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TORT LAW—GOVERNMENT LIABILITY—STRICT LIABILITY UNDER THE MASSACHUSETTS TORT CLAIMS ACT—Mass. Gen. Laws Ann. ch. 258 (West Cum. Supp. 1981).

I. INTRODUCTION

Prior to the July 20, 1978 enactment of the Massachusetts Tort Claims Act¹ (MTCA), Massachusetts was one of five jurisdictions retaining a strict doctrine of government immunity.² The MTCA, similar in some respects to the Federal Tort Claims Act³ (FTCA), abolished the common-law doctrine of government immunity.⁴ Although the government clearly is liable in negligence under the MTCA,⁵ whether strict liability may be applied to government activity is still open for discussion.

This note will examine both the propriety of applying strict liability to government activity in Massachusetts and the sources of authority for doing so. These issues will be clarified by a preliminary discussion of two topics: The history of government immunity from its common-law roots to its legislative abolition and the common-law doctrine of strict liability.

1. MASS. GEN. LAWS ANN. ch. 258 (West Cum. Supp. 1981). The Massachusetts Tort Claims Act [hereinafter referred to as MTCA] was an amendment to the General Laws, replacing the earlier version of chapter 258.

§ 1. Definitions . . .

“Public employer”, the commonwealth and any county, city, town or district, and any department, office, commission, committee, council, board, division, bureau, institution or agency thereof [which] exercises direction and control over the public employee, but not a private contractor with any such public employer, the Massachusetts Bay Transportation Authority, the Massachusetts Port Authority, the Massachusetts Turnpike Authority, or any other independent body politic and corporate.

§ 2. Liability; . . .

Public employers shall be liable for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any public employee while acting within the scope of his office or employment, in the same manner and to the same extent as a private individual under like circumstances, . . . and shall not be liable for . . . any amount in excess of one hundred thousand dollars. . . .

2. Note, *Governmental Tort Immunity in Massachusetts: The Present Need for Change and Prospects for the Future*, 10 SUFFOLK L. REV. 521, 524 (1976). The other four jurisdictions were Delaware, Maryland, South Carolina, and Virginia. *Id.*

3. 28 U.S.C. §§ 1346(b), 2671-2680 (1976).

4. Note, *Sovereign Immunity in Massachusetts*, 13 NEW ENG. L. REV. 877, 877 (1978).

5. MASS. GEN. LAWS ANN. ch. 258, § 2 (West Cum. Supp. 1980).

II. HISTORY OF GOVERNMENT IMMUNITY

A. *Massachusetts Law Prior to the MTCA*

Prior to the MTCA's enactment, government immunity in Massachusetts had two components: Sovereign immunity and municipal immunity.⁶ The United States Supreme Court first recognized sovereign immunity in dicta in the 1821 case of *Cohens v. Virginia*.⁷ The doctrine was widely accepted because it furthered two public policies. The first of these policies was to free government administration from the hindrance of liability for acts perceived by the public as tortious.⁸ Second, sovereign immunity guaranteed that public funds raised through taxation were used to benefit the general public and not to compensate individuals who suffered tortious injury as a result of government activity.⁹ Underlying these policies was the belief that, even if such compensation were appropriate, the expense to the government would be crippling.¹⁰ Massachusetts' common-law sovereign immunity rule, reiterated most recently in *Morash & Sons, Inc. v. Commonwealth*¹¹ in 1973, stated that the state is immune from tort liability unless it consents to be sued by either statute or supreme judicial court decree.¹²

The second kind of government immunity recognized in the Commonwealth, municipal immunity, originated in *Mower v. Inhabitants of Leicester*.¹³ The municipal corporation in *Mower* was found immune from common-law tort liability for neglect of a duty owed to the general public that caused injury to an individual.¹⁴ From its origin in *Mower*, municipal immunity in Massachusetts developed two facets.¹⁵ First, when the municipality assumed a function of the state for the benefit of the general public, the municipality also "borrowed" the state's sovereign immunity.¹⁶ The

6. Note, *supra* note 2, at 522.

7. 19 U.S. (6 Wheat.) 264, 369 (1821).

8. Note, *supra* note 2, at 532.

9. *Id.*

10. *Id.*

11. 363 Mass. 612, 296 N.E.2d 461 (1973).

12. *Id.* at 615, 296 N.E.2d at 463. The earlier version of MASS. GEN. LAWS ANN. ch. 258 (West 1959) provided that certain miscellaneous and relatively minor claims could be satisfied only with the government's consent.

13. 9 Mass. 247 (1812).

14. *Id.* at 249.

15. *Cambridge v. Commissioner*, 357 Mass. 183, 186, 257 N.E.2d 782, 785 (1970).

16. *Hill v. Boston*, 122 Mass. 344, 380 (1877).

second facet of municipal immunity developed from a principle expressed in *Bolster v. City of Lawrence*:¹⁷ if a municipal act is for the common good and the municipality gains no special corporate advantage or profit from it, the municipality is immune from liability regardless of its assumption of a state function.¹⁸ The historical discussion of municipal immunity¹⁹ in *Whitney v. City of Worcester*²⁰ presented the ultimate common-law rule on the subject: a municipality is immune from liability for injuries resulting from the tortious acts of its officers or employees when they are performing public functions, whether the functions are required or permitted by the legislature, and when no particular corporate advantage, pecuniary profit, or enforced contribution from particularly benefitted individuals results.²¹

Whitney incorporated one theme set forth previously in *Morash & Sons, Inc. v. Commonwealth*:²² Abolition of the immunity defense. In 1973 *Morash* forecasted the end of government immunity though the supreme judicial court refrained from abolishing the defense at that time. The court stated that, although it had the power to abrogate government immunity, abolition was a task better suited to the legislature.²³ In the four years following this hint to the legislature, however, the court declined three opportunities to abrogate government immunity.²⁴ During this period

17. 225 Mass. 387, 114 N.E. 722 (1917).

18. *Id.* at 390, 114 N.E. at 724.

19. *Whitney v. City of Worcester*, 373 Mass. 208, 213-14, 366 N.E.2d 1210, 1213-14 (1977).

20. 373 Mass. 208, 366 N.E.2d 1210 (1977).

21. *Id.* at 214-15, 366 N.E.2d at 1214-15. The exceptions to municipal immunity created by the statutes and case law lessened the harshness of municipal immunity, which had left tortiously injured plaintiffs totally without a remedy. An action for relief from unwarranted exclusion of a child from public school was created by statute. MASS. GEN. LAWS ANN. ch. 76, § 16 (West 1969). The statutes created an action for damages for personal injury and property loss resulting from road defects. *Id.* ch. 84, § 15. Similarly, an action for damages for loss of life resulting from road defects was created by statute. *Id.* ch. 229, § 1. The statute also provided an action allowing recovery for property damage resulting from riot. *Id.* ch. 269, § 8 (repealed 1962). In *Kurtigian v. City of Worcester*, 348 Mass. 284, 203 N.E.2d 692 (1965), plaintiff, who was hit by a tree limb from a negligently maintained tree on city property, was allowed to recover on a theory of private nuisance despite the city's immunity from negligence actions. In *Miles v. City of Worcester*, 154 Mass. 511, 28 N.E. 676 (1891), an encroaching city wall was held to constitute a nuisance for which the city was found strictly liable despite immunity from an action in trespass.

22. 363 Mass. 612, 296 N.E.2d 461 (1973).

23. *Id.* at 624, 296 N.E.2d at 468.

24. In *Hannigan v. New Gamma-Delta Chapter of Kappa Sigma Fraternity, Inc.*, 367 Mass. 658, 327 N.E.2d 882 (1975), plaintiff pleaded, in part, that her fall

the legislature unsuccessfully attempted to pass several abolition bills.²⁵

In *Whitney*, decided in 1977,²⁶ the court took two major steps toward the abolition of government immunity. The court announced that government immunity would be abrogated judicially if the legislature did not make a pronouncement in the area by the end of the next legislative session.²⁷ *Whitney* also intimated that judicial abrogation might be retroactive to *Morash*.²⁸ According to one commentator, the legislature feared that retroactive abrogation of government immunity would have an adverse effect on the voters and taxpayers.²⁹ The dicta in *Whitney*, threatening retroactive abrogation, thus provided impetus for legislative action.³⁰

The *Whitney* court took a second major step toward the abolition of government immunity by proposing a scheme of government liability.³¹ Under *Whitney* judicial inquiry would shift from the nature of the government enterprise as a whole to the specific act or omission complained of as tortious.³² *Whitney* discarded government immunity but also suggested the limits of liability.³³ *Whitney* chose to immunize those government activities that traditionally had fallen within the discretionary function excep-

and injury on a state college campus were due to the negligence of the Commonwealth. The court stated that it would continue to refrain from abolishing government immunity until the legislature either acted or demonstrated an intent not to act. *Id.* at 662, 327 N.E.2d at 885. In *Caine v. Commonwealth*, 368 Mass. 815, 335 N.E.2d 340 (1975), plaintiff, who sought damages in a wrongful death action, claimed that the death of her intestate was caused by the state's negligence in failing to remove an unnatural accumulation of ice from a highway. The court again refused to abolish government immunity, noting that the legislature had not yet demonstrated an intent of inaction. *Id.* at 816, 335 N.E.2d at 341. *Accord*, *Piotti v. Commonwealth*, 370 Mass. 386, 348 N.E.2d 425 (1976), in which Plaintiff appealed from a judgment awarding her maximum compensation under the Crime Victim's Compensation Act, MASS. GEN. LAWS ANN. ch. 258A (West Cum. Supp. 1981) and sought additional damages. Plaintiff alleged that the state's negligence in allowing two juveniles to escape from custody caused the death of the decedent. The court refused to override the legislature's statutory limitation of the Commonwealth's liability, which was essentially a partial immunity. 370 Mass. at 388, 348 N.E.2d at 427.

25. Note, *supra* note 4, at 877.

26. 373 Mass. at 208, 366 N.E.2d at 1210.

27. *Id.* at 210, 366 N.E.2d at 1212.

28. *Id.*

29. Johnedis, *The Supreme Judicial Court and Tort Immunity*, 63 MASS. L. REV. 75, 81 (1978).

30. *Id.*

31. 373 Mass. at 216, 366 N.E.2d at 1215.

32. *Id.* at 218, 366 N.E.2d at 1216.

33. *Id.* at 216, 366 N.E.2d at 1215.

tion.³⁴ Thus, immunity was established for acts involving discretion and judgment and the weighing of policy alternatives.³⁵ The *Whitney* court proposed seven factors that could be used to determine whether liability should attach: Categorization of the tortious conduct as government planning or policymaking; endangerment of efficient government process by imposition of tort liability; usurpation of executive or legislative power through judicial review of the conduct; availability of an alternative remedy other than an action for damages; reasonable expectations of the injured person with respect to the responsible government entity; the nature of the duty running between the government and the individual; and the nature of the injury.³⁶ The court concluded that, in cases where these seven factors are not determinative, government liability should be the general rule.³⁷ *Whitney*, in holding that government liability was the general rule, set the stage for the enactment of the MTCA.

B. *The MTCA*

As a result of the judiciary's prodding in *Whitney* the legislature enacted the MTCA on July 20, 1978.³⁸ The MTCA holds public employers liable for the negligent or wrongful acts or omissions of their employees in the same manner as a private individual under similar circumstances.³⁹ The MTCA defined the term "public employer" broadly to include the numerous government entities in the Commonwealth.⁴⁰

A primary rule of statutory interpretation is that strong consideration should be given to legislative intent⁴¹ as manifested in a specific statement of purpose or as implied from legislative history.⁴² The objective is to interpret a statute in accordance with the stated or implied intent of the enacting body.⁴³

Though the legislative history of the MTCA is virtually nonex-

34. *Id.* at 217, 366 N.E.2d at 1216.

35. *Id.* at 218-19, 366 N.E.2d at 1216.

36. *Id.* at 219, 366 N.E.2d at 1217.

37. *Id.*

38. See text accompanying notes 27-30 *supra*. See note 1 *supra* for text of §§ 1 & 2 of the MTCA; notes 104-05 *infra* for §§ 4 & 5; note 117 *infra* for § 10; and note 109 *infra* for § 11.

39. MASS. GEN. LAWS ANN. ch. 258, § 2 (West Cum. Supp. 1981).

40. *Id.* § 1.

41. *United States v. Rosenblum Truck Lines, Inc.*, 315 U.S. 50, 53 (1942).

42. *United States v. Cooper Corp.*, 312 U.S. 600, 605 (1941).

43. *United States v. Rosenblum Truck Lines, Inc.*, 315 U.S. 50, 53-54 (1942).

istent,⁴⁴ the legislature's intent may be drawn from specific statements of purpose. Very brief statements of purpose are found in two places. The sponsors of the original bill stated that their purpose was "to abolish government immunity."⁴⁵ The session laws⁴⁶ delineate the scope of construction: "[t]he provisions of this act shall be construed liberally for the accomplishment of the purposes thereof. . . ."⁴⁷ These brief statements of legislative intent suggest that the legislature wanted the MTCA to be construed liberally to abolish government immunity. When the MTCA is construed liberally, strict liability becomes applicable to government activity. Because section 2 of the MTCA states in part that the government is "liable . . . in the same manner . . . as a private individual,"⁴⁸ strict liability as applied to individuals must be examined to clarify the issues underlying strict liability's application to the government.

III. DOCTRINE OF STRICT LIABILITY

Strict liability has been defined as liability without fault.⁴⁹ The concept of fault, violation of a standard of due care, became the most important component of liability in Anglo-American law during the industrial revolution of the eighteenth and nineteenth centuries.⁵⁰ In 1868, however, a gradual erosion of the fault concept began.⁵¹ In *Rylands v. Fletcher*⁵² the House of Lords held that those who use their land in unusual and extraordinary ways should provide some protection to their neighbors for losses that might occur. A common theme recurred as the fault doctrine was eroded and the doctrine of strict liability arose: liability began to be as-

44. Note, *supra* note 4, at 879. The bill originated in the House as H.R. 1394 on January 4, 1978. A survey of numerous sources, including the bill's sponsors, the Legislative Research Bureau in Boston, and the Committee on the Judiciary, unearthed no historical material which gives a definitive statement of legislative intent.

45. JOURNAL OF THE HOUSE OF REPRESENTATIVES H.R. 1394, 2330 (1978).

46. "Session laws" is the name given to the body of laws enacted by a state legislature at one of its annual or biennial sessions. The term session laws is used to distinguish the body of laws from the compiled or revised statutes of the state. BLACK'S LAW DICTIONARY 1230 (5th ed. 1979).

47. 1978 MASS. ACTS ch. 512, § 18.

48. MASS. GEN. LAWS ANN. ch. 258, § 2 (West Cum. Supp. 1981).

49. BLACK'S LAW DICTIONARY 1591 (4th ed. 1968).

50. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 75, 492 (4th ed. 1971).

51. *Id.* at 494 n.25 (referring to *Rylands v. Fletcher*, L.R. 3 E. & I. App. 330 (1868)).

52. L.R. 3 E. & I. App. 330 (1868).

signed not so much on the basis of fault but on the basis of who could best bear the risk.⁵³

In general tort law, strict liability may be applied to six types of individual activity. When a nuisance arises and it creates an abnormally dangerous situation, strict liability is triggered.⁵⁴ Abnormally dangerous trespassory activity similarly invokes the application of strict liability.⁵⁵ Strict liability is also available to compensate injured individuals in the areas of abnormally dangerous activity,⁵⁶ products liability,⁵⁷ workmen's compensation,⁵⁸ and dangerous animals.⁵⁹

Of the six major areas of individual strict liability, only two are relevant to the discussion in this note: nuisance and abnormally dangerous activity. The supreme judicial court has rejected strict liability in trespass⁶⁰ and products liability.⁶¹ Workmen's compensation is governed by a statutory provision that is distinct from the MTCA.⁶² Dangerous animals do not represent a significant problem within the Commonwealth.⁶³

53. W. PROSSER, *supra* note 50, § 75, at 495.

54. *Id.* § 87, at 575-76; RESTATEMENT (SECOND) OF TORTS § 822, Comment a (1965).

55. W. PROSSER, *supra* note 50, § 13 at 63-64.

56. RESTATEMENT (SECOND) OF TORTS, *supra* note 45, at §§ 519-520.

57. *Id.* § 402A.

58. W. PROSSER, *supra* note 50, § 80, at 525.

59. *Id.* § 76, at 496.

60. No litigation concerning the application of strict liability in trespass has been reported in Massachusetts. Moreover, application of this type of strict liability has been tacitly foreclosed by *Miles v. City of Worcester*, 154 Mass. 511, 28 N.E. 676 (1891), discussed at note 21 *supra*.

61. *Swartz v. General Motors Corp.*, 375 Mass. 628, 629, 378 N.E.2d 61, 62 (1978). The legislature's adoption of the most liberal warranty alternative in the Massachusetts version of the Uniform Commercial Code, MASS. GEN. LAWS ANN. ch. 106, § 2-318 (West Cum. Supp. 1981), is evidence that the legislature adopted the spirit of § 402A. *Back v. Wickes Corp.*, 375 Mass. 633, 639, 378 N.E.2d 964, 968 (1978). The Uniform Commercial Code section holds the manufacturer, seller, lessor, or supplier liable for breach of express or implied warranty, regardless of privity with the plaintiff, if the injured party was one whom the defendant could reasonably have expected to use, consume, or be affected by the goods. MASS. GEN. LAWS ANN. ch. 106, § 2-318 (West Cum. Supp., 1981). The *Swartz* court found an endorsement of § 402A unnecessary: strict liability for injury caused by defective products in Massachusetts will be applied only through breach of warranty. 375 Mass. at 629, 378 N.E.2d at 62.

62. MASS. GEN. LAWS ANN. ch. 152 (West Cum. Supp. 1981).

63. Dangerous animals would most likely be found in a zoo or wildlife preserve. The number of private or government owned or operated enterprises of this type within the Commonwealth is quite small. The most recently reported case in

The court, however, has applied strict liability to nuisance⁶⁴ and abnormally dangerous activity.⁶⁵ Nuisance that creates an abnormally dangerous situation may be considered under the general classification of abnormally dangerous activity.⁶⁶ The difference between an abnormally dangerous nuisance and an abnormally dangerous activity per se lies not in any concept of liability but in remedy. Nuisances may be remedied in three ways: The court may award the plaintiff damages for deprivation of the use and enjoyment of his land; the court may enjoin the nuisance; or the plaintiff may undertake the self-help remedy of abatement.⁶⁷ Abnormally dangerous activity, however, is remedied only through damages.⁶⁸ On the other hand, liability is identical for abnormally dangerous nuisances and abnormally dangerous activities per se. The focus of this note is on liability; therefore, abnormally dangerous nuisance activity will be considered subsumed into abnormally dangerous activity.

Individuals engaged in abnormally dangerous activity are held strictly liable for damage and injury because society has made a judgment that the social utility of the activity is outweighed by the risk of harm it poses.⁶⁹ The rationale behind strict liability is that the price to be paid for engaging in abnormally dangerous activity is liability without fault.⁷⁰

the Commonwealth involving strict liability and dangerous animals arose in 1960 when a zebra escaped from the Eastern States Exposition. *Smith v. Jalbert*, 351 Mass. 432, 435-36, 221 N.E.2d 744, 746 (1966).

64. For a discussion of nuisance in *Kurtigian and Miles*, see note 24 *supra*. The court has specifically applied strict liability in nuisance to government activity. *Morash & Sons, Inc. v. Commonwealth*, 363 Mass. at 614, 296 N.E.2d at 463. The maintenance of large, uncontained supplies of road salt within a populated area in *Morash* qualified as "conduct which is abnormal and out of place in its surroundings," W. PROSSER, *supra* note 50, § 87, at 574, and thus constituted strict liability in nuisance.

65. The *Rylands* doctrine was accepted by the court in *Ball v. Nye*, 99 Mass. 582 (1868), cited in *Clarke-Aiken Co. v. Cromwell-Wright Co., Inc.*, 367 Mass. 70, 76, 323 N.E.2d 876, 879 (1975). In *Clarke-Aiken*, the court accepted the position of the RESTATEMENT (SECOND) OF TORTS, *supra* note 54, at §§ 519-520 concerning strict liability and abnormally dangerous activity. *Id.* at 89-91, 323 N.E.2d at 886-87.

66. See note 54 *supra*.

67. W. PROSSER, *supra* note 50, §§ 90 at 602-06.

68. RESTATEMENT (SECOND) OF TORTS, *supra* note 54, at § 519, Comment d.

69. W. PROSSER, *supra* note 50, § 75, at 494-95. Social utility is measured by the benefits which the actor and the community derive from the activity. *Id.* at 495.

70. Comment, *Absolute Liability Under the Federal Tort Claims Act*, 60 MIL. L. REV. 53, 55 (1973).

IV. STRICT LIABILITY AND GOVERNMENT ACTIVITY

Statutory approaches to government liability vary among the jurisdictions and form a continuum.⁷¹ At one end of this continuum is New York, which considers government liability the norm and immunity the exception.⁷² California appears at the opposite end of the spectrum with government immunity as the norm and specific liabilities the exception.⁷³ Several jurisdictions along the continuum create a private strict liability cause of action for abnormally dangerous activity and apply such liability to government activity. New York,⁷⁴ Oregon,⁷⁵ and Washington⁷⁶ all accept strict liability

71. Note, *supra* note 2, at 543.

72. *Id.*

73. *Id.*

74. New York recently endorsed a strict liability cause of action against the government in *Doundoulakis v. Town of Hempstead*, 42 N.Y.2d 440, 448, 368 N.E.2d 24, 27, 398 N.Y.S.2d 401, 404 (1977). Strict liability is limited, however, by the requirement that the defendant's activity be shown to be the proximate cause of the plaintiff's injuries. *Id.* at 453, 368 N.E.2d at 30, 398 N.Y.S.2d at 407.

75. Oregon, while not specifically endorsing the application of strict liability to government activity, has applied the concept to individual activity which is ultrahazardous. *McLane v. Northwest Natural Gas Co.*, 255 Or. 324, 327, 467 P.2d 635, 637 (1970). The Oregon Supreme Court, however, tacitly recognized strict liability actions against the government in its exceptionally broad construction of the Oregon Tort Claims Act. See OR. REV. STAT. §§ 30.260-300 (1973), *contrued in Dowers Farms, Inc. v. Lake County*, 288 Or. 669, 607 P.2d 1361 (1980).

The court in *Dowers Farms* stated:

[T]he Tort Claims Act was intended to be remedial legislation, allowing all citizens to seek *redress for any tort committed by their governments, except for specific immunities listed in the statutes*. . . . A narrow statutory construction of the provisions of the Tort Claims Act would be contrary to its general remedial purposes.

288 Or. at —, 607 P.2d at 1367 (emphasis added). Nowhere in the Oregon statute is the government immunized against strict liability for ultrahazardous activity.

76. A Washington Supreme Court decision, *Edgar v. State*, 92 Wash. 2d 217, 222-23, 595 P.2d 534, 539, *cert. denied*, 444 U.S. 1077 (1979), used the same rationale as the Oregon decision, holding that the State of Washington, under its statutes, is liable for damages arising from any tortious activity if the plaintiff can show that a private cause of action exists for the factual situation at hand. The Washington Supreme Court has indicated several times that a private cause of action exists in strict liability for ultrahazardous activity. The most recent of these decisions is *Langan v. Valicopters, Inc.*, 88 Wash. 2d 855, 860-61, 567 P.2d 218, 221 (1977). In an earlier case, *Pacific N.W. Bell Tel. Co. v. Port of Seattle*, 80 Wash. 2d 59, 64, 491 P.2d 1037, 1040 (1971), the court was on the verge of applying strict liability to government activity but declined to do so because the activity in that case was not deemed ultrahazardous. It is interesting to note that the court felt that the plaintiff's case was a meritorious one and granted relief on a theory of *res ipsa loquitur*. *Id.* at 67, 491 P.2d at 1041. See also notes 82-90 *infra* and accompanying text.

to some degree within their tort claims acts. In California, where one would expect the immunity norm to rule out strict liability, the courts and legislature have applied the doctrine in practice without specifically endorsing it.⁷⁷ The federal government⁷⁸ and Iowa,⁷⁹ however, have excluded strict liability from their tort claims acts.

Professor Marc Franklin, a prominent torts scholar, has written that California and New York tort decisions are influential and rarely atypical.⁸⁰ Further, decisions from those two states usually become models for other states to follow.⁸¹ A trend may be developing since abnormally dangerous government activity has been subjected to strict liability to some degree in four of the six jurisdictions where the issue has been litigated and since New York and California are among those four states. Whether Massachusetts will interpret its tort claims act to encompass strict liability for government's abnormally dangerous activities will be considered below in two stages: The first addresses the general policies that might justify strict liability; the second delves into the sources authorizing Massachusetts courts to apply strict liability to government activity.

V. JUSTIFICATION FOR APPLYING STRICT LIABILITY TO GOVERNMENT ABNORMALLY DANGEROUS ACTIVITY

A. *Argument for Strict Liability*

Holding the government strictly liable for its abnormally dangerous activities eliminates four major problems associated with

77. California accepted the application of strict liability to private ultra-hazardous activity under RESTATEMENT (SECOND) OF TORTS, *supra* note 54, § 519 in *Orser v. George*, 252 Cal. App. 2d 660, 672-73, 60 Cal. Rptr. 708, 717 (1967). The California Tort Claims Act, CAL. GOV'T CODE §§ 810-996 (West 1980), has been interpreted to allow recovery in nuisance cases involving aircraft noise. The court in *Nestle v. City of Santa Monica*, 6 Cal. 3d 920, 937, 496 P.2d 480, 491, 101 Cal. Rptr. 568, 579 (1972), held that the government was liable, under the Tort Claims Act, CAL. GOV'T CODE § 815 (West 1980), for aircraft noise since it was a nuisance under CAL. GOV'T CODE § 3479 (West 1980).

78. *Laird v. Nelms*, 406 U.S. 797, 802-03, *rehearing denied*, 409 U.S. 902 (1972).

79. *Lewis v. State*, 256 N.W.2d 181, 192 (Iowa 1977).

80. M. FRANKLIN, CASES AND MATERIALS ON TORT LAW AND ALTERNATIVES xix (2d ed. 1979).

81. *Id.* A concurring opinion in a California case, *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436 (1944), is considered to be the origin of the doctrine of strict liability for defective products. The decision by the New York Court of Appeals in *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928), is considered to be the leading tort case on proximate cause.

compensating tortiously injured individuals. First, an innocent, tortiously injured individual still has a claim even though a remedy is not available in strict liability. To provide compensation, the judiciary must engage in the inequitable and convoluted process of circumventing strict liability.⁸² The courts, including those in Massachusetts,⁸³ grant relief by straining other doctrines⁸⁴ such as *res ipsa loquitur*,⁸⁵ trespass,⁸⁶ nondelegable duty,⁸⁷ taking of property,⁸⁸ and nuisance.⁸⁹ None of these theories, however, provides total liability coverage for abnormally dangerous activity. As a result, liability for abnormally dangerous activity is determined on a case-by-case basis. Plaintiff's recovery is directly proportionate to his skill in manipulating the facts to conform to one of the causes of action mentioned above.

Rejecting strict liability also subverts a major purpose underlying the abolition of government immunity:⁹⁰ To relieve injured individuals from bearing the costs of the government's torts.⁹¹ Placing this burden on an individual is inconsistent with the values embraced by a democratic society.⁹²

Without a strict liability cause of action, tort issues that should be litigated in the courts are handled by other, less appropriate procedures.⁹³ As a result, relief may be obtained only by submitting private bills for compensation to the legislature.⁹⁴ The legislature has granted damage awards only in the wake of major catastrophes. An example is the 1947 Texas City fertilizer explosions where 300 separate claims totalling two hundred million dol-

82. Comment, *supra* note 70, at 71.

83. See the discussion of *Kurtigian* at note 21 *supra*.

84. Comment, *supra* note 70, at 70-71.

85. Jacoby, *Absolute Liability Under the Federal Tort Claims Act*, 26 FED. B.J. 5, 6 (1966), Comment, *supra* note 70, at 66.

86. Comment, *supra* note 70, at 67. See Reynolds, *Strict Liability Under the Federal Tort Claims Act: Does "Wrongful" Cover a Few Sins, No Sins or Non-Sins?*, 23 AM. U. L. REV. 813, 818-19 (1974).

87. Comment, *supra* note 70, at 69.

88. *Id.* at 70.

89. Reynolds, *supra* note 86, at 818-19.

90. Note, *The Supreme Court and the Tort Claims Act: End of an Enlightened Era?*, 27 CLEV. ST. L. REV. 267, 283 (1978).

91. *Id.*

92. See generally Note, *supra* note 4, at 879 n.12.

93. Note, *Torts—Federal Tort Claims Act—Sonic Boom—Cause of Action Based in Absolute Liability Not Actionable Under the Federal Tort Claims Act*, 48 NOTRE DAME LAW. 727, 732 (1973).

94. *Id.*

lars were filed.⁹⁵ The United States Supreme Court denied recovery, forcing plaintiffs to seek relief in Congress by private bill.⁹⁶ The private bill procedure generally is considered to be inequitable since tort issues may be subordinated to political considerations. The sheer number of private bills, the inadequacy of legislative factfinding tools, and pressure by the bills' proponents⁹⁷ all make the legislature an inappropriate forum for resolution of tort issues. Several tort claims acts have explicitly stated an intent to eliminate the private bill procedure.⁹⁸

Unless a remedy is available in strict liability, therefore, the government may engage in abnormally dangerous activity with impunity. A major tenet of tort law, the regulation of conduct,⁹⁹ is thus emasculated. In 1944 California Supreme Court Justice Roger J. Traynor discussed the policies that led him to apply strict liability when a waitress was injured by an exploding bottle of Coca Cola:¹⁰⁰ public policy dictated that responsibility be fixed where it would reduce hazards to life and health most effectively.¹⁰¹ Although Justice Traynor was speaking in the context of products liability, his reasoning is also pertinent to abnormally dangerous activity. Placing responsibility on the government would deter carelessness in the government's pursuit of abnormally dangerous activities.

B. *Arguments Against Strict Liability*

The major argument against applying strict liability to government activity is the same one that was levelled against the abolition of government immunity: costs are potentially staggering.¹⁰² A

95. *Dalehite v. United States*, 346 U.S. 15, 17 (1953).

96. *Laird v. Nelms*, 406 U.S. 797, 802 (1972). Although relief was granted by private bill, the process was both costly and lengthy. *Id.*

97. *Feres v. United States*, 340 U.S. 135, 140 (1951).

98. *Id.* (expressing the purpose of the FTCA); N.Y. JUD. LAW § 1 (Ct. Cl. Act, Hist. Note) (McKinney 1963).

99. *Escola v. Coca Cola Bottling Co. of Fresno*, 24 Cal. 2d 453, 462, 150 P.2d 436, 440-41 (1944) (Traynor, J., concurring).

100. *Id.* at 456, 150 P.2d at 437.

101. *Id.*

102. Note, *supra* note 2, at 532. In fiscal year 1964, when sovereign immunity was still the law, 580 claims were filed against the Commonwealth under the limited Massachusetts claims settlement procedure. Those claims were settled by the attorney general for slightly more than \$110,000. MASS. LEGISLATIVE RESEARCH COUNCIL, REP. ON SENATE BILL 990, 77 (January 1965). When one considers that the Commonwealth has 14 counties, 39 cities, 312 towns, and numerous boards and

leading commentator in this area considers this argument invalid because the government may use general funds to compensate tort victims and thereby distribute the costs through the tax system.¹⁰³

In Massachusetts compensation is limited by the MTCA. Section 4 of the Act requires that administrative remedies be exhausted before a lawsuit is initiated against the government.¹⁰⁴ Early settlement of claims is encouraged by section 5 of the Act, which removes an external approval requirement for payment of claims under \$2,500 and requires only the approval of the government attorney for payment of claims between \$2,500 and \$20,000. Settlements between \$20,000 and \$100,000 need be approved only by the secretary of administration and finance.¹⁰⁵ The ultimate effect of sections 4 and 5 of the Act is to direct claims from the courts to administrative agencies.¹⁰⁶

committees, the potentially staggering costs of unrestricted abolition of government immunity become apparent. MASSACHUSETTS FACTS, 8 (1976).

103. Reynolds, *supra* note 86, at 833.

104. MASS. GEN. LAWS ANN. ch. 258 (West Cum. Supp. 1981).

§ 4. Prerequisites to Civil Action; . . . Limitation of Action

A civil action shall not be instituted against a public employer on a claim for damages under this chapter unless the claimant shall have first presented his claim in writing to the executive officer of such public employer within two years after the date upon which the cause of action arose, and such claim shall have been finally denied by such executive officer in writing and sent by certified or registered mail, or as otherwise provided by this section. The failure of the executive officer to deny such claim in writing within six months after the date upon which it was presented, or the failure to reach final arbitration, settlement or compromise of such claim according to the provisions of section five, shall be deemed a final denial of such claim. No civil action shall be brought more than three years after the date upon which such cause of action accrued. Disposition of any claim by the executive officer of a public employer shall not be competent evidence of liability or amount of damages.

105. *Id.*

§ 5. Arbitration, Compromise, Settlement, and Release of Claims; . . .

The executive officer of a public employer may arbitrate, compromise or settle any claim for damages under this chapter; provided, that any award, compromise or settlement in excess of two thousand five hundred dollars shall be made only with the prior approval of the public attorney for such public employer; provided further, however, that in any case where the public employer is the commonwealth, any award, compromise or settlement in excess of twenty thousand dollars shall be made only with the prior approval of the secretary of administration and finance. . . .

106. It may seem incongruous to state that legislative settlement of claims is unfair and yet to encourage administrative settlement. The two positions are consistent, however. There is no alternative in the event of an unsatisfactory legislative settlement. Under the MTCA, on the other hand, an unsatisfactory administrative *settlement offer* may be rejected and a judicial remedy pursued. See note 104 *supra*.

The possibility of staggering costs also is reduced by the maximum recovery limit, \$100,000 on each claim, set by the Act.¹⁰⁷ In addition, the sting of damages is softened by section 8 of the MTCA, which authorizes the government to purchase liability insurance.¹⁰⁸

Section 11 of the MTCA promises to have the most chilling effect on frivolous lawsuits.¹⁰⁹ In the event of a judgment against the plaintiff and a determination by the court that the action was frivolous or in bad faith, the court may order judgment against the plaintiff for costs.¹¹⁰

In addition to these legislative limitations, several doctrinal limitations also will prevent staggering costs. The supreme judicial court considers strict liability feasible only if defendant's act or omission is the proximate cause of plaintiff's injuries.¹¹¹ The *Restatement (Second) of Torts (Restatement)* provides the government with two possible defenses: Assumption of risk;¹¹² and, to a very limited extent, contributory negligence.¹¹³ When this note was published, however, neither of these defenses to strict liability had been accepted in Massachusetts.

The staggering costs argument against strict liability, therefore, is unfounded because of the cost-limiting effects of both the MTCA and the limitations imposed by the doctrines of proximate

107. MASS. GEN. LAWS ANN. ch. 258, § 2 (West Cum. Supp. 1981).

108. *Id.* § 8.

109. *Id.*

§ 11. Frivolous claims; costs; subsequent actions

If the judgment in any action brought under this chapter is in favor of the public employer, judgment for costs and execution thereon may issue in favor of the public employer, if the court finds the action brought by the claimant to have been frivolous or in bad faith, and final judgment on the action shall be a bar to any other or further action being brought on the same claim or subject matter.

110. None of the other tort claims acts examined in this article has such a restrictive provision. Although no statistics are yet available on the total amount of claims paid under the MTCA, the chilling effect of §§ 4, 5, and 11 should reduce potential claims costs.

111. *Clarke-Aiken Co. v. Cromwell-Wright Co., Inc.*, 367 Mass. at 90 n.21, 323 N.E.2d at 887 n.21.

112. RESTATEMENT (SECOND) OF TORTS, *supra* note 45, at § 523. The plaintiff must knowingly and voluntarily proceed to encounter the risk by coming within range of it. *Id.* Comment e.

113. *Id.* § 524. In general, plaintiff is not barred from recovery in strict liability by his or her own negligence. *Id.* In the infrequent circumstances when the plaintiff's conduct consists of unreasonable and intentional exposure to a risk of harm from an abnormally dangerous activity, he is barred from recovery. *Id.* Comment b.

cause, assumption of risk, and contributory negligence. Denying a strict liability cause of action is contrary to public policy and forces injured individuals to resort to inappropriate theories of recovery. Strict liability should be applied to the government in Massachusetts since the argument opposing application is not convincing.

VI. AUTHORITY TO APPLY STRICT LIABILITY

Under the MTCA the government is liable for "negligent or wrongful acts or omissions."¹¹⁴ Strict liability for abnormally dangerous activity is not mentioned. Authority, therefore, must be drawn from the intent of the legislature and the language of the Act. Two phrases within the Act seem to incorporate strict liability: The phrase "wrongful act or omission" in section 2; and the phrase "liable . . . in the same manner . . . as a private individual,"¹¹⁵ also found in section 2.

The legislature did not intend to immunize the government from claims in strict liability for abnormally dangerous activity. Rather, the legislature wanted the Act to be liberally construed to abolish government immunity.¹¹⁶ Specific immunities are listed in the Act: Discretionary function immunity; immunity in the execution of statutory duties; and immunity for intentional torts.¹¹⁷ None of these immunities mentions or even alludes to strict liability or abnormally dangerous activity.¹¹⁸

One of these immunities, the discretionary function exception, has been used incorrectly¹¹⁹ by some federal courts¹²⁰ as a bar to

114. MASS. GEN. LAWS ANN. ch. 258, § 2 (West Cum. Supp. 1981).

115. *Id.*

116. See text accompanying note 47 *supra*.

117. MASS. GEN. LAWS ANN. ch. 258, § 10 (West Cum. Supp. 1981) states:

§ 10. Application of sections one to eight

The provisions of sections one to eight, inclusive, shall apply to:—

(a) any claim based upon an act or omission of a public employee when such employee is exercising due care in the execution of any statute or any regulation of a public employer, or any municipal ordinance or by-law, whether or not such statute, regulation, ordinance or by-law is valid;

(b) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a public employer or public employee, acting within the scope of his office or employment, whether or not the discretion involved is abused;

(c) any claim arising out of intentional tort

118. See *id.* ch. 258.

119. See generally Peck, *Laird v. Nelms*, *A Call for Review and Revision of the Federal Tort Claims Act*, 48 WASH. L. REV. 391, 410-11 (1973).

120. See *Abraham v. United States*, 465 F.2d 881 (5th Cir. 1972); *Maynard v. United States*, 430 F.2d 1264 (9th Cir. 1970); *McMurray v. United States*, 286 F.

strict liability recovery for government abnormally dangerous activity. This exception immunizes from liability government activities that involve judgment and choice of policy.¹²¹ Discretionary function immunity is widespread among the various tort claims acts¹²² and is set out clearly in section 10(b) of the MTCA.¹²³ Discretionary function immunity is used to bar government strict liability because the government decision to engage in abnormally dangerous activity is based on the unlimited choice of competing policies and objectives, the social utility of the activity, and the risk of harm.¹²⁴

Discretionary function immunity is not a bar to government strict liability in Massachusetts. The Massachusetts Supreme Judicial Court, in *Clarke-Aiken Co. v. Cromwell-Wright Co.*,¹²⁵ accepted the *Restatement* formulations of abnormally dangerous activity and strict liability.¹²⁶ The court noted that under section 519, one who carries on abnormally dangerous activity is subject to liability for ensuing harm even though he has exercised the utmost care to prevent such harm.¹²⁷ Section 520 then enumerates six factors that contribute to a finding of abnormally dangerous activity: High degree of risk of harm to person, land, or chattels of another; possibility of great harm; inability to eliminate the risk through due care; uncommon nature of the activity; inappropriateness of the activity to the place of conduct; and extent to which risks outweigh social benefits.¹²⁸ The *Clarke-Aiken* court articulated the *Restatement's* test for determining when strict liability is appropriate:

“[i]n general, abnormal dangers arise from activities which are in themselves unusual, or from unusual risks created by more usual activities under particular circumstances. . . . The essential question is whether the risk created is so unusual, either because of its magnitude or because of the circumstances surrounding it, as to justify the imposition of strict liability for the harm which results from it, even though it is carried on with all reasonable care.”¹²⁹

Supp. 701 (W.D. Mo. 1968); *Schwartz v. United States*, 38 F.R.D. 164 (D.N.D. 1965); *Huslander v. United States*, 234 F. Supp. 1004 (W.D.N.Y. 1964).

121. *Whitney v. City of Worcester*, 373 Mass. at 216-17, 366 N.E.2d at 1215-16.

122. *Id.* at 217-18, 366 N.E.2d at 1216.

123. See note 117 *supra* for the text of § 10 of the MTCA.

124. See *Peck*, *supra* note 119, at 410.

125. 367 Mass. 70, 323 N.E.2d 876 (1975).

126. *Id.* at 89, 323 N.E.2d at 886-87.

127. *Id.*

128. RESTATEMENT (SECOND) OF TORTS, *supra* note 54, at § 520.

129. 367 Mass. at 89, 323 N.E.2d at 886-87 (quoting RESTATEMENT (SECOND) OF TORTS, *supra* note 54, at § 520 Comment f).

The court stressed that the nature and extent of the risk rather than the nature of the activity should be emphasized.¹³⁰ If the government were to plead immunity from liability for abnormally dangerous activity under the discretionary function rule, focus would shift to the nature and extent of the risk. Sections 519 and 520 of the *Restatement* then would be invoked and a three-part test applied.

Under the *Restatement's* test, the activity first must be determined to be abnormally dangerous under the standard of section 520. If the activity is deemed abnormally dangerous, strict liability is applied. Finally, even though the activity is deemed abnormally dangerous and the defendant is held strictly liable, the activity must be shown to be the proximate cause of the plaintiff's injuries.¹³¹ Because of the shift in focus to the nature and extent of the risk, the allegation of abnormally dangerous activity, under this test, forecloses judicial inquiry into whether the activity was undertaken as the result of a planning or policymaking decision. When examination of that decision is foreclosed, the discretionary function immunity becomes inapplicable.

Only a handful of lower federal courts have used discretionary function immunity as a bar to recovery in strict liability actions against the federal government.¹³² The United States Supreme Court has not had the opportunity to consider discretionary function immunity as a bar to strict liability recovery.¹³³ Justice Stewart, in dissent, however, asserted that the discretionary function immunity is inapplicable as a bar to recovery in strict liability against the federal government.¹³⁴ He stated that the purpose of the discretionary function immunity is to prevent the possibility that policy decisions made by the legislative or the executive branches might be reviewed by the courts in the context of a tort action.¹³⁵ Justice Stewart also stated that there is no such danger in the area of abnormally dangerous activity because strict liability causes of action look to the abnormally dangerous nature of the activity rather than the policy decision behind the undertaking.¹³⁶

130. *Id.* at 89-90, 323 N.E.2d at 887.

131. *See* note 111 *supra* and accompanying text.

132. *See* note 120 *supra*.

133. In the one case in which the issue arose, *Laird v. Nelms*, 406 U.S. 797 (1972), the Court based its holding on a different rationale; therefore, consideration of this issue was deemed unnecessary. *Id.* at 803.

134. *Id.* at 810 (Stewart, J., dissenting).

135. *Id.* at 811.

136. *Id.* at 811-12.

Once an activity is deemed abnormally dangerous, liability depends solely on the issue of causation.¹³⁷

Authority to apply strict liability to abnormally dangerous government activity may be implied since the Massachusetts legislature has not manifested a contrary intent. In fact, the legislature specifically stated that the MTCA was to be given a liberal construction in order to abolish government immunity.¹³⁸ No legislative history associated with the MTCA indicates an intent to foreclose strict liability. An argument could be made that the discretionary function exception is a tacit bar to strict liability. This argument, used in the lower federal courts,¹³⁹ has not been addressed in a United States Supreme Court majority opinion and has been dismissed as inapplicable in a Supreme Court dissenting opinion.¹⁴⁰ Although the issue of whether discretionary function immunity bars strict liability has not been litigated in Massachusetts, the Commonwealth's case law strongly supports the conclusion reached by Justice Stewart: discretionary function immunity is inapplicable as a bar to strict liability.¹⁴¹ Nor does legislative intent prohibit the application of strict liability to the government's abnormally dangerous activity. Therefore, implied authority to incorporate that type of immunity must be found in the language of the MTCA.

A. *The Phrase "Wrongful Acts or Omissions"*

The first source of implied authority for applying strict liability to Massachusetts state and municipal governments is construction of the word "wrongful" in section 2 of the MTCA, which assigns government liability for "wrongful acts or omissions."¹⁴² Even in the absence of Massachusetts precedent construing "wrongful," it is inappropriate to draw upon existing federal precedent without a legislative directive to do so. *Laird v. Nelms*,¹⁴³ decided by the Supreme Court in 1972, construed the word "wrongful," which appears in section 1346(b) of the FTCA. The Court rejected an interpretation that would have resulted in the application of strict

137. *Id.* at 812.

138. 1978 Mass. Acts ch. 512 § 18.

139. See notes 119-120 *supra* and accompanying text.

140. *Laird v. Nelms*, 406 U.S. 797, 810-12 (Stewart, J., dissenting).

141. *Id.*

142. See note 1 *supra*.

143. 406 U.S. 797 (1972).

liability to the government.¹⁴⁴ Although the “wrongful” language in the MTCA is similar to that in the FTCA, interpretation of the two statutes should not necessarily be the same. Neither the legislative history¹⁴⁵ nor the language of the MTCA indicates whether the legislature intended that the two acts be given a similar interpretation. Legislative silence in this area may mean that the legislature did not intend to follow federal interpretive precedent.

In one prior instance the Massachusetts legislature told the courts the weight to be given federal precedent by including a specific requirement to follow federal precedent in the Massachusetts statute. In the Consumer Protection Act,¹⁴⁶ passed eleven years before the MTCA, the legislature specifically directed the courts to follow federal interpretive precedent.¹⁴⁷ The language of the Consumer Protection Act subject to federal interpretation is identical to that in the Federal Trade Commission Act. The MTCA and the FTCA, however, do not share the same language.¹⁴⁸ Because the legislature specified in a statute the treatment to be accorded federal precedent, legislative silence in this area with regard to the MTCA probably indicates an indifference to federal cases that construe the FTCA.

Dicta from *Packaging Industries Group v. Cheney*,¹⁴⁹ decided in 1980 by the Massachusetts Supreme Judicial Court, although it addresses the scope of direct appellate review, could be read to require adherence to *Laird v. Nelms*.¹⁵⁰ The *Packaging Industries* court stated that, when state statutory language “closely tracks” that of a federal statute, the court will follow federal interpretive precedent.¹⁵¹ The section 2 MTCA language, however, does not “closely track” section 1346(b) of the FTCA. Two important differences distinguish the superficially similar language of the two statutes. In *Poirier v. Superior Court*,¹⁵² source of the *Packaging Industries* dicta, the language of the Massachusetts statute being construed was taken directly from the Norris-LaGuardia Act and inserted into

144. *Id.* at 802-03.

145. *See* notes 44-48 *supra* and accompanying text for a discussion of MTCA legislative history.

146. MASS. GEN. LAWS ANN. ch. 93A (West 1972).

147. *Id.* § 2(b).

148. 15 U.S.C. § 45(a)(1) (1976).

149. 1980 Mass. Adv. Sh. 1189, 405 N.E.2d 106.

150. 406 U.S. at 797.

151. 1980 Mass Adv. Sh. at 1191, 405 N.E.2d at 108-09.

152. 337 Mass. 522, 150 N.E.2d 558 (1958).

the Massachusetts statute via amendment.¹⁵³ It is logical to assume, therefore, that the legislature wanted the Massachusetts statute to parallel the federal act. In contrast, the MTCA did not borrow language from the FTCA,¹⁵⁴ so it can be argued that the MTCA was not intended to parallel the FTCA. Under the *Poirier* test, therefore, the language of section 2 of the MTCA does not "closely track" that of the FTCA.

The second important difference between the language of section 2 of the MTCA and section 1346(b) of the FTCA is the context in which the word "wrongful" is used in the two sections. The statutory language in section 1346(b) clearly indicates that federal government tort liability is determined under the substantive tort law of the jurisdiction where the cause of action accrued.¹⁵⁵ Section 1346(b) concerns a choice of law question; it does not describe the scope of government liability. On the other hand, section 2 of the MTCA, entitled "Liability," pertains to the scope of state and local government liability in Massachusetts. Because the section 2 language is not used in the same context as the language in section 1346(b) and does not "closely track" the language of section 1346(b), the *Packaging Industries* dicta directing state courts to follow federal precedent is inapplicable.¹⁵⁶

Application of the *Packaging Industries* dicta would have brought the *Nelms* decision almost to the level of mandatory precedent. Without the *Packaging Industries* dicta, *Nelms* is merely persuasive authority. As persuasive authority, *Nelms* must be evaluated prior to an application as interpretive precedent for the MTCA.

Few courts have followed *Nelms*.¹⁵⁷ The decision has been criticized widely and vociferously in law review articles.¹⁵⁸ Each of

153. *Id.* at 526-27, 150 N.E.2d at 561.

154. See notes 44-48 *supra* and accompanying text.

155. Peck, *supra* note 119, at 392.

156. Use of federal precedent to interpret the MTCA is appropriate in some cases. The determinative factor is whether the particular MTCA language "closely tracks" that of the FTCA. 1980 Mass. Adv. Sh. at 1191, 405 N.E.2d at 108-09.

157. Three courts have applied *Nelms* strictly to negate a cause of action against federal or state government in strict liability. *Medley v. United States*, 480 F. Supp. 1005, 1013 (M.D. Ala. 1979); *McGarry v. United States*, 370 F. Supp. 525, 531 (D. Nev. 1973); *Lewis v. State*, 256 N.W.2d 181, 192 (Iowa 1977).

158. At the time of publication, seven law review articles criticized the *Nelms* decision: Peck, *supra* note 119; Reynolds, *supra* note 86; Comment, *supra* note 70; Note, *Torts—The Federal Tort Claims Act—Absolute Liability, The Discretionary Function Exception, Sonic Boom*, Laird v. Nelms, 92 S. Ct. 1899 (1972), 6 AKRON L. REV. 105 (1973); Note, *supra* note 90; Note, *Torts—A Definite Pronouncement on the*

the several bases of the Court's decision has been denounced.

The *Nelms* Court considered itself bound by dicta in *Dalehite v. United States*.¹⁵⁹ *Dalehite* held that the federal government was not liable for extensive damage resulting from fertilizer explosions aboard two cargo vessels in the harbor of Texas City, Texas in 1947.¹⁶⁰ The *Nelms* Court determined that *Dalehite* bound it *not* to hold the federal government strictly liable for damage resulting from aircraft noise.¹⁶¹ *Dalehite*'s restriction of strict liability,¹⁶² however, was not a holding in the case but rather mere dicta.¹⁶³ Dicta is not subject to *stare decisis*.¹⁶⁴

Even if the *Dalehite* statement on strict liability were considered a holding, it would have been restricted severely by *Indian Towing v. United States*¹⁶⁵ and *Rayonier, Inc. v. United States*.¹⁶⁶ The *Indian Towing* Court held the federal government liable for damages resulting from a negligently maintained lighthouse. The Court stated that the FTCA was intended to compensate victims of tortious government activity in circumstances similar to those rendering a private individual liable.¹⁶⁷ Lower courts were instructed not to impose immunity onto a statute designed to limit immunity.¹⁶⁸ *Rayonier*, which held the federal government liable for negligence in fighting a forest fire, reaffirmed the *Indian Towing* test.¹⁶⁹ The Court also stated that *Dalehite* was rejected by *Indian*

Federal Tort Claims Act—Strict Liability Eliminated, 9 GA. ST. B.J. 342 (1973); Note, *supra* note 93, at 727. This author was unable to find a single law review article which evaluates *Nelms* as a sound and logical decision.

159. 346 U.S. 15 (1953).

160. *Id.* at 17.

161. 406 U.S. at 802-03.

162. *Id.* at 44-45.

163. "[L]iability does not arise by virtue of either United States ownership of an 'inherently dangerous commodity' or property, or of engaging in an 'extra hazardous' activity." 346 U.S. at 45. Commentators have construed this statement and the discussion accompanying it as dicta. Peck, *supra* note 119, at 398; Reynolds, *supra* note 86, at 816; Note, *Torts—The Federal Tort Claims Act—Absolute Liability, The Discretionary Function Exception, Sonic Boom, Laird v. Nelms*, 92 S. Ct. 1899 (1972), *supra* note 158, at 107; Note, *Torts—A Definite Pronouncement on the Federal Tort Claims Act—Strict Liability Eliminated*, *supra* note 158, at 348.

164. BLACK'S LAW DICTIONARY, *supra* note 45, at 1261.

165. 350 U.S. 61 (1955).

166. 352 U.S. 315 (1957). See also Peck, *supra* note 119, at 396; Comment, *supra* note 70, at 64-65; Note, *Torts—The Federal Tort Claims Act—Absolute Liability, The Discretionary Function Exception, Sonic Boom, Laird v. Nelms*, 92 S. Ct. 1899 (1972), *supra* note 158, at 107-08.

167. 350 U.S. at 68.

168. *Id.* at 69.

169. 352 U.S. at 319.

Towing to the extent that it contradicted *Indian Towing*.¹⁷⁰ *United States v. Praylou*,¹⁷¹ decided by the United States Court of Appeals for the Fourth Circuit, also was cited in *Rayonier* as support for *Indian Towing*'s narrowing of *Dalehite*.¹⁷² In *Praylou*, the Fourth Circuit held the government strictly liable under North Carolina law for damages from an airplane crash.¹⁷³ The *Nelms* majority opinion rejecting strict liability did not mention the *Indian Towing* and *Rayonier* restrictions of *Dalehite* or *Rayonier*'s tacit approval of strict liability for government activity.

The legislative history of the FTCA, which was relied upon by the *Dalehite* and *Nelms* Courts to determine legislative intent with regard to government strict liability, is inconclusive at best.¹⁷⁴ Three different versions of the FTCA's legislative history, one in the *Dalehite* majority opinion, one in the *Nelms* majority opinion, and one in the *Nelms* dissent, are cited regarding congressional intent concerning the application of strict liability to the federal government. The *Dalehite* version of the FTCA legislative history was drawn from Senate committee discussion that took place during the Seventy-sixth Congress indicating that "wrongful" was intended to cover actions, such as trespass, that were not strictly negligent.¹⁷⁵ The Court in *Nelms* cited a House committee memorandum discussing a Seventy-seventh Congress House draft bill.¹⁷⁶ This 1942 draft bill included a discretionary function exception which exempted planning and policymaking decisions and value judgments from review to prevent suits against the government for legally authorized acts. The draft was never enacted into law.¹⁷⁷ *Nelms*' dissent cited legislative history from the 1946 bill that was passed and enacted into the FTCA.¹⁷⁸ Joint committee discussion indicates that the bill was designed to establish a uniform system permitting actions to be initiated on "'any tort claim . . . with the

170. *Id.*

171. 208 F.2d 291 (4th Cir. 1953).

172. 352 U.S. at 319 n.2.

173. 208 F.2d at 295.

174. Reynolds, *supra* note 86, at 815-16; Note, *Torts—The Federal Tort Claims Act—Absolute Liability, The Discretionary Function Exception, Sonic Boom*, Laird v. Nelms, 92 S. Ct. 1899 (1972), *supra* note 158, at 108.

175. 346 U.S. at 45.

176. 406 U.S. at 801-02 (citing to Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary, 77th Cong., 2d Sess. 13 at 65-66 (1942)).

177. 406 U.S. at 801-02.

178. *Id.* at 805-07.

exception of certain classes of torts *expressly exempted* from the operation of the act.' ”¹⁷⁹

Of these three versions, the one that is most convincing is that cited by the *Nelms* dissent. Although the other statements of legislative history are relevant, the history that is most recent and most closely associated with the statute is determinative.¹⁸⁰ Since the version cited by the *Nelms* dissent has the most weight, congressional intent may be inferred to allow a cause of action in strict liability against the federal government. This congressional intent would make the *Nelms* holding on strict liability incorrect and the *Nelms* decision useless in interpreting the MTCA. “Wrongful” may therefore be construed to include strict liability.

Massachusetts case law does not specifically define what constitutes a “wrongful” act. In Massachusetts, however, a tortious act is defined as one that will subject the actor to subsequent liability.¹⁸¹ Under section 519 of the *Restatement*, accepted in Massachusetts,¹⁸² abnormally dangerous activity subjects the actor to strict liability. Abnormally dangerous activity, therefore, is tortious. Tortious activity is widely defined as wrongful activity.¹⁸³ Thus, since abnormally dangerous activity is both tortious and wrongful, it is actionable under the phrase “liable for . . . wrongful acts or omissions”¹⁸⁴ which appears in section 2 of the MTCA.

B. *The Phrase “Liable in the Same Manner . . . as a Private Individual”*

The phrase “liable in the same manner and to the same extent as a private individual under like circumstances,”¹⁸⁵ which appears in section 2 of the MTCA, mandates the use of strict liability against the government. Since strict liability for abnormally danger-

179. *Id.* at 806-07.

180. See *Steiner v. Mitchell*, 350 U.S. 247, 254 (1956) (construing the Portal to Portal Act, 29 U.S.C. §§ 254, 251-262 (1976)).

181. *Morash & Sons, Inc. v. Commonwealth*, 363 Mass. at 621, 296 N.E.2d at 467; *Rogers v. Postal Tel. Cable Co.*, 265 Mass. 544, 546-47, 164 N.E. 463, 463 (1929).

182. *Clarke-Aiken Co. v. Cromwell-Wright Co., Inc.*, 367 Mass. at 89-90, 323 N.E.2d at 886-87.

183. BLACK'S LAW DICTIONARY, *supra* note 45, at 1335. See *Howard's Adm'r v. Hunter*, 126 Ky. 685, 689-90, 104 S.W. 723, 724 (1907); *Judson v. Peoples Bank & Trust Co. of Westfield*, 17 N.J. 67, 91, 110 A.2d 24, 35 (1954); *Kelly v. Mohrhussen*, 50 Wis. 2d 337, 341, 184 N.W.2d 149, 151 (1971).

184. MASS. GEN. LAWS ANN. ch. 258, § 2 (West Cum. Supp. 1981).

185. *Id.*

ous activity is a viable private cause of action in Massachusetts,¹⁸⁶ it could be applied to government activity under section 2 of the MTCA.

Use of the phrase "liable . . . as a private individual" was proposed as the test of federal government liability in both *Indian Towing v. United States*¹⁸⁷ and *Rayonier, Inc. v. United States*.¹⁸⁸ In the jurisdictions that allow a cause of action in strict liability against the government,¹⁸⁹ the *Indian Towing* test is used to construct a scheme of government liability that parallels that of a private individual.

Use of the phrase "liable . . . as a private individual" as a source of authority most likely will be criticized in Massachusetts as a construction that is not commensurate with the legislature's original intention. This criticism is unfounded with regard to the MTCA. The legislature stated a brief but specific intent that "The provisions of this act shall be construed liberally for the accomplishment of the purposes thereof,"¹⁹⁰ that purpose being "to abolish government immunity."¹⁹¹ At least three jurisdictions use the *Indian Towing* test to allow a strict liability cause of action against the government.¹⁹² The section 2 phrase "liable . . . as a private individual" supports application of the *Indian Towing* test in Massachusetts.

VII. CONCLUSION

Massachusetts was one of the last five states to retain government tort immunity. The doctrine of government immunity, consisting of sovereign and municipal immunity, was firmly entrenched in Massachusetts until 1973. In five decisions from 1973 to 1977 the supreme judicial court hinted to the legislature that abolition of government immunity was a task better suited to the legislature than to the judiciary. As a result of these hints the MTCA finally was enacted on July 20, 1978. The MTCA specifically allows recovery against the government on a negligence theory but not on a strict liability theory.

186. See note 65 *supra*.

187. 350 U.S. 61, 61 (1955).

188. 352 U.S. 315, 315 (1957); see notes 167-172 *supra* and accompanying text.

189. See notes 72-77 *supra* and accompanying text.

190. See notes 45-48 *supra* and accompanying text.

191. *Id.*

192. Those jurisdictions are New York, Oregon, and Washington. See notes 74-76 *supra*.

Strict liability is liability without fault. It is applicable when the social utility of an activity is outweighed by the risk of harm. Under American tort law in general, whether a jurisdiction takes an expansive approach to government liability, as New York does, or a restrictive approach, as California does, strict liability is a suitable cause of action when the government engages in abnormally dangerous activity.

Strict liability will eliminate the difficulties currently facing Massachusetts courts. In the absence of strict liability the courts must resort to inappropriate legal theories to grant relief to tortiously injured plaintiffs. Relief should be granted in a direct strict liability cause of action: innocent individuals then will be compensated for injuries caused by the government's abnormally dangerous activities. In addition, relief will be granted through judicial rather than legislative proceedings. Finally, the government will be compelled to exercise a higher standard of care in the conduct of abnormally dangerous activities.

Nothing in Massachusetts statutes or case law explicitly allows or explicitly bars strict liability actions against the government for abnormally dangerous activity. Implied authority, however, may be drawn from two phrases in the language of section 2 of the MTCA. The phrase "wrongful acts or omissions" may be construed to include strict liability. The phrase "liable . . . as a private individual" has been proposed as the test for federal tort liability and is the test for government liability in several jurisdictions that allow strict liability actions against the government.

The judiciary and the legislature might choose not to recognize the section 2 language as an implied source of authority for strict liability's application to the government. If those two branches of government view the arguments with disfavor, it will be incumbent upon the legislature to mandate the application of strict liability to government abnormally dangerous activity in Massachusetts. The application of strict liability transfers the cost of abnormally dangerous government activity from the innocent victims of the activity to the government and ultimately to the general public, which benefits from the activity.

Massachusetts has taken a great step forward with the enactment of the MTCA. The Commonwealth's progress in compensating tortiously injured individuals should continue through judicial recognition or legislative provision of a cause of action against the government in strict liability for abnormally dangerous activity.

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