

OFF THE RAILS: THE SURPRISING STORY OF SMITH V. RAPID TRANSIT, INC.

All ignorance toboggans into know
And trudges up to ignorance againe.
- e. cummings

*D. Michael Risinger**

I. INTRODUCTION.....	675
II. PART 1: THE STORY	676
III. THE REST OF THE STORY (OR MOST OF IT).....	692
A. The E-mail Cometh	692
B. What the E-mail Attachments Contained—Procedural History	692
C. Observations on Certain Preliminary Matters of Fact.	696
D. The Actual Facts of the Case, as Best I Can Reconstruct Them from the Available Information.....	698
IV. CONCLUSION	703
APPENDIX.....	704

I. INTRODUCTION

A large percentage of lawyers of my generation and later would recognize the case of *Smith v. Rapid Transit, Inc.*¹ because the short opinion of the Massachusetts Supreme Judicial Court was presented in its entirety in leading evidence casebooks. The reader may recall that, according to the opinion, the evidence presented by the Plaintiff, Betty Smith, was insufficient to raise a jury issue on the question of Rapid Transit’s ownership of the bus which she testified ran her off the road

* John J. Gibbons Professor of Law Emeritus, Seton Hall University School of Law. My thanks to Ronald J. Allen and Mike Pardo for helpful comments and help in general, to E. James Angelo, genealogist extraordinaire, for help with knotty genealogical issues, and to Neil B. Cohen, Charles A. Sullivan, Brian Sheppard, and William C. Thompson, without whose patient review and excellent counsel this project could not have been brought to completion. In addition, I thank Maura Looney, First Assistant Clerk of the Supreme Judicial Court of Massachusetts, whose contributions are more fully acknowledged *infra*, and last but not least, Lesley C. Risinger, without whose contributions and assistance, editorial and otherwise, nothing happens in my world.

¹ *Smith v. Rapid Transit, Inc.*, 58 N.E.2d 754 (1945).

and caused her to collide with a parked car. However, a close look at the realities of transportation in Winthrop, Massachusetts in 1941 makes it almost certain that any bus operating in Winthrop at 1:00 a.m. on the date and at the place of the accident was indeed a Rapid Transit bus. But beyond that, newly discovered material casts a surprising light on the conventional understanding of the dispute that led to the opinion.

II. PART 1: THE STORY

In December of 2021, I sent Ron Allen² a Christmas card, and he responded by sending me a present. It was a copy of a draft article by Ron and his student and co-author Christopher Smiciklas entitled “The Law’s Aversion to Naked Statistics and Other Mistakes.”³ The article involves an extended consideration of and response to positions taken by David Enoch and co-authors to the effect that “the law” (in America) is such that “courts are reluctant to base affirmative verdicts on evidence that is purely statistical” and that the “intuitive distinction between individual and bare statistical evidence can be found in a large number of court judgments.” From these two propositions a large number of conclusions are claimed to flow. Allen and Smiciklas’s main claim is that both propositions, particularly the first, are untrue.

This is not a new position for Professor Allen. Indeed, he made essentially the same point in regard to the actual realities of American law in 1986:

Support for the proposition that courts are reluctant to allow cases to be decided on the basis of “statistical evidence” is greatly exaggerated in the literature. For example, Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1380 (1985), asserts that “[p]laintiffs in such cases would almost certainly lose by directed verdict; the evidence would never reach the jury.” The support for that proposition is *Guenther v. Armstrong Rubber Co.*, 406 F.2d 1315 (3d Cir. 1969), where, in reversing a directed verdict *for the defendant* and remanding for a new trial, the court in passing referred to one “probabilistic” argument raised by the plaintiff with disapproval. That, however, was dictum and it was in the

² Ron Allen is Ronald J. Allen, John Henry Wigmore Professor of Law at Northwestern University and, among other things, a distinguished scholar of the law of evidence and the process of proof. We have been friends for nearly fifty years.

³ Ronald J. Allen & Christopher Smiciklas, *The Law’s Aversion to Naked Statistics and Other Mistakes*, 28 LEGAL THEORY 179 (2022) (The published version is not significantly different from the copy from which I originally worked, and the text quoted below is still present in the published version) [<https://doi.org/10.1017/S135232522200012X>].

context of sending the case back for a new trial. Nesson also cites *Smith v. Rapid Transit, Inc.*, 317 Mass. 469, 58 N.E.2d 754 (1945), in which a verdict for the defendant was sustained. *Smith* is difficult to view as a “statistical evidence” case, however. The plaintiff did not rely on any such evidence. She merely asserted that she was forced off the road by a bus and in addition proved that Rapid Transit, Inc. was the only bus company operating regularly on the road where the accident occurred. In appraising the strength of the evidence, the court concluded that it was a matter of “conjecture” who owned the bus and that “[t]he most that can be said of the evidence in the instant case is that perhaps the mathematical chances somewhat favor the proposition that a bus of the defendant caused the accident. This was not enough.” *Smith*, 317 Mass. at 470, 58 N.E.2d at 755. That is the language of a traditional sufficiency of the evidence decision. Nesson does not mention here the case that *Smith* relied on, *Sargent v. Massachusetts Accident Co.*, 307 Mass. 246, 29 N.E.2d 825 (1940). The *Sargent* court did make the assertion that evidence is insufficient when “mathematically the chances somewhat favor a proposition to be proved.” *Id.* at 250, 29 N.E.2d at 827. However, the decision of the court reversed a directed verdict for the defendant and entered a directed verdict for the plaintiff in a factual context that is easily as probabilistic as that in *Smith*.

An example of a court employing a directed verdict as a sanction for the evidentiary practices of the plaintiff may be *Galbraith v. Busch*, 267 N.Y. 230, 196 N.E. 36 (1935), where the court reversed a jury verdict for the plaintiff and remanded for a new trial where the plaintiff had failed to call the defendant, who could have considerably dispelled the ambiguity about the nature of the litigated events. See Rubinfeld, *Econometrics in the Court Room*, 85 COLUM. L. REV. 1048, 1048 (1985) (“The use of statistical methods for resolving disputes has found increasing acceptance within the adversary system.”).⁴

This convinced me then, and it still does. But more to the point for what follows here, note the treatment of *Smith v. Rapid Transit, Inc.* One of the important sub-arguments in the Allen & Smiciklas piece is an attack on Enoch’s treatment of *Smith* as support for two of the main contentions they say are mistaken, set out above, and described by Allen & Smiciklas thus:

⁴ Ronald J. Allen, *A Reconceptualization of Civil Trials*, 66 B.U. L. REV. 401, 429 n.67 (1986).

The first mistake is exemplified by the reliance on *Smith v. Rapid Transit* as the “seminal case” demonstrating the suspicion of statistical evidence⁵ (reliance on *Smith* also exemplifies the second mistake, as we shall explain below). In legal conversation, a “seminal case” means something like “quite influential in an original way.” *Smith* was neither.⁶

⁵ Allen & Smiciklas, *supra* note 3, at 187. One would think that a seminal case would be widely cited by courts. However, from the decision of *Smith* in 1945 through 1972, *Smith* was cited in only eleven reported judicial decision in the U.S., all but two from Massachusetts, and most references to it being in string cites. One of the two non-Massachusetts cases was a 1953 3rd Circuit diversity case which the Court believed was controlled by Massachusetts law. The other citation from another jurisdiction came in 1972 from the intermediate appellate court in Michigan, in a dissent where *Smith* appears to have been characterized (inaccurately) as having rejected formal probability evidence of the type reflected in the truly seminal case of *People v. Collins*. *Smith* was not cited again in a reported opinion in the U.S. for 17 years. See App. 2, Part C (cases collected).

However, there is a way in which *Smith* might loosely be called “seminal,” that is, reading *Smith* might put a person in mind of a hypothetical involving actual, if hypothetical, statistics. The first example of this in the law journal literature occurred fifteen years after the decision in *Smith* in Edward H. Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 MINN. L. REV. 903 (1970), where, on page 964, Prof. Cooper says (dropping a “cf.” footnote to *Smith*): “[What] if the plaintiff can show only that he was hit by a taxicab and that the defendant owns four of the five taxicabs licensed to operate in the town where the accident occurred?” This set the wheels in motion, and was the harbinger that led to blue buses, gatecrashers, and the plethora of other rather unrealistic “naked” statistical hypotheticals (and the formal probability analysis deployed on them) which were to come. But it is unfair to attribute these exotic plants to the *Smith* case, or to the opinion in *Smith*.

Actually, there was one earlier example which mentioned neither *Smith* nor *Sargent*, but was obviously influenced by at least the latter in the hypothetical it put forth involving the buzzing of a farm field by a jet plane. See Henry M. Hart, Jr. and John T. McNaughton, *Evidence and Inference in the Law*, Chapter 3 of a collection on Evidence and Inference in a number of settings edited by Daniel Lerner, first published in DAEDALUS (the journal of the American Academy of Arts & Sciences), Vol. 87, at 46 (1958). Their hypothetical is irritatingly unrealistic, given the virtual absence of privately owned jet aircraft that would fit the description of the episode given in the hypothetical. See *A Brief History of Private Jets*, FAST PRIV. JET (Jul. 2, 2021), <https://www.fastprivatejet.com/en/blog/brief-history-of-private-jets#:~:text=Hans%20von%20Oheim%20and%20Sir,flights%20were%20also%20being%20tested>. In addition, the summary treatment of what would later be called “naked” statistical proof exaggerated the hostility of the courts, but its shortness and journal placement rendered it only of marginal impact, although it was set out in numerous editions of the Louisell et al. casebook (see the entry on this casebook in Part A of Appendix 2.)

⁶ Allen & Smiciklas, *supra* note 3, at 187. One further note. When Laurence Tribe published his monumental article *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329 (1971) [<https://doi.org/10.2307/1339610>], apparently uninfluenced by Cooper (whose article had been published only shortly before and whom Tribe does not cite), Tribe set out the first version of the Blue Bus hypothetical in print, *id.* at 1340–41, and dropped an extensive footnote, *id.* at n.37, which begins thus: “In *Smith v. Rapid Transit, Inc.*, . . . the actual case on which this famous chestnut is based,

This passage set my mind racing back over my own relationship with the *Smith* case, a relationship of well over fifty years. During that time I had come to the conclusion that *Smith* itself had nothing to do with statistical proof, much less unclothed statistical proof, but also that it was a highly unsatisfactory product, in a numerous ways, of the litigation system that generated it. As for any fame it had, through mischaracterization or otherwise, it was, like the members of a certain Hollywood family, more famous for being famous than for any intrinsic merit or accomplishment.

I first encountered *Smith* in my evidence course at Harvard Law School in 1967. Our casebook was the fifth (1965) edition of the Morgan/Maguire casebook (although by that time Edmund Morris Morgan was gone, John Maguire was retired, and the operative editing of the book fell on Jack Weinstein, James Chadbourne, and John Mansfield⁷). *Smith* was the lead case in a section entitled “Circumstantial Proof—Proof Used Inferentially—General Considerations.” The opinion, being remarkably short (five paragraphs)

no statistical data were in fact presented . . .” What Tribe meant by “famous chestnut” is unclear. I suspect somebody at Harvard who taught evidence had generated the blue bus hypothetical and used it in classes. I did not hear it in my evidence class in 1968 (taught by then-Professor Breyer, who of course later went on to greater things), but the class met on Saturday mornings, and I must confess less than perfect attendance, *mea culpa*.

Finally, Tribe’s article warning against misuses of mathematical modelling of various litigation phenomena including the weight of various burdens, is brilliant, and anticipates the main themes of what are referred to as the Bayes Wars of the next half century. The articles he cites as the foundation for what was quickly becoming a fad are included in footnote 5, reproduced here in its entirety:

See, e.g., Cullison, Probability Analysis of Judicial Fact-Finding: A Preliminary Outline of The Subjective Approach, 1 U. TOL. L. REV. 538 (1969) [hereinafter Cullison]; Finkelstein & Fairley, A Bayesian Approach to Identification Evidence, 83 HARV. L. REV. 489 (1970) [hereinafter Finkelstein & Fairley]. See also, Becker, Crime and Punishment: An Economic Approach, 76 J. POL. ECON. 169 (1968) [hereinafter cited as Becker]; Birmingham, A Model of Criminal Process: Game Theory and Law, 56 CORNELL L. REV. 57 (1970) [hereinafter cited as Birmingham]; Kaplan, Decision Theory and the Factfinding Process, 20 STAN. L. REV. 1065 (1968) [hereinafter cited as Kaplan]; cf. Broun & Kelly, Playing the Percentages and the Law of Evidence, 1970 ILL. L. F. 23. [hereinafter cited as Broun & Kelly].

Tribe, *supra* at 1332, n.5.

Two points about these sources are important at this point. First, the two main sources were from 1970 and all were less than three years old, and second, none of the sources cited *Smith*.

⁷ See JOHN MAGUIRE, JACK B. WEINSTEIN, JAMES H. CHADBOURNE & JOHN H. MANSFIELD, CASES AND MATERIALS ON EVIDENCE vii, ix (5th ed. 1965) (noting Maguire took emeritus status and the remaining authors had not).

required no editing and was set out in full.⁸ There was nothing in the book connecting the *Smith* case to statistical proof of any sort.⁹

I remember being vaguely troubled by *Smith*. It seemed to me that there must have been more information bearing on the issue of Rapid Transit's ownership *vel non* of the bus at the trial of the case than one could derive from the opinion. Who was responsible for this state of affairs was not at all obvious (the trial court, one or both parties, the Supreme Judicial Court of Massachusetts (SJC), or some combination thereof), but it was a very thin description of what was allegedly a very thin case. One phrase in particular always stood out to me. The court recited that "There was another bus line in operation in Winthrop at that time but not on Main Street." "At that time" struck me as highly ambiguous (much more on this later). It struck me that there was clearly more there than met the eye, but what it was I did not know. And that is more or less how I taught the case from successor editions of that casebook from the beginning of my teaching career in 1973 to the mid-1980s.

Then a telephone conversation with Neil Cohen sharpened my view considerably.¹⁰ What Neil pointed out to me as an aside while discussing

⁸ *Id.* at 547–48. For those who have not committed the *Smith* opinion to memory and may need to consult it to refresh their recollection in regard to various assertions in this piece, it is set out in full in Appendix 1. Also, for those who might think that other teaching materials of the time, or other legal literature, might have treated *Smith v. Rapid Transit* more extensively, I have examined the main casebooks of the era and other references in the legal literature and found that not to be the case. They are described in part A of Appendix 2.

⁹ It is true that the *Smith* opinion is immediately followed in the case book by a note which reads in its entirety as follows: "For a discussion of the problems raised in the *Smith* case, see [V.C.] Ball, *The Moment of Truth: Probability Theory and Standards of Proof*, 14 VAND. L. REV. 807 (1961)." *Id.* at 548. That sounds as if the referenced article might say something about *Smith* and formal probability theory. That turns out not to be the case. The article, by Vaughn Ball, was a pioneering article in many ways, and a harbinger of things to come. It was, for instance, the first mention in the legal literature of the Reverend Bayes and his eponymous Theorem. However, the article does not mention *Smith*, although it does (critically) discuss the case relied upon in the *Smith* opinion, *Sargent v. Massachusetts Accident Co.*, 29 N.E.2d 825 (Mass. 1940). And its treatment of *Sargent* is more quotidian than the title of the article might suggest, viewing it as a case in the debate over whether a preponderance should be viewed as requiring a more-likely-than-not (informal) probability, or some degree of belief in the factfinder beyond the probability. Ball, *supra*, at 818–19. Ball viewed it for what it was, an ordinary circumstantial evidence case (in which the plaintiff in *Sargent* prevailed, incidentally). The attempt that follows at formally modelling the problem of preponderance using frequentist probability theory does not change this.

¹⁰ Telephone interview between Neil Cohen and author. Aside from being on his way to becoming one of the preeminent commercial law scholars in the world, Neil had just recently published a brilliant article pointing out why, despite supposed "paradoxes" resulting from "naked statistical proof" hypotheticals like the famous "blue bus" hypothetical, it was a mistake to model the notion of preponderance of the evidence as

2024]

RISINGER

681

the *Smith* case was the incredible oddity of the physical layout of Winthrop, Massachusetts. Winthrop was (and is) functionally an island just east of East Boston, with only two roads allowing vehicular access—one across a bridge from East Boston, and the other all the way across town by a road entering from the North over what was essentially an isthmus. These facts were, to my mind, potentially very relevant to the supposed presence of non-Rapid Transit buses at the time and place of the accident, and it became a standard exercise in my evidence classes thereafter to explore the implications of these and similar context facts that impacted the likelihood of non-Rapid Transit buses at the time and specific place of the accident. Finally, in 2005, after the first volume of the “Law Stories” series (specifically, “Property Stories”) was published by Foundation Press, I concluded that a volume of “Evidence Stories” was likely in the offing, and decided to try to tell the real story of *Smith v. Rapid Transit, Inc.* To that end, I began reaching out in various ways to people familiar with the local history of Winthrop, and I managed to clarify some important details about the circumstances of Winthrop and its transportation system in February of 1941. But I could not overcome certain roadblocks, and the press of other obligations intervened, and in January of 2006 I shut the drawer on the unfinished project.

Then a line in the Allen & Smiciklas piece dragged me back to the project. What they said about *Smith* was that it did not involve any statistical evidence, or hostility thereto, but merely “lousy” evidence, by which they meant (according to their definition of the term “lousy evidence”) “unreliable evidence, like witnesses who literally make things up, or evidence which is insufficient for a reasonable person to conclude that the burden of persuasion has been satisfied.”

I acknowledged receipt of the Allen & Smiciklas piece immediately, but in the face of all of this, I was moved to re-open the 2006 drawer, and to supplement that research through the use of the marvelous online resources now available which were not available in 2005, and here is what, two months later, I communicated to Ron and a few other friends.

I think you are on soft ground when you say the actual decision in *Smith* was right because the evidence adduced by plaintiff was “lousy.” First, we really don’t know what evidence was presented. We have no access to any part of the

a point estimate of anything exceeding a point-estimate probability of .5, because all real-world statistics were samples that carried confidence intervals that had to be accounted for in the models. See generally Neil B. Cohen, *Confidence in Probability: Burdens of Persuasion in a World of Imperfect Knowledge*, 60 N.Y.U. L. REV. 385 (1985).

record (although I have tried, sort of, and may try again).¹¹ Instead we have only the characterization by the Supreme Judicial Court. And, after many years reviewing records and other evidence in regard to claims of innocence, and comparing them to what courts, especially affirming appellate courts, said about the facts, I think I am qualified to say that the stories told by courts about the facts are not always accurate. (Frankian fact skepticism, anyone?)¹²

I then continued to explain¹³ that we don't have good information about what happened at the trial of *Smith v. Rapid Transit*, but we can be relatively confident of the following, derived partly from the Supreme Judicial Court (SJC) opinion, and partly from other sources, most of them judicially noticeable or otherwise provable in 1941–1945.

The episode that gave rise to the controversy occurred on Thursday, February 6, 1941, at about 1:00 a.m. Suit was filed against Rapid Transit, Inc., by Betty Smith¹⁴ in the Massachusetts Superior Court for Suffolk County, at some point before the expiration of the statute of limitation for torts then in place, which was unlikely to have been more than two years. Whenever suit was actually filed, World War II came on and likely slowed the disposition, although by today's standards, a little over four years from incident to final disposition on appeal is not that

¹¹ If the record still exists it would be in the SJC clerk's office storage, retrieving it would undoubtedly present something of a problem, and examining it would require a trip to Boston.

¹² Jerome Frank outlined his theory of "fact skepticism" in his 1949 book *COURTS ON TRIAL*. See JEROME FRANK, *COURTS ON TRIAL* (1973). Frank was not skeptical of the actual existence of facts, or their importance to delivering the promise of the law. However, he asserted that the legal process as then structured was not well suited to getting factfinding right. For a discussion of this theory and its implications, see D. Michael Risinger, *Searching for Truth in the American Law of Evidence and Proof*, 47 GA. L. REV. 801, 808–11 (2013). Finally, Professor Allen and I ultimately agreed that it was the usual practice to take recitations of facts in appellate opinions at face value despite any Frankian reservations, as he and Smiciklas had done in their treatment of *Smith v. Rapid Transit*.

¹³ The text that follows is very close to the text of the e-mail attachment I sent to Ron on February 12, 2022 (styled as a valentine—copies of both e-mail and attachment on file with author), with some edits for clarity. The textual and explanatory footnotes were largely present. However, most of the footnotes regarding supporting sources I didn't regard as necessary as between Ron and me, but of course they are now necessary for purposes of publication, so I have added them to the text that follows.

¹⁴ The plaintiff, Betty Smith, presents something of a mystery. Her full name and residence would have been set out in the complaint, and her age and occupation would almost certainly have been revealed during her testimony. But again, we don't have the record of the case to help identify her. [At this point, in my communication to Ron Allen, using census and other records, I identified three plausible candidates for Betty Smith in Dorchester, and none in Winthrop or the rest of Boston. I set out extensive documentation of the research involved, but I have omitted it here as both burdensome to the reader and to no good purpose, for reasons that will become obvious later.]

long. At any rate, the case came on for trial in Boston in the Superior Court for Suffolk County, probably in 1944. (There was no effective general pre-trial discovery *à la* the Federal Rules of Civil Procedure in place in Massachusetts at that time, although limited interrogatories were allowed).¹⁵

A jury was empaneled, and the plaintiff's lawyer put on the plaintiff's case. We know that the plaintiff Betty Smith testified, but the extent and exact content of her testimony is unknown aside from the quotations given by the SJC ("parked car," "a great big, long, wide affair," and "forced her to turn to the right," quoted from some unspecified source).¹⁶ But her testimony must have contained more relevant detail than that.

At the end of the evidence presented (it is not clear that it was at the end of the plaintiff's case or at the end of the defendant's case, although the quotation about another bus line would seem to suggest the latter¹⁷), Rapid Transit made a motion for directed verdict on failure-of-proof grounds regarding their ownership of the bus that caused the accident, which was granted by Judge Buttrick (Allan C. Buttrick, a well-known member of the judiciary).¹⁸ We do not know if

¹⁵ See *infra* note 48.

¹⁶ "Forced her to turn to the right" is set out in quotes as if it were a quotation from her testimony, but she would not have testified in those terms, referring to herself as "her." Either it is a paraphrase or a quotation from some other source, but in either case it shows the lack of care the court took with the details of the actual evidence and record below.

¹⁷ It is also unclear if any evidence concerning damages was put in, or instead, the trial was bifurcated to address liability first. It seems likely that the trial was bifurcated, with liability tried first.

¹⁸ Judge Buttrick was in some ways an archetypal Yankee WASP. He was born Allan Gordon Wood in Fitchberg, Massachusetts, on March 16, 1876. His mother died when he was two, and his father had a difficult time as a single father. He was adopted by distant cousins George and Ellen Buttrick of Lancaster, Massachusetts when he was about five. Instead of attending college, he entered Boston University Law School in 1895 or so, graduating in 1897. He relatively quickly became a justice of the peace and very active in Republican politics. He settled in his birth home of Fitchburg but maintained a second residence on Beacon Hill for most of his career, where he was elected to the state senate and to the assembly. He belonged to all the right brotherhoods and clubs. He was appointed by Leverett Saltonstall as a Judge of the Superior Court right after Saltonstall was sworn in as Governor in 1939 and served in that capacity until his retirement in 1952. When the Smith case came on for trial in Boston, there is nothing to suggest that Judge Buttrick knew anything about the peculiarities of Winthrop. Nor was he apparently a very patient judge. The most telling line in this regard is from his obituary in the *Boston Globe* when he died in 1954: "Judge Buttrick presided over hundreds of trials throughout the state. He disposed of many of them with swift decisions." *Allan Buttrick, Ex Superior Justice, Dies*, BOSTON GLOBE, Nov. 29, 1954, at 25. Incidentally, Buttrick's title was "Justice" when he was a Justice of the Peace, but became "Judge" when he was appointed to the Superior Court, as the report in *Smith* makes clear in its synopsis ("Exceptions from Superior Court, Suffolk County, Buttrick, Judge"). *Smith v.*

he issued a written opinion of any kind to explain his decision, or what, if anything, he put on the record orally, but since there was an appeal, there was bound to have been some sort of transcript of proceedings or note of testimony prepared at some time, as well as briefs and appendices submitted by each of the parties.

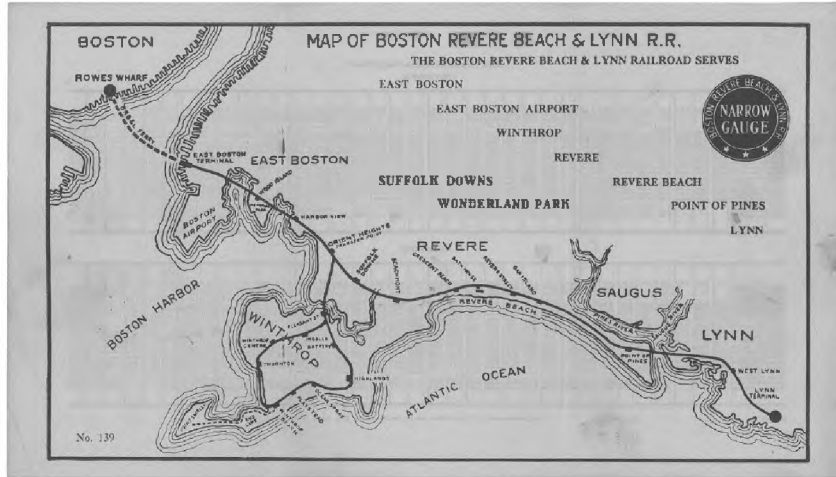
On appeal, the SJC affirmed, holding that Judge Buttrick was right that, on what was presented (whatever it was), there was insufficient evidence to infer by a preponderance of the evidence that the bus described by Betty Smith was a Rapid Transit bus rather than a bus belonging to someone else. The opinion by Justice Spalding (as previously noted) is only five paragraphs long.

Beyond this, there are certain geographic peculiarities of Winthrop that were judicially noticeable in 1941 (whether they were submitted to the court or not), which bear significantly on whether a non-Rapid Transit bus is a plausible, or even tenable, hypothesis.

As previously noted, while not technically an island, Winthrop in February 1941 is best thought of as such since its northern border with the next town was marshland and part of a federal reserve with no roads through. There were (and are) only two ways for vehicular traffic to enter or leave Winthrop. One either enters from the direction of Saugus and Lynn, south on Revere Street (and exits by driving north on that same street), or one enters by driving in an easterly direction from South Boston, across the bridge onto Main Street in Winthrop (or exits by driving over the bridge in the opposite direction). All this is obvious from the maps below, the first from 1939 and the second from 1903 (but accurate in all relevant dimensions, with the advantage of showing the narrow-gauge loop and its stations, which is so much a part of the background as to why Rapid Transit was running buses in Winthrop at all in February 1941).¹⁹

Rapid Transit, Inc., 58 N.E.2d 754 (1945). So I have referred to him as “Judge Buttrick” throughout the text.

¹⁹ See ROBERT A. LILJESTRAND & DAVID R. SWEETLAND, BOSTON, REVERE BEACH AND LYNN RAILROAD 4 (2002) [hereinafter LILJESTRAND & SWEETLAND] (source of the first map); *Boston, Revere Beach and Lynn Railroad*, WIKIWAND, https://www.wikiwand.com/en/Boston,_Revere_Beach_and_Lynn_Railroad (last visited Mar. 31, 2024) (source of the second map).



MAP OF WINTHROP
 PUBLISHED BY
FLOYD AND TUCKER
 1903.

FLOYD & TUCKER
 BROKERS IN
Wintthrop Real Estate and Mortgages
 Insurance Written in the Best Stock and Mutual Companies.
 Agents for the Massachusetts Wharf Coal Company.
 Notary Public. Justice of the Peace.
 OFFICES:
BOSTON: 34 School St., Room 35, opp. City Hall.
WINTHROP: Cor. Wintthrop and Jefferson Sts., Centre Station.
 TELEPHONE, WINTHROP 27-2.

SCALE 1000 FEET TO THE INCH

Here are the relevant details in a nutshell. In 1940, Winthrop was a town of about 17,000 residents.²⁰ Largely a bedroom suburb of Boston, it had been blessed for decades with efficient public transportation provided by the Boston, Revere Beach and Lynn Railroad (hereinafter referred to as the “railroad” or “narrow gauge”).²¹ This railroad was a fairly short line as railroads went, running a main line from its main terminal on Boston Harbor in southern East Boston to Lynn, with various stops along the way,²² and a Winthrop spur, referred to as the loop (for reasons that are obvious from the map), which ran from Orient Heights on the mainline east about half a mile, where it crossed into Winthrop over a railroad bridge and served the stations on the loop around Winthrop shown on the map, returning to Orient Heights after completing the loop alternately in a clockwise direction, with the next train operating in a counter-clockwise direction.²³ People commuting to Boston would ride to the Orient Heights station, then switch to a southbound train to access the Boston transit system at the railroad’s main terminal. The presumably much smaller number who worked in Saugus or Lynn would take a northbound train from Orient Heights. I have found no evidence of any regular bus service in Winthrop (excepting the railroad’s own Point Shirley shuttle bus) while the narrow-gauge loop was in operation (although three taxi companies were listed in the latest pertinent Winthrop directory).²⁴

But then operations ceased, and rather abruptly at that. In 1937, the railroad filed a bankruptcy petition seeking re-organization.²⁵ Then in September 1938, the Boston Elevated (part of Boston’s rapid transit system), which serviced the railroad’s main station and ferry terminal,

²⁰ 16,852 to be exact. See WORLD ALMANAC AND BOOK OF FACTS FOR 1941 641 (E. Eastman Irvine, ed., 1st ed. 1946) (showing population of places in the U.S. with more than 2500 residents).

²¹ See generally, ROBERT C. STANLEY & WILLIAM LIEBERMAN, NARROW GAUGE: THE STORY OF THE BOSTON, REVERE BEACH AND LYNN RAILROAD 3 (1980) [hereinafter STANLEY WITH LIEBERMAN]; LILJESTRAND & SWEETLAND, *supra* note 19, at 4.

²² For a view of the full system as of 1939, see map from Timetable of the railroad for 1939, reproduced in LILJESTRAND & SWEETLAND, *supra* note 19, at 4.

²³ LILJESTRAND & SWEETLAND, *supra* note 19, at 26; The railroad also ran a shuttle bus to Point Shirley from the Winthrop Beach station, but that bus disappeared when the railroad did, as did the railroad company’s ferry boats and ferry slips. See STANLEY WITH LIEBERMAN, *supra* note 21, at 62, 108.

²⁴ See WINTHROP, MASSACHUSETTS DIRECTORY 233 (1931) (listing the “Red Taxi Company,” the “Winthrop Beach Taxi Company,” and the “Winthrop Taxi Service Co., Inc.”). There is no listing for a bus company. This directory was available on Ancestry, and there were no other directories available.

²⁵ STANLEY WITH LIEBERMAN, *supra* note 21, at 81.

2024]

RISINGER

687

closed.²⁶ This left the railroad and its passengers with no convenient access to most of Boston by public transit. In July 1939, the railroad applied to the Public Utilities Commission for permission to abandon service,²⁷ and in October the railroad amended the bankruptcy petition to become a liquidation petition, which was approved shortly thereafter, and all operations ceased on January 27, 1940.²⁸ These events threatened to leave Winthrop commuters high and dry, but, presumably after substantial behind-the-scenes negotiations, Rapid Transit, Inc. came to the rescue by agreeing to provide a bus service and system to replace the railroad.²⁹ On January 24, 1940, the day before the railroad service made its last run, Rapid Transit was granted a 60-day permit to begin bus service in Winthrop, and on March 26 the authorization was made permanent.³⁰ It seems clear that one of the terms of the service was that there were to be late-night runs to Maverick Square in East Boston to pick up any Winthropites who had stayed late after a night of sporting events, cultural events, or whatever else they may have been doing in Boston. Without such an agreement it is unlikely that it would have made economic sense to run those post-midnight buses, since the post-midnight trips from the Winthrop Highlands station to Maverick Square would have been empty on most nights, and the trip back would have had significant loads generally only on weekends, or perhaps on some weeknights in the summer, depending on how the Red Sox were doing. It certainly would not have paid to run these post-midnight trips in the early hours of a Thursday morning in February absent a requirement to do so.

As an aside, it should be noted that traffic would have been generally sparse at such a time. These circumstances lend credence to the notion that the driver of the scheduled bus did not necessarily keep a perfectly timed schedule, and might have been tempted to highball it to Maverick Square without sufficient attention to oncoming traffic.

Be that as it may, all of these facts and conditions bear heavily on the likelihood of a bus other than the scheduled Rapid Transit bus causing the accident. In this regard, consider this excerpt from the SJC's opinion:

²⁶ STANLEY WITH LIEBERMAN, *supra* note 21, at 124. There is a very detailed chronology of the events that led up to the cessation of service by the railroad and the take-over of service by Rapid Transit in Appendix VII, Chronology of Events During the Period of the BRB&L Railroad, pp. 117–18.

²⁷ STANLEY WITH LIEBERMAN, *supra* note 21, at 117.

²⁸ STANLEY WITH LIEBERMAN, *supra* note 21, at 117.

²⁹ STANLEY WITH LIEBERMAN, *supra* note 21, at 117.

³⁰ STANLEY WITH LIEBERMAN, *supra* note 21, at 117.

The department of public utilities had issued a certificate of public convenience or necessity to the defendant for three routes in Winthrop, one of which included Main Street,³¹ and this was in effect in February, 1941. “There was another bus line in operation in Winthrop at that time but not on Main Street.”

The first oddity to be noted is that the second sentence is in quotation marks, but the source of the quotation is unknown.³² It does not appear to be in a form that would come from actual testimony. But a worse problem is the sentence’s tricky ambiguity. What was intended by “at that time”? Did the court mean to assert that another bus company was “in operation” in some way at some times in some unknown part of Winthrop in February of 1941, or that this unnamed bus company actually ran scheduled buses after midnight in significant areas of Winthrop in 1941? A casual reader, I believe, would probably regard the latter as both intended and true. Whatever the intentment, we can be reasonably certain that it was not true.

I have yet to find an official indication of the existence of any such bus company, or any published source that asserts that after the narrow-gauge loop shut down, there was any bus service operational in Winthrop except Rapid Transit. However, there does appear to have been another bus line that came into Winthrop (barely) in the early 1940s, and it may have actually been in operation by February of 1941, as recited in the opinion, but the details of its operation render it virtually irrelevant as a claimed source of a non-Rapid Transit bus in this case.

My information on the other bus company came from Don Simonini, a member of a Winthrop Historical Commission who had seen Mr. Simonini saw the bus in operation in the early 1940s, and wrote me in late 2005:

[T]he Service Bus Lines Co. served Winthrop in those early, post-railroad, days, but only coming into & leaving from the Highlands, and meant to serve Lynn, Saugus, etc. Their bus would come in—hang around for about 20 minutes to get the

³¹ The court’s footnote states: “The defendant in its brief concedes that this route included the place where the accident occurred.” *Smith v. Rapid Transit, Inc.*, 58 N.E.2d 754, 755 n.1 (Mass. 1945).

³² Given that the reference to the defendant’s brief as the source of the admission referred to in the previous footnote came very close to the quotation in the opinion, I think that it was copied from the Defendant’s brief, where it was likely connected to the concession by a “but.” This would account for its tricky phrasing.

2024]

RISINGER

689

Rapid Transit Winthrop bus connection there, then turn around and go out again. Nowhere near the site of the event.³³

If you look at the map, Winthrop Highlands station was in the far northeast corner of Winthrop, barely in Winthrop at all. Service Bus apparently provided transport to those who worked in Saugus or Lynn after the connection to the northbound train (and the northbound train itself) disappeared. This would likely have been predominantly rush-hour service. In addition, it seems clear that the Service Bus operated as a shuttle with no premises of its own in Winthrop, and certainly no bus yard or repair facilities in Winthrop that might have harbored an unscheduled bus. Finally, on the issue of schedule, it is vanishingly unlikely that Service Bus would run any bus in the late evening or after midnight in freezing February. Who would have been their patrons? It might have been different in the summer when the Suffolk Downs racetrack and amusement park were open (they were halfway between Saugus and Lynn), but in February—nonsense. So, despite the tricky phrasing of the opinion, I think we can safely eliminate the other bus line referred to by the court (which we can assume was Service Bus) as a plausible source of the bus involved in the accident.

And here is what the court has to say about all this:

The direction of a verdict for the defendant was right. The ownership of the bus was a matter of conjecture. While the defendant had the sole franchise for operating a bus line on Main Street, Winthrop, this did not preclude private or chartered buses from using this street; the bus in question could very well have been one operated by someone other than the defendant.³⁴

Hmm. Yes, the non-exclusive control of the streets prevented the application of the doctrine of *res ipsa loquitur* to the circumstances of this case. *Smith* does echo the problems of obtaining knowledge from a defendant concerning the operative events giving rise to the controversy, dealt by the truly seminal 1863 English case of *Byrne v. Boadle*³⁵ by creating the doctrine of *res ipsa loquitur*. But the question remains, how plausible are alternative sources of buses at that time and at that place under the conditions then and there appertaining?

I have already dealt with the other bus line, and the court seems to be aware that it is not a strong candidate, because it does not mention the other bus line in its operative summary paragraph. It only mentions

³³ E-mail from Don Simonini, Member, Winthrop Hist. Comm'n, to author (Dec. 27, 2005) (on file with author).

³⁴ *Smith*, 58 N.E.2d at 755.

³⁵ *Byrne v. Boadle*, (1863) 159 Eng. Rep. 299 (Exch.).

“private” and “charter” buses, without referencing any specific possible buses. One would think that if there were any plausible such buses, the defense would have identified them and the court would have noted them. This once again merely underlines the deficiencies of the opinion.

Charter buses first. What sort of event would be held in Winthrop on a Wednesday in February (a work night, a school night) that would require a chartered bus, much less one on the street at 1:00 in the morning? The weather eliminates outdoor events.³⁶ School dance? Church bingo? High school basketball? Again, the time renders these ridiculous. I think charters are non-starters in the plausibility department. That leaves “private buses.” Buses owned by schools or churches are eliminated on the same grounds as charters.

I was told by Mr. Simonini that the Army installation, which only had about 200 personnel assigned to it in those pre-war times, owned some buses, but they were school bus-type buses and painted olive-drab,³⁷ while the Rapid Transit buses were blue and white, and the Service buses were green and white.³⁸ And what would an Army bus be doing running on Main Street toward East Boston at 1:00 a.m. on a freezing Thursday morning? Again, the actual details of the plaintiff’s testimony would probably have borne heavily on the plausibility of confusing what she saw with an Army bus, but given all the circumstances, it is an implausible alternative hypothesis.³⁹

The court labelled the identification of the bus as a Rapid Transit bus “a matter of conjecture,” but most of the speculative conjecture that occurred in this case was that used to defeat the plaintiff’s claim.⁴⁰ So, I wouldn’t be so quick to sing the praises of the result as proper because the evidence produced was “lousy.” There were, I am sure, people serving long prison sentences in Massachusetts on weaker evidence

³⁶ The weather was fair with an overnight low of 18 degrees. *Weather Reports: Forecasts*, BOSTON GLOBE, Feb. 5, 1941, at A24.

³⁷ ³⁷E-mail from Don Simonini, Member, Winthrop Hist. Comm’n, to author (Dec. 28, 2005, 08:34 PM) (on file with author).

³⁸ ³⁸E-mail from Don Simonini, Member, Winthrop Hist. Comm’n, to author (Dec. 28, 2005, 04:15 PM) (on file with author).

³⁹ As to whether Ms. Smith might have confused some other type of vehicle for a commercial bus, see the suggestion of Allen & Smicklas, *supra* note 3, at 190. I think, however, that is out of bounds, since Betty Smith was at least specific that what she saw was a bus, and the jury could easily find from her direct testimony that she in fact saw a bus and limit itself to the hypothesis of non-Rapid Transit buses (so the court would have to limit its sufficiency ruling, as it did, to that hypothesis). Even so, I can think of precious few vehicles that are easily confusable with a bus of any kind, especially a modern square front bus.)

⁴⁰ *Smith*, 58 N.E.2d at 755.

2024]

RISINGER

691

than the evidence that Rapid Transit operated the bus involved in this case.

There are a couple of loose ends to tie up. First, I had always taken the fact that Betty Smith did not simply say that she had seen “Rapid Transit” on the side of the bus as it passed by her during her evasive action as being evidence of her unusual honesty. But there is some evidence that some or all of the Rapid Transit buses being run in Winthrop had not yet been painted with a logo.⁴¹ The implications of running unidentified buses on its routes, if true, might have provided another ground for arguments similar to *res ipsa*, but the facts are not clear enough to pursue this.⁴²

Second, it is possible that the actual record below was in fact deficient because of attorney malpractice, in that there was a plethora of relevant context information, much judicially noticeable, which would have been available on proper investigation. If the Betty Smith of the case was the Dorchester Betty Smith, and she hired a Dorchester lawyer unfamiliar with the oddities of Winthrop’s geography or transportation history, the record might have been thin due to lack of investigation. Still, the implications of the time of the accident, the day of the week, and the weather would have remained, and should have been obvious to both the court below and the SJC. In any event, Rapid Transit got over and Betty Smith lost when she should have won. You may call that part of the public policy of Massachusetts in 1941 if you want to. In fact, it might have been, more’s the pity.

And there things stood in mid-February of 2022. I was pretty satisfied with this exposition, and was starting the process of preparing it for publication.

Then the e-mail arrived.

⁴¹ Compare the two buses shown as Rapid Transit buses in operation in late January of 1940 shown on pages 107 and 109 of Stanley with Lieberman. *STANLEY WITH LIEBERMAN supra* note 21, at 107–09. One is a school-bus like bus apparently without distinctive markings or paint. The other is a flat-front bus which appears to be newly painted, but the photo is taken from an angle that does not show the side. According to the caption of the first photo, Rapid Transit had a hard time assembling enough buses to fulfill its new service obligation and in 1940 it took what it could get. Whether this situation was fully resolved by February of 1941 is unclear.

⁴² Nor would “frolic and detour” be a tenable defense. How likely is it that an employee was driving the bus on an errand of his own under the circumstances of the case? Almost nil, I would say.

III. THE REST OF THE STORY (OR MOST OF IT).

A. *The E-mail Cometh*

The reader will recall that I told Ron Allen that in 2005 I had tried in a desultory way to determine if there was a record on appeal still in existence, and that I might try again. I gave some thought in late January of 2022 to the logistical problems of a travel-impaired person in his late seventies actually going to Boston in the middle of a pandemic to examine court records *in situ*, but on an off-chance, almost a lark, really, I dialed the main number for the office of the Clerk of the Supreme Judicial Court of Massachusetts, and after a couple of rings it was answered. The person who answered it was named Maura Looney, and she was the First Assistant Clerk of the SJC. She listened patiently to my story, and then indicated that she would get in touch with storage to see what, if anything, was still in existence. I did not hear back for some weeks, and on February 18, I made a gentle inquiry about the status of my request. About two hours later, Ms. Looney responded. Not only had she found the record on appeal and the briefs, she had had them scanned so that I would not have to come to Boston, and they were attached to the e-mail.⁴³

B. *What the E-mail Attachments Contained—Procedural History*

Before giving an account of what the documents from the SJC clerk's office revealed about the facts of the case, a few things must be said about the record itself. It does not resemble what one might expect for a record of proceedings below in modern practice. For instance, there was no verbatim transcript made, and the rendition of the testimony of witnesses is by an old-style "note of testimony" narrative in the third person without the questions that elicited the information being set out. So that readers may make their own judgments and interpretations if they so desire, both the record on appeal and the briefs are included in full in Appendix 3 and Appendix 4. However, for our purposes, it will be both foundational and helpful to describe what can be gleaned from the documents about the timeline concerning the proceedings below.

As the reader already knows, the accident involved in the case took place shortly after 1:00 a.m. on the morning of February 6, 1941. What the reader probably does not yet know (obviously I did not, *vide supra*) is that the applicable statutory time-bar period for such automobile

⁴³ Email from Maura Looney, First Assistant Clerk, Supreme Judicial Court of Mass. (Feb. 18, 2022) (on file with author). I will be forever grateful for the assistance and kindness of this remarkable public servant.

personal injury actions was only one year.⁴⁴ In addition, it turns out that Rapid Transit, Inc. was not the first party sued by Betty Smith for personal injuries arising from the crash. Sometime before the expiration of the statutory period on February 5, 1942, Betty Smith filed an action in the Boston Municipal Court against the owner of the car she struck, on the theory that his car was improperly parked and protruding into the travel lane.⁴⁵ In this action she appears to have been represented by Davis B. Kingston.⁴⁶ This action was “disposed of” in some way before October of 1944.⁴⁷

⁴⁴ See App. 3, Record of Appeal, Defendant’s Answer, p. 11. Davis B. Kingston filed the initial process in the action against Rapid Transit, Inc., and then disappeared from the case. See App. 3, Record of Appeal, last document, Writ of Attachment dated May 14, 1943. Defendant gives the actual filing date as May 13 in his Brief. See App. 4, Briefs on Appeal, at 2. As to Mr. Kingston’s involvement in this case, see *infra* note 48. He is replaced thereafter by Mr. Badger, as to whom see *infra* note 49 and accompanying text.

⁴⁵ App. 4, Brief for Defendant, p. 2.

⁴⁶ *Id.* The name of the defendant in this action was given in the cited brief only as “McDonough.” But as set out below, the name of the defendant was James McDonough. McDonough was from Dorchester. App 3, Record of Appeal, at 9 (police report). The status of the “police report” as it appears in the record presents some interesting problems, which I believe can be resolved with fair certainty. First, the “police report” was read into the record orally by its author, officer Thomas Traynor, and was then written down as part of the note of his testimony by whoever prepared the record on appeal. No actual copy of the police report survives. The text allegedly as read out by Traynor which was later written down in the note of testimony is: “The car she hit was owned by Thomas McDonough, 37 Whittier Street, Dorchester, Registration 753296 Mass. license 291713.” There is an obvious error here. It is clear that the first name of Mr. McDonough was James, not Thomas. This is established by the 1940 census, which contains a James McDonough, 37 Whitten Street, Dorchester, age 36. The correspondence here between the community and the house number, and the near correspondence of the street name, clearly establishes this to be the owner of the car as reflected in the police report. So not only was the note of testimony clearly wrong about McDonough’s first name, it was wrong about the exact name of the street he lived on (Whitten, not Whittier). Whether these errors were the result of bad legibility in the actual police report, errors of reading by Trainor, or errors of transcription by the note taker or the writer of the note of testimony (if these were different people) is unclear. Nevertheless, it seems beyond reasonable doubt that the owner of the car was James McDonough, 37 Whitten Street, Dorchester, age 36, teacher, married, one child. Why he had gone from Dorchester to Winthrop on that cold school night in February is unknown. It is also a remarkable coincidence that his car was involved in an accident with another car that had wended its way from Dorchester, finally arriving at that fated late hour. However, this appears to be one of those coincidences that happen by random correspondence in any informationally rich environment and seem on their face to be meaningful, but are not.

⁴⁷ The exact course of this action (Smith v. McDonough) is unclear from the record. All we know is that it was “disposed of” at some point prior to the appeal in Smith v. Rapid Transit, Inc. See App. 4, Defendant’s Brief on Appeal, p. 2. This disposition was almost certainly by settlement, but when the “disposition” occurred is not recited. We do know that it pended long enough for McDonough’s lawyer to propound interrogatories on Betty Smith, and for her to answer them, because she was cross-examined on a couple of her answers at the trial in the Rapid Transit action. See App. 3,

On May 13, 1943, a separate action had been initiated against Rapid Transit Inc. by Betty Smith, per her lawyer Davis B. Kingston,⁴⁸ for damages in the amount of \$10,000. Kingston apparently had had trouble perfecting service against Rapid Transit, Inc., and so sought service by attachment from the Sheriff on May 13, 1943. Whenever the action was actually filed, it was certainly filed after February 7, 1942, the date on which the statute ran.⁴⁹

The return date for opposing the attachment was May 29, 1943, and by then or shortly thereafter, Francis D. Harrigan⁵⁰ (later joined by Herbert L. Barrett) filed a declaration (the first pleading corresponding to today's "complaint") on June 9, 1943. This was followed on June 10, 1943, by Rapid Transit's answer, filed by the prominent Boston firm of Badger, Pratt, Doyle, and Pratt.⁵¹ It was a short answer—seven

Record of Appeal, at 5. I suspect, given the information concerning Betty Smith's statements to the police on the night of the accident, that it was settled for, essentially, nuisance value before or shortly after the Rapid Transit action was initiated and was itself in pretrial preparation and investigation mode. McDonough was referred to as "Defendant McDonough" in the note of his testimony in the Rapid Transit case, see Record of Appeal, at 9, so it may have been still formally pending then. Nevertheless, it seems unlikely, however it was "disposed of," that it yielded Betty Smith much money. Finally, the presence of interrogatory practice shows that Massachusetts at this time was not totally without modern discovery mechanisms, but these apparently did not include depositions.

⁴⁸ The involvement of Mr. Kingston as lawyer for Betty Smith against Rapid Transit (and presumably against Mr. McDonough also) in the Boston Municipal Court proceedings raises one of the most interesting and complicated issues of Massachusetts practice, especially in automobile cases, in the 1940s. Mr. Kingston was also chief justice of the Boston Municipal Court. Obituary, *Davis B. Kingston—Services Wednesday for Boston Chief Justice*, BOSTON GLOBE 26 (Feb. 22, 1954). How could he represent plaintiffs in a court where he was Chief Justice? Well, he was allowed to do just that, as were the other justices of the municipal and district courts of the time, where all "motor tort" cases had to be filed initially by statute. A summary of this arrangement and the move to abolish it can be found in ALAN J. DIMOND, *Chapter 23 - Administration of Justice*, in 3 ANN. SURV. MASS. L. 225 (1955–56). Luckily for us, all potential mischief of this bizarre arrangement was washed away when the case was removed to Superior Court, presumably by Rapid Transit (though both parties had a right of removal). So for us, it is just a footnote. For these original filing requirement and removal options in "motor torts," see Motor Tort Entries, 101 B. BULL. 16 (1935).

⁴⁹ It may be that Massachusetts had an unusual procedure allowing the initiation of an action by writ of attachment even against a domestic corporation. When the lawyers who replaced Mr. Kingston as lawyers for Betty Smith against Rapid Transit, Inc. filed their Declaration (i.e., complaint) in the case, they did not style it "amended declaration." App. 3, Record of Appeal, at 10.

⁵⁰ Harrigan was a well-known trial lawyer who was active in Democratic politics and once ran for governor of Massachusetts on the Democratic ticket. See Obituary, "Francis D. Harrigan, Once Ran for Governor," BOSTON GLOBE 30 (Nov. 17, 1969). How he came to represent Betty Smith is unknown.

⁵¹ Obituary, *Walter I. Badger, Jr., Headed Hub Bar Assoc.*, BOSTON GLOBE at 26 (Nov. 26, 1965).

2024]

RISINGER

695

conclusory paragraphs—with a high percentage of boilerplate, but it did raise the statute of limitations defense.

The case then entered the pre-trial investigation and preparation phase, and at some point was removed to the Suffolk County Superior court for trial.⁵² The parties awaited a call to trial for nine or ten months before it was finally listed and came on for trial in front of the Honorable Alan Buttrick.

We do not know the exact date of the trial, but the bill of exceptions upon which the appeal was based (and which contains the note of evidence at trial) was settled, signed by Judge Buttrick, and filed April 6, 1944. Judge Buttrick apparently did not write any opinion, or explain from the bench in any detail (that we know of, or that was included in the record), the reasons why he granted the Defendant's motion for directed verdict asserting that the evidence was insufficient to go to the jury on the issue of Rapid Transit's responsibility for the actions of the bus in question. But this appears to have been viewed as the main issue in the case at the start of the trial, since the trial was obviously conducted in a bifurcated manner with liability tried first before damages. In addition, Judge Buttrick did not utilize what appears to have been the more common practice of submitting the case to the jury with a reservation of the sufficiency issue.⁵³ Finally Judge Buttrick apparently did not rule on the time-bar defense, a defense that seems in retrospect to have been fully justified.

The process of appeal to the Supreme Judicial Court was then undertaken. The parties were represented by the same attorneys who had conducted the trial. Briefs were prepared and filed in the October Term of 1944 (they are not more specifically dated), and the Supreme Judicial Court rendered its decision and filed its opinion on January 6, 1945. It seems likely that the case was decided on the papers without oral argument. The defense raised the time-bar issue in its brief, at least by implication, but since it had not cross-appealed, it appears that it was not technically before the court, and was not addressed or mentioned in the opinion.

⁵² As noted in note 49 *supra*, and sources there cited, right of removal to the Superior Court was part of the odd and complex scheme requiring all automobile injury cases to be started in the municipal or similar courts.

⁵³ *See, e.g.*, *Friese v. Boston Consol. Gas Co.*, 88 N.E.2d 1 (Mass. 1949). Judge Buttrick's approach appears to indicate a belief that submitting the case to the jury with a reservation would have resulted in a verdict for the badly injured plaintiff to which she was not entitled. Whether his rulings were influenced by the weaknesses present in the direct testimony of plaintiff and her witnesses revealed *infra* (which was as a matter of law sufficient evidence on the issue of the existence of the bus, and the negligence of its drive), is unknown.

C. *Observations on Certain Preliminary Matters of Fact.*

The first lines of the note of the testimony of Betty Smith are: Betty Smith, the plaintiff, testified that at the time of the accident she was a widow living in the State of Vermont and the owner of an automobile registered in Vermont; that she came from Vermont to visit her sister-in-law in Dorchester while she was sick . . .⁵⁴

It is clear from this that Betty Smith the Plaintiff was none of the candidate Betty Smiths I had earlier identified.⁵⁵ However, her testimony was almost certainly false, or close to it, when she asserted that she was a “widow living in the state of Vermont.” The note of her testimony gives no specific address in Vermont. However, the police report from the night of the accident, which was read into the record, indicates (whether from a document or from her oral statement is unclear) that her Vermont address was only a postbox (Box 37) in Montpelier, Vermont, and the car had “registration 89193, Vermont.”⁵⁶ In the 1940 census there were only eight Betty Smiths enumerated in Vermont, and all of them were under 22 and none was a widow. In addition, in the same census, there was a Betty Smith, widow, age 46, born in Vermont, living in Malden, Massachusetts, which is only eight miles northwest of Winthrop and fifteen miles southeast of the Vermont line (although it is 175 miles southeast of Montpelier). It seems highly probable that this was the Betty Smith who was involved in the accident on February 6, 1941.⁵⁷ But why would she maintain a postal address in Vermont and register her car there? This is easy. At the time Massachusetts was the only jurisdiction in the country that had a mandatory automobile insurance law.⁵⁸

We might learn more about Plaintiff Betty Smith if we could determine her surname at birth. The information in the note of her

⁵⁴ See App. 3, Record of Appeal, at 2.

⁵⁵ See *supra* note 14.

⁵⁶ App. 3, Record of Appeal, at 9 (police report).

⁵⁷ There is a 1930 census entry for this Betty Smith, which reflects that she was already living apart from her husband at that time. Her maiden name and her husband’s first name are not given, but her marriage year is given as 1916. Unfortunately they were missed in the 1920 census. Good luck finding the marriage of a woman named Betty of the right age to a man named Smith in 1916. I have tried and failed.

⁵⁸ In 1925, Massachusetts passed the first legislation in the country requiring automobile insurance for drivers as a prerequisite to registering a vehicle. See Ralph H. Blanchard, *Compulsory Motor Vehicle Liability Insurance in Massachusetts*, 3 L. & CONTEMP. PROBS. 537, 538–39 (1936). For over 30 years, Massachusetts was the only state in America with a compulsory auto insurance law requiring insurance before registration. See generally James Williard Hurst, *Chapter Eight: The Automobile*, 2022 WISC. L. REV. 463 (2022).

2024]

RISINGER

697

testimony might be expected to lead to this fact, but it does not. She asserted that she had gone to Dorchester to visit her sister-in-law, who was sick and who died while Betty was there.⁵⁹ A sister-in-law would normally be the wife of one's brother or the sister of one's husband. We know that Betty's husband's name was Smith. A careful examination of both census records and the death notices in the *Boston Globe* from February 2 through February 5, 1941, reveals no wife of a man named Smith who died in Dorchester during that period. In addition, we are told in the note of Betty Smith's testimony that Mrs. Mulligan (who was in the car when the collision occurred and testified at trial) was the sister of the deceased woman (Mrs. Smith's "sister-in-law's sister").⁶⁰ Mrs. Mulligan was Anna T. Mulligan, nee Malone, who is easy to trace back through census records, the most important of which is the federal census of 1900. This reveals that Anna Malone (sub-nom "Annie") had three siblings: Dennis (born circa 1881), Kate (born circa 1885), and Agnes (born circa 1888). It is abundantly clear that Dennis and Agnes both lived in Dorchester in 1941, and that Dennis and his spouse were alive at that time,⁶¹ and that Agnes was then alive and not yet married.⁶² In addition, Mary, who had married one William Kaufman, was living with him in Dorchester in 1940 and did not die until 1951.⁶³ That leaves Kate to be Anna's sister who died. Kate is hard to find in the available records after 1910. However, having checked all available records, including the death notices described above, I have found no plausible candidate for Kate. That does not mean that she was not the deceased—given all the circumstances, she probably was. She could have been missed in the 1940 census or listed under an as yet undiscovered married name, and not everyone publishes a death notice for a loved one. However, for our purposes, we cannot determine either Kate's married name or, by inference, Betty's birth surname. And that's about

⁵⁹ App. 3, Record of Appeal, at 2 (note of Smith testimony).

⁶⁰ *Id.*

⁶¹ Dennis J. Malone (father Dennis Malone, mother Mary A. Burns Malone), married Johanna M. Coffey Purcell on July 25, 1909. See Massachusetts Marriage Record, downloaded from Ancestry. In the 1940 census they were living in Dorchester with their son Joseph, age 20. Dennis Malone's draft registration card, dated April 26, 1942, lists his wife Johanna as the person who would always know his whereabouts. Hence, she was alive in 1941. Dennis died on December 10, 1943, and was survived by Johanna. Obituary, Dennis J. Malone, *BOSTON GLOBE* 2 (Dec. 11, 1943).

⁶² See Massachusetts 1943 Marriage Record for the marriage of Agnes Malone (age 56, first marriage) to Timothy Hooley (age 57, second marriage). Agnes Hooley died in 1955, and her obituary listed her sister, Anna Mulligan, as surviving her. Obituary, Agnes Hooley, *BOSTON GLOBE* at 39 (May 11, 1959).

⁶³ See Obituary, Mary A. Kaufman, widow of William W. Kaufman, *BOSTON GLOBE* at 19 (Jan. 23, 1951) (listing her survivors as Agnes Hooley and Anna T. Mulligan).

as far as we can go with that. Nevertheless, all the available evidence strongly points to Plaintiff Betty Smith being Malden Betty Smith. Of course, the court and jury apparently knew nothing of this and thus could not be influenced by it in their evaluation of Betty's reliability as a witness, but we are free to consider it. However, we might over-value the avoidance of the insurance obligation. It was probably a not-uncommon fiddle that otherwise upright people practiced, as it continues to be in New Jersey if the New York and Pennsylvania plates on our block are any indication.

D. The Actual Facts of the Case, as Best I Can Reconstruct Them from the Available Information.

My own best explanation of all of this is as follows: On February 5, 1941, Mrs. Mulligan (Anna T. Mulligan, nee Malone, age 50) attended the funeral and Mass for her sister Kate (married name unknown) in Dorchester with her husband and three adult children, all of whom lived at home.⁶⁴ The Mass would normally have been concluded by noon or so and normally be followed by a lunch for the attendees. Attendees would normally have included Mrs. Mulligan's two sisters and their husbands' families, and her brother and his wife and family, all of whom lived in Dorchester, as well as Betty Smith, Kate's sister-in-law, and perhaps other relatives and friends of the family. After Mass, or at the beginning of the post-Mass meal gathering, Mr. Mulligan or one or more children indicated that they wanted to get back to Winthrop. Anna said she would like to stay, and Betty Smith volunteered to drive her home after the events. Mr. Mulligan and the children then drove back to Winthrop. Sometime in the early evening, Betty Smith and Anna Mulligan got on the road to head toward Winthrop.⁶⁵ It is likely that there had been some alcohol consumption at the gathering before they left. Mrs. Mulligan had called her friend from Winthrop, Mrs. Fay (Mary F. Fay, nee Murphy, age 50), and found out she was visiting someone in East Boston along with a man named Egan (also apparently from Winthrop).⁶⁶ Mrs. Mulligan and Betty Smith then arranged to pick up Mrs. Fay (and also Mr. Egan) on their way to Winthrop and give Mrs. Fay

⁶⁴ For her and her children, see 1940 census. For some reason her husband James was enumerated in Florida, not Winthrop, on enumeration day mid-1940. However, whatever the reason, it is unlikely to have indicated any long-term separation, or to suggest that he had not returned to Winthrop by February of 1941. They were missed in the 1950 census, but were clearly together in Winthrop when he died in 1951. See Obituary, "James B. Mulligan, beloved husband of Anna (Malone) Mulligan, who died in Winthrop on Dec. 15, 1951," BOSTON GLOBE at 18 (Dec. 17, 1951).

⁶⁵ App. 3, Record of Appeal, at 2 (Smith testimony).

⁶⁶ See *id.*

a ride to her home at 42 Madison Avenue in Winthrop, which was less than a mile from Mr. Mulligan's home at Shirley Street. They stopped at the house where Mrs. Fay was, and stayed for some period of time. It was beginning to get late, but they were now hungry (or perhaps in need of coffee) and the four of them (Smith, Mulligan, Fay and Egan) decided to go to the East Boston Howard Johnson's Restaurant at 951 Bennington St.⁶⁷ They must have entered fairly late, because they stayed until the restaurant closed shortly before 1:00 a.m., when they all got in Betty Smith's car and headed toward Winthrop.⁶⁸ Betty Smith was driving, Mrs. Mulligan was in the rear seat behind the driver, Mrs. Fay was in the rear seat on the passenger side,⁶⁹ and Mr. Egan was in the front passenger seat.⁷⁰ Betty Smith and Mrs. Mulligan were certain to have been emotionally and physically exhausted from the events of the day, whether or not they had consumed any alcohol at some point. There was still a substantial amount of snow left over from a heavy snow a day or two earlier, which remained plowed into mounds at the curbs of the streets they traversed.⁷¹ The total distance they drove before the accident occurred (just before they reached the intersection of Main Street and Banks Street in Winthrop) was 1.3 miles.⁷²

Here is where things get both interesting and frustrating. Betty Smith rear-ended a car parked adjacent to the snowbank that extended from the curb.⁷³ The car was owned by James McDonough of

⁶⁷ *Id.* The address is from the Boston City Directory for 1941, p. 755. Mrs. Smith "thought it was on Bennington St." Record of Appeal, at 2 (note of Smith testimony). The site is currently a Dunkin Donuts (see Google StreetView for the address), but the building is too big for the Donut Shop, and looks suspiciously like it could previously have been a Howard Johnson's.

⁶⁸ App. 3, Record of Appeal, at 2 (testimony of Betty Smith).

⁶⁹ *Id.* at 3; *id.* at 6 (testimony of Mary F. Fay) ("she [Fay] . . . was sitting on the left hand side of the back seat"); *id.* at 7 (testimony of Mrs. Mulligan) (" . . . she [Mulligan] was sitting in the rear seat").

⁷⁰ Egan's position in the car is by inference from that of the others. It is possible—though unlikely—that for some reason the front passenger seat was unoccupied, and that all three passengers were in the back seat. Egan did not testify and was not mentioned in the testimony after they left Howard Johnson's, except to be identified as one of the three passengers. See App. 3, Record of Appeal, at 2 (testimony of Betty Smith).

⁷¹ *Id.* at 2–3.

⁷² See Directions from 951 Bennington Street, Boston, MA 02128 to the intersections of Main Street and Banks Street, Winthrop, MA 02152, GOOGLE MAPS, <https://www.google.com/maps/dir/> (request directions from 951 Bennington Street to Main and Banks Street) (last visited Mar. 29, 2024). The route is not different from what it was in 1941.

⁷³ App. 3, Record of Appeal, at 3–4 (testimony of Betty Smith); *id.* at 8 (testimony of Thomas E. Trainor); *id.* at 8–9 (testimony of John L. McDonald); *id.* at 9 (testimony of McDonough).

Dorchester.⁷⁴ Mr. McDonough was either in his car or visiting one of the houses that lined that side of the street and heard the crash. Either someone notified the police or else flagged down a passing patrol car. At any rate, a patrol car containing Officers Thomas E. Trainor⁷⁵ and John L. McDonald of the Winthrop Police arrived on scene “shortly after” the accident.⁷⁶ After investigating, apparently all parties were allowed to go on their way without citation or detention. A police report was generated the body of which was read into evidence as follows:

Feb. 1941, 1:15 a.m. Mrs. Betty Smith, Box 37, Montpelier, Vermont. Her car hit a car that was parked on Main Street, no one hurt. Registration 81903, Vermont, and the car she hit was owned by Thomas McDonough [sic; actually James], 37 Whittier [sic actually Whitten] Street, Dorchester, Registration 753296 Mass. license 291713. Damage done to Mr. McDonough’s car to the right and left rear fenders and rear bumper torn off. Mrs. Smith said she would take care of the damage done. Satisfactory to both parties. Officers Trainor and McDonald.⁷⁷

A few things must be noted here: first, Betty Smith apparently did not produce a driver’s license (a notation was made of McDonough’s license but none for Smith), and that was let slide, apparently because of her upset state and abject acceptance of responsibility and promise to pay for all damages to the McDonough car; second, no mention was apparently made of a bus causing the accident, or of McDonough’s car sticking out excessively in the rear. These circumstances were elaborated on, at least by implication, when Trainor and McDonough testified for Defendant Rapid Transit at the trial. Trainor testified that when he arrived, the McDonough car was parked “pretty close to the curb and parallel to it.”⁷⁸ He couldn’t say whether the Smith car had struck the McDonough car flush or at an angle, but the McDonough car

⁷⁴ *Id.* at 8 (testimony of Thomas E. Trainor); *id.* at 9 (testimony of John L. McDonald); App. 3, Record of Appeal, at 9 (testimony of McDonough). *But see id.* at 1 (“a car in which the plaintiff was, collided with the rear part of an automobile owned by a one James McDonough . . .”).

⁷⁵ Trainor was a Sergeant when he testified at trial, *see id.* at 8 (testimony of Thomas E. Trainor), but it appears from the police report that he was only a patrolman at the time of the accident. *See id.* at 9.

⁷⁶ *Id.* at 8 (note of Trainor testimony).

⁷⁷ *Id.* at 9. I have taken the liberty of correcting the police report to avoid reader confusion that would result from simply reporting it as it appears in the record. The corrections are fully explained and justified in note 46 *supra*.

⁷⁸ *Id.* at 8.

2024]

RISINGER

701

was “stove in” all across the back from left to right mudguard, the bumper was torn off, and the two cars were locked together.⁷⁹

McDonald also testified that the McDonough car was parked “right aside the curbing parallel to it, and the Smith car was parallel to the curb directly to the rear of the McDonough car and locked into the McDonough car.”⁸⁰ After describing the damage to the McDonough car in much the same terms as Trainor, McDonald indicated that they had pried apart the two cars, and that after they did, the radiator of the Smith car was leaking.⁸¹ On cross-examination, McDonald clarified his earlier statement saying that the cars were parallel to the snowbank, but then—apparently in response to some question about statements by Mrs. Smith that he had previously “testified to in the McDonough case”—he said that he had heard Mrs. Smith say to defendant McDonough that she was to blame and that she would be agreeable to pay for all the damages to the McDonough car.⁸²

Mr. McDonough testified that on the night of the accident, Mrs. Smith “at no time when she talked to him, or to the police officers in his presence did she ever claim that his car was out in the street or was turned at an angle.”⁸³ No mention was made by any witness of any assertion being made on the night of the accident that a bus had caused the accident.

Let us reflect a bit on the events and the scene at the time of and immediately after the collision. We are not told the make and model of either car, but the Smith car had to be some sort of sedan since it had both front and rear seats.⁸⁴ It is not possible to estimate the speed of the Smith car on contact, but given the amount of damage, it was no love tap. In those days without seatbelts or other restraints, all passengers would have been thrown forward, the two in the rear into the backs of the seats in front of them, the front passenger potentially into the dashboard or windshield, and the driver into the steering column. Betty Smith, already physically and emotionally exhausted, and now under the trauma of the event, was almost certainly the first to exit the car to assess the damage. Certainly, at some point when the police were separating the cars, the passengers were likely to have emerged into the seventeen-degree night. So here you have four exhausted and

⁷⁹ App. 3, Record of Appeal, at 8.

⁸⁰ *Id.* at 8 (McDonald testimony).

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 9.

⁸⁴ *Id.* at 7 (testimony of Mrs. Mulligan) (“[S]he was sitting on the rear seat of Mrs. Smith’s car.”).

traumatized middle-aged people milling about. At that time they reported that they were okay, if we credit the police report of “no injuries.”⁸⁵ We do not know how the three Winthropites got home that night, but at some time they must have. Maybe Betty Smith’s car was sufficiently operational to get them the last mile or two, as cold as it was, without overheating. Maybe the police gave them a ride. Maybe they had to call a taxi from one of the houses on the street. However, it is abundantly clear that Betty Smith was not going to go to wherever she lived that night, or for a couple of days, since she had to have her car repaired.⁸⁶ She was probably taken in by Mrs. Mulligan, but may have had to sleep on a sofa as the adrenaline subsided and as the effects of the day and the accident took hold.

And so, what about the assertion in the police report of “no injuries”?⁸⁷ That was apparently true or substantially true for three lucky ducks, Mrs. Mulligan, Mrs. Fay, and Mr. Egan, or at least they did not suffer sufficient injuries that they ever sought compensation, so far as we know. But it clearly was not true of Betty Smith. It is fairly certain that the delayed effects of soft tissue injuries, connective tissue injuries, and other injuries resulted in substantial impairment and pain. The *ad damnum* of the first count of her declaration puts it this way: that in consequence of the accident “she sustained severe personal injuries,” resulting in “pain of body and anguish of mind, which caused her to “be put to expense for medical care and attendance,” and made her “unable to attend to her usual duties.”⁸⁸ It should be noted that the \$10,000 amount of the original writ of attachment was not an insubstantial sum, amounting to more than \$178,475 in March 2024 dollars.⁸⁹

So I think we can conclude that Betty Smith did not want any trouble on the night of the accident, partly because of her lack of insurance and lack of a Vermont driver’s license, and that she was willing to have everything just go away by falling on her sword as to fault and payment for damages to McDonough’s car. But when, days or weeks later, she found herself seriously injured, she decided to sue to cover her losses including pain and suffering. But was her first action against McDonough, and/or her second against Rapid Transit, acts of cold-blooded fraud? Not necessarily.

⁸⁵ App. 3, Record of Appeal, at 8.

⁸⁶ Her *ad damnum* for the second count of her declaration (property damage) indicates that she ultimately had to rent a car. *Id.* at 10.

⁸⁷ *Id.*

⁸⁸ *Id.* (*ad damnum* to first count of Plaintiff’s Declaration).

⁸⁹ See *CPI Inflation Calculator*, BUREAU OF LABOR STATS., <https://data.bls.gov/cgi-bin/cpicalc.pl> (last visited May 16, 2024).

2024]

RISINGER

703

First, in the stress of the accident and its aftermath, and in her desire to avoid any further investigation, she may have failed to mention the bus even though it existed and had some role in the happening of the accident. In addition, her passengers probably did not volunteer anything to the police except in response to a question (“Are you hurt?” for instance). When it became obvious that Betty Smith had been seriously injured, the three of them (Mrs. Smith, Mrs. Mulligan and Mrs. Fay) might well have consulted about their recollection and recalled the bus incident as they testified to it. Or they may have conferred in a manner that led each to remember more than they saw, a kind of *folie à trois* in aid of the injured Betty Smith. Or maybe Betty Smith concocted the bus story when it became clear that her claim against McDonough was not going to result in significant compensation, and the others went along out of friendship and sympathy for the seriously injured woman’s plight. However, a bus clearly existed on that street, going westward, at about that time, given the Rapid Transit schedule. And it is fairly clear that Betty Smith must have seen it and noted it as an odd object on the street at that time. Otherwise, how would she have even known that an assertion concerning a bus would not be met with instant derision? Whether the bus played any role in causing the accident is another issue.

So there might not have been a bus involved in causing the accident. However, assuming there was a bus which caused the accident, in whole or in part, none of this undermines the analysis given in Part 1 about the extremely small likelihood that it was anything but a Rapid Transit bus.

When I finally worked through all this, I considered retitling the article “Lies, Damned Lies, and No Statistics: There Wasn’t Any Bus Involved in the Accident, But If There Was, It Was a Rapid Transit Bus.” But I decided that such a title would be a spoiler that gave away too much at the beginning. But now, it seems to me, it functions well as the conclusion.

IV. CONCLUSION

There probably was no bus involved in the accident, but if there was such a bus, it was a Rapid Transit bus.

704

SETON HALL JLPP

[Vol. 48:3

APPENDIX

SMITH

v.

RAPID TRANSIT, Inc.

Jan. 4, 1945.

Before FIELD, C. J., and LUMMUS, QUA, RONAN, and SPALDING, JJ.

Attorneys and Law Firms

H. L. Barrett, of Boston, for plaintiff.

W. I. Badger, of Boston, for defendant.

Opinion

SPALDING, Justice.

The decisive question in this case is whether there was evidence for the jury that the plaintiff was injured by a bus of the defendant that was operated by one of its employees in the course of his employment. If there was, the defendant concedes that the evidence warranted the submission to the jury of the question of the operator's negligence in the management of the bus. The case is here on the plaintiff's exception to the direction of a verdict for the defendant.

These facts could have been found: While the plaintiff at about 1:00 A. M. on February 6, 1941, was driving an automobile on Main Street, Winthrop, in an easterly direction toward Winthrop Highlands, she observed a bus coming toward her which she described as a 'great big, long, wide affair.' The bus, which was proceeding at about forty miles an hour, 'forced her to turn to the right,' and her automobile collided with a 'parked car.' The plaintiff was coming from Dorchester. The department of public utilities had issued a certificate of public convenience or necessity to the defendant for three routes in Winthrop, one of which included Main Street,¹ and this was in effect in February, 1941. 'There was another bus line in operation in Winthrop at that time but not on Main Street.' According to the defendant's time-table, buses were scheduled to leave Winthrop Highlands for Maverick Square via Main Street at 12:10 A. M., 12:45 A. M., 1:15 A. M., and 2:15 A. M. The running time for this trip at that time of night was thirty minutes.

The direction of a verdict for the defendant was right. The ownership of the bus was a matter of conjecture. While the defendant had the sole franchise for operating a bus line on Main Street, Winthrop, this did not preclude private or chartered buses from using this street; the bus in question could very well have been one operated by someone

2024]

RISINGER

705

other than the defendant. It was said in Sargent v. Massachusetts Accident Co., 307 Mass. 246, at page 250, 29 N.E.2d 825, at page 827, that it is 'not enough that mathematically the chances somewhat favor a proposition to be proved; for example, the fact that colored automobiles made in the current year outnumber black ones would not warrant a finding that an undescribed automobile of the current year is colored and not black, nor would the fact that only a minority of men die of cancer warrant a finding that a particular man did not die of cancer.' The most that can be said of the evidence in the instant case is that perhaps the mathematical chances somewhat favor the proposition that a bus of the defendant caused the accident. This was not enough. A 'proposition is proved by a preponderance of the evidence if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there.' Sargent v. Massachusetts Accident Co., 307 Mass. 246, at page 250, 29 N.E.2d 825 at page 827.

In cases where it has been held that a vehicle was sufficiently identified so as to warrant a finding that it was owned by the defendant, the evidence was considerably stronger than that in the case at bar. See, for example, Kelly v. Railway Express Agency, Inc., 315 Mass. 301, 52 N.E.2d 411; Gallagher v. R. E. Cunniff, Inc., 314 Mass. 7, 8, 9, 49 N.E.2d 448; Breen v. Dedham Water Co., 241 Mass. 217, 135 N.E. 130; Heywood v. Ogasapian, 224 Mass. 203, 112 N.E. 619; Hopwood v. Pokrass, 219 Mass. 263, 106 N.E. 997.

The evidence in the instant case is no stronger for the plaintiff than that in Atlas v. Silsbury-Gamble Motors Co., 278 Mass. 279, 180 N.E. 127, or in Cochrane v. Great Atlantic & Pacific Tea Co., 281 Mass. 386, 183 N.E. 757, where it was held that a finding that the vehicle in question was owned by the defendant was not warranted.

Exceptions overruled.

APPENDIX 2

A. *Casebooks from major publishers in print between 1945 and 1971, and their treatment (or not) of Smith v. Rapid Transit, Inc.:*

1. EDMUND M. MORGAN AND JOHN MAGUIRE, CASES AND MATERIALS ON EVIDENCE (Third edition, 1951)
2. EDMUND M. MORGAN, JOHN MAGUIRE, AND JACK B. WEINSTEIN, CASES AND MATERIALS ON EVIDENCE (Fourth edition, 1957)
3. JOHN MAGUIRE, JACK B. WEINSTEIN, JAMES H. CHADBOURN AND JOHN H. MANSFIELD, CASES AND MATERIALS ON EVIDENCE (Fifth edition, 1965)

The first two editions of this casebook set the *Smith* opinion out in full as the first case in the section on “proof used inferentially,” without comment, and followed by a sentence in the Notes section saying that “the following material samples the inexhaustible problems springing from the fertile field of inferences.” No invocation of “statistical,” nor of the meaning of “mathematically” as used in *Smith*. Nor is there a citation to the case that *Smith* relied on, *Sargent*. By the 1966 edition the *Smith* case is followed by the sentence “For discussion of the problems raised by *Smith*, see Ball, *The Moment of Truth: Probability Theory and Standards of Proof*, 14 Vand. L. Rev. 807 (1961).” But Ball did not mention *Smith*, and discussed *Sargent* only in relation to the debate about the “probability plus belief” interpretation of the burdens of producing evidence and persuasion. See discussion in main text at note 9.

4. GEORGE W. MATHESON AND JEROME PRINCE, CASES AND MATERIALS ON EVIDENCE Foundation Press (1949)
5. MATHESON & PRINCE (Second edition, 1954)

Neither *Smith* nor *Sargent* cited in either edition.

6. MASON LADD, CASES AND MATERIALS ON THE LAW OF EVIDENCE (Second edition, Callaghan, 1955)

Cites neither *Smith* nor *Sargent*.

2024]

RISINGER

707

7. CHARLES T. MCCORMICK, *CASES AND MATERIALS ON THE LAW OF EVIDENCE* (Second edition, West Publishing, 1948).

Sets out *Smith* opinion in full at pp. 987–988 as the second of four cases dealing with the burden of producing evidence, without commentary on any of them.

8. CHARLES T. MCCORMICK, *CASES AND MATERIALS ON THE LAW OF EVIDENCE* (Third edition, West Publishing, 1956)

Not substantially different from the 1948 edition except that a 1950 case is substituted for the first of the four cases (a 1937 case in the earlier edition).

9. DAVID W. LOUISELL, JOHN KAPLAN AND JON R WALTZ, *CASES AND MATERIALS ON EVIDENCE* (Foundation Press, 1968)

Sets out *Smith* in full at 46–47, followed by an excerpt from the relatively obscure Hart and McNaughton article setting out their “buzzing jet plane” hypothetical. See discussion of this piece, main text at note 5. While we can infer that this hypothetical was inspired by *Smith*, *Smith* was not cited in the Hart and McNaughton piece. After this excerpt, there are references to a variety of sources, including the Ball piece and three articles from the newer legal literature from the mid-1960s invoking formal probability as a claimed useful tool for analyzing the legal system, none of which references *Smith*. The implausible “buzzing jet plane” hypothetical lived on here (although virtually nowhere else) in edition after edition at least through 1999. I quit checking at that point.

B. Treatises:

JOHN ARTHUR MAGUIRE, *EVIDENCE: COMMON SENSE AND COMMON LAW* (Foundation Press, 1947). Does not mention *Smith*, statistics, or mathematics in discussing the burdens of production and persuasion, but does mention generally (and critically) the “probability plus belief” standard at p. 180 without any case citations.

EDMUND M. MORGAN, *BASIC PROBLEMS OF EVIDENCE*, First edition (2 vol. paperback), 1954

EDMUND M. MORGAN, *BASIC PROBLEMS OF EVIDENCE*, Second edition (one vol., hard bound) (ALI/ABA, 1963).

Neither edition cites *Smith* or *Sargent*.

CHARLES T. MCCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* (West, 1954)

Cites neither *Smith* nor *Sargent* although it has a chapter (Chapter 36) on Burdens.

Note: The leading treatise at the time was of course WIGMORE ON EVIDENCE. The third edition was completed in 1940, and Wigmore died in 1943. It was kept current thereafter by pocket parts issued more-or-less yearly until the fourth edition began to be published in the 1970s. I have not been able to locate copies of the pocket parts for the period 1945–1970, but they are not likely to have done much in regard to *Smith* except to note its existence.

C. *Reported cases in the United States citing Smith v. Rapid Transit, Inc. from 1945 through 1972:*

1. *Carter v. Yardley & Co.*, 319 Mass. 92 (1946)

The legal issue was the liability of a manufacturer of a bottle of perfume that proved caustic to the skin to a purchaser from a retail store. The answer given was that there was liability despite lack of contractual privity. The citation to *Smith* (and to *Sargent*) was merely prefatory to the analysis (and both cases were characterized rather loosely as requiring “a greater likelihood” that the caustic agent found its way into the bottle through the negligence of the defendant, which in this case the evidence was sufficient to support). *Id.* at 95.

2. *Friese v. Boston Consol. Gas Co.*, 324 Mass. 623 (1949)

The case dealt with liability for a gas explosion which involved equipment (a furnace and a hot water heater) installed and maintained by the defendant. There was a verdict for the defendant which was set aside by the trial judge on sufficiency grounds. The SJC ruled that there was ample evidence supporting the verdict on the ground of improper installation, but that one of the instructions given by the trial court and cross appealed by the defendant authorized a finding of

2024]

RISINGER

709

liability on a ground for which there was no evidence at all (improper cleaning of the pilot light). Since there was a general verdict the SJC could not determine the impact of the improper instruction, and remanded for a retrial. *Sargent, Smith*, and one other case were cited in a string cite for the proposition "Verdicts must rest on more solid foundations." *Id.* at 631.

3. *Sarkesian v. Cedric Chase Photographic Laboratories*, 324 Mass. 620 (1949)

Plaintiff delivered a roll of film he had shot on a foreign trip to the defendant for development. The defendant lost the film. One defense was that there was insufficient evidence to show that the film itself reflected developable exposures, in the face of plaintiff's testimony that he had used that brand of film regularly while abroad, had it developed abroad, and always received back photographic prints and negatives. The court held the evidence sufficient, citing *Smith* in a long string cite not much to the point.

4. *Tartas's Case*, 328 Mass. 595 (1952)

Tartas, a processor of hides by trade, worked part time processing hides for a number of employers, including Jarka Stevedore Company and at least two others. Tartas contracted anthrax from handling infected hides, and died. His estate proceeded against Jarka Stevedore Company, for whom he worked during the incubation period, but did not bring in the other employers for whom he worked during the same period. Jarka's worker's compensation insurance carrier defended by alleging that there was insufficient evidence to prove by a preponderance that Tartas became infected while working with Jarka's hides. There was no specific evidence of infection of hides held by any of the employers at the time of infection. The S.J.C., through Lummus, J. held the evidence insufficient to prove the liability of Jarka and its worker's compensation carrier, citing *Smith* in a string cite and quoting the operative language from *Sargent* (which Lummus had written). Apparently missing was any testimony concerning the number of hours worked at each employer during the incubation period, which would have made the case more like *Smith* if it had been proffered.

5. *Tomao v. A. P. DeSanno & Son, Inc.*, 209 F.2d 544 (3rd Cir. 1954)

A personal injury action brought in federal court in the E.D of Pa. on diversity jurisdiction. Plaintiff was a Pennsylvania resident who was a student in a trade school in Massachusetts. He was injured when a grinding wheel he was using disintegrated. He sued both on the grounds of defect and failure to warn. All were agreed that Massachusetts law governed. Plaintiff won at trial, and on appeal, the Third Circuit held that the evidence was sufficient, citing *Carter v. Yardley, supra*. There is a quote from *Carter* with a string cite citing *Smith*.

6. *Watson v. Wilson*, 335 Mass. 769 (1957)

As the first West headnote says, "In an action for death of a boy allegedly struck by truck driven by defendant who denied his truck had struck the boy, even if evidence was sufficient to show that defendant's truck had struck deceased, it was insufficient to show that striking was negligent." The driver testified he was only going fifteen miles per hour, and was unaware of any striking. No witness testified to excessive speed, or observed how the striking occurred. *Smith* was cited in a string cite on the sufficiency of the evidence to establish contact between the boy and the truck, but not negligence. Like *Smith*, it seems that there must have been more here than meets the eye.

7. *Marino v. Trawler Emil C., Inc.*, 350 Mass. 88 (1966)

A complicated state court case involving federal claims of wrongful death under the Jones Act, and state claims of wrongful death under the Massachusetts wrongful death statute. The case involves "fish spotters," persons employed to see schools of fish in order to guide trawlers in pursuit of them. Until mid-1958, all fish spotters were members of the trawler crew who spotted from the masthead. Then in the mid-1950s an innovation occurred whereby fish spotting was done from a light airplane, which could in addition herd the schools of fish it spotted to a certain extent. In 1958 a consortium of six trawlers intending to fish for porgies in Massachusetts Bay contracted to sell their entire catch to Gloucester Byproducts Co., and agreed to the hiring of an aerial fish spotter. Gloucester contracted with Harold Fogg, who owned his own plane, to spot for all six trawlers.

Gloucester paid Fogg \$12 per hour for his services, and was reimbursed one-sixth each by each of the trawlers. In the middle of the fishing season, the trawler owners suggested the need for a second spotting plane, and Gloucester hired Auclair and his plane on terms similar to Fogg's. Since Auclair had no experience spotting fish, Gloucester hired Marino to ride in Auclair's plane to do the spotting. On August 28, 1958, during spotting operations, the two planes collided and Marino was killed. Marino's estate sued all the trawlers and Gloucester. The court ruled, unsurprisingly, that Marino was not a member of the crew of any of the trawlers, and confirmed the dismissal of the Jones Act claim accordingly. On the claim that the airplane pilots were servants of the vessels, the Court ruled that there was sufficient evidence of the requisite control to allow the inference of a master-servant relationship. On the argument that there was insufficient evidence of negligence by the pilots, the court rather sneered at the contention, marshalling a number of facts, and it was in that connection that a string cite containing *Smith* was deployed and the Massachusetts requirement reflected therein that the result did not rest on conjecture was said to have been satisfied.

8. *Kenney v. Sears, Roebuck & Co.*, 355 Mass. 604 (1969)

This case is frustrating. In June of 1960, Mrs. Kenney bought a Whirlpool refrigerator from Sears. Sears delivered and installed the refrigerator in the house she shared with her mother, Mrs. Compass, and also issued a written one-year "repair or replace" warranty against defects. The refrigerator never worked right. It make funny noises, emitted a strange "burning" smell, and would not freeze ice cream. Mrs. Smith called the Sears service department "five or six times" to complain and request service, but never contacted them in writing or went to the store to register her complaint in person. Sears never sent a service man. Thirteen months after her purchase, the house caught fire. Luckily no one was in the house, so there was no personal injury, but there was extensive property damage. In 1962 an action was filed on behalf of Mrs. Kenney and Mrs. Compass. There were various counts against Whirlpool, and various counts against Sears on various theories, but common to all theories were two questions—was there a defect in the refrigerator, and did that defect cause the fire. A large number of other issues were

raised on appeal, but for our purposes the main interest is in the court's assertion that

[t]he evidence, in our opinion, does not contain any definite statements of fact or expressions of expert opinion permitting the conclusion that it was more likely that the fire arose from causes within the refrigerator than from causes, including wiring defects and short circuits, outside the refrigerator. Essentially, the precise cause of the fire is left to conjecture and surmise.

Id. at 608 (citing *Smith*, *Sargent*, and one other more recent case, *Beaver v. Costin*, 352 Mass. 624 (1967), which does not cite either *Smith* or *Sargent* and in fact is much more generous to the plaintiff's evidence than either of those cases, or of this one).

There are many problems with this. First, it seems clear there was a defect in the refrigerator involving its electrical system. Second, it seems clear that the point of origin of the fire was some place in the kitchen area. Third, the court implies a false dichotomy when it alludes to causes "within the refrigerator" vs. causes "outside the refrigerator." If the refrigerator was drawing excess power, the point of combustion might easily have been in wiring outside the refrigerator. Perhaps the court was influenced by the fact that the circuit to which the refrigerator was plugged in had an inappropriate 30 amp fuse which provided no protection against electrical draws that could cause overheating and combustion wherever it actually took hold. At any rate, this case, unlike *Smith*, did not suffer from thin information so much as misanalysed information. In my opinion.

9. *Imbimo v. Ahrens* 44 Mass. App. Dec. 116 (Mass. App. Div. 1970)

Plaintiff claimed damages for breast cancer alleged to have been traumatically aggravated in an auto accident. The plaintiff's expert testified that such aggravation "could have happened." The trial judge sitting without a jury found for the plaintiff. The appeals court reversed, holding that the mere possibility testified to by the expert was insufficient. *Smith* cited in a boilerplate string cite setting out a garbled version of the "probability plus belief" standard. (Plaintiff must prove that it "appears more likely or probable in the sense that

2024]

RISINGER

713

actual belief in its truth derived from the evidence, exists in the mind of court notwithstanding any doubts that may still linger there.”) *Id.* at 124.

10. *People v. Bailey*, 36 Mich. App. 272 (Ct. App. Div. 3, 1972)

Defendant Bailey was convicted of armed robbery in a retrial after his first conviction in a trial with four other defendants was reversed on *Bruton* grounds. In the second trial, the less-than-positive identification of the victim eyewitness (“he looks like one of them”) was allowed to be corroborated by testimony of a detective that Bailey knew and hung out with the previously convicted defendant, who had confessed. Held sufficiently corroborative to be admitted. In a long dissent, Judge Levin attempted to show, in a fashion owing a great deal to *People v. Collins*, that the probability of coincidental acquaintance between an innocent person fitting the description of the robber and the clearly guilty person was not all that remote. He then cited *Collins* and *Smith* as cases which had rejected “probability proof.” While I am sympathetic to some of the points raised in the dissent, the characterization of *Smith* is questionable.

11. *O’Malley v. R. Zoppo Co. Inc.*, 362 Mass. 588, (1972)

This case involved the removal of topsoil and a decorative trees and underwood tom property owned by the plaintiff, during work done by the Zoppo Company pursuant to a contract with the state and city to enclose a brook and make drainage improvements. The state and city had an easement that allowed them access to do the work, but the removals of soil and vegetation were not necessary to the work. It was undisputed that the removals were done during the period Zoppo conducted the work. Zoppo defended on the ground that there was insufficient proof that Zoppo rather than some other miscreant, removed the soil and trees. The trial court granted directed verdict based, inter alia, on *Smith*. The S.J.C. reversed, marshalling the context evidence including an apparent admission by Mr. Zoppo himself, and concluded that there was plenty of evidence to sustain a finding by a jury that Zoppo was responsible for the removal, despite perhaps plausible arguments by Zoppo that someone else could have done it. The Court commented that the lower court appeared “momentarily to have mistaken the standard to be applied.” *Id.* at 570. Two points are to be noted here. First, the

Sargent/Smith precedents seem to have eroded, and second, if the *Smith* court had had available to it the kind of information presented in the *Zoppo* case, the result would likely have been different.

D. *Legal Journal Articles and Notes Citing Smith v. Rapid Transit, Inc. from 1945 to 1970*

1. Edmund M. Morgan, *Significant Developments in the Law During the War Years*, Published for the Association of American Law Schools by the Practising Law Institute, New York, 1946

2. Edmund M. Morgan, *The Law of Evidence, 1941–1945*, 59 HARV. L. REV. (1946)

Items 1 and 2 are identical, and so they will be treated together. In his examination of recent decisions on the sufficiency of evidence, Morgan spends a good deal of time on Justice Lummus's opinion in *Sargent*, and with respect to *Smith* merely notes that it applied the *Sargent* approach. Morgan is critical of both the coherence and the "probability plus belief" standard of *Sargent*, preferring the approach of Justice Traynor in dissenting in two California cases, bottoming the standards of preponderance and clear and convincing evidence on varying degrees of probability. Given this, it is hard to conclude that the inclusion of *Smith* in his casebook represented an endorsement of it.

3. W. Barton Leach and John T. McNaughton, *Developments in Massachusetts Evidence, 1940–1955*, 49 MASS L.Q. (1955).

The *Smith* case noted thus: "Smith v. Rapid Transit, Inc., 317 Mass. 469, 58 NE2d 754 (1945), held that mathematical probability of a fact is not alone enough to sustain a finding of that fact." This mischaracterizes *Smith* (and *Sargent*, since the *Sargent* formula, quoted in *Smith*, was that it was not enough that the mathematical probability somewhat favored the plaintiff).

4. John T. McNaughton, *Burdens of Proof and Presumptions in Massachusetts*, B.U. L. REV. 481 (1955).

This material also appeared in Leach & McNaughton, *HANDBOOK OF MASSACHUSETTS EVIDENCE*, Little, Brown, 1956. "If

2024]

RISINGER

715

the evidence is so scant or ambiguous that the jury could reasonably find neither way as to the existence of the fact, the judge should...ensure a finding against the party with the burden of persuasion. This is so whether or not the scant evidence adduced, considered alone, reflects a high probability that the fact exists. *Smith v. Rapid Transit, Inc...*" This mischaracterizes *Smith's* language (quoting from *Sargent*) regarding the "mathematical" probability "somewhat" favoring the plaintiff not being sufficient.

5. Frank R. Lacy, *Annual Survey of Oregon Law, Torts*, 1959 OREGON L. REV. 67 (1959)

Jamerson v. Witt, 215 Ore. 227 (1958), was a case where a homeowner and the antenna installer he had hired were both electrocuted when the antenna mast came into contact with a high voltage wire which crossed the homeowner's property. In analyzing the case at pp. 74-75, the author takes issue with the Court's conclusion that the evidence in the case was insufficient to support a claim by the estate of a homeowner against the estate of the installer. In so doing, the author says that such negligence on the part of the installer was probable, and asks the question "but is probability enough," and drops a footnote to *Smith*. Thereafter, however, the author never answers that question, and turns to a *res ipsa loquitur* analysis which would have resulted in the case being sent to the jury. The question and the associated footnote were mere flourishes. Professor Lacy taught evidence at Oregon Law, and it is likely he encountered *Smith* either in Morgan's Harvard Law Review piece, or in Morgan's or McCormick's casebook.

6. Hugh W. Babb, *The Proposed Uniform Commercial Code*, 7 PORTLAND U. L. REV. 16 (1961).

At p. 119, the author criticizes the U.C.C. draft on sufficiency as including only a balance-of-probabilities formula, and omitting "the vital requirement of "actual belief," saying that this is "contrary to *Smith v. Rapid Transit, Inc.*" and other common law cases, following this by a quotation from a Michigan case to the same "probability plus belief" effect.

7. Charles H. Randall, Jr., *Survey of South Carolina Law, Evidence*, 15 S. C. L. Rev. 96 (1962)

Smith is mentioned in a comment on a South Carolina worker's compensation case, *Parker v. Corbett Canning Co.* A night watchman was found dead lying with his feet in a pool of water. Six feet away was an electrical cord which was not plugged into the nearby wall socket. Plaintiff's theory was that the death was "work related" because one could infer that the deceased died from electrocution when removing the plug from the wall. There was no other evidence of electrocution presented. The court held that the evidence was insufficient to support a finding that the death was work-related. The author of the comment dropped a footnote that said "Judicial struggles with this problem are indicated in four cases collected and cited by Dean McCormick in his casebook...." The author then cited these cases, one of which was *Smith*.

8. Carl M. Seliger and Roderic B. Schoen, *To Purify the Bar: A Constitutional Approach to Non-Professional Misconduct*, 5 NATURAL RESOURCES J. 299 (1965).

A long and interesting article on whether and when it is proper, or even Constitutional, to discipline a lawyer for conduct not specifically related to the practice of law. The placement of the article is decidedly odd, but one of the authors was the editor of the journal. The article was inspired by a case in New Mexico which suspended a lawyer who drove while intoxicated and had an accident resulting in death. He only pled to driving while intoxicated (a misdemeanor), but was nevertheless suspended indefinitely with a minimum period of a year. In a section on the over-inclusiveness problem that can be presented by disciplinary categories that are too general, the authors drop a "cf." citation to *Smith*.

9. Jack B. Weinstein, *Some Difficulties in Devising Rules for Determining Truth in Judicial Trials*, 66 COL. L. REV. 223 (1966)

Then-Professor Weinstein is quite critical of *Smith*, *Sargent*, and the "probability plus belief" standard, saying of them as follows:

Although it is necessary to decide cases on the basis of probabilities, many courts still insist that mere "mathematical chances are not enough to support a finding," and "a proposition is proved by a preponderance of the evidence [only] if it is made to appear...that actual belief in its truth, derived from the

2024]

RISINGER

717

evidence, exists in the mind or minds of the tribunal.” The evidentiary rule establishing such more-than-probable standards needs rethinking. Apart from their deleterious effect in many routine litigations, they deny the courts the assistance that will be increasingly available from statistical analysis and expert testimony.

Id. at 230 (citations omitted). So like Morgan before him, this co-editor of the Morgan/Maguire casebook did not regard the *Smith* case positively.

10. W. Barton Leach and Paul J. Liacos, *Burden of Proof and Presumptions*, 52 MASS. L.Q. (1967)

Basically the same as Leach & McNaughton version (number 3 *supra*), except the *Smith* (actually *Sargent*) formula is corrected to include the “somewhat favors” language.

11. Hans Zeisel, *Dr. Spock and the Case of the Vanishing Women Jurors*, 37 U. CHI. L. REV. 1 (1969)

Zeisel, an eminent sociologist and legal scholar, addressed the question of why there were so few women in the venire pool from which Dr. Spock’s jury was selected when he and four others (the Boston Five) were tried for interfering with the draft. Zeisel’s data gathering and statistical analysis revealing a number of built-in structural defects and practices in the system of preparing jury pools that guaranteed an underrepresentation of females is compelling, but did not succeed in convincing the trial judge to grant a new trial after conviction by the all-male jury. As part of his general analysis of probability in court, however, Zeisel does what is in my opinion a less than excellent job in analyzing a couple of cases, one of which (at p. 12) is *Smith*, which he describes as “well known to law students.” He then shows that it is less than well known to him. He mischaracterizes it as involving a woman who had been “negligently run over by a bus,” and further as involving the insufficiency of plaintiff’s evidence that “the defendant owned the overwhelming majority of busses operating on that street” to prove defendant’s ownership.

This should not be taken as an endorsement of *Smith* or the other cases he discusses. After a lengthy discussion of the opinion in *People v. Collins*, he concludes at page 15: “Seen in the context of these cases, the statistical proof of how the

718

SETON HALL JLPP

[Vol. 48:3

women jurors for the Spock trial were made to disappear would have assumed a special significance had it come under judicial scrutiny. It might have offered the perfect opportunity for establishing the principle that statistical inference may constitute proof of an individual event.”

12. Edward H. Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 MINN. L. REV. 903 (1970–1971)

See discussion in main text, note 5.

2024]

RISINGER

719

APPENDIX 3

**RECORD
OF
APPEAL**

THE COMMONWEALTH OF MASSACHUSETTS

SUPERIOR COURT.

SUFFOLK, SS.

No. 386735

RETTEY SMITH

vs.

RAPID TRANSIT, INC.

*PLAINTIFF'S SUBSTITUTE BILL OF EXCEPTIONS*

This is an action of tort brought to recover for personal injuries and property damage alleged to have been sustained as the result of the negligence of the defendant, its servants or agents in the operation of a bus on Feb. 6, 1941 on Main Street in Winthrop, Massachusetts.

All pleadings and exhibits may be referred to and are hereby made a part of this bill of exceptions.

The material evidence introduced at the trial was as follows:—

The accident occurred at about 1:00 A.M. on Feb. 6, 1941 on Main Street in Winthrop, Massachusetts, when a car in which the plaintiff was, collided with the rear part of an automobile owned by one James McDonough which was parked on Main Street about twenty-five feet east of the easterly curb line as extended of Banks Street which intersected Main Street at a right angle.

JAMES M. CUSHING for the plaintiff, testified that he was Administrative Secretary to the Department of Public Utilities for the Commonwealth of Massachusetts; that according to the records of that department, a certificate of Public Convenience or Necessity was issued on March 12, 1940 to Rapid Transit Company, Inc., which was made up to three routes, one of which included Main Street, or a portion of

2024]

RISINGER

721

2

it that this certificate was for Route 2 in the Town of Winthrop from the junction of Shirley Street and Washington Avenue over Shirley Street to Hawthorne Avenue, over Beach Road to Hawthorne Avenue to Winthrop Shore Drive, being a public way controlled by the Metropolitan District Commission, Crescent Avenue from Beach Road to Revere Street, over Revere Street from Crescent Avenue to Winthrop Street, otherwise known as McGee's Corner, over Main Street from Winthrop Street to the Winthrop-Boston line; that this franchise was in force and effect in February 1941; that the same company had another route over Main Street entering at a different point and that no other company had a franchise to operate on Main Street to Crest at that time. There was another bus line in operation in Winthrop at that time but not on Main Street.

BETTY SMITH, the plaintiff, testified that at the time of the accident she was a widow living in the State of Vermont and the owner of an automobile registered in Vermont; that she came from Vermont to visit her sister-in-law in Dorchester while she was sick; that her sister-in-law died while she was here and she stayed for the funeral; that on the day of the accident and before the accident happened she was coming from Dorchester to Winthrop to bring her sister-in-law's sister to her home in Winthrop; that they came from Dorchester right through Everett and the Parkway and over through Chelsea to the Heights; that Mrs. Mulligan and she were in the car; that they stopped at the house of a Mrs. Fay and Mrs. Fay and a Mr. Egan were there and went along with them and there were four persons in the car at the time of the accident; that they went to Howard Johnson's place, which she thought was on Bennington Street, and left there before it closed to go towards Winthrop; that at the time of the funeral and a day or two before the funeral, there had been a heavy snow storm and when the accident happened, there was snow around at various places on the ground in Winthrop and in Dorchester; that after they came out of Johnson's, they turned to the right on Bennington Street and went over a bridge going east towards Winthrop; that Saratoga Street is the beginning after you leave the bridge at Orient Heights and then you go on to Main Street in Winthrop; that at the place where the accident happened, she should say Main Street was about thirty-three feet wide from curb to curb, with rather nice residential houses on

SEP 15 1950

each side including a few double houses and driveways into the houses; that this would be going from Orient Heights east towards Winthrop Highlands if you bear to the left after Main Street and Revere Street and as she was going along towards Banks Street, she was going in the direction of the Highlands; that there were snow banks on each side of the road extending out about three feet from the curbstone; that Banks Street was the nearest street to the scene of the accident and as the witness was going, came into Main Street on her left; that she had her lights on and it was a cold, clear night; that as she was driving along, she should figure she was about sixty feet from a car that she saw in the distance and she kept driving at the regular speed she was going, which was about twenty miles an hour; that a car was coming towards her and started to slow down and as that car approached, she kept going at the same rate of speed, thinking she was going to pass the parked car that was near Banks Street, and she saw a bus coming along, she should say about forty miles an hour; that as the car was approaching she kept on going at the same speed and thought she had room enough to pass the parked car and the snow bank but she saw she didn't as this bus came about forty miles an hour and the lights were very bright, she didn't want to have a head-on collision with the bus so she swerved to the right and as she did, she went into the parked car; that the parked car didn't have any lights at all; that she should say it was about seven feet from the intersection of Banks Street parallel to the snowbank and the rear end of the parked car was out at an angle about three feet; that as she was going along there and approaching this parked car in the space between the parked car and the snow, she was about twenty feet nearer to make the opening if the bus hadn't come along; that the bus did not stop; that she saw the parked car and was trying to pass that and then saw the other car coming towards her and knew that she had a chance, there wasn't anything else coming and then the bus came out around to pass the other car; that she was about twenty feet away from the parked car when the bus cut out from behind the other car; that after the bus passed that car she turned; that the bus was coming through passing the other car that was coming towards her; that there was snow on both sides of the road and the parked car was at an angle of about thirty degrees; that she was about sixty feet from the car she saw approaching her when she first saw it and kept driving on; that

2024]

RISINGER

723

4

she was then about twenty feet from the parked car; that the car slowed down and she kept going at the same rate of speed thinking she was going to get through that opening before he got there and he was letting her do that when a bus came along at forty miles an hour and drove her over to run into the parked car; that she couldn't get in between anyway and knew that so she turned towards the snow bank and as she did, she hit the rear of the parked car and damaged the front end of her car. After the accident the front wheels were in back of the parked car.

On CROSS-EXAMINATION the plaintiff testified that on either side of the road a snow bank two or three feet high extended out from the curbing about three feet; that Main Street was thirty-three feet wide; that there were no car tracks in the middle of the street and she was driving on the right as near as she could to keep away from the snow; that she should say that the left hand side of her car was about in the center of the road; that the road was slightly slippery and there was a little ice on it; that Main Street at this point was straight and she could see a long distance up Main Street in an easterly direction in which she was going; that there was an electric light but she was unable to tell which side the light was on, although she imagined the place was well lighted; that her headlights were in good condition and focusing properly; that her brakes were in good condition; that under the conditions that night with the brakes she had in good condition, if she had applied her brakes quickly, she would probably go about five feet before she stopped travelling at twenty miles an hour; that she first saw the other car approaching her about three car lengths ahead of her and then saw the bus; that the other car was travelling about twenty miles an hour and still moving when she saw the bus; that when she first saw the bus, it was probably five feet behind the other car, travelling at around thirty miles an hour, but it turned out and came past it; that she couldn't tell for what distance it followed the other car before it started to pull out, she should say, it travelled about two feet behind the other car before it started to pull out, she knows she thought she had plenty of room, the car ahead of the bus was slowing down from twenty miles an hour to fifteen miles an hour; that the bus pulled out and started going very fast, she should say, forty miles an hour; that she thought she had a chance; that when the

5

bus pulled out, it was about three times the distance of the parked automobile from her; that the other car was about twenty feet back from the easterly line of Banks Street at about the same distance she was from the easterly line of Banks Street and was slowing down, she thought it was giving her a chance to get by; that she was still going twenty miles an hour and thought she had plenty of chance when the bus pulled out; that the left hand side of her car at that time was towards the center of the road; that this bus was a great big, long, wide affair; that as the bus passed, it came at such speed that it forced her to turn to the right; that no part of the bus came in contact with her car and she pulled in and came in contact with the parked automobile; that after the accident some police officers came and she told them about the bus; that she told them the lights blinded her; that she didn't think there was any other obstruction that would interfere with her seeing a car approaching in the opposite direction before it was sixty feet away from her or thereabouts; that when the bus first pulled out on an angle, it was going about thirty miles an hour and as it was pulling out it increased its speed; that as it came out it pulled to the left and she had to pull to the right to avoid hitting it; that she pulled to the right to get out of its way and got out of its way; that the other car preceding the bus was about two feet from the snow bank.

The plaintiff was shown interrogatories which she answered in the case of *Smith v. McDonough* and her attention was called to interrogatory five "Please state specifically in detail the entire description of your accident, giving every detail relating to said accident, and stating in detail how it happened". The answer to interrogatory five which the plaintiff admitted making was as follows: "I was operating my car in an easterly direction in Winthrop. A bus was approaching from the opposite direction and likewise another vehicle was travelling parallel to the bus. I drove my car to the right side of the road and the McDonough car was parked about three feet from a snowbank near the right hand curb at an angle with lights, causing me to strike the same". Her attention was called to interrogatory six in the McDonough case: "When did the operator of the plaintiff's automobile first see the defendant?". Her admitted answer to this interrogatory was "When I was about six feet away".

2024]

RISINGER

725

6

JOSEPH M. SULLIVAN, called by the plaintiff, testified that he was Assistant Manager of Rapid Transit, Inc. which had a franchise to run from Maverick Square in East Boston to Main Street in Winthrop and then on to Revere Street and then through McGee Square out to Crescent and around the Highlands; that in response to a request he had brought in the time tables of busses running during February 1941; that the last regular trip from Maverick to Winthrop was 12:43 A.M. which was two busses; that one goes through Main Street and Revere and Crescent and the other by Winthrop Center; that one turns off to the right on Main Street and goes by the Yacht Club and waterfront; that coming towards Boston between midnight and one-thirty in the morning a bus was scheduled to leave at 12:10 A.M. via the Highlands, through Maverick; that this goes from McGee Square towards the Boston line on Main Street; that the next one on that line from McGee Square on Main Street leaves Winthrop Beach at 12:45 A.M., the next one at 1:15 A.M. and the next one at 2:15 A.M.; that the running time at that time of night is thirty minutes; that the busses were equipped with high and low beams and in most of the busses the high and low beam can be used by the operator by pressing on something with his foot or hand; that the practice followed usually was for the operator to change from the high beam to the low beam when a car was approaching from the other direction; that the running time allowed to cover this route was 22 to 23 minutes during the day and after 9:00 P.M., 30 minutes; a longer running time is allowed at night so that the busses can proceed at a much slower speed.

On CROSS-EXAMINATION, this witness testified that at this time of night there was just one bus on Main Street.

MARY F. FAY, for the plaintiff, testified that she lived at 42 Madison Avenue, Winthrop, and on the night of the accident was sitting on the left hand side of the back seat of the automobile, that there was snow on both sides of Main Street; that the automobile in which she was, was on Main Street, Winthrop, going easterly; that the street back from Banks Street was Herman Street, which came in from the right hand side of Main Street as you come from Orient Heights and the next intersecting street before the accident happened would be Banks Street on the left; that Main Street was a straight street

7

at that point and as you came along from Herman going towards Banks Street that night you could see headlights; that just as they passed Herman Street, just a little way back from Banks Street, they saw headlights and at that time Mrs. Smith's car was the nearest to the parked car; that there was an ordinary car coming and parallel to that a bus was coming along; that the witness saw the parked car but Mrs. Smith tried to pass the parked car and just as she did this, the other car was coming along, the bus came quickly at a terrific speed with bright headlights to it and passed that car to the left of Mrs. Smith so it swerved well over to the right hand side and she went into the snow bank and the parked car; that the operator of the bus did not change the power or strength of his headlights at any time from the time she first saw it up to the time the accident happened.

On CROSS EXAMINATION, this witness testified that by parallel she meant coming in the same direction; that the bus wasn't alongside of the other car when she saw it but came out; that she believed the car in front of the bus was slowing down to let Mrs. Smith pass the parked car; that she would have had a chance to pass; that when Mrs. Smith was passing the parked car, the bus came at a terrific speed; that as she went to pass it, she would have had a chance; that the bus was coming at terrific speed right along; that when she first saw the parked car, she was maybe about seven feet from it but didn't just remember how many feet it was.

MRS. MULLIGAN, for the plaintiff, testified that she lived at 380 Shirley Street in Winthrop and was riding in this car on Main Street at the time of the accident; that the roadway that night was not as wide as it ordinarily is for the use of cars but was narrowed by a snow bank on both sides; that she saw the parked car at some time; that Main Street was a straight street at this point and she was sitting on the rear seat of Mrs. Smith's car; that as they were going along and before they got to Banks Street, she saw an ordinary passenger car and travelling in back in the same direction was a bus; that they were about two car lengths in back of the parked car and the ordinary car was coming towards Mrs. Smith's car and she was about to pass the parked car when this ordinary passenger car slowed and this bus just turned out at quite a rate of speed and had clear headlights; that

2024]

RISINGER

727

8

Mrs. Smith swerved her car to the right and in doing so, she ran into the snow bank and the parked car.

On CROSS-EXAMINATION, this witness testified that when Mrs. Smith's car was about to pass this parked car, the other ordinary car slowed down and a bus came out; that at that time the front of Mrs. Smith's car was not up to the rear of the parked car but it was two lengths away and moving when she first saw the other car coming in the opposite direction and it was after that when Mrs. Smith was about to pass the parked automobile that the witness first became aware of the bus.

THOMAS E. TRAINOR, for the defendant, testified that he was a police sergeant in Winthrop and came to the scene of the accident shortly after it was over; that he saw two automobiles there and later found out that one of them was owned by McDonough and the other one owned by Mrs. Smith; that the McDonough car was parked pretty close to the curb and parallel to it and the Smith car was in the rear of the McDonough car; that the Smith car had hit the rear, he didn't know whether directly, but it had hit it and the two cars were fastened together; that the two rear mudguards of the McDonough car were stove in and the rear bumper was broke off, the whole rear end was stove in.

JOHN L. McDONALD, for the defendant, testified that he was a police officer of the Town of Winthrop and arrived at the scene of the accident after it occurred with Sergeant Trainor; that when they got to the scene of the accident, the McDonough car was parked right aside of the curbing parallel to it and the Smith car was parallel to the curbing directly to the rear of the McDonough car and locked into the McDonough car; that the Smith car was right straight head on to the McDonough car and not at an angle; that the right and rear fenders of the McDonough car were damaged and the trunk was pushed in; that the radiator of the Smith car was leaking after they pried the cars apart.

On CROSS-EXAMINATION this witness testified that the right wheels of both these cars were parallel to the snow bank, alongside the snow bank and one directly behind the other. Trainor heard the plaintiff say to defendant McDonough that she was to blame and would take care of all damages. Also in the McDonough case, McDonald testified that he heard the plaintiff say that she would be agreeable to pay for all damages to the McDonough car.

The police report was read into evidence as follows:—"February 6, 1941, 1:15 a.m. Mrs. Betty Smith, Box 37, Montpelier, Vermont. Her car hit a car that was parked on Main Street, no one hurt. Registration 81993 Vermont, and the car she hit was owned by Thomas McDonough, 37 Whittier Street, Dorchester, registration 753296 Mass., license 281,713. Damage done to Mr. McDonough's car to the right and left rear fenders and rear bumper torn off. Mrs. Smith said she would take care of the damage done. Satisfactory to both parties. Officers Trainor and McDonald".

Defendant McDONOUGH testified that at no time when the plaintiff talked to him or to the police officers in his presence did she ever claim that his car was out in the street or was turned at an angle.

The case was tried before Mr. Justice Buttrick sitting with a jury. At the close of the evidence, the defendant presented a motion that a verdict be ordered for the defendant. This motion was allowed by the court and the plaintiff duly excepted.

All the material evidence is herein set forth.

And the plaintiff being aggrieved by the action of the court in allowing the motion of the defendant for a directed verdict, brings this her Bill of Exceptions and prays that the same may be allowed.

BETTY SMITH

By her Attorneys,

FRANCIS D. HARRIGAN

H. L. B.

HERBERT L. BARRETT

Assented to

BADGER, PRATT, DOYLE & BADGER Attys.

JAMES A. PARRISH

Attys. for Defendant.

Allowed.

ALLAN G. BUTTRICK

J. S. C.

Apr. 6, 1944

Filed April 6, 1944.

2024]

RISINGER

729

10

PLAINTIFFS DECLARATION

Count 1. And the plaintiff says that on or about February 6, 1941 she was lawfully operating her motor vehicle on Main Street, a public way in the Town of Winthrop, when a bus of the defendant was then and there operated and controlled by the defendant's agents or servants in a careless and negligent manner and caused the plaintiff to run into a third vehicle and to sustain severe personal injuries; and the plaintiff says that in consequence of her said injuries she suffered pain of body and anguish of mind, was put to expense for medical care and attendance, and was unable to attend to her usual duties, all to her damage.

Count 2. And the plaintiff says that on or about February 6, 1941 she was lawfully operating her motor vehicle on Main Street, a public way in the Town of Winthrop, when a bus of the defendant was then and there operated and controlled by the defendant's agents or servants in a careless and negligent manner and caused the plaintiff to run into a third vehicle, causing property damage to the said vehicle; and the plaintiff says that in consequence thereof she was put to expense for its repair, for the hire of another vehicle, and suffered depreciation in the value thereof, all to her damage.

By her attorney,

FRANCIS D. HARRIGAN

Filed June 9, 1943.

DEFENDANT'S ANSWER

And now comes the Defendant in the above-entitled action, and for answer to the plaintiff's writ and declaration, denies each and every allegation contained therein.

The defendant further denies that the places referred to in the plaintiff's declaration are public ways and calls upon the plaintiff to prove the same.

And further answering, the defendant says that the injuries or damage alleged were caused in whole or in part, by the plaintiff's own negligence.

730

SETON HALL JLPP

[Vol. 48:3]

11

And further answering, the defendant says that the injuries or damage alleged were caused in whole or in part by the violation by the plaintiff, her servants or agents, of the various statutes, ordinances and regulations governing the conduct of the parties at the time said injuries or damage were received.

And further answering, the defendant says that if it shall appear that the defendant's motor vehicle was involved in an accident at the time and place referred to in the plaintiff's declaration, the said motor vehicle was not then and there being operated by a person for whose conduct the defendant was legally responsible.

And further answering, the defendant says that the alleged cause of action referred to in the plaintiff's declaration did not accrue within one year of the bringing of this action: wherefore, the defendant says that the plaintiff is barred by the terms of the Statute and the defendant is not liable.

And further answering, the defendant says that the motor vehicle referred to in plaintiff's declaration as having been in contact with the vehicle for the operation of which defendant is alleged to be responsible was not legally registered but was an outlaw and a nuisance on the highway which the plaintiff knew or had reasonable cause to know; wherefore, the plaintiff is not entitled to recover.

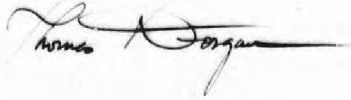
By its attorneys,

BADGER, PRATT, DOYLE & BADGER

Filed June 10, 1943.

Copy,

Attest:



Clark.

2024]

RISINGER

731

No. 0001

BETTY SMITH

vs.

RAPID TRANSIT, INC.

PLAINTIFF'S EXCEPTIONS

SUFFOLK COUNTY.

W. B. Smith, Oct. 3, 1944 -

Oppos.

H. Y. Barnett for def.

W. L. Badger, Jr. for def.

Commonwealth of Massachusetts.

SUFFOLK, SS.

To the Sheriffs of our several Counties, or their Deputies, or any Constable of any City or Town within our said Commonwealth.

GREETING.

(L. S.)

WE COMMAND you to attach the goods or estate of Rapid Transit Inc., a corporation duly established by law and having a usual place of business in Winthrop

in our county of Suffolk to the value of Ten Thousand Dollars: and summon the said Defendant (if he may be found in your precinct), not to appear before our Justices of the Municipal Court of the City of Boston, to be holden at Boston, within our County of Suffolk, for civil business, on Saturday, the 29th day of May A. D. 19 43, at nine of the clock in the forenoon; then and there to answer to Betty Smith

in an action of Tort To the damage of the said Plaintiff, (as she says) the sum of Ten Thousand Dollars, as shall then and there appear, with other due damages. And have you there this Writ with your doings therein.

WITNESS, DAVIS B. KENISTON, Esquire, at Boston aforesaid, the 13th day of May, in the year of our Lord one thousand nine hundred and forty-three.

Edmond J. Hoy CLERK.

Copy, Attest: Thomas D. ... CLERK OF THE SUPERIOR COURT.

2024]

RISINGER

733

APPENDIX 4

PLAINTIFFS'

BRIEF

SUPREME JUDICIAL COURT

FOR THE COMMONWEALTH.

SUFFOLK COUNTY.

October Siting, 1944

No. 10,001

BETTY SMITH

vs.

RAPID TRANSIT, INC.**BRIEF FOR THE PLAINTIFF.****Statement of the Case.**

This is an action of tort for personal injuries and property damage resulting from a collision of automobiles, which was tried before Mr. Justice Buttrick sitting with a jury. The case comes before this court upon the plaintiff's exception to the allowance by the trial justice of defendant's motion for a directed verdict.

Facts.

The accident occurred about one o'clock in the morning of February 6, 1941 on Main Street in Winthrop (Record p. 1). The plaintiff had attended a funeral in Dorchester and at the time of the accident was driving through Winthrop towards Winthrop Highlands with four persons in

2024]

RISINGER

735

the car (Record pp. 2 and 3). At the point of the accident Main Street was about 33 ft. wide from curb to curb (Record p. 2). There had been a heavy snowstorm (Record p. 2) and there were snowbanks on each side of the road extending out about 3 ft. from the curbstone (Record p. 3). As the plaintiff approached the scene of the accident there was a parked car ahead on her right without lights, standing parallel to the snowbank, with the rear end out at an angle of thirty degrees about 3 feet (Record p. 3). As she approached the parked car at a speed of about twenty miles an hour, she saw another car coming towards her ahead on her left about 60 ft. away, which started to slow down. She thought that she had room to pass the parked car and the snowbank and kept going at the same rate of speed. When she was about 20 ft. away from the parked car, a bus cut out from behind the other car at a speed of about forty miles an hour and drove her over into the parked car. She hit the rear of the parked car (Record pp. 3, 4 and 7). When she first saw the bus, it was probably five feet behind the car approaching her travelling at about thirty miles an hour but it pulled out from behind the other car to its left and increased its speed to about forty miles an hour and she had to pull to the right to avoid hitting it (Record pp. 4 and 5). No part of the bus came in contact with the plaintiff's car but it came at such speed that it forced her to turn to the right. The bus was "a great big long wide affair" (Record p. 5).

The records of the Department of Public Utilities for the Commonwealth showed a Certificate of Public Convenience or Necessity issued to Rapid Transit, Inc. for three routes in Winthrop, one of which included Main Street from Winthrop Street to the Winthrop-Boston line and was in effect in February 1941. No other company had a franchise to operate on Main Street at that time (Record pp. 1 and 2).

The Assistant Manager of Rapid Transit, Inc. testified that this company had a franchise to operate buses on

Main Street in Winthrop from Maverick Square to Winthrop Highlands, that a bus was scheduled to leave at 12:10 A. M. via the Highlands to Maverick Square, which went towards the Boston line on Main Street; that the next one on that line left Winthrop Beach at 12:45 A. M., the next one at 1:15 A. M. and the next one at 2:15 A. M. and that the running time at that time of night was thirty minutes (Record p. 6).

Argument.

I. THERE WAS CLEARLY SUFFICIENT EVIDENCE OF NEGLIGENCE.

The fact that there was no collision between the bus and the automobile being operated by the plaintiff is not material. It is sufficient if the bus was operated in such a negligent manner as to cause the plaintiff's automobile to collide with another car.

Golden v. Carnevale, 273 Mass. 159 at p. 161.
White v. Calcutt, 269 Mass. 252 at p. 255.

The jury were warranted in finding upon the evidence that the bus cut out from behind another car and increased its speed as it approached the plaintiff leaving no room for the plaintiff to continue as she was travelling and directly causing the plaintiff to turn to her right and collide with the parked car in order to avoid a head-on collision with the bus. The only real issue apparently raised by the record is the identity of the bus.

II. THERE WAS SUFFICIENT EVIDENCE TO WARRANT THE JURY IN FINDING A GREATER LIKELIHOOD THAT THE ACCIDENT WAS CAUSED BY A SCHEDULED BUS OF THE DEFENDANT THAN BY ANYTHING ELSE.

The verdict of the jury is warranted and is not based on conjecture if a reasonable inference of negligence could

2024]

RISINGER

737

4

have been drawn from the facts testified to and especially in the absence of any evidence from the defendant to explain the facts relied upon by the plaintiff.

Heuser v. Tibston & Hollingsworth Co., 230 Mass. 299 at p. 302.

Washburn v. R. F. Owens Co., 258 Mass. 446 at p. 450.

The plaintiff has sustained the burden of proving that the bus was the cause by introducing evidence that there was a greater likelihood that the accident was due to the bus than that it was due to something else.

Chase v. Merchant, 1944 Advance Sheets 419 at the bottom of p. 420.

Thomas v. Spincy, 310 Mass. 749.

Rocka v. Alber, 302 Mass. 155.

Atlas v. Silsby-Gamble Motors Company, 278 Mass. 279 at p. 282.

Noonan v. P. M. Leavitt Co., 238 Mass. 481.

Higwood v. Boston & Northern St. Rg., 209 Mass. 345 at p. 348.

The evidence throughout refers simply to the bus and the only description of it is the plaintiff's evidence that it was "a great big long wide affair" (Record p. 5). The jury, however, have a right to draw upon their common experience in arriving at a verdict. According to common experience the word "bus" is understood to mean a certain type of motor vehicle operated by a regular carrier for the transportation of passengers. The word has as definite a meaning at the present time as the word "trolley" or "street car" and there can be no doubt whatever that the jury knew and understood what the plaintiff and other witnesses meant by the use of the word bus and that it referred to a regular passenger bus. This meaning is confirmed by

the testimony of the defendant's assistant manager who refers throughout his testimony simply to busses without further explanation and apparently without question as to the meaning of the word (Record p. 6). The jury could certainly find that the plaintiff in referring to a bus meant by the use of this word the same kind of a vehicle which the defendant's assistant manager meant to refer to in using the word busses.

There was evidence from which the jury could find that the defendant was a licensed carrier with a franchise permitting it to operate busses along a route which passed the particular point where the accident occurred (Record pp. 2 and 6); that no other company had a franchise to operate at this point (Record p. 2) and that one of the scheduled busses operated by the defendant was due to pass the point of the accident at about the time when it occurred (Record p. 6). There was evidence from the defendant of a bus scheduled to leave at 12:45 A. M. which would make its entire run in about thirty minutes and would, therefore, be on Main Street at the point where the accident occurred at about 1:00 A. M. when the evidence shows that it did occur. (Record pp. 6 and 1.)

The only other possibility is that the bus was either a stolen bus or an unauthorized bus. The chance of this being the fact is extremely remote and the defendant has introduced no evidence whatever showing the possibility of any cause of the accident other than the negligent operation of its own bus. The record certainly shows a greater likelihood that the accident was caused by a regularly scheduled bus operated by the defendant than by any other cause. In fact, it is difficult to see upon the evidence appearing in the record how the jury could have any doubt about the fact that the defendant's bus was the cause.

There can be no question of agency since a bus being operated upon a regularly scheduled trip would undoubtedly be operated by one of the defendant's employees in

2024]

RISINGER

739

6

the regular course of the business of transporting passengers for hire. It is extremely unlikely that there could have been any bus at the point of the accident when it occurred other than such a bus owned and operated by the defendant.

The case of *Atlas v. Silsbury-Gamble Motor Company*, 278 Mass. 279, heretofore cited involves a private automobile. There was evidence that the plaintiff was struck by a Chrysler Sedan bearing a registration plate with the letters DK thereon and that the defendant owned a Chrysler Sedan carrying registration plate D58K. There were undoubtedly many other Chrysler Sedans on the road and the particular Chrysler Sedan involved may have been operated by some one who was not engaged upon the defendant's business at the time of the accident. The evidence in the instant case goes a great deal farther and excludes the likelihood of other buses on the road and also the likelihood that the bus was operated by some one other than an employee of the defendant on a regular run.

Conclusion.

In conclusion it is respectfully submitted that the jury were warranted in finding by reasonable inference from established facts that there was a greater probability that the accident was caused by a regularly scheduled bus of the defendant, operated by one of its employees, than by any other cause and that the court erred in directing a verdict for the defendant.

Respectfully submitted,

**FRANCIS D. HARRIGAN,
HERBERT L. BARRETT,
Attorneys for the Plaintiff.**

740

SETON HALL JLPP

[Vol. 48:3

DEFENDANT'S BRIEF

2024]

RISINGER

741

COMMONWEALTH OF MASSACHUSETTS.
SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH.

SUFFOLK COUNTY.

OCTOBER SITTING, 1944.

No. 10,001.

—————
BETTY SMITH
v.
RAPID TRANSIT, INC.
—————

BRIEF FOR DEFENDANT.

—————
Statement of Case.

This is an action of tort brought by the plaintiff to recover for personal injuries and property damage alleged to have been received through the negligent operation by the defendant, its agents or servants, of a passenger bus on Main Street, Winthrop, Massachusetts, at about 1:00 a.m., February 6, 1941.

On evidence most favorable to the plaintiff, it could have been found that at the time above referred to she was operating a motor vehicle owned by her from Dorchester to Winthrop. She was proceeding east toward Winthrop on Main Street and approaching a parked car owned by one McDonough, which was next to a snowbank on the right-hand side of the street as she was traveling. Coming in the opposite direction was another car, and behind it a bus.

2

The plaintiff started to pass the McDonough car and had got out into the middle of the street when she observed the bus, traveling about forty miles per hour, swing out to pass the car coming in the opposite direction. As a result of this situation, finding there was not sufficient room to get by the parked car, she attempted to swing in behind it, and in doing so, ran into it. The bus did not come in contact with the plaintiff's car, and proceeded on without stopping.

At the time of the accident there were snowbanks on either side of Main Street which narrowed the normal width from thirty-three feet to about twenty-seven. There was disputed evidence as to whether the McDonough car was parked with or without lights, and whether parallel to the curb, or at a thirty degree angle as contended by the plaintiff.

Suit was originally brought by the plaintiff against McDonough, and no action was brought against the defendant until May 13, 1943. The suit against McDonough has been disposed of. There was evidence that at the time of the accident the defendant held from the Department of Public Utilities a franchise to operate busses on various routes, one of which included Main Street at the point where the accident occurred, and that no other company had a franchise which covered this street. There was evidence from an assistant manager of the defendant that the bus schedule in force at the time showed that busses were due to leave Winthrop for Boston via Main Street at 12.10 and 12.45 a.m. The only description of the bus given by any witness was "that this bus was a great big, long, wide affair" and that "the lights blinded her" (the plaintiff) (Plaintiff's Exceptions, page 5). The police report read in evidence was as follows:

"February, 1941, 1:15 a.m. Mrs. Betty Smith, Box 37, Montpelier, Vermont. Her car hit a car that was parked on Main Street, no one hurt. Registration

2024]

RISINGER

743

3

81993 Vermont, and the car she hit was owned by Thomas McDonough, 37 Whittier Street, Dorchester, registration 753296 Mass., license 291,713. Damage done to Mr. McDonough's car to the right and left rear fenders and rear bumper torn off. Mrs. Smith said she would take care of the damage done. Satisfactory to both parties. Officers Traisor and McDonald."

At the conclusion of the evidence the defendant reasonably moved that a verdict be ordered for it. This motion was allowed by the Court, and the plaintiff duly excepted.

It is respectfully submitted that the Court was right in directing the verdict.

Argument.

The questions presented by the foregoing statement of the case are whether there is any evidence which would warrant a jury in finding that the bus in question belonged to the defendant and was operated by its agent or servant in the course of his employment at the time the accident occurred. No question is here raised but that the evidence warranted the submission to the jury of the question of the operator's negligence in the management of the bus.

At the outset it may be conceded that it is the clear law of this Commonwealth that "the issue was for the jury, if anywhere in the evidence, from whatever source derived, any combination of circumstances could be found from which a reasonable inference could be drawn in favor of the plaintiff. If any such combination of circumstances could be found it is, for present purposes, immaterial how many other combinations could have been found which would have led to conclusions adverse to the plaintiff," *Kelly v. Railway Express Agency, Inc.* 1943 Adv. Sh. 2027, 315 Mass. 301; and

4

further, it is clear that the plaintiff is "not bound to exclude all other causes." *Chase v. Marchant*, 1944 A.S. 419, 420, 315 Mass. 894.

The plaintiff's difficulty in this case lies in the fact that there is no shred of evidence describing the bus which would not equally apply to any bus of any line now operated in Massachusetts. There is no description of its color, any signs upon it, or any passengers riding in it. It does not appear that the operator was uniformed or bore any designating badge. All that is submitted is evidence that the defendant had a right under its franchise to operate busses on the street in question, and that its schedule showed that a bus operating upon it might have been at the scene of the accident at the time it occurred. It is strongly urged that this is not enough. Even if from these meager facts it could have been inferred that the defendant owned the bus, mere ownership would not be sufficient to fasten liability upon it, *Seaboyer v. Director General of Railroads*, 244 Mass. 122.

It is a matter of common knowledge that many bus lines customarily charter their busses to organizations or private parties, and that these busses operate upon the public highways without regard to any schedule. There is nothing in this record to make it any more probable that the bus in question belonged to the defendant than to any other of numerous bus lines.

But the plaintiff has a still further difficulty. Since there is no evidence of any passengers in or upon the bus, there is no basis for inference that it was being used upon the defendant's business at the time of the accident, *Hopwood v. Pokrass*, 219 Mass. 263; *Heywood v. Ogasipon*, 224 Mass. 203; *Welch v. Checker Taxi Co.*, 262 Mass. 310; nor is the fact that the route of the bus was one used by defendant's busses at certain times enough to fasten liability upon it, *Porcino v. De Stefano*, 243 Mass. 398.

2024]

RISINGER

745

5

This case is clearly distinguishable from *Kelly v. American Railway Express Agency Inc.*, 1943 Adv. Sh. 2027, 313 Mass. 301 (*supra*). In that case the plaintiff was struck by a truck, bearing the defendant's name, coming out of a driveway almost exclusively used by defendant's vehicles at a time when defendant's schedule showed one or two trucks should have been making such a movement there during regular business hours. This accident occurred upon a main public highway in no way exclusively or even predominantly used by defendant's buses.

As previously stated, there is no evidence as to the ownership or the operation, and it is respectfully submitted that the Court was correct in ordering a verdict for the defendant, and that the plaintiff's exceptions should be overruled.

Respectfully submitted,

RAPID TRANSIT, INC.,

By its Attorneys,

BADGER, PRATT, DOYLE & BADGER.

WALTER I. BADGER, JR.,
Of Counsel.

RESCRIPT

2024]

RISINGER

747

No. 10001

SUPREME JUDICIAL COURT

FOR THE COMMONWEALTH.

Rescript, Suffolk County.

Betty Smith

vs.

Rapid Transit, Inc.

COPY.

748

SETON HALL JLP

[Vol. 48:3

COMMONWEALTH OF MASSACHUSETTS.

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH,

AT BOSTON, Jan. 4, 1945.

IN THE CASE OF

Betty Smith
vs.

Rapid Transit, Inc.

pending in the Superior Court for the County
of SuffolkORDERED, that the clerk of said court in said county make the following
entry under said case in the docket of said court; viz.,—

Exceptions overruled.

BY THE COURT,
WALTER F. FREDERICK, CLERK.

January 4, 1945.

Brief statement of the grounds and reasons of the decision.

See opinion on file.

A true copy,
Attest:*Walter F. Frederick*

Clerk.