/14 14
verdict. Applying this standard to the medical testimony in the case should have led the Court to the conclusion that the plaintiff was in a high risk category of developing aseptic necrosis. If, medically speaking, the plaintiff were in a high risk category, it was wrong for the Court to conclude that the likelihood may only have been "negligible." As Justice Liacos pointed out in his concurring opinion, the majority acted "without foundation in fact or law." He particularly could not understand the majority's dismissal of the medical testimony that the plaintiff was a "high risk":

I do not understand the court's facile dismissal of this important testimony of an expert witness. "High" is indeed a relative term, and this expert in effect testified that [the plaintiff] was a high risk, relative to other persons, for the development of aseptic necrosis. I think this is just the type of evidence contemplated by those courts that have called for expert testimony on "the nature of the harm which may result and the probability of its occurrence."

Equally perplexing is the majority's cavalier conclusion that the doctors were expressing a legal conclusion, not a medical opinion, when they opined that the plaintiff should have been warned of the risk of aseptic necrosis. In offering this testimony the doctors were clearly not stating legal conclusions. Rather, they were stating their opinion of the medical standard of care to which physicians must conform. This is precisely the kind of testimony that is routinely utilized to establish the standard of care in professional malpractice cases.

It is not clear precisely what changes Precourt will require in traditional Massachusetts practice. Perhaps attorneys can adjust to the Court's one-in-a-million-objection by asking medical experts to quantify on a percentage basis all of their professional opinions. Whether this is possible or not, it does not address the other glaring inadequacy of the majority opinion. It does not tell lawyers what they must do to be sure that the Court will recognize that medical witnesses are testifying to an appropriate medical standard of physician care. From the majority opinion in

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20 Id. at 691, 481 N.E.2d at 1146.
21 Justice Liacos disagreed with the majority's opinion although he concurred in the result. Justice Liacos noted that the plaintiff had two separate operations after both of which Prednisone was prescribed. The plaintiff admitted that he would have undergone the first operation even if he had been warned of the risk of aseptic necrosis. However, Justice Liacos was unable to find sufficient evidence that the plaintiff's condition "was caused by the drug therapy administered after the second operation." Id. at 703, 439 N.E.2d at 1153. Accordingly, in his opinion, the plaintiff had not connected the negligence to the harm. Id.
22 Id. at 699, 481 N.E.2d at 1150.
23 Id. at 701-02 n.2, 481 N.E.2d at 1152 n.2.
Precourt, however, it is clear that testimony as to what a doctor “should have” done, for reasons unknown, may not be enough to get a case to a jury. The Precourt majority has provided no help at all on this important question. There is not even a hint in the opinion as to why the Court refused to accept the “should have” testimony as establishing a medical standard of care.

§ 10.7. Negligence—Legal Malpractice. In Fishman v. Brooks,\(^1\) the defendant was injured in an automobile accident in 1975 and shortly thereafter retained the plaintiff as his attorney. The plaintiff, who had not tried a case since 1961 because he was primarily engaged in real estate conveyancing, did not commence suit for sixteen months and then delayed service of process for another ten months. He did little or no investigation of the accident and “engaged in no useful pretrial discovery.”\(^2\) In April, 1978, after trial had been scheduled for June, the plaintiff consulted with another attorney, more experienced in personal injury cases, but failed to agree on an equal split of his fee.\(^3\) Thereafter, the plaintiff made a $250,000 settlement demand which was refused.\(^4\) On the eve of trial, the plaintiff was still unprepared to try the case and told the defendant that he could not win if he went to trial.\(^5\) The defendant finally settled for $160,000.\(^6\)

Initially, the case sub judice arose out of a complaint filed by the attorney claiming that the defendant client had violated one of the terms of their fee agreement.\(^7\) The plaintiff eventually abandoned this claim but did not dismiss the action before the defendant filed a counterclaim containing both a malpractice and an abuse of process count. The trial jury hearing the counterclaim found the plaintiff negligent in his handling of the personal injury suit and awarded the defendant damages in the amount of $525,000 on the malpractice count and $10,000 on the abuse of process count.\(^8\) The trial court reduced the malpractice award to reflect the defendant’s contributory fault in the accident, the amount of the medical expenses already paid and the amount the defendant personally received from the settlement.\(^9\) The Supreme Judicial Court affirmed.

The basic principles of legal malpractice applicable to Fishman were

\(^{1}\) 396 Mass. 643, 487 N.E.2d 1377 (1986).
\(^{2}\) Id. at 645, 487 N.E.2d at 1379.
\(^{3}\) Id.
\(^{4}\) Id.
\(^{5}\) Id.
\(^{6}\) Id.
\(^{7}\) Id. at 644, 487 N.E.2d at 1378.
\(^{8}\) Id. at 645–46, 487 N.E.2d at 1379.
\(^{9}\) Id. at 646, 487 N.E.2d at 1379.
An attorney who has not held himself out as a specialist owes his client a duty to exercise the degree of care and skill of the average qualified practitioner. The attorney who breaches this duty will be liable for any reasonably foreseeable loss caused by his negligence.

Under this approach, an attorney will be liable when he negligently cause[s] a client to settle a claim for an amount below what a properly represented client would have accepted. Fishman provides the classic example of a case of this genre where an attorney has improperly prepared a case or lacks the ability to handle it properly and "causes his client to accept a settlement not reasonable in the circumstances."

The counterclaim presented two issues. Initially, it had to be determined whether the plaintiff had been negligent in settling the defendant's claim. If negligence did exist, it then had to be determined whether the defendant would have recovered more than the settlement amount had he been represented properly. In effect, there is "a trial within a trial" on this second issue because the jury has to determine the probable outcome of the underlying personal injury case.

The principal issues on appeal, however, were evidentiary. The plaintiff claimed that the trial court erroneously admitted expert testimony from a lawyer experienced in tort law and an experienced claims adjuster. Both testified to the reasonable settlement value of the underlying claim. The plaintiff objected that this value was not a proper measurement of value. Disagreeing, the Court found the evidence relevant to prove not only the plaintiff's negligence, but also that his negligence caused a loss to his client.

Finally, the Court indicated that the doctrine holding that a violation of statute constitutes evidence of negligence is applicable to violations

11 Id.
13 Id.
14 Id. at 647, 487 N.E.2d at 1380.
15 Id.
16 The attorney testified that the case normally would have settled for $450,000 to $500,000 and the claims adjuster stated $400,000 to $450,000. Id. at 648, 487 N.E.2d at 1380. The jury's verdict was $525,000. Id. at 645-46, 487 N.E.2d at 1379.
17 Id. at 648, 487 N.E.2d at 1380 (citing Rodriguez, supra, note 9, at 30. See also, Williams v. Bashman, 457 F. Supp. 322, 328 (E.D. Pa. 1978); Duncan v. Lord, 409 F. Supp. 687, 693 (E.D. Pa. 1976); Warwick, Paul & Warwick v. Dotter, 190 So. 2d 596, 598 (Fla. App. 1966)).
of the canon of ethics. Although the violation of a disciplinary rule "is not itself an actionable breach of duty to a client," it may be some evidence of an attorney's negligence "if a [client] can demonstrate that [the] disciplinary rule was intended to protect one in his position." Holding that expert testimony is not required in the application of this doctrine, the Court noted that it is no more appropriate in the case of a disciplinary code violation than it would be in the case of a violation of statute or regulation.

§ 10.8. Negligence—Vicarious Liability—Automobiles—Consent Statute. During the Survey year the Supreme Judicial Court decided a case which may cause some confusion in future cases involving General Laws chapter 231, section 85A, the automobile consent statute. Under that statute, evidence of registration of a motor vehicle is prima facie evidence of the registrant's right of control over the driver and, therefore, legal responsibility for injuries caused by the operation of the motor vehicle. In Cheek v. Econo-Car Rental System of Boston, Inc., the plaintiff was injured while a passenger in a car leased by the driver from the defendant rental car agency. The Municipal Court for the City of Boston found for the plaintiff but the Appellate Division remanded for "further findings." Upon receipt of the additional "findings," the Appellate Division vacated the prior judgment for the plaintiff and ordered a new trial. At the second trial before a different judge, the defendant prevailed. Plaintiff's report was then dismissed by the Appellate Division and plaintiff appealed to the Supreme Judicial Court claiming the order for the second trial was in error.

The Supreme Judicial Court concluded that, in ordering the retrial, the Appellate Division had held correctly that the defendant-lessee could be held liable only if there existed a master-servant relationship between it and the lessee-driver at the time of the accident. The initial remand to the trial court was for the specific purpose of making such further fact findings. Because the further findings appeared to contradict earlier fact determinations that a bailment for hire, not an agency, existed, the
Supreme Judicial Court concluded that the Appellate Division had correctly ordered a new trial.

At the outset, the Supreme Judicial Court explained that the automobile consent statute is only an evidentiary provision and accordingly does not change substantive tort law. The statute only creates a rebuttable presumption that the registered owner of a motor vehicle has control over the driver. Where control exists as a matter of fact, the owner of the vehicle is liable for accidents caused by the negligent operation of the vehicle by the driver.

The Supreme Judicial Court held that the case was properly remanded in the first instance because the trial judge "had made no findings concerning the defendant's right to control the operation of the vehicle or the purpose for which it was being operated . . . ." On remand, the first trial judge found the automobile was registered to the defendant. In her second "finding" (which was in reality a ruling) she concluded "[p]ursuant to Chapter 231, Section 85A," that "the fact of registration [is] prima facie evidence that an agency relationship existed between [the lessee] and the defendant." Her third "finding" was that "[t]his prima facie evidence was not controverted by the defendant at the trial of this matter." The only evidence relating to this finding was testimony by the plaintiff, who was the sole trial witness, that she was a passenger in an automobile that the driver had rented from the defendant and that, at the time of the accident, they were returning from a nightclub early in the morning. Considering the second and third findings together, the Supreme Judicial Court held that the trial judge was in error in concluding that, because the statutory presumption had not been "controverted by the defendant," a finding of agency was compelled by the consent statute:

That ruling—that a finding of agency was compelled—was erroneous. The prima facie evidence was controverted—i.e., it was opposed, contested, or disputed—by the evidence that the vehicle had been leased and was being used at the time of the accident to transport its occupants from a nightclub.

though unlikely, because the [lessee] rented the vehicle from the defendant but was also using the vehicle at the time of the accident in furtherance of the defendant's business and under the defendant's right of control." Id. at 663, 473 N.E.2d at 661.

5 Id. at 661, 473 N.E.2d at 660.
6 Id. at 662, 473 N.E.2d at 661.
7 Id.
8 Id. at 661, 473 N.E.2d at 660.
9 Id.
10 Id.
11 Id. at 661, 662, 473 N.E.2d at 660, 661.
12 Id. at 663, 473 N.E.2d at 661.
The evidence was sufficient to warrant a finding either way on the agency question. 13

Three justices expressed a strong dissent stating that the court was "simply wrong" in concluding that the trial judge considered a finding of agency "compelled." 14 Noting that the trial judge "never said [her finding] was compelled," 15 the dissent argued that her statement that the prima facie evidence of control "was not controverted by the defendant" was accurate since the controverting evidence had been supplied by the plaintiff. 16 Although the source of "controverting" evidence is immaterial, the dissent reasoned that the trial judge was not compelled to believe it. "As a trier of fact she was free to accept or reject this testimony in much the same way as a jury would be free to accept or reject testimony." 17 If the trial judge had rejected the "controverting" testimony and the defendant had introduced no evidence to prove the nonexistence of the agency relationship, then, the dissent further argued, there was no evidence to overcome the presumption created by the consent statute. 18 As thus explained, the trial judge had properly interpreted and applied the statute. Concluding, the dissenters warned that the majority's opinion will "eviscerate G.L. c. 231, § 85A, and, without trying to vaticinate, [we] believe this opinion may well return to haunt us." 19

§ 10.9. Negligence—Liability of General Contractor for Construction Site Injuries. In Corsetti v. The Stone Co., 1 the Supreme Judicial Court clarified the law with respect to the liability of a general contractor for construction site injuries. The Court's opinion establishes the relevancy of rules and regulations promulgated by the state for the protection of workers on construction sites in defining the applicable standards for determining negligent conduct.

The case involved a negligence action brought by a construction worker, an employee of a subcontractor, against the general contractor to recover for injuries sustained when he fell from a scaffolding on which he was working. 2 The plaintiff's specific complaint was that the general contractor was negligent in failing to require workers on the construction

13 Id.
14 Id. at 664, 473 N.E.2d at 661 (Nolan, J., dissenting).
15 Id.
16 Id.
18 Id. at 664–65, 473 N.E.2d at 662.
19 Id. at 664, 473 N.E.2d at 662.
2 Id. at 3, 483 N.E.2d at 794.
project to use appropriate safety equipment\(^3\) as specified in rules and regulations issued by the state Department of Labor and Industries.\(^4\)

At the outset, the Court agreed that the general contractor, Stone, could not be vicariously liable for the negligence of the subcontractor, Salvucci, or its employees unless the relationship between Stone and Salvucci was that of master and servant.\(^5\) However, the Court held that, regardless of the precise relationship, Stone could become liable for its own negligence to Salvucci’s employees. The Court expressly refused to limit Stone’s potential liability to the general duty to provide Salvucci’s employees with a reasonably safe worksite and to warn them of defects which Stone reasonably could have discovered on the worksite or in appliances already in place thereon.\(^6\) The Court noted that a general contractor can acquire other obligations. If, for example, the general contractor “retains the right to control the work [of the subcontractor] in any of its aspects, including the right to initiate and maintain safety measures and programs, he must exercise that control with reasonable care for the safety of others, and he is liable for damages caused by his failure to do so.”\(^7\) Liability of this genre, the Court reasoned, exists apart from the doctrine of respondeat superior or the principles of agency. It “usually, though not exclusively, [exists] when a principal contractor entrusts a part of the work to subcontractors, but [he] himself or through a foreman superintends the entire job.”\(^8\) Whether the general contractor has sufficient control over part of the work of the subcontractor to render him liable on this theory is a question of fact for the jury.\(^9\)

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\(^3\) Id.

\(^4\) The plaintiff relied upon Industrial Bulletin No. 12, Rules and Regulations for the Prevention of Accidents in Construction Operations, Department of Labor and Industries, Division of Industrial Safety, The Commonwealth of Massachusetts. These regulations were formally promulgated on January 1, 1978, 441 Code Mass. Regs. 10.00 et seq. The plaintiff also relied upon regulations of the federal Occupational Safety and Health Administration, specifically upon a booklet entitled “Construction Industry, OSHA Safety and Health Standards Digest, U.S. Department of Labor Occupational Safety and Health Administration, (Revised) June 1975.” Id. at 9, 483 N.E.2d at 797. However, the Court decided the case exclusively on the basis of the state regulations and accordingly did not determine the effect of the federal regulations. Id. at 13, 483 N.E.2d at 800.


\(^6\) Id. at 9, 483 N.E.2d at 798.

\(^7\) Id. at 10, 483 N.E.2d at 798 (citing RESTATEMENT (SECOND) OF TORTS, § 414).

\(^8\) Id.

In holding that the jury properly could have found that Stone owed Corsetti the duty of reasonable care for his safety, the Court relied upon both Stone’s construction contracts and the on-site activities of its employees. Stone’s contract with the owner of the premises placed on Stone the responsibility “to initiate, maintain, and supervise ‘all safety precautions and programs in connection with the Work.’”\(^{10}\) Under its subcontract with the plaintiff’s employer, Stone retained the authority and control necessary to carry out that responsibility.\(^{11}\) These contractual provisions, by themselves, the Court ruled, could not “vary or heighten any duty Stone may have owed to the plaintiff,” but they were “relevant as evidence of control over the safety aspects of the work.”\(^{12}\) Other provisions of the contracts specifying that Stone was to comply with federal and state safety regulations served to “provide[] evidence of the standards the parties considered to be material to due care under the circumstances.”\(^{13}\) More specifically, the jury could have found that Stone’s supervisor at the job site had the authority to direct subcontractors to remedy violations of safety rules and regulations and to stop work if they failed to comply.\(^{14}\) Stone’s representative admitted making minimal inspections and discussing safety requirements and procedures with the subcontractors.\(^{15}\) He also knew that Salvucci’s masons were not using safety belts while working on the scaffolding.\(^{16}\) Thus, from both the contractual provisions and the on-site activity of Stone’s employees, the jury could have found that Stone retained and exercised control over the safety of workers.

On the issue whether Stone had been negligent in not requiring the use of safety belts by persons working on the scaffolding, Stone’s defense was twofold: first, that safety belts were not required by industry custom;\(^{17}\) and, second, that the use of safety belts were not feasible. The first defense was found inconsistent with the safety regulations promulgated by the state\(^{18}\) which were held to be controlling.\(^{19}\) The second was

\(^{10}\) Id. at 11, 483 N.E.2d at 799. This language also appears in the model construction contract sponsored by the American Institute of Architects, entitled “Standard form of Agreement Between Owner and Contractor 1977 Edition,” denominated AIA Document A101, and “General Conditions of the Contract for Construction,” denominated AIA Document A201. Article 10 of Stone’s contract with the owner of the premises is identical with the AIA provisions. Id. at 6 n.4, 483 N.E.2d at 796 n.4.

\(^{11}\) Id. at 11, 483 N.E.2d at 799.

\(^{12}\) Id. at 11 n.8, 483 N.E.2d at 799 n.8.

\(^{13}\) Id.

\(^{14}\) Id.

\(^{15}\) Id.

\(^{16}\) Id.

\(^{17}\) There was evidence that safety lines and belts were used by masons but not under the conditions in which the plaintiff was working when he fell. Id. at 7, 483 N.E.2d at 797.

\(^{18}\) See supra note 4.

\(^{19}\) Corsetti, 396 Mass. at 13, 483 N.E.2d at 800.
disputed by expert testimony that the use of safety belts and lines were “feasible, practicable and dictated by good safety management.” This testimony, together with the circumstances of the plaintiff’s fall, the Court observed, was sufficient to warrant a finding of negligence “totally apart from the regulations.”

§ 10.10. Products Liability—Duty of Supplier of Component Parts to Warn of Dangers in Assembled Product. The question of the possible duty of a supplier of component parts to warn of dangers inherent in the use of another product of which his parts are components was presented to the Supreme Judicial Court for the first time in Mitchell v. Sky Climber, Inc. The Court concluded that the duty of the component parts’ supplier is limited to the duty to warn of dangers associated with the use of its own product and that there is no duty to warn the assembler or its customers of any dangers associated with the assembled product.

The defendant, Sky Climber, had supplied a motor incorporated into a scaffold sold or leased by another defendant, Marr, to Brisk, the employer of plaintiff’s decedent. The plaintiff’s decedent died as a result of an electric shock he sustained while attempting to repair the scaffolding equipment upon which he was working. The plaintiff made no claim that Sky Climber’s product was defective, nor did he allege any failure on the part of Sky Climber adequately to warn of dangers associated with the use of its motor. His only complaint was that “Sky Climber violated a duty to give instructions concerning the safe and proper rigging and use of the scaffolding.”

Although Sky Climber did not supply any part of the scaffold other than the motor, it did distribute manuals to customers containing safety, rigging, operating and maintenance information. Decedent’s employer received them frequently and made them available to workers, including a field superintendent who used the information to advise foremen on the job. The Court assumed jury questions existed as to whether there was negligence (presumably on the part of Marr or Brisk) in the assembling of the equipment or in the wiring of the scaffold. However, it was not alleged that Sky Climber was responsible for any of this. There were no allegations that Sky Climber’s manual contained any error that led to

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20 Id.
21 Id.
§ 10.10. 1 396 Mass. 629, 487 N.E.2d 1374 (1986).
2 Id. at 631, 487 N.E.2d at 1376.
3 Id. at 630, 487 N.E.2d at 1375.
4 Id.
5 Id.
6 Id. at 630, 487 N.E.2d at 1376.
7 Id.
8 Id.
improper rigging of the scaffold or to the use of defective equipment therein.\textsuperscript{9} Rather, the plaintiff argued that, because Sky Climber voluntarily distributed a manual, it owed an affirmative duty to warn against the defective assembling and wiring of the scaffold. In rejecting this argument, the Court stated there was "no duty on a manufacturer to set forth in customers’ manuals a warning of a possible risk created solely by the act of another that would not be associated with a foreseeable use or misuse of the manufacturer's own product."\textsuperscript{10} Summary judgment for Sky Climber, therefore, was appropriate.

\textbf{§ 10.11. Products Liability—Pharmaceutical Manufacturer's Duty To Warn.} In another duty to warn case, the Supreme Judicial Court placed a heavy duty upon manufacturers of oral contraceptives. In \textit{MacDonald v. Ortho Pharmaceutical Corp.},\textsuperscript{1} the plaintiff and her husband brought suit against the defendant, Ortho, for injuries allegedly caused by Ortho's birth control pills. The jury found for the plaintiffs, but the trial court granted defendant's motion for judgment notwithstanding the verdict on the theory that Ortho did not owe a duty to warn consumers of dangers associated with prescription drugs. Transferring the case on its own motion, the Supreme Judicial Court reinstated the jury verdict. In doing so, the Court has gone farther than any other court in imposing a duty upon manufacturers of birth control pills to warn consumers directly of dangers inherent in the use of the pill.\textsuperscript{2}

The plaintiff, a twenty-six year old woman, had obtained oral contraceptives through a prescription issued by her doctor. As required by federal law, Ortho labeled the dispenser in which the pills were contained with a warning disclosing the drug's possible side effects.\textsuperscript{3} Also pursuant to federal law, the plaintiff's doctor gave her a booklet, prepared and distributed by Ortho.\textsuperscript{4} This booklet contained detailed information about the contraceptive pill and its risks.\textsuperscript{5} The label and booklet warned of the danger of brain damage caused by abnormal blood clotting, although the

\textsuperscript{9} Id. at 631, 487 N.E.2d at 1376.
\textsuperscript{10} Id. at 632, 487 N.E.2d at 1376.
\textsuperscript{2} Id. at 144, 475 N.E.2d at 73 (O'Connor, J., dissenting).
\textsuperscript{3} Id. at 132, 475 N.E.2d at 66.
\textsuperscript{4} Id. at 133, 475 N.E.2d at 67.
\textsuperscript{5} Id. at 132–33, 475 N.E.2d at 67.
word “stroke” was not used. After three years of using the drug, plaintiff suffered a stroke which left her permanently disabled.

The jury returned a verdict finding no negligence or breach of warranty in the manufacture of the pills. The jury also found that Ortho had adequately advised plaintiff’s doctor of the risks. However, it found Ortho had breached its warranty and was negligent in not providing sufficient warning to the plaintiff. The jury reached this decision despite the admission of the plaintiff that she had read both the label on the contraceptive dispenser and the booklet given to her by her physician.

In entering judgment notwithstanding the verdict, the trial court ruled that, because oral contraceptives are prescription drugs, Ortho had fulfilled its duty to warn consumers by providing adequate warnings to the prescribing physician. In reversing, the Supreme Judicial Court recognized that the trial court had applied the rule formulated for prescription drugs. But, the Court ruled, “[o]ral contraceptives . . . bear peculiar characteristics which warrant the imposition of a common law duty on the manufacturer to warn users directly of associated risks.”

The Court recognized that the rule it laid down departs from the prescription drug rule overwhelmingly recognized throughout the United States. With one possible exception, the rule for prescription drugs is that “the prescribing physician acts as a ‘learned intermediary’ between the manufacturer and the patient” so that “the duty of the ethical drug manufacturer is to warn the doctor, rather than the patient, [although] the manufacturer is directly liable to the patient for a breach of such duty.” In departing from this principle, the Court made it clear that its decision was limited to oral contraceptives because the pill “stands apart from other prescription drugs.” In the use of oral contraceptives, the consumer is “actively involved” in the decision to take the drug.

6 Id. at 133–34, 475 N.E.2d at 67. The significance of the word “stroke” is discussed in § 10.12, infra.
7 MacDonald, 394 Mass. at 133–34, 475 N.E.2d at 67.
8 Id. at 134, 475 N.E.2d at 68.
9 Id.
10 Id. at 134–35, 475 N.E.2d at 68.
11 Id. at 134–35 n.7, 475 N.E.2d at 68 n.7. See in this regard infra § 10.12.
12 MacDonald, 394 Mass. at 135, 475 N.E.2d at 68.
13 Id. at 136–37, 475 N.E.2d at 69–70.
15 Id. at 136, 475 N.E.2d at 69 (quoting McEwen v. Ortho Pharmaceutical Corp., 270 Or. 375, 386–87, 528 P.2d 522, 529 (1974)).
16 Id. at 138, 475 N.E.2d at 70.
17 Id. at 137, 475 N.E.2d at 69.
physician typically examines the patient once before prescribing the pill and only annually thereafter.\textsuperscript{18} Thus, the patient "only seldom ha[s] the opportunity to explore her questions and concerns about the medication with the prescribing physician"\textsuperscript{19} and she "cannot be expected to remember all of the details for a protracted period of time."\textsuperscript{20} Because of the availability of alternatives, the feasibility of direct warnings to the consumer and the substantial risk involved in taking the pill, the Court concluded that "the manufacturer cannot rely upon the medical profession to satisfy its common law duty to warn . . . the ultimate user."\textsuperscript{21} The Court underscored that its decision did not diminish the physician's own duty to give adequate warnings to the patient to enable her to make an informed choice whether to use the drug or not.\textsuperscript{22}

Justice O'Connor dissented, stating that "the prescription drug' rule, combined with the \textit{Harnish} [informed consent] rule, most fairly and efficiently allocates among drug manufacturers, physicians, and drug users, the risks and responsibilities involved with the use of prescription pills."\textsuperscript{23} Justice O'Connor also expressed his belief that these rules "best insure that a prescription drug user will receive in the most efficient manner the information that she needs to make an informed decision as to whether to use the drug."\textsuperscript{24}

The Court's attempt to distinguish oral contraceptives from other prescription drugs is unpersuasive. Patients who take heart medicine or other drugs on a continuing basis to regulate essential bodily systems are in positions similar to those who take oral contraceptives. These other patients need to be enlightened in the use of the drugs prescribed for them and in the recognition of possible harmful side effects. As a result of the \textit{Harnish} informed consent rule, there is no longer any basis for assuming that these other patients are not actively involved in the decision to follow a prescribed course of treatment. Similarly, there is no reason to assume that these patients see physicians as often as they should or that the medical warnings associated with the drugs they use are any less complicated or more easily understood and remembered than in the case of oral contraceptives. Over time, the Court's attempt to distinguish oral contraceptives from other drugs may prove unsuccessful. Ultimately, the Supreme Judicial Court may find itself in the position

\textsuperscript{18} Id.
\textsuperscript{19} Id.
\textsuperscript{20} Id. (quoting 35 Fed. Reg. 9002 (1970)).
\textsuperscript{21} Id. at 138, 475 N.E.2d at 70.
\textsuperscript{22} Id. at 139 n.13, 475 N.E.2d at 70, n.13 (citing Harnish v. Children's Hospital Medical Center, 387 Mass. 152, 155, 439 N.E.2d 240, 243). \textit{See supra} \textsection 10.6.
\textsuperscript{23} MacDonald, 394 Mass. at 145, 475 N.E.2d at 72.
\textsuperscript{24} Id. at 145–46, 475 N.E.2d at 72.
§ 10.12 where it will have to repudiate the prescription drug rule, if it wants to retain the MacDonald rule.

§ 10.12. Products Liability—Adequacy of Pharmaceutical Manufacturer’s Warning to Consumer. MacDonald v. Ortho Pharmaceutical Corp.\(^1\) gave the Supreme Judicial Court the opportunity not only to impose upon manufacturers of oral contraceptives a duty to warn consumers directly, but also to comment upon the adequacy of the warnings given. Before arriving at the question of the adequacy of the particular warnings given in MacDonald, however, it is first necessary to reconcile the jury findings that adequate warning was given to the plaintiff’s physician but not to the plaintiff although she received the same warning as her physician. These findings are not necessarily inconsistent.

Ortho, it will be recalled, complied with the FDA requirements both by placing a warning on the label of the dispenser in which the pills were delivered to consumers and by providing a booklet written in lay language which contained additional information and was distributed to users of the pill by prescribing physicians.\(^2\) Mrs. MacDonald admitted receiving and reading both of these warnings. Nevertheless, the jury found that Ortho failed to give adequate warning to Mrs. MacDonald, although it found that Ortho had given adequate warning to her gynecologist.\(^3\) If the adequate warning given to the gynecologist were conveyed by him to his patients, as required by the informed consent doctrine,\(^4\) then it logically follows that Mrs. MacDonald would have received adequate warning. Under such circumstances, the fact that Ortho had not communicated with her directly (except through the pill dispenser) would have caused her no harm. However, this apparently was not the case. Her physician was not a party to the action and the jury did not have the benefit of his testimony. However, Mrs. MacDonald testified that her physician informed her only of possible “bloating,” and “had not advised her of the increased risk of stroke . . . .”\(^5\) Accordingly, the jury’s finding of adequate disclosure to the physician but not to Mrs. MacDonald is internally consistent and supported by the testimony in the case. It is therefore proper to focus on the adequacy of Ortho’s label and booklet in providing appropriate warning to consumers.

\(^2\) See supra § 10.11.
\(^3\) MacDonald, 394 Mass. at 134–35, 475 N.E.2d at 68.
\(^5\) MacDonald, 394 Mass. at 134–35 n.7, 475 N.E.2d at 68 n.7.
Ortho first argued that its warnings were adequate because they complied with FDA requirements which Ortho further claimed "preempt[ed] or define[d] the bounds of the common law duty to warn." The Court rejected this argument because the FDA had specifically noted that "the boundaries for civil tort liability for failure to warn are controlled by applicable state law." Although the federal warning provisions are quite extensive, the Supreme Judicial Court refused to make the common law duty coextensive with the federal regulations. Instances might arise, reasoned the Court, "where a trier of fact could reasonably conclude that a manufacturer's compliance with FDA labeling requirements or guidelines did not adequately apprise oral contraceptive users of inherent risks." This may have been the very situation presented. Even though Ortho may have complied with the FDA requirements, and physicians might have contemplated the possibility of strokes, the Court held that "the jury nonetheless could have found that the lack of a reference to 'stroke' breached Ortho's common law duty to warn" consumers. As the Court stated: "compliance with FDA requirements, though admissible to demonstrate lack of negligence, is not conclusive on this issue, just as violation of FDA requirements is evidence, but not conclusive evidence, of negligence."

MacDonald declares a consumer warning adequate if it is "comprehensible to the average user and . . . convey[s] a fair indication of the nature and extent of the danger to the mind of a reasonably prudent person." Whether a warning is sufficient will "almost always" be a question for the jury because a jury will provide a better indication of what an average person understands. A warning, otherwise appropriate, may be found inadequate because of its tone, as contrasted with its content:

The adequacy of such warnings is measured not only by what is stated, but also by the manner in which it is stated. A reasonable warning not only conveys a fair indication of the nature and dangers involved, but also warns with the degree of intensity demanded by the nature of the risk. A warning

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*Id.* at 139, 475 N.E.2d at 70.

7 *Id.* (citing 43 Fed. Reg. 4214 (1978)).


9 MacDonald, 394 Mass. at 140, 475 N.E.2d at 71.

10 *Id.*

11 *Id.* (quoting Ortho Pharmaceutical Corp. v. Chapman, 180 Ind. App. 33, 49 (1979), quoting Spruill v. Boyle-Midway, Inc., 308 F.2d 79, 85 (4th Cir. 1962)).
may be found to be unreasonable in that it was unduly delayed, reluctant in tone or lacking in a sense of urgency.  

Based upon the testimony given and the jury’s common experience, the Court held that the jury was free to conclude that the failure to use the word “stroke” “unduly minimized the warning’s impact or failed to make the nature of the risk reasonably comprehensible to the average consumer.”13 According to the Court, “the jury may have concluded that there are fates worse than death, such as the permanent disablement suffered by MacDonald, and that the mention of the risk of death did not, therefore, suffice to apprise an average consumer of the material risks of oral contraceptive use.”14

The Court also rejected Ortho’s contention that the plaintiff had failed to establish that her injuries were proximately caused by any inadequacy in the warning given. Specifically, Ortho argued that a reasonably prudent person, having been informed, as was Mrs. MacDonald, of the risk of death by abnormal blood clotting and having chosen to assume that risk, would not have acted differently if informed of the risk of “stroke.”15 Rejecting this argument, the Court held that the jury was free to credit Mrs. MacDonald’s testimony that she would not have taken the pill had she been warned of the risk of “stroke.”16 The fact that she did not ask her doctor for an explanation of the warnings concerning “abnormal blood clotting” and “death” suggested comparative negligence on her part, but it did not prevent the jury from finding a causal connection between her injuries and the failure of Ortho to warn her of a possible stroke. However, because this issue was not raised below, the Court did not entertain it on appeal.17

§ 10.13. Defamation—Constitutional Principles—Statements Not of Public Concern. During the Survey year, the United States Supreme Court had further occasion to define the limits of Gertz v. Robert Welsh, Inc.,1 in which the Court held that the first amendment prohibited tort awards of presumed and exemplary damages against publishers for false and defamatory statements unless the plaintiff proved “actual malice,” that

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12 Id. at 141, 475 N.E.2d at 71 (quoting Seley v. G. D. Searle Co., 67 Ohio St. 2d 192, 198, 423 N.E.2d 831, 837 (1981)).
13 Id. at 141, 475 N.E.2d at 71–72.
14 Id.
15 Id. at 142, 475 N.E.2d at 72.
16 Id.
17 Id.
is, knowledge of falsity or reckless disregard of the truth.\(^2\) This year, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,\(^3\) the Supreme Court held that plaintiffs could recover presumed and punitive damages absent a showing of "actual malice" without violating the First Amendment when the defamatory statements did not involve matters of public concern. This decision has already become significant in Massachusetts due to the several defamation cases decided during this Survey year.

In *Dun & Bradstreet*, the petitioner, a credit reporting agency, sent a report to its subscribers stating that the respondent construction contractor had filed a voluntary petition for bankruptcy.\(^4\) The report was found to be false and a gross misrepresentation. A Dun & Bradstreet (D & B) employee had made an error in reviewing bankruptcy proceedings and D & B failed to follow its own procedure of verifying the information.\(^5\) The contractor was awarded $50,000 in compensatory or presumed damages and $300,000 in punitive damages.\(^6\) The Vermont Supreme Court reversed a lower court's grant of a new trial because it concluded that *Gertz* was not meant to apply to "non-media" speakers and private figure plaintiffs.\(^7\) The United States Supreme Court affirmed, but for different reasons. In essence, the Court held that the *New York Times-Gertz* standard does not apply to speech on matters of purely private concern.

In deciding whether the statements were about public or private matters, the Court applied the *Gertz* balancing test. In *Gertz*, the Court had determined that the constitutional interest in preserving "uninhibited, robust, and wide-open debate" "on public issues"\(^8\) was greater in the case of public, as compared with private, figures.\(^9\) The Court struck this balancing of constitutional interests in protecting speech and the state's interests in protecting its private citizens from defamatory injury to reputation in the context of "expression on a matter of undoubted public concern."\(^10\) *Gertz* did not indicate, however, how the balance would be struck where the defamatory statements were not matters of public concern. This issue was addressed in *Dun & Bradstreet*.\(^11\)


\(^4\) *Id.* at 751, 105 S.Ct. at 2941, 86 L.Ed.2d at 595.

\(^5\) *Id.*

\(^6\) *Id.* at 752, 105 S.Ct. at 2942, 86 L.Ed.2d at 596.

\(^7\) *Id.*

\(^8\) *Id.* at 754, 105 S.Ct. at 2943, 86 L.Ed.2d at 597 (quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)).

\(^9\) *Id.* at 756, 105 S.Ct. at 2944, 86 L.Ed.2d at 598.

\(^10\) *Id.* at 758, 105 S.Ct. at 2945, 86 L.Ed.2d at 599.

\(^11\) The nature of speech as involving matters of public or private concern is determined by its content, form and context. *Id.* at 761, 105 S.Ct. at 2947, 86 L.Ed.2d at 601. These
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After first noting that "speech on matters of purely private concern is of less First Amendment concern," the Dun & Bradstreet Court then noted it "is not totally unprotected" and ultimately concluded that the constitutional protection of such speech is "less stringent." Because of the "reduced constitutional value of speech involving no matters of public concern," the Court held that the state could award presumed and punitive damages "absent a showing of actual malice."

§ 10.14. Defamation—Constitutional Principles—Determination of a Public Figure. In Materia v. Huff, the Supreme Judicial Court held that Massachusetts would follow the rule accepted by many jurisdictions that officials of unions qualify as "public figures" for the purpose of union elections and other union business. In Materia, a defeated incumbent union official obtained $15,000 in compensatory damages for injuries sustained because of a defamatory letter circulated by his opponents prior to a union election. Because the trial judge did not instruct the jury that the plaintiff was a limited public figure, as a matter of law, the Supreme Judicial Court reversed and remanded the case for a new trial.

Ordinarily, the question whether the plaintiff is a public figure is for the jury. Where however, the facts bearing upon this question are "uncontested or agreed by the parties," it becomes the responsibility of the trial judge to determine as a matter of law the plaintiff's status as a public official or a private figure. This determination is important because it affects the standard of liability which the states constitutionally may consider in defamation cases. In Materia, the court considered the nature of the credit report involved and concluded that it was speech involving no matters of public concern. The Dun & Bradstreet report had been disseminated to a limited number of persons composed of "only five subscribers, who, under the terms of the subscription agreement, could not disseminate it further," and therefore obviously did not involve "any strong interest in the free flow of commercial information." It was speech solely in the individual interest of the speaker and its specific business audience, and was "solely motivated by the desire for profit . . . ." Moreover, the information was objectively verifiable and the market provided a powerful incentive for accuracy since false credit reporting is of no use to creditors. Thus, any incremental 'chilling' effect of libel suits would be of decreased significance.

1 Id. at 759, 105 S.Ct. at 2946, 86 L.Ed.2d at 600.
2 Id.
3 Id. at 328, 475 N.E.2d at 1213.
4 Id. at 300, 475 N.E.2d at 1214.
5 Id. (citing Rosenblatt v. Bear, 383 U.S. 75 (1966)(public official); and Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 165-169 (1979)(public figure)).
adopt as part of their substantive law of defamation. Where the plaintiff is a public official or a public figure, the Constitution preempts a standard other than "actual malice," that is, "knowledge of falsity or reckless disregard for the truth." However, the states are free to determine for themselves appropriate standards for determining the liability of publishers and broadcasters of defamatory falsehood injurious to a private person "so long as they do not impose liability without fault." 

§ 10.15. Defamation—Constitutional Principles—Labor Disputes—Burden of Proof—Damages—Interest. The Supreme Judicial Court determined the interaction of federal and state law concerning libel occurring in a labor law context in Tosti v. Ayik (Tosti II). The defendant Ayik, the author of an alleged libelous article, and the union which published it, both appealed from the retrial verdicts awarding the plaintiff $5,000 in damages against Ayik and $495,000 against the union. The article accused the plaintiff, a foreman at a General Motors plant, of punching vehicle repair tickets when the repair work had not been performed. As a management employee, the plaintiff should not have been punching tickets, a matter that was reserved for union employees under the collective bargaining agreement. After publication of the article, General Motors discharged the plaintiff allegedly for punching the vehicle repair tickets of unrepaired vehicles. As a result, the plaintiff sued and recovered verdicts against Ayik and the union for interference with an employment relationship as well as for libel. These verdicts were set aside on appeal. On remand, the jury returned verdicts for both defendants on the tortious interference counts and for plaintiff against both defendants on the libel counts. On the second appeal of the defendants, the Supreme Judicial Court affirmed the libel judgments but found the award against the union excessive. Accordingly, it remanded the case for remittitur in an amount determined by the trial judge or for a new trial should the plaintiff refuse to accept remittitur.

The Supreme Judicial Court first had to decide whether state libel law could be applied to defamation occurring in a labor context or whether it was preempted by overriding federal labor policy. On the previous

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7 Gertz, 418 U.S. at 346.
2 Id. at 485, 476 N.E.2d at 931.
3 Id. at 484, 476 N.E.2d at 931.
4 Id.
5 Id.
7 Tosti II, 394 Mass. at 501, 476 N.E.2d at 940.
appeal, the Court had concluded that “[f]ederal labor law preempts [s]tate
libel law to the extent that defamatory statements made in the context
of a labor dispute are [not] actionable [unless] made with knowledge of
their falsity or with reckless disregard of the truth.” Subsequent to Tosti
I, however, the United States Supreme Court decided Local 926, Int'l
Union of Operating Eng'rs v. Jones, holding that a claim of tortious
interference with an employment relationship was preempted because it
“was not ‘so deeply rooted in local law’ as to outweigh ‘the interference
with federal labor law that prosecution of the state action would entail.’”
Nevertheless, Tosti II found no preemption. Instead, the Supreme Judi­
cial Court read Local 926 as reaffirming an earlier decision of the United
States Supreme Court that held “‘an action for malicious and injurious
libel in the course of a labor dispute . . . was not pre-empted . . . since
remedying injury to reputation was only of slight concern to the national
labor policy and was a matter deeply rooted in state law.’”

The Supreme Judicial Court next decided that the plaintiff did not have
to prove the responsibility of the union for the action of its subordinates
by clear and convincing evidence, but it did have to meet this standard
in its proof of actual malice. “In defamation cases governed by the
standard of New York Times v. Sullivan,” stated the Court, “we are
under a constitutional obligation to determine ‘whether the jury would
be warranted in concluding that malice was proved by clear and con­
vincing evidence.’” This standard may not be as difficult as it might
first appear. As the Court “reiterate[d] . . . a]ctual malice is not neces­
sarily proved in terms of ill will or hatred, but is proved rather by a

8 Tosti I, 386 Mass. at 723, 437 N.E.2d at 1064 (citing Nat'l Ass'n of Letter Carriers v.
Austin, 418 U.S. 264, 273 (1974); Linn v. Plant Guard Worker Local 114, 383 U.S. 53, 61
(1966)).
10 Id. at 681.
11 Tosti II, 394 Mass. at 486, 476 N.E.2d at 932 (citing Local 926, 460 U.S. at 681 n.11,
quoting Linn, 383 U.S. at 64).
12 In making the ruling, the Court had to confine the applicability of G.L. c. 149, § 20B
to “actions arising from violent labor disputes, such as injunction and contempt proceed­
ings.” Tosti II, 394 Mass. at 487, 476 N.E.2d at 933.
13 The Court defined “[c]lear and convincing proof [as] involv[ing] a degree of belief
greater than the usually imposed burden of proof by a fair preponderance of the evidence,
but less than the burden of proof beyond a reasonable doubt imposed in criminal cases.”
(1975).
showing that the defamatory falsehood was published with knowledge that it was false or reckless disregard of whether it was false.”17 “The test is entirely a subjective one,”18 but it can be satisfied by objective evidence as Tosti II itself demonstrates.

The Court relied upon several objective factors in deciding that there was evidence sufficient to provide clear and convincing proof of Ayik’s malice. In the first place, Ayik testified that he was not motivated in writing the story by plaintiff’s alleged failure to repair the vehicles involved. Rather, his concern was that plaintiff was engaged in an activity reserved for union workers under the collective bargaining agreement.19 Because of this motivation, the jury could have inferred that Ayik “either fabricated the other charges or . . . [made] his accusations based on suspicions and not facts.”20 There was evidence that this was the case. The defendant had testified that on June 7, the date in question, his own work in “chasing stock” kept him away from the area where he and plaintiff were stationed “for substantial periods of time, including the fifteen minute period [immediately] prior to making the observations alleged in his article.”21 Ayik also conceded that he did not know how to read the tickets and therefore had no idea what repairs were actually designated on the tickets, nor whether any of the cars whose tickets were punched by plaintiff had improper repairs or safety problems.22 Finally, Ayik admitted that his allegations that plaintiff had punched the tickets of unrepai red vehicles on June 7 was based solely on his observations of plaintiff allegedly doing the same thing during the months of April and May.23 Plaintiff contradicted these allegations, testifying that Ayik could not have made the observations alleged because plaintiff had not worked the night shift as did Ayik during April and May. This testimony, “if believed by the jury,” the Court held, “was sufficient to provide clear and convincing proof that Ayik either published his article based on fabricated observations of the plaintiff or, at the least, entertained serious doubts as to the truths of his allegations.”24

The Supreme Judicial Court’s remaining observations of its constitutional role in reviewing libel actions centered on the excessive damage

18 Id.
19 Id. at 493, 476 N.E.2d at 936.
20 Id.
21 Id. at 492, 476 N.E.2d at 935.
22 Id.
23 Id. at 493, 476 N.E.2d at 936.
24 Id.
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award against the union. In ordinary defamation cases, the Court observed, judges have "a special duty of vigilance in charging juries and [in] reviewing verdicts to see that damages are no more than compensatory," both "[b]ecause of constitutional considerations, and the potential difficulties in assessing fair compensation."25 A defamed plaintiff is "entitled only to fair compensation for his actual damages, including his mental suffering and harm to his reputation, and for any special damage he has suffered which have been pleaded and proved."26 The duty to exercise special vigilance is even greater in reviewing defamation occurring in a labor context. Here, the Court reasoned, "heightened scrutiny" is required because "the propensity of juries to award excessive damages for defamation . . . may pose a threat to the stability of labor unions."27

Although the Court surmised that the jury believed that the union "caused the plaintiff's discharge by the libelous publication," it was not convinced that the evidence presented was sufficient to support this conclusion. Although "[t]here was evidence that the plaintiff and his family suffered financial hardship in the years after his discharge,"28 the Court could find no proof in the record that "the plaintiff's failure to obtain full-time employment [during these years] was due to the defendant's tortious acts."29 In particular, there was no proof that potential employers were aware of the libelous article, let alone that they would not hire plaintiff because of the defamation.30

Finally, the Court upheld the trial court in awarding interest on the jury verdict at the rate of twelve percent per annum from June 13, 1973, the date of the commencement of the action, until March 23, 1983, when judgment was entered. In assessing interest at twelve percent, the trial judge retroactively applied the 1982 amendment to General Laws chapter 231, section 6B, which was expressly made applicable "to all actions in which damages are assessed on or after the effective date of this act" which occurred during July, 1982.31

§ 10.16. Defamation—Media—Negligence. Following the decision of the Supreme Court of the United States in Gertz v. Robert Welsh, Inc.1 the Supreme Judicial Court resolved the conflict between the first amendment

25 Id. at 495, 476 N.E.2d at 937 (quoting Stone, 367 Mass. at 861, 330 N.E.2d at 170).
26 Id. at 496, 476 N.E.2d at 938.
27 Id. (citing Linn, 383 U.S. 53 at 64).
28 Id. at 497, 476 N.E.2d at 939.
29 Id. at 498, 476 N.E.2d at 939.
30 Id.
and the law of defamation by holding, in *Stone v. Essex County Newspapers, Inc.*,\(^2\) that “private persons may recover compensation upon proof of negligent publication of a defamatory falsehood.”\(^3\) During the Survey year, the Court refined its *Stone* holding by ruling in *Appleby v. Daily Hampshire Gazette*,\(^4\) that “reasonable reliance upon the accuracy of stories obtained from a reputable wire service does not give rise to a triable issue of negligence.”\(^5\)

The *Appleby* plaintiff, convicted for assault and battery, homosexual rape and kidnapping, commenced ninety-four separate actions against various newspapers, radio and television stations for allegedly false and defamatory statements made about him during the criminal investigation.\(^6\) The lower court entered summary judgment on behalf of the newspapers\(^7\) because the allegedly false statements had been republished verbatim from reports of reputable wire services.\(^8\)

On appeal, the Supreme Judicial Court first noted that, under generally recognized tort principles, the republisher of a defamatory statement is subject to liability as if he were the original publisher.\(^9\) Thus, using the negligence standard of *Stone*, the speaker is required to act “reasonably in checking on the truth or falsity . . . of the communication before publishing it.”\(^10\) In departing from this duty in the context of the case before it and in holding that the republication of wire service stories without verification is not negligent as a matter of law, the Court emphasized the industry acceptance of the wire services as accurate sources of information.\(^11\) In fact, wire service stories were routinely republished without independent corroboration.\(^12\) More importantly, the Court was influenced by the fear that required verification of wire services stories would place too heavy a burden upon the media. According to the Court, “‘[n]o newspaper could . . . assume in advance the burden of specially


\(^{3}\) Id. at 855, 330 N.E.2d at 166 (emphasis in original).


\(^{5}\) Id. at 34, 478 N.E.2d at 722.

\(^{6}\) Id.

\(^{7}\) Id. The trial judge entered final summary judgments for the newspapers in four cases which he deemed representative of the twenty-nine other cases pending before him. In order to avoid unnecessary costs and delays, he directed the clerk-magistrate not to enter summary judgment in the remaining cases until an appellate court affirmed the action in the four decided cases. Id. at 35, 478 N.E.2d at 723.

\(^{8}\) Id. at 35, 478 N.E.2d at 723.

\(^{9}\) Id. (citing RESTATEMENT OF TORTS, SECOND, § 580B, comment g (1977)).

\(^{10}\) Id.

\(^{11}\) Id. at 37, 478 N.E.2d at 725.

\(^{12}\) Id.
verifying every item of news reported to it by established news gathering agencies, while at the same time publishing timely stories of worldwide or national interest."

Aside from these practical burdens, the Court reasoned, the imposition of a duty of verification would impinge upon society’s first amendment interest in having news media free from “apprehensive self-censorship.”

For the same reasons, the Court also disagreed with the plaintiff’s contention that a newspaper acts negligently when it fails to verify the accuracy of a story if independent verification is feasible. Even though the stories may originate in an area of proximity to a particular newspaper, “it would impose an impermissible burden on the dissemination of news if the media, and the courts, were forced to make subtle distinctions between verifiable and nonverifiable wire stories.”

Of the approximately forty-eight articles published about the Appleby plaintiff, forty-four were verbatim republications of the wire service dispatches. Having concluded that a finding of negligence cannot be predicated upon the verbatim republication of a reputable wire service story, the Court ruled that summary judgment was appropriate in each of these cases. The Court then concluded that four additional articles written by staff members of the newspapers were entitled to the same protection and summary disposition to the extent that they were accurate restatements of the wire service dispatches. The Court stated that “[a]s far as a newspaper’s negligence with respect to the truth of a statement is concerned, there is no difference between reprinting a wire service story verbatim, and accurately restating its contents.”

Finally, the Court was careful to limit its holding to wire service stories that appear proper on their face. Protection would not attach to stories that are “so inherently improbable or inconsistent that the [republishers] had, or should have had, some reason to doubt their accuracy.” The Court also stressed that a triable issue might result where the plaintiff can show that the republishers “knew, or should have known, of certain facts extraneous to the wire service stories which would have raised doubts as to the stories’ veracity.”

13 Id. (citing Layne v. Tribune Co., 108 Fla. 177, 188, 146 So. 234, 239 (1933)).
14 Id. at 38, 478 N.E.2d at 726.
15 Id.
16 Id.
17 Id. at 39, 478 N.E.2d at 726.
18 Id.
19 Id.
20 Id.
21 Id.
§ 10.17. Defamation—Determination Whether Statements Concern Plaintiff. This Survey year also provided the Supreme Judicial Court with the chance to update the common law regarding the test to be employed in determining whether defamatory statements concern a particular person. New England Tractor Trailer Training of Connecticut, Inc. v. Globe Newspaper Co.,\(^1\) raised the question whether a series of newspaper articles defamed the separately incorporated Massachusetts and Connecticut branches of a private vocational training school. The Massachusetts corporation (NETTT-Mass) stipulated to a dismissal with prejudice, but the Connecticut corporation (NETTT-Conn) proceeded with its claim.\(^2\) Relying upon Hanson v. Globe Newspaper Co.,\(^3\) the newspaper moved for summary judgment on the ground that it did not defame the Connecticut school because its highly critical references to the "New England Tractor-Trailer School," "New England" and "N. E. Tractor" were intended to apply only to the Massachusetts school.\(^4\) The person who served as president of both schools, however, countered with an affidavit claiming that although NETTT-Mass and NETTT-Conn were separately incorporated schools, they held themselves out to the public as but a single entity with two locations.\(^5\) In reversing summary judgment for the newspaper, the Appeals Court ruled that there existed a genuine issue of material fact as to whether the statements were of and concerning the plaintiff.\(^6\) The newspaper's application for further appellate review was thereafter granted.\(^7\)

In affirming, the Supreme Judicial Court brought Hanson in line with the decisions of the Supreme Court of the United States in New York Times v. Sullivan\(^8\) and Gertz v. Robert Welsh, Inc.\(^9\) Hanson stood for the fundamental principle that a plaintiff must "allege and prove that the words were spoken or written of or concerning the plaintiff."\(^10\) In making this determination, Hanson adopted a subjective test, pursuant to which the central inquiry was to determine "[t]he defendant's meaning in regard both to the person to whom the words should be applied and the imputations against him . . . ."\(^11\) The subjective nature of this test is no more clearly demonstrated than by the facts of Hanson itself.

\(^{1}\) 395 Mass. 471, 480 N.E.2d 1005 (1985) [hereinafter NETTT].
\(^{2}\) Id. at 472, 480 N.E.2d at 1006.
\(^{3}\) 159 Mass. 293, 34 N.E. 462 (1893).
\(^{4}\) NETTT, 395 Mass. at 473, 480 N.E.2d at 1007.
\(^{5}\) Id.
\(^{6}\) Id.
\(^{7}\) Id. at 472, 480 N.E.2d at 1006.
\(^{8}\) 376 U.S. 254 (1964), discussed supra § 10.13.
\(^{10}\) Hanson, 159 Mass. at 294, 34 N.E. at 462.
\(^{11}\) Id. at 294–95, 34 N.E. at 462.
In *Hanson*, the defendant published an article about "H. P. Hanson, a real estate and insurance broker of South Boston."\(^{12}\) The newspaper intended the article to describe one "A. P. H. Hanson" who had been convicted of a crime. However, another real estate and insurance broker from South Boston whose name was "H. P. Hanson," sued for libel because the allegations were untrue as applied to him. Based upon a factual finding that "the alleged libel declared on by the plaintiff was not published by the defendant of or concerning the plaintiff,"\(^ {13}\) the Supreme Judicial Court held that a judgment for the defendant was proper.

In *NETTT*,\(^ {14}\) the Supreme Judicial Court decided to review *Hanson* for two reasons: (1) The nearly century-old *Hanson* decision "represent[ed] an historic view of tort law largely rejected by later cases" and "fail[ed] to accommodate the profound changes in defamation law" brought about by developing principles of constitutional law;\(^ {15}\) (2) *Hanson* was decided before the negligent defamation standard was articulated in the wake of *Sullivan* and *Gertz*. Consideration of these changes led the Court to conclude that:

a purely subjective test for determining whether a defendant’s words are of and concerning the plaintiff represents an outmoded historic conception of tort law . . . . Tort law generally deems those injured by a person’s unintentional slips deserving of compensation if the slips could have been avoided through the use of ordinary care.\(^ {16}\)

Adhering to the subjective test of *Hanson*, the Court reasoned, would "unduly narrow the potential for liability in defamation cases and [would] leave[] deserving plaintiffs uncompensated."\(^ {17}\) Instead, the Court believed that liability should exist whenever defamatory statements, negligently made, "reasonably could be interpreted to refer to the plaintiff."\(^ {18}\) This is all that is meant by the requirement that the defamation be "of and concerning the plaintiff."\(^ {19}\) As provided in the Restatement of Torts, Second, § 564: "A defamatory communication is made concerning the person to whom its recipient correctly, or mistakenly but reasonably, understands that it was intended to refer."\(^ {20}\) In summation, the Court concluded that:

[A] defamation plaintiff must prove that the defendant’s words are of and concerning the plaintiff. To do so, the plaintiff must prove either that the defendant intended its words to refer to the plaintiff and that they were so

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\(^ {12}\) *Id.* at 294, 34 N.E. at 462.

\(^ {13}\) *Id.* at 299, 34 N.E. at 464.

\(^ {14}\) *NETTT*, 395 Mass. at 476, 480 N.E.2d at 1008.

\(^ {15}\) *Id.*

\(^ {16}\) *Id.*

\(^ {17}\) *Id.*

\(^ {18}\) *Id.*

\(^ {19}\) *Id.*

\(^ {20}\) *RESTATEMENT OF TORTS, SECOND, § 64 at 165 (1977).*
understood, or that the defendant's words reasonably could be interpreted to refer to the plaintiff and that the defendant was negligent in publishing them in such a way that they could be so understood.\footnote{NETIT, 395 Mass. at 483, 480 N.E.2d at 1012.}

In the earlier discussed Appleby case, the Supreme Judicial Court stated that summary judgment generally is not useful in negligence cases. The Court explained: "'[B]ecause of the jury's 'unique competence in applying the reasonable man standard,'" "summary judgment is rarely appropriate with respect to the merits of a negligence case."\footnote{Appleby, 395 Mass. 32, 36, 478 N.E.2d 721, 724 (1985) (quoting Foley v. Matulewicz, 17 Mass. App. 1004, 1005, 459 N.E.2d 1262, 1263 (1984), quoting 10A C.A. WRIGHT, A.R. MILLER & M.K. KANE, FEDERAL PRACTICE AND PROCEDURE § 2729, at 194 (1983)).} However, this is not the view in defamation cases. In NETIT, the Supreme Judicial Court clearly stated that it favors the use of summary judgment procedures in defamation cases.\footnote{NETIT, 395 Mass. at 480, 480 N.E.2d at 1011 (citing Cefalu v. Globe Newspaper Co., 8 Mass. App. Ct. 71, 74, 391 N.E.2d 935, 937 (1979), appeal dismissed and cert. denied, 444 U.S. 1060 (1980)).} Summary judgment was improper in this case, however, because the affidavit of the president of the two branches was sufficient to raise a genuine dispute of fact both as to the question whether the defendant newspaper was negligent and the question whether the defamation reasonably could be interpreted as referring to the Connecticut school.

\section*{10.18. Damages—Collateral Source Income.} The aspect of the decision of the Supreme Judicial Court in Corsetti v. The Stone Co.,\footnote{396 Mass. 1, 483 N.E.2d 793 (1985), discussed supra § 10.9.} that has had the most immediate impact upon tort law in Massachusetts relates to the collateral source income rule. Unfortunately, this portion of the Court's opinion has been widely misinterpreted as making evidence of collateral source income automatically admissible in any case where the defense of malingering on the part of the plaintiff is raised. This is not the holding of the Court. Only a very minor change has been made in the collateral source income rule. Such evidence generally remains inadmissible. For an analysis of this aspect of the Corsetti case, see Comment, supra p. 1.

10.19 Torts

and held that contribution among joint tortfeasors must be apportioned under the contribution statute\(^3\) on a pro rata basis rather than under the comparative negligence statute\(^4\) on relative degrees of fault. In the second case, \textit{Rathbun v. Western Massachusetts Electric Co.},\(^5\) the Court refused to order one equally negligent defendant to indemnify another, but suggested that the Legislature consider amending the contribution statute to apportion contribution on the basis of comparative fault.

In the primary action in \textit{Zeller}, the plaintiff had been awarded $1,287,466 in damages for injuries suffered during an operation performed by one defendant, Dr. Cantu, using surgical blades manufactured by another defendant, the American Safety Razor Corporation (ASRC). The blades broke and became permanently lodged in the plaintiff's back.\(^6\) Cantu paid the plaintiff only $100,000, the limit of his insurance coverage; ASRC paid the balance. Cantu was then ordered to pay ASRC an additional $548,516.05\(^7\) as contribution under General Laws chapter 231B, section 3(b).

On appeal, Cantu claimed that the trial judge erred in not awarding contribution on the basis of his comparative fault, asserting: (1) the enactment of the comparative negligence statute impliedly repealed or modified the earlier enacted contribution statute; (2) the contribution statute's reference to "equity" in chapter 231B, 2(c) required apportionment of damages based upon fault; and (3) the failure to consider relative fault violated both the due process and equal protection clauses of the state and federal constitutions.\(^8\)

In rejecting the implicit repeal argument, the Supreme Judicial Court first noted that section 2(a) of the contribution statute expressly states that "[i]n determining the pro rata shares of tortfeasors ... their relative degrees of fault shall not be considered."\(^9\) Thus, the contribution statute expressly covered the situation before the Court. Second, the comparative negligence statute contained no provisions specifying a method for determining contribution awards and, therefore, did not conflict with the contribution statute. By its express language, the comparative negligence statute showed its only purpose was to "ameliorate the harsh results" of the contributory negligence doctrine.\(^10\) Because the two statutes did not

\(^{3}\) G.L. c. 231B (1984 ed.).
\(^{4}\) G.L. c. 231, § 85 (1984 ed.).
\(^{6}\) Zeller, 395 Mass. at 77, 478 N.E.2d at 931.
\(^{7}\) This figure represents one-half of the amount paid by ASRC plus interest, minus the payment made by Cantu to the plaintiff.
\(^{8}\) Zeller, 395 Mass. at 77–78, 478 N.E.2d at 931.
\(^{9}\) Id. at 78, 478 N.E.2d at 931.
\(^{10}\) Id. at 79, 478 N.E.2d at 931–32.
conflict, the Court concluded that there was "no reason to apply the exceptional doctrine of implied repeal." The Court also noted that other jurisdictions which, like Massachusetts, had enacted the Uniform Contribution Among Joint Tortfeasors Act, were "unwilling to presume solely on the basis of the subsequent adoption of comparative negligence, an intention to repeal the Uniform Act's pro rata method of allocating liability." The Court was not unmindful of the possible unfairness of a pro rata apportionment in the event of tortfeasors of unequal fault, yet concluded the matter was beyond its control.

We are sympathetic to the proposition that where joint tortfeasors bear different degrees of responsibility for a plaintiff's injuries, it is more equitable to apportion their liability on the basis of comparative fault. However, it is the Legislature's prerogative to make such a change in our law, not ours. We therefore agree with the judge below that General Laws chapter 231B, section 2, bars any consideration of the relative fault of a codefendant in assessing his or her pro rate share of the damages.

Cantu predicated his equity argument upon the specific language of section 2(c) of the contribution statute which provides that "principles of equity applicable to contribution generally shall apply." Although based upon the language of the statute, this argument was rejected easily. The Legislature was unequivocal in stating in section 2(a) that "relative degrees of fault shall not be considered" and there is nothing in section 2(c), the Court reasoned, which "qualifies this directive by giving courts the discretion to consider fault if equity so requires." The Court relied upon the stated intent of the Commissioners on uniform state laws in determining the limited scope of section 2(c): "According to its drafters, the purpose of § 2(c) was to make clear 'that except as limited by the section, principles of equity shall control. The common situation with which the courts would be concerned here is that involving insolvency of a potential contributor.'" This view has wide acceptance. As the Court further noted, "Cantu [could] not point to any court which has solely relied on the language in § 2(c) to introduce comparative fault principles into the contribution system despite § 2(a)'s clear prohibition of such considerations."

Lastly, the Court rejected Cantu's due process and equal protection

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11 Id. at 79–80, 478 N.E.2d at 931–32.
12 Id. (citing Arctic Structures, Inc. v. Wedmore, 605 P.2d 426, 430-33 (Alaska 1979); Lincenberg v. Issen, 318 So.2d 386, 393 (Fla. 1975); Liberty Mut. Ins. Co. v. General Motors Corp., 65 Hawaii 428, 653 P.2d 96 (1982)).
13 Id. at 81, 478 N.E.2d at 933.
14 G.L. c. 231B, § 2(c).
15 Zeller, 395 Mass. at 82, 478 N.E.2d at 933.
16 Id. (quoting Commissioner's Comment, Uniform Contribution Among Tortfeasors Act, 12 U.L.A. 87 (1975) (emphasis supplied by the Court).
17 Id. at 83, 478 N.E.2d at 934.
arguments. Assuming without deciding that Cantu had a valid due process claim,\(^\text{18}\) the Court found that Cantu had not met his "'burden of proving the absence of any conceivable grounds which would support the statute.'"\(^\text{19}\) The uniform act was intended to and did distribute the burden of liability fairly. Although apportioning damages on the basis of relative fault may be "'a more equitable method,'" the Court stated, this alone "does not render G.L. c. 231B unconstitutional."\(^\text{20}\) The Court dismissed Cantu’s equal protection claim that no rational basis existed for a system that determined negligence by comparative fault while apportioning contribution on a pro rata basis because it "overlook[ed] the fundamental difference between the negligence of a plaintiff—who has contributed to his own harm—and the negligence of defendants who have caused injury to another."\(^\text{21}\) The fundamental difference between the two situations, the Court stated, provides a rational basis for measuring the fault of a plaintiff by a standard that was different from that used to apportion damages among codefendants.\(^\text{22}\)

Although the Court affirmed the judgment ordering Cantu to pay a pro rata contribution to ASRC, it recognized throughout its opinion that "strong policy considerations favor apportionment on the basis of comparative fault. . . ."\(^\text{23}\) These were not arguments that the Court could entertain, however, but were instead considerations properly addressed to the General Court.

\section*{§ 10.20. Damages—Indemnification.} In \textit{Rathbun v. Western Massachusetts Electric Co.},\(^{\text{1}}\) the plaintiffs were injured upon a city landfill when the body of a truck they were unloading came into contact with a high voltage electric transmission line of the defendant, Western Massachusetts Electric Company (WMEC). Tort actions were brought against both WMEC and the city of Pittsfield which had given WMEC an easement for its electrical line over the city’s landfill site.\(^{\text{2}}\) The actions were settled with both defendants contributing equally to the settlement.\(^{\text{3}}\) After settlement, trial continued on the third party claims of the city and WMEC

\begin{footnotes}
\item \textit{Id.} at 84 n.7, 478 N.E.2d at 934 n.7 ("[I]t is questionable whether a tortfeasor has a constitutional right to any form of contribution, let alone contribution determined by his relative fault.").
\item \textit{Id.} (quoting Commonwealth v. Franklin Fruit Co., 388 Mass. 228, 235, 446 N.E.2d 63, 69 (1983)).
\item \textit{Id.} at 84, 478 N.E.2d at 935.
\item \textit{Id.} at 85, 478 N.E.2d at 935.
\item \textit{Id.}
\item \textit{Id.}
\item § 10.20. \textit{Id.}
\item \textit{Id.} at 362, 479 N.E.2d at 1384.
\item \textit{Id.}
\end{footnotes}
against each other for indemnification. The trial court found both defendants equally negligent, apparently because they each permitted the unloading activity without taking steps to protect or warn users of the landfill site of the hazard of the electric wires.\textsuperscript{4} The city accepted this judgment, but WMEC appealed.

On appeal WMEC sought indemnification on three theories. First, WMEC claimed it was entitled to indemnification because it was not negligent. Second, even if it were negligent, WMEC claimed it was entitled to indemnity under an implied obligation arising under the easement deed given by the city. Finally, WMEC argued that its negligence, if any, did not preclude it from obtaining indemnity under the common law because the city was actively negligent but WMEC was not. Specifically, WMEC claimed it was in the position of a landowner and therefore was only constructively negligent.\textsuperscript{5}

Rejecting the first contention, the Supreme Judicial Court held that WMEC was properly found negligent. WMEC had control over the land in crucial respects.\textsuperscript{6} It had exclusive control over its transmission line and retained the right to protect it. Moreover, because WMEC did not have exclusive control over the land, it was bound to anticipate that the land would be used by others. In view of its “high duty of care” as a “transmitt[er] of electricity,”\textsuperscript{7} the Court stated the finding that WMEC was negligent was not clearly erroneous. Accordingly, WMEC was subject to the general rule that “a person who negligently causes injury to a third person is not entitled to indemnification from another person who also negligently causes that injury.”\textsuperscript{8} Moreover, as a negligent tortfeasor WMEC was subject to an indemnity claim under G.L. c. 231B.\textsuperscript{9}

\textsuperscript{4} Id.
\textsuperscript{5} Id. WMEC Brief for Appellant at 27 (citing Stewart v. Roy Bros. Inc., 358 Mass. 446, 458, 265 N.E.2d 357, 367 (1970); Afeniko v. Harvard Club of Boston, 365 Mass. 320, 336 n.7, 312 N.E.2d 196, 208 n.7 (1974)).
\textsuperscript{6} The Court reserved the question of the significance that would have attached if the city had retained exclusive control over the premises. Rathbun, 395 Mass. at 363 n. 2, 479 N.E.2d at 1384 n.2.
\textsuperscript{7} Rathbun, 395 Mass. at 363, 479 N.E.2d at 1384 (citing Gelinas v. New England Power Co., 359 Mass. 119, 124, 268 N.E.2d 336, 340 (1971)). In an action against an electric power company, the Gelinas Court recognized that the duty of “[c]are and diligence” varied in amount and degree according to the particular circumstances. Because “electricity is a highly dangerous force, those employing it are properly held to a correspondingly high degree of care in its use.” Gelinas, 359 Mass. at 124, 268 N.E.2d at 340 (quoting Edgarton v. H. P. Welch Co., 321 Mass. 603, 610, 74 N.E.2d 674, 678 (1947)).
\textsuperscript{8} Rathbun, 395 Mass. at 364, 479 N.E.2d at 1385.
\textsuperscript{9} G.L. c. 231B, § 1(a) provides that “[e]xcept as otherwise provided in this chapter, where two or more persons become jointly liable in tort for the same injury to person or property, there shall be a right of contribution among them even though judgment has not been recovered against all or any of them.”

http://lawdigitalcommons.bc.edu/asml/vol1985/iss1/14
WMEC's claim that an agreement by the city to indemnify it should be implied from the city's deed of easement similarly was rejected with ease. The Court held that the ambiguous language in the deed was inadequate to create an implied obligation. "The general rule," the Court stated, "is that there must be express language creating an obligation to indemnify one against his own negligence." 10

The Court similarly was unimpressed with WMEC's argument that it was entitled to indemnity under common law principles because of the relationship of its negligence to that of the city's. WMEC claimed that it had "specifically [sic] delegated to the city its duty" "to maintain adequate clearance underneath the wires" 11 and that the city had negligently allowed the land to be filled in under the electric line without informing WMEC. Consequently, WMEC argued, the city was directly negligent in creating the dangerous condition while WMEC was only constructively negligent because it "rel[ied] upon the delegation to another of [the] performance of a duty of due care." 12 Some authority did exist suggesting that a negligent party such as WMEC should be entitled to indemnity because "he nevertheless acted in good faith . . . and has relied upon [a joint tortfeasor] to perform his active legal duty of due care." 13

In rejecting this contention, the Court first noted that indemnity has been allowed to one who was not free from fault only in exceptional cases. 14 These few instances have occurred "where the person seeking indemnification did not join in the negligent act of another but was exposed to liability because of that negligent act." 15 Accordingly, it has sometimes been said that such indemnitees "have been only 'constructively' rather than 'actually' negligent or . . . have been 'derivatively' or 'vicariously' liable rather than 'directly' liable." 16 While the Court was unwilling to confine indemnity recovery by negligent persons to these specific instances, it stated that no instructive general rule could be formulated. Nevertheless, the Court highlighted the fact that "the indemnitee's negligence has been insignificant in relation to that of the indemnitor" in instances where such indemnification has been allowed. 17 The Court did not explain what it meant by "insignificant" but, as noted

10 Id. at 365, 479 N.E.2d at 1384.
11 WMEC Brief for Appellant at 17–20, 34.
12 Id. at 37 (citing and discussing Lowell v. Boston & Lowell R.R. Corp., 23 Pick. (40 Mass.) 24 (1839); Milford v. Holbrook, 9 Allen (91 Mass.) 17, 23 (1864)).
14 Rathbun, 395 Mass. at 365, 479 N.E.2d at 1385.
15 Id.
16 Id. The Court properly observed that these distinctions may serve to state the result, "but hardly assist in reaching that result." Id.
17 Rathbun, 395 Mass. at 365, 479 N.E.2d at 1385.
above, it was clear that WMEC's negligence here was not insignificant because of "the special level of care of a company transmitting electricity."18

Although Rathbun involved tortfeasors who were found to be equally negligent, the Court, nevertheless, suggested in a footnote that the Legislature amend the contribution act to reflect the relative degrees of fault among joint tortfeasors.19 Such legislative action would not have affected this case, but it could offer "[f]uture relief" to a "tort defendant not entitled to indemnity but less negligent than another defendant . . . ."20 The Court, however, was not able to offer any such relief on a decisional law basis:

An adjustment of common law indemnity principles to place all the loss on the more negligent of two tortfeasors would not be an improvement, and for us to lay down a common law rule of indemnification based on relative fault . . . would seem to intrude on the apportionment rule of the contribution statute.21

18 Id.
19 Id.
20 Id.
21 Id. (citing Zeller v. Cantu, 395 Mass. 76, 82–83, 478 N.E.2d 930, 936 (1985)).