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Chapter 14: Torts

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CHAPTER 14

Torts

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§14.1. **Introduction.** The *Survey* period witnessed significant developments in many areas of tort law. Among these developments were several Supreme Judicial Court decisions giving further interpretation to the scope and application of the medical malpractice tribunal system, extending its jurisdiction to complaints against providers under the Consumer Protection Act,[1] and to actions for breach of warranty against physicians.[2] In the area of products liability, the Court also established standards clarifying the duty of manufacturers to design safe products.[3] A tort remedy was created for the negligent infliction of emotional distress resulting in physical injuries to parents who witness injuries to their children.[4] The Court also provided clarification for the elements of the tort of intentional infliction of emotional distress.[5] In the area of landlord-tenant relations, the Supreme Judicial Court recognized the landlord's implied warranty of habitability as the basis for an action in tort for damages to a tenant who sustained a personal injury resulting from a landlord's failure to maintain his premises in accordance with applicable safety codes.[6] In addition, the General Court enacted legislation clarifying the duties and obligations of ski area operators[7] and

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§14.1. [1] Little v. Rosenthal, 1978 Mass. Adv. Sh. 2793, 382 N.E.2d 1037. See § 10 *infra.*

[2] Salem Orthopedic Surgeons, Inc. v. Quinn, 1979 Mass. Adv. Sh. 661, 386 N.E.2d 68. See § 10 *infra.*

[3] Uloth v. City Tank Corp., 1978 Mass. Adv. Sh. 3168, 384 N.E.2d 1188; Back v. Wickes Corp., 375 Mass. 633, 378 N.E.2d 964 (1968); Smith v. Ariens, 375 Mass. 620, 377 N.E.2d 954 (1978). See § 3 *infra.*

[4] Dziokonski v. Babineau, 375 Mass. 555, 380 N.E.2d 1295 (1978). See § 9 *infra.*

[5] Harrison v. Loyal Protective Life Ins. Co., 1979 Mass. Adv. Sh. 2477, 396 N.E.2d 987; Boyle v. Wenk, 1979 Mass. Adv. Sh. 1947, 392 N.E.2d 1053. See § 9 *infra.*

[6] Crowell v. McCaffrey, 1979 Mass. Adv. Sh. 568, 386 N.E.2d 1256. See § 8 *infra.*

[7] G.L. c. 143, §§ 71N-71S, *as enacted by* Acts of 1978, c. 455, § 4. See 11 *infra.*

legislation permitting family members to obtain compensatory damages from other family members who have caused or threatened them with physical harm.[8]

§14.2. Products Liability—Strict Liability. In the two products liability cases decided during the *Survey* year, *Swartz v. General Motors Corp.*[1] and the companion case of *Back v. Wickes Corp.*,[2] the Supreme Judicial Court again[3] addressed the issue of whether to adopt the doctrine of strict liability in tort in products liability cases.[4] Because it found that the commonwealth's expanded warranty law offered litigants a comparable remedy,[5] the Court refused to adopt the doctrine of strict liability as embodied in the Restatement (Second) of Torts.[6]

Both *Swartz* and *Back* were products liability cases predicated on the defective design of motor vehicles.[7] In *Swartz* the trial judge, at the conclusion of the plaintiffs' opening statement, directed a verdict for the defendant on the issue of strict liability.[8] On appeal, the Supreme Judicial Court affirmed, thereby declining to adopt strict liability as a theory of recovery in the commonwealth. It did so, however, noting that legislative changes in the commonwealth's warranty law[9] rendered such a move unnecessary.[10] The Court, reviewing a series of amendments to section 2-318 of chapter 106 of the Uniform Commercial Code, noted that the requirement of privity of contract, a traditional defense

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[8] G.L. c. 209A, *as enacted by* Acts of 1978, c. 447, § 2. See § 12 *infra*.

§14.2. [1] 1978 Mass. Ad. Sh. 1867, 378 N.E.2d 61.

[2] 1978 Mass. Adv. Sh. 1874, 378 N.E.2d 964.

[3] *See* Necktas v. General Motors Corp., 357 Mass. 546, 259 N.E.2d 234 (1970), where a majority of the Court rejected the adoption of strict liability in tort. *Id.* at 549, 259 N.E.2d at 236.

[4] For a list of jurisdictions which have adopted the RESTATEMENT (SECOND) OF TORTS § 402A (1965) or a modified version, see 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16A(3) (1978).

[5] G.L. c. 106, § 2-318, *as amended by* Acts of 1971, c. 670, § 1; Acts of 1973, c. 750, § 1; Acts of 1974, c. 153.

[6] 1978 Mass. Adv. Sh. at 1868-71, 378 N.E.2d at 64; 1978 Mass. Adv. Sh. at 1881-82, 378 N.E.2d at 969. *See* RESTATEMENT (SECOND) OF TORTS § 402A (1965), which provides in relevant part that a business seller of a defective product will be liable to a user or consumer for physical harm resulting from the use of the product even though "(a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller." *Id.*

[7] 1978 Mass. Adv. Sh. at 1867, 378 N.E.2d at 62; 1978 Mass. Adv. Sh. at 1875, 378 N.E.2d at 966. Both cases, which were decided in the same day, reached the same result with respect to the issue of strict liability. Therefore, the remaining discussion will make reference to the *Swartz* decision only.

[8] 1978 Mass. Adv. Sh. at 1868, 378 N.E.2d at 63.

[9] G.L. c. 106, § 2-318.

[10] 1978 Mass. Adv. Sh. at 1870, 378 N.E.2d at 63.

to allegations of breach of warranty, had been abolished.[11] Therefore, the Court reasoned, the resulting statute provided a remedy as comprehensive as that advocated by the Restatement.[12] On this basis, the Court held that in the commonwealth there is no "strict liability in tort" apart from liability for breach of warranty imposed under chapter 106, section 2-318.[13]

Despite the basic soundness of the Court's conclusion concerning the congruence of the two theories of liability, there remain some differences which should be noted. Semantic differences, although minimal, are apparent. First, strict liability in tort applies to cases involving defective products placed on the market by a "seller . . . engaged in the business of selling such a product."[14] The Uniform Commercial Code employs the term "merchant," which it defines as a "person who deals in goods . . . ."[15] Second, recovery in strict tort liability has been extended to "consumers or users, remote purchasers, employees, and bystanders,"[16] even though section 402A of the Restatement restricts recovery to consumers or users.[17] Under section 2-318 in Massachusetts, "any person whom the manufacturer, seller, lessor, or supplier might reasonably have expected to use, consume, or be affected by the goods"[18] can maintain a claim alleging breach of warranty. Third, under either theory, in order for the injured plaintiff to recover, the product must have been defective or unsafe when the manufacturer relinquished his control,[19] and the injury must have been reasonably foreseeable, whether growing out of normal use or foreseeable misuse.[20] Section 402A of the Restate-

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[11] *Id.* at 1869, 378 N.E.2d at 63. *See* Acts of 1971, c. 670, § 1; Acts of 1973, c. 750, § 1; Acts of 1974, c. 153. As amended, G.L. c. 106, § 2-318 reads:

> Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer, seller, lessor or supplier of goods to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not purchase the goods from the defendant if the plaintiff was a person whom the manufacturer, seller, lessor or supplier might reasonably have expected to use, consume or be affected by the goods. The manufacturer, seller, lessor or supplier may not exclude or limit the operation of this section. Failure to give notice shall not bar recovery under this section unless the defendant proves that he was prejudiced thereby. All actions under this section shall be commenced within three years next after the date the injury and damage occurs.

Id.

[12] 1978 Mass. Adv. Sh. at 1869-70, 378 N.E.2d at 63.

[13] *Id.* at 1867, 378 N.E.2d at 62.

[14] RESTATEMENT (SECOND) OF TORTS § 402A(1)(a) (1965).

[15] G.L. c. 106, § 2-104(1).

[16] Note, *Massachusetts Strict Product Liability Law,* 14 NEW ENG. L. REV. 237, 251 (1978).

[17] RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965).

[18] G.L. c. 106, § 2-318.

[19] *See, e.g.,* Coyne v. Tilley Co., 368 Mass. 230, 318 N.E.2d 623 (1975).

[20] *See, e.g.,* Back v. Wickes Corp., 1978 Mass. Adv. Sh. 1874, 378 N.E.2d 964.

ment, however, requires a defective condition that is unreasonably dangerous,[21] while the Uniform Commercial Code states that a good is unmerchantable if it is unfit "for the ordinary purposes for which such goods are used . . . ." [22]

In addition to differences with respect to terminology, there are other more substantive distinctions between strict tort liability and Massachusetts' statutory warranty liability, distinctions which operate as limitations on recovery. The 1973 legislative amendment to section 2-318 regarding notice of breach provides a limited defense to warranty actions where the defendant can prove prejudice resulting from the lack of notice.[23] This provision has no counterpart in section 402A of the Restatement.[24] While legislative retention of this limitation might be laudable where the defendant manufacturer is in fact prejudiced by the failure to notice a claim, it nevertheless does constitute a limitation not contained in the Restatement. A second limitation contained in Uniform Commercial Code concerns the unenforceability of disclaimers of express and implied warranties involving consumer goods and services and the unenforceability of attempted contractual limitations on the same.[25] At present, this provision does not apply to nonconsumer goods, such as heavy industrial or commercial equipment. Accordingly, a significant class of foreseeable innocent users, particularly employees, may still be barred from warranty recovery by the arms-length bargaining of employers-purchasers and manufacturers.

The impact of these differences—some semantic some substantive—remains to be seen. Clearly, the Supreme Judicial Court has chosen warranty as the appropriate remedy for claims arising out of consumer use of manufactured products. It remains for future cases and legislative enactments to determine where the road of warranty liability will lead.

§14.3. **Products Liability—Duty to Design a Safe Product.** The duty of a manufacturer to design a product so that it is reasonably fit for its intended use is well-established in Massachusetts.[1] This duty has been recognized to include instances where an improper design feature prevented a safety mechanism from operating as intended.[2] During the *Survey* year, the Supreme Judicial Court substantially broadened the

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[21] RESTATEMENT (SECOND) OF TORTS § 402A (1965).
[22] G.L. c. 106, § 2-314(2)(c).
[23] Acts of 1973, c. 750, § 1.
[24] RESTATEMENT (SECOND) OF TORTS § 402A.
[25] G.L. c. 106, § 2-316A.

§14.3. [1] *See, e.g.*, do Canto v. Ametek, Inc., 367 Mass. 776, 328 N.E.2d 873 (1975).
[2] *Id.*

duty to design a safe product in three separate cases, *Uloth v. City Tank Corp.*,[3] *Smith v. Ariens Co.*,[4] and *Back v. Wickes Corp.*[5]

Ordinarily, if a product performs the functions for which it was designed and manufactured, the manufacturer or designer has no liability, especially where the inherent dangers of the product are obvious to the predictable users or where adequate warnings of risks have been furnished.[6] The decision in *Uloth v. City Tank Corp.*[7] created an exception to this rule where inexpensive safety designs could substantially reduce the risk of harm with minimal impact on product function. In *Uloth,* the plaintiff, an unskilled and uneducated worker, lost his foot when it got caught by a descending trash compacter blade at the back of a refuse truck on which he was working. When the compacting cycle began to run, the plaintiff thought the truck was beginning to move and quickly leaped onto the rear step. In the process he lost his balance and his left foot was trapped and severed by the descending blade.[8] At trial, the judge denied the defendants' motions for directed verdicts.[9] On direct appeal from the denial of motions for directed verdicts, the Supreme Judicial Court affirmed judgment on the negligence counts.[10]

At the outset of its analysis, the Court stated that the focus in design negligence cases should not be on how the product is meant to function but "on whether the product is designed with reasonable care to eliminate avoidable dangers."[11] The Court rejected the suggestion that the issue of negligence should turn solely on whether the product or its safety features performed their intended functions.[12] It observed that a product may function as intended and still be negligently designed. The Court ruled that where, as in the present case, the plaintiff had presented evidence of design changes which would have lessened the danger of the product without undue cost or significant diminution in the efficiency of the product, the case should be presented to the jury.[13] Thus, by focusing on the facility with which the manufacturer could incorporate safety mechanisms into his product, the Court adopted a rule that would encourage manufacturers to design safe, if imperfect, products rather than unsafe perfect ones.[14]

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3 1978 Mass. Adv. Sh. 3168, 384 N.E.2d 1188.
4 375 Mass. 620, 377 N.E.2d 954 (1978).
5 375 Mass. 633, 378 N.E.2d 964 (1978).
6 Schaeffer v. General Motors Corp., 372 Mass. 171, 360 N.E.2d 1062 (1977).
7 1978 Mass. Adv. Sh. 3168, 384 N.E.2d 1188.
8 *Id.* at 3171, 384 N.E.2d at 1190-91.
9 *Id.* at 3168, 384 N.E.2d at 1190.
10 *Id.* at 3169, 384 N.E.2d at 1190.
11 *Id.* at 3172, 384 N.E.2d at 1191.
12 *Id.*
13 *Id.* at 3176, 384 N.E.2d at 1193.
14 *Id.* at 3172-73, 384 N.E.2d at 1191.

In reaching its decision, the Court also rejected the defendants' suggestion that warnings alone or the presence of obvious danger could limit a manufacturer's liability.[15] It recognized, however, that the existence of warnings or obvious danger is a factor to be weighed by the jury on the issue of negligence.[16] The Court noted that in certain circumstances a warning might not reduce the likelihood of injury.

> [A] user may not have a real alternative to using a dangerous product . . . . Further, a warning is not effective in eliminating injuries due to instinctual reactions, momentary inadvertence, or forgetfulness on the part of the worker. One of the primary purposes of safety devices is to guard against such forseeable situations.[17]

The Court therefore ruled, in view of the somewhat limited effectiveness of warnings, that if a slight change in design could prevent serious injuries, the designer of a product could not avoid liability simply by warning of the possible injury.[18]

The duty to design products to minimize foreseeable risks was further refined in *Smith v. Ariens Co.*[19] In *Smith,* the plaintiff was injured while operating a snowmobile manufactured by the defendant. The snowmobile hit a rock partially covered by snow. On impact, the plaintiff's face struck a brake bracket which had two sharp metal protrusions which were pointed toward her face. As a result of the accident, the plaintiff required surgery.[20] The trial court entered a directed verdict for the manufacturer and the Appeals Court affirmed. The Supreme Judicial Court reversed and ordered a new trial.[21]

On appeal, the Court rejected the defendant's argument that "tort liability should not be imposed on manufacturers for design defects which merely enhance, rather than cause, injuries."[22] Observing, however, that a manufacturer has the duty to design products that are reasonably fit for their intended use, the Court reasoned that liability could be found if collisions were viewed as incidental to the normal use of the products.[23] Recognizing two divergent lines of cases concerning the extent of liability,[24] the Supreme Judicial Court embraced the more

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15 *Id.* at 3173-74, 384 N.E.2d at 1191.
16 *Id.* at 3176, 384 N.E.2d at 1193.
17 *Id.* at 3174, 384 N.E.2d at 1192.
18 *Id.* at 3175, 384 N.E.2d at 1192.
19 375 Mass. 620, 377 N.E.2d 954 (1978).
20 *Id.* at 621, 377 N.E.2d at 955.
21 *Id.*
22 *Id.* at 623, 377 N.E.2d at 956.
23 *Id.*
24 *Id.* at 623-24, 377 N.E.2d at 956-57. *Compare* Evans v. General Motors Corp., 359 F.2d 822, 824 (7th Cir. 1966), *cert. denied,* 385 U.S. 836 (1966) (no

progressive view that collisions are foreseeable as incidental to the use of certain products.[25] The Court found that it was foreseeable that snowmobiles, like automobiles, would be involved in collisions. Thus, it determined that the defendant owed a duty to users of its snowmobiles to avoid unreasonable risks of injuries resulting from collisions.[26] On this basis, the Court held that liability may be imposed for an enhanced injury when that injury results from the manufacturer's failure to use reasonable care in the design of its product.[27]

In *Back v. Wickes Corp.*,[28] the Court applied the rule expressed in *Smith* to a products liability action brought under the Uniform Commercial Code.[29] The action was brought by the representatives of crash victims who were killed when their motor home had caught fire and exploded after hitting a cable fence at the side of the highway. The plaintiffs alleged that the motor home was defective both because of the location and design of the gas tank and because of the flammability of the motor home itself.[30] After jury verdicts for the defendants, the plaintiffs appealed, in part because of certain jury instructions. The Supreme Judicial Court reversed the judgment for defendants and ordered a new trial.[31]

On appeal, the Court ruled that, under the circumstances of the case, the trial judge was in error to instruct the jury that misuse or abuse of a product would be a complete defense.[32] In so ruling, the Court, by way of dicta, remarked that the jury instructions were incomplete because they permitted the jury to conclude that crashing into a guardrail is an abnormal use of a motor home, such as would relieve the

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liability for enhanced injuries because intended use of products does not include participation in collisions with other objects) *with* Larson v. General Motors Corp., 391 F.2d 495, 501 (8th Cir. 1968) (finding that enhanced injuries from collisions are foreseeably incidental to normal use).

25 375 Mass. at 624, 377 N.E.2d at 957.

26 *Id.* at 625, 377 N.E.2d at 957.

27 *Id.* In reaching its decision the Court disposed of two other arguments which are significant in products liability litigation. First, the Court held that the presence of a decal containing the name "Ariens" was sufficient to identify the defendant as the manufacturer, particularly since "Ariens" was defendant's trademark. *Id.* at 1858-60, 377 N.E.2d at 955-56. Second, the Court ruled that expert testimony was not required to establish that a design defect exposed the users to an unreasonable risk of injury. In this instance, the jury could determine from its own lay knowledge whether an unshielded metal protrusion was such a defect. *Id.* at 1863, 377 N.E.2d at 957-58.

28 375 Mass. 633, 378 N.E.2d 946 (1978).

29 For a discussion of this aspect of the case, see § 2 *supra*.

30 *Id.* at 636-37, 378 N.E.2d at 967.

31 *Id.* at 635, 378 N.E.2d at 966.

32 *Id.* at 638, 378 N.E.2d at 968. The Court ruled that since no evidence was presented that the product was misused, the instruction on misuse was superfluous and misleading. *Id.*

manufacturer of liability.[33] Citing *Smith v. Ariens Co.*,[34] the Court pointed out that, with regard to negligence actions, it had rejected the view that a collision was not foreseeably incidental to the use of a motor vehicle.[35] It then likewise rejected the applicability of this view to products liability actions brought under the Uniform Commercial Code.[36] Applying this rule, the Court reasoned that crashing into a highway guardrail was not necessarily an "abnormal" or "extraordinary" use of a motor home.[37] The Court thereby made it clear that in future products liability cases collision will be deemed to be among the foreseeable uses of a motor vehicle.

These three Supreme Judicial Court decisions articulate in two respects an expanded duty to design a safe product: (1) a manufacturer must incorporate reasonable safety features into the product, and (2) the manufacturer must design a product to minimize injuries caused by mishaps arising out of the ordinary use of the product. With regard to the first requirement, the manufacturer may be liable even if its product performed as intended, when there is evidence that an available design modification would have substantially reduced or eliminated the risk of injury without adding undue cost or interfering with the performance of the product.[38] In the case of the second requirement, the manufacturer may breach his duty if he fails to design the product so as to avoid or minimize risks from all reasonably foreseeable events, including accidents[39] or collisions.[40] This expanded duty of manufacturers to produce safe products is a progressive step in Massachusetts products liability law. By grounding liability on the foreseeability of the resultant harm, the Court has drawn on one touchstone of both tort and warranty law. Insofar as the manufacturer is best situated to design and test a product for safety and to spread the costs of any resultant safety improvements, increased responsibility, fostered by increased liability, furthers the public interest.[41] By imposing increased liability, the Court has provided the economic incentive to insure the incorporation of safety devices that will safeguard the users of these products.

§14.4. Products Liability—Admissibility of Recall Letter. A recurring evidentiary problem in the law of torts has been the admissibility of evidence of subsequent improvements or repairs when offered to

[33] *Id.* at 638-39, 378 N.E.2d at 968.
[34] 375 Mass. 620, 377 N.E.2d 954 (1978).
[35] 375 Mass. at 639, 378 N.E.2d at 968.
[36] *Id.*
[37] *Id.*
[38] 1978 Mass. Adv. Sh. at 3176, 384 N.E.2d at 1193.
[39] 375 Mass. at 624, 377 N.E.2d at 957.
[40] 375 Mass. at 639, 378 N.E.2d at 968.
[41] 1978 Mass. Adv. Sh. at 3175, 384 N.E.2d at 1192, and cases cited.

establish a defendant's liability for damages occurring prior to the improvements or repairs.[1] A specific example of this problem, arising in actions based on products liability, is the question of recall letters or recall campaigns offered by a plaintiff on the issues of defectiveness or control.[2] In order to recover damages caused by an alleged improperly manufactured or defectively designed product, a plaintiff must show that a defect existed before the manufacturer introduced the product into the stream of commerce.[3] Where the plaintiff's theory is founded on improper manufacture, tracing the defect to the manufacturer is particularly difficult because the defendant may argue that the shipper, the retailer, or normal wear and tear is responsible for an alleged defect. In *Carey v. General Motors Corp.*,[4] the Supreme Judicial Court considered, *inter alia*, whether a recall letter, warning of the same defect alleged by the plaintiff as the cause of his injuries,[5] should be admitted to prove that the plaintiff's motor vehicle was defective when it left the manufacturer.[6]

In *Carey*, the plaintiff's one-year-old automobile, manufactured by General Motors, left the roadway and hit a tree, thereby causing severe injuries to both plaintiffs.[7] The plaintiff-driver testified that he attempted to down-shift the vehicle's manual transmission approximately 500 feet from the point of the accident.[8] At 400 feet from the point of collision, the plaintiff noticed that the accelerator pedal had become stuck.[9] While he attempted to free the pedal, the automobile accelerated

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§14.4. [1] *See, e.g.*, Dias v. Woodrow, 342 Mass. 218, 172 N.E.2d 705 (1961) (evidence of repairs after accident insufficient to show control); Manchester v. City of Attleboro, 288 Mass. 492, 193 N.E. 4 (1934) (safety measures taken after accident inadmissible); *but see* doCanto v. Ametek, 367 Mass. 776, 328 N.E.2d 873 (1975) (post-accident safety improvements admissible to prove knowledge or notice as to defect and to show practicality of improvements); *see generally* 19 MASSACHUSETTS PRACTICE, K. HUGHES, EVIDENCE § 293-94, at 346-52 (1961); C. MCCORMICK, EVIDENCE § 275, at 666-69 (2d ed. 1972).

[2] *See, e.g.*, Manieri v. Volkswagenwerk, 151 N.J. Super. 422, 376 A.2d 1317 (App. Div. 1977) (recall letters admissible if pertaining to defect testified to by plaintiff's expert); Fields v. Volkswagen of America, Inc., 555 P.2d 48, 57 (Okla. 1976) (defect must be proved independently; recall letters relevant only to issue of existence of defect while product under manufacturer's control); *but see* Embry v. General Motors, 115 Ariz. 433, 565 P.2d 1794 (1974) (exclusion of recall letters not reversible error); *see generally* Annot., 84 A.L.R.3d 1220 (1978).

[3] *See, e.g.*, Smith v. Ariens Co., 375 Mass. 620, 377 N.E.2d 954 (1978).

[4] 1979 Mass. Adv. Sh. 940, 387 N.E.2d 583.

[5] *Id.* at 950, 387 N.E.2d at 587.

[6] *Id.* at 950, 387 N.E.2d at 587-88.

[7] *Id.* at 942, 387 N.E.2d at 584.

[8] *Id.* at 941, 387 N.E.2d at 584.

[9] *Id.*

to a speed of fifty or sixty miles per hour.[10] He stepped on the brake pedal when the car was twenty-five feet from the collision point.[11]

The plaintiffs' case rested largely on the testimony of an expert witness, a mechanical engineer.[12] The expert testified that one of three defects probably caused the events related by the two plaintiffs.[13] As part of their case-in-chief the plaintiffs offered proof, in the form of a recall letter distributed by General Motors in 1969, that General Motors notified owners of vehicles similar in model and design to that owned by the plaintiff that the cam and throttle mechanisms were potentially defective.[14] The defendant objected but the trial judge admitted the recall letter.[15]

On appeal, the Supreme Judicial Court held that the recall letter had been properly admitted, but only on the specific issue of whether the defect originated while the product was under the defendant's control.[16] The Court ruled that before a recall letter may be admitted, the plaintiff first must offer independent proof that a defect existed in the particular vehicle involved in the occurrence.[17] In the case at hand, the Court observed, the plaintiff's expert had testified that a defective cam could have interfered with the throttle mechanism and caused the accident.[18] Having met this threshold proof requirement, the plaintiff was entitled to introduce the recall letter, in effect an admission by General Motors, to establish that the defect had occurred while the vehicle was still in the defendant's hands.[19] The Court rejected the defendant's argument that the admission of recall letters as evidence of a defect's existence at the time of manufacture would inhibit manufacturers from initiating recall campaigns.[20] Noting that federal law compels recall campaigns, the Court concluded that its decision could not discourage a practice that is required by law and is in no way voluntary.[21]

§14.5. Legal Malpractice—Survival of Actions. Until *McStowe v. Bornstein* [1] was decided during the *Survey* year, the question of the sur-

[10] *Id.* at 942, 387 N.E.2d at 584.

[11] *Id.* Both plaintiffs had recently left a party where both had been drinking. The plaintiff passenger was intoxicated. *Id.* at 941, 387 N.E.2d at 584.

[12] *Id.* at 943, 387 N.E.2d at 585.

[13] *Id.* at 945, 387 N.E.2d at 586.

[14] *Id.* at 950, 387 N.E.2d at 587.

[15] *Id.*

[16] *Id.* at 950, 387 N.E.2d at 587-88. *See generally* 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 12.01(5) (1978).

[17] 1979 Mass. Adv. Sh. at 950, 387 N.E.2d at 588.

[18] *Id.* at 951, 387 N.E.2d at 588.

[19] *Id.* at 951-52, 387 N.E.2d at 588.

[20] *Id.* at 952, 387 N.E.2d at 588.

[21] *Id.*; *see* 15 U.S.C. § 1411 (1976).

§14.5. [1] 1979 Mass. Adv. Sh. 1024, 388 N.E.2d 674. *See also* Comment, 64 MASS. L. REV. 182 (1979).

vival of malpractice actions against a deceased attorney was decided on traditional common law principles. If the complaint was framed as a negligence action, it did not survive.[2] If it was framed as an action in contract, it did.[3] *McStowe,* however, recognized that legal malpractice actions, regardless of the manner of pleadings, are based on a breach of an attorney's contractual obligation to the client and therefore should survive.[4]

In *McStowe,* the plaintiff sued the representatives of the attorney's estate, alleging malpractice.[5] The representatives defended on the ground that, under chapter 228, section 1,[6] governing the survival of certain tort actions, and common law principles, a tort action based upon the negligence of an attorney did not survive.[7] On appeal, the Supreme Judicial Court declined to observe rigid procedural distinctions between actions in tort and actions in contract, determining instead that the gist of a legal malpractice complaint is the attorney's breach of contract.[8] Therefore, the Court ruled that the existence of a contractual relationship between the plaintiff and the deceased attorney permitted the action to survive.[9] Because it rested its decision on the common law rule that contract actions survive a defendant's death, the Court found that it did not need to consider whether section 1 of chapter 228 barred the action.[10] Hence, the Court adopted the general rule in force in other jurisdictions [11] that actions for malpractice may be brought against the estate of a deceased attorney.[12]

§14.6. Child Trespassers—Duty of Reasonable Care. In 1974, the Supreme Judicial Court, in *Pridgen v. Boston Housing Authority,*[1] sig-

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[2] Connors v. Newton Nat'l Bank, 336 Mass. 649, 147 N.E.2d 185 (1958).

[3] *See* Griffiths v. Powers, 216 Mass. 169, 103 N.E. 468 (1913); Drury v. Butler, 171 Mass. 171, 50 N.E. 527 (1898).

[4] 1979 Mass. Adv. Sh. at 1028, 1029, 388 N.E.2d at 676.

[5] *Id.* at 1026, 388 N.E.2d at 675.

[6] G.L. c. 228, § 1, provides in relevant part: "In addition to the actions which survive by the common law, the following shall survive: . . . (2) Actions of tort (a) for assault, battery, imprisonment or other damage to the person . . . or (d) for damage to real or personal property . . . ." *Id.*

[7] 1979 Mass. Adv. Sh. at 1026, 388 N.E.2d at 676.

[8] *Id.* at 1209, 388 N.E.2d at 677 (citing Mechanics Nat'l Bank v. Killeen, 1979 Mass. Adv. Sh. 129, 384 N.E.2d 1231).

[9] 1979 Mass. Adv. Sh. at 1029, 388 N.E.2d at 677.

[10] *Id.*

[11] *See* Annot., 65 A.L.R.2d 1211 (1959).

[12] The Court left undecided the question of which statute of limitations would apply to an action against an attorney. Noting that in the medical malpractice field the issue has been decided by statute, the Court suggested that the issue with respect to attorney malpractice might be similarly settled. *Id.* at 1030-31 & 1031 n.5, 388 N.E.2d at 677 n.5.

§14.6. [1] 364 Mass. 696, 308 N.E.2d 467 (1974); *see* 1974 ANN. SURV. MASS. LAW § 6.8, at 116-19.

nificantly modified traditional rules with respect to the duties owed by an owner or occupier of property toward trespassers.[2] Prior to *Pridgen*, an owner or occupier of property needed only to refrain from wilful, wanton, or reckless conduct in the management of his premises.[3] In *Pridgen*, a child became "helplessly trapped" in an elevator shaft owned and maintained by the defendant.[4] The Court held that once a property owner learns that a trespasser is "helplessly trapped" on his property, the owner must exercise reasonable care to prevent injury, including taking affirmative action if needed.[5] During the *Survey* year, the Massachusetts appellate courts considered two cases involving child trespassers.

In *Kalinkowski v. Smith*,[6] the Appeals Court considered the case of a child in a position of danger who, while not trapped, was unaware of the impending danger because of her age.[7] On many previous occasions, she had stood beside the tracks of a commuter train in order to wave to the trainmen.[8] On the day in question, the plaintiff was beside the tracks as the train approached along a level track at approximately 20 to 25 miles per hour.[9] After sounding its whistle, the train proceeded along the tracks.[10] The child, however, was too close to the tracks, was struck by the train, and was severely injured.[11] At the conclusion of the plaintiff's opening statement, the trial judge granted the defense motion for a directed verdict.[12]

In a terse opinion, the Appeals Court considered the case in light of *Pridgen* [13] and held that the facts alleged by the plaintiff were sufficient to warrant a jury verdict that the trainmen had not exercised reasonable care in operating the train.[14] Although the child was not physically trapped, the Court concluded that her inability to appreciate the danger made her position "tantamount to that of the helplessly trapped child in *Pridgen*." [15] Furthermore, once the trainmen had observed the child, a jury could have concluded that the conductor and engineer did not

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[2] 364 Mass. at 705, 308 N.E.2d at 475.

[3] *Id.*; *see* Urban v. Central Mass. Elec. Co., 301 Mass. 519, 523, 17 N.E.2d 718, 721 (1938).

[4] 364 Mass. at 700, 308 N.E.2d at 470.

[5] *Id.* at 711-13, 308 N.E.2d at 477.

[6] 1978 Mass. App. Ct. Adv. Sh. 1261, 383 N.E.2d 550.

[7] *Id.* at 1262, 383 N.E.2d at 551. The plaintiff was four years old at the time of the incident. *Id.*

[8] *Id.* at 1262, 383 N.E.2d at 551.

[9] *Id.*

[10] *Id.* at 1262-63, 383 N.E.2d at 551. The train's whistle was sounded approximately 600 feet from the point of the accident. *Id.*

[11] *Id.* at 1263, 383 N.E.2d at 551.

[12] *Id.* at 1261, 383 N.E.2d at 550.

[13] *Id.* at 1263, 383 N.E.2d at 551-52.

[14] *Id.* at 1265, 383 N.E.2d at 552.

[15] *Id.* at 1263, 383 N.E.2d at 552.

exercise reasonable care to avoid injury to the plaintiff.[16] At the very least, the Court noted, the operators could have sounded a warning and slowed the train down.[17]

In a similar decision during the *Survey* year, *Soule v. Massachusetts Electric Co.*,[18] the Supreme Judicial Court considered the rights of a child injured while playing on property owned by the defendant.[19] In *Soule*, an eight-year-old plaintiff[20] was playing with friends on town property commonly used by townspeople for recreational purposes.[21] Across the town property was an easement used by the defendant power company for its power lines.[22] At one point along the lines, the company placed a switching station, with electrical equipment inside, on a wooden platform approximately eight to fifteen feet above the ground.[23] The plaintiff, thinking the station would make a "good lookout tower," [24] climbed the station and struck his head inside a hole in the floor of the station.[25] He contacted an uninsulated wire inside and was severely burned.[26] Answering special questions, the jury returned a verdict in favor of the plaintiff.[27] The trial judge, however, granted a defense motion for judgment notwithstanding the verdict and entered judgment for the defendant.[28]

Reversing the trial judge's ruling and reinstating the jury verdict,[29] the Supreme Judicial Court held that the defendant was required to exercise reasonable care to prevent harm to foreseeable child trespassers.[30] To reach such a conclusion, the Court ruled that a statutory exception for child trespassers,[31] enacted after the accident, did not foreclose judicial action to accomplish, as a matter of common law, a similar result retroactively.[32] Noting that the evolution of tort law was a process strongly influenced by the courts, the Court in *Soule* declared

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16 *Id.*
17 *Id.* at 1265, 383 N.E.2d at 552.
18 1979 Mass. Adv. Sh. 1380, 390 N.E.2d 716.
19 *Id.* at 1380, 390 N.E.2d at 717.
20 *Id.* The incident occurred in 1954 when the plaintiff was eight years old. The Court does not explain the reason for the lengthy delay between the time of the incident and the time of trial.
21 *Id.* at 1382, 390 N.E.2d at 718.
22 *Id.*
23 *Id.* at 1381-82, 390 N.E.2d at 717-18.
24 *Id.* at 1382, 390 N.E.2d at 718.
25 *Id.* at 1383, 390 N.E.2d at 718.
26 *Id.*
27 *Id.* at 1381, 390 N.E.2d at 717.
28 *Id.*
29 *Id.*
30 *Id.* at 1385, 390 N.E.2d at 719.
31 G.L. c. 231, § 85Q, *added by* Acts of 1977, c. 259.
32 *Id.* at 1385, 390 N.E.2d at 719.

that questions of tort law are "appropriately a subject for *both* legislative and judicial lawmaking."[33] Since judicial action was appropriate, the Court, extending the rationale of earlier decisions, declared that property owners must exercise reasonable care where the presence of a child trespasser is a foreseeable event.[34]

Like the Appeals Court in *Kalinkowski,* the Supreme Judicial Court in *Soule* was willing to interpret liberally the requirements of the *Pridgen* decision. In *Soule,* the defendant had no knowledge of the dangerous condition in the switching station or the presence of the trespassing child.[35] The *Pridgen* rule, which requires a property owner to exercise reasonable care, was originally effective only when the owner was aware of the trespasser's presence.[36] The Court in *Soule* effectively dispensed with this requirement and substituted an objective test which looks to the reasonable foreseeability of the presence of a trespassing child.[37]

These two decisions by commonwealth appellate courts continue the trend, begun in recent years, of extending greater protection to child trespassers.[38] The rule enunciated in *Soule* brings Massachusetts into conformity with the overwhelming majority of jurisdictions which have rejected the position that accords greater protection to property owners than to trespassing children.[39] The only question which remains is whether the same protections will be extended to adult trespassers when such a question is presented on appeal.[40]

§14.7. Negligence—Licensees and Trespassers. In *Monterosso v. Caudette,*[1] decided during the *Survey* year, the Appeals Court clarified the legal distinction drawn between licensees and trespassers for the purpose of determining the duty owed by an owner or occupier of land to persons present on his property.[2] In *Monterosso,* the plaintiff was injured when she fell in the common hallway of a commercial building.[3]

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[33] *Id.* at 1390, 390 N.E.2d at 721. *See also* Poirier v. Plymouth, 1978 Mass. Adv. Sh. 100, 372 N.E.2d 212; Mounsey v. Ellard, 363 Mass. 693, 297 N.E.2d 43 (1973).

[34] 1979 Mass. Adv. Sh. at 1389, 390 N.E.2d at 720-21.

[35] *Id.* at 1380-83, 390 N.E.2d at 717-18.

[36] 364 Mass. 696, 711-13.

[37] 1979 Mass. Adv. Sh. at 1389, 390 N.E.2d at 720-21.

[38] See note 33 *supra.*

[39] At the time *Soule* was decided, only Maryland, New Hampshire, Ohio, and Vermont did not recognize a "child trespasser" exception. 1979 Mass. Adv. Sh. at 1388 n.10, 390 N.E.2d at 720 n.10.

[40] *See* the concurring opinions of Chief Justice Hennessey and Justice Kaplan, 1979 Mass. Adv. Sh. at 1393, 390 N.E.2d at 722 (Hennessey, C.J., concurring) and *id.* at 1394, 390 N.E.2d at 722. (Kaplan, J., concurring).

§14.7. [1] 1979 Mass. App. Ct. Adv Sh. 1467, 391 N.E.2d 948.

[2] *Id.* at 1477-79, 391 N.E.2d at 955-56.

[3] *Id.* at 1467, 391 N.E.2d at 951. The plaintiff was a customer of one of the tenants of the building. *Id.* at 1470, 391 N.E.2d at 952.

The plaintiff brought an action in negligence against the defendant lessee of a portion of the building.[4] The trial judge denied the defendant's motion for a directed verdict and sent the case to the jury.[5]

One principal issue in the case was whether the plaintiff, at the time of the accident, was a licensee or trespasser.[6] In his charge to the jury, the trial judge noted that there is no longer any distinction made between licensees and invitees in determining the standard of care owed to third parties.[7] He then stated that a licensee is owed a duty of reasonable care in the maintenance of the premises, while a trespasser is owed only the duty to refrain from wilful, wanton, or reckless conduct.[8] In describing the legal difference between licensees and trespassers, the trial judge instructed the jury that a trespasser is one who lacks "an *invitation*, express or implied," to be on the defendant's property.[9] In answer to special questions, the jury found that the defendant had been causally negligent, but that the plaintiff was a mere trespasser on the defendant's premises.[10] Consequently, a judgment was entered in favor of the defendant and the plaintiff appealed.[11]

The Appeals Court ruled that the trial judge's charge was inadequate with respect to the definitional distinction drawn between trespassers and licensees.[12] The court held that the instruction tying "the lawfulness of the visit to an invitation . . . " was erroneous,[13] because such a standard ignored a middle ground presented by the evidence.[14] By casting the charge in terms of "mutually exclusive categories," the trial judge had foreclosed the possibility that the defendant's conduct may have provided the plaintiff "with reason to believe she could enter if she so desired."[15] Thus, the court suggested that the plaintiff may have been privileged to enter the hallway. In such a case, the defendant would have owed her a duty of reasonable care.[16] Because the instructions did not adequately explain this "middle ground" raised by the evidence, the court concluded that the plaintiff was entitled to a new trial.[17]

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[4] *Id.* at 1467-68, 391 N.E.2d at 951. The defendant also brought an action against the owner and a second tenant. The trial judge allowed directed verdicts in favor of these defendants. *Id.*

[5] *Id.* at 1468, 391 N.E.2d at 951.

[6] *Id.* at 1477, 391 N.E.2d at 955.

[7] *Id.*

[8] *Id.*

[9] *Id.* (emphasis in original).

[10] *Id.* at 1468, 391 N.E.2d at 951.

[11] *Id.*

[12] *Id.* at 1477-78, 391 N.E.2d at 955.

[13] *Id.* at 1478, 391 N.E.2d at 955.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

In essence, the Court in *Monterosso* expanded the concept of implied invitation. One test for determining whether a plaintiff was given an implied invitation is to assess the defendant's conduct. In *Monterosso,* the court also permitted the jury to look to the plaintiff's understanding of the defendant's conduct.[18] The test, however, should be an objective one, which determines whether the plaintiff was reasonable, in light of all the circumstances, in implying an invitation to enter the defendant's premises.

§14.8. **Negligence—Landlord and Tenant.** Since the 1973 Supreme Judicial Court decision in *Boston Housing Authority v. Hemingway,*[1] a landlord has been held to convey an implied warranty of habitability whenever he leases a rental unit for dwelling purposes.[2] Abandoning archaic common law principles, the Court in *Hemingway* held that an essential element of any lease is the landlord's duty to keep the premises fit for human habitation.[3] During the *Survey* year, the Supreme Judicial Court, in *Crowell v. McCaffrey,*[4] considered whether a tenant may recover damages for personal injuries arising from a violation of the implied warranty of habitability.[5]

In *Crowell,* a tenant was injured when the porch railing against which he was leaning gave way.[6] The porch was across a hallway from the door to the plaintiff's third-floor apartment.[7] While the plaintiff was told that he could use the porch "in the summertime," [8] the tenant paid rent only for the apartment itself.[9] The railing was shown to have been in bad repair and, after the accident, the landlord boarded up the window giving access to the porch.[10] The plaintiff alleged that defendant had been negligent in maintaining an area in his control.[11] The plaintiff further alleged that if the porch was part of the rented premises, the defendant had breached the implied warranty of habitability.[12] During the trial, the plaintiff attempted to introduce pertinent sections of

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[18] *Id.*

§14.8. [1] 363 Mass. 184, 293 N.E.2d 831 (1973); Schwartz, *Property and Conveyancing,* 1973 ANN. SURV. MASS. LAW § 1.9, at 18-46.

[2] 363 Mass. at 199, 293 N.E.2d at 843.

[3] *Id.*

[4] 1979 Mass. Adv. Sh. 568, 386 N.E.2d 1256.

[5] This was one of two theories advanced by the plaintiff. The other theory alleged simple negligence in the maintenance of the building's common areas. See text at note 11 *infra.*

[6] 1979 Mass. Adv. Sh. at 569, 386 N.E.2d at 1258.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.* at 568-69, 386 N.E.2d at 1258.

[12] *Id.* at 569, 386 N.E.2d at 1258.

the State Building Code and the State Housing Code.[13] The trial judge excluded this evidence.[14] At the close of the plaintiff's case, the trial judge granted the defendant's motion for a directed verdict on both counts.[15]

Acting on the plaintiff's motion for direct appellate review, the Supreme Judicial Court reversed the trial court and held that sufficient evidence was presented to the jury on either count to support a finding in favor of the plaintiff.[16] The Court determined that if the jury found that the porch remained under the defendant's control, then the landlord could have been negligent in maintaining the porch.[17] If, however, the porch was part of the rented premises, the landlord could have breached his warranty to comply "with minimum standards prescribed by the State Building Code and the State Sanitary Code."[18] Furthermore, the Court concluded, the statutory provisions from the building and housing codes were relevant on either the negligence or warranty issues and, consequently, should have been admitted by the trial judge.[19]

The important aspect of *Crowell* is the Supreme Judicial Court's conclusion that the implied warranty of habitability necessarily includes liability for injuries caused by a breach.[20] When a landlord leases a rental dwelling unit, he makes an implied agreement that the unit "complies with minimum standards prescribed by building and sanitary codes and that he will do whatever these codes require for compliance . . . ."[21] In the present case, the Court concluded, the jury would have been warranted in finding that the landlord, by the exercise of reasonable care, could have discovered the defects in the porch.[22]

As a result of the *Crowell* decision, a tenant now has the right to recover for injuries that arise from a violation of the building codes, even if the defect arises after the tenant occupies the premises. Furthermore, the tenant may not even have to prove lack of due care on the part of the landlord in discovering the defects. The Court refused to consider whether a tenant must comply with statutory notice requirements in order to preserve the right to sue in the event of injury.[23] While there was evidence showing that the landlord's failure to discover the defects

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13 *Id.* at 569-70, 386 N.E.2d at 1258.
14 *Id.*
15 *Id.* at 568, 386 N.E.2d at 1258.
16 *Id.* at 568-69, 386 N.E.2d at 1258.
17 *Id.*
18 *Id.* at 569, 386 N.E.2d at 1258.
19 *Id.*
20 *Id.* at 578, 386 N.E.2d at 1261.
21 *Id.* at 579, 386 N.E.2d at 1261-62.
22 *Id.* at 579, 386 N.E.2d at 1262.
23 *Id.*

was unreasonable, the Court also declined to consider whether such a jury finding is "essential to liability."[24] It is possible, therefore, that the Court, in the future, may impose upon a landlord strict liability for injuries which arise from building or sanitary code violations.

§14.9. **Intentional and Negligent Infliction of Emotional Distress.** In 1971 in *George v. Jordan Marsh Company*,[1] the Supreme Judicial Court joined a substantial number of jurisdictions [2] and recognized the tort of intentional infliction of emotional distress. During this *Survey* year, the Court, in *Boyle v. Wenk* [3] and *Harrison v. Loyal Protective Insurance Co.*,[4] refined and extended this developing tort. More significantly, during the *Survey* year, the Supreme Judicial Court, in the landmark decision of *Dziokonski v. Babineau*,[5] further expanded the rights of plaintiffs to recover for emotional injury by recognizing the distinct tort of negligent infliction of emotional distress.

In *Boyle v. Wenk*, which concerned an allegation of intentional infliction of emotional distress,[6] the defendant Wenk was employed by Consulting Investigators, Inc., to do private investigative work. He was asked to gather information concerning the health and capacity for work of a John Walsh.[7] The plaintiff, a Mrs. Boyle, was Walsh's sister-in-law. Walsh and his wife lived in an apartment located in the home of Mrs. Boyle.[8] At some point, the defendant telephoned the Boyle home, spoke with Mrs. Boyle, and attempted to question her about Walsh.[9] The plaintiff suggested that Walsh be contacted directly and asked not to be called again.[10] She also told the defendant that she had just been discharged from the hospital.[11]

The following week Wenk again telephoned the Boyle home at one o'clock in the morning.[12] He spoke with the plaintiff, who was alone at home with her children. She told him not to telephone again.[13] Mrs. Boyle testified at trial that this call left her in great distress.[14] Despite the plaintiff's requests, the defendant appeared at the Walsh

[24] *Id.* at 579-80, 386 N.E.2d at 1262.

§14.9. [1] George v. Jordan Marsh Co., 359 Mass. 244, 268 N.E.2d 917 (1971).
[2] *See* W. PROSSER, TORTS § 12 (4th ed. 1971).
[3] 1979 Mass. Adv. Sh. 1947, 392 N.E.2d 1053.
[4] 1979 Mass. Adv. Sh. 2477, 396 N.E.2d 987.
[5] 375 Mass. 555, 380 N.E.2d 1295 (1978).
[6] 1979 Mass. Adv. Sh. at 1947, 392 N.E.2d at 1054.
[7] *Id.* at 1948, 392 N.E.2d at 1054.
[8] *Id.*
[9] *Id.* at 1948-49, 392 N.E.2d at 1054.
[10] *Id.* at 1948-49, 392 N.E.2d at 1054-55.
[11] *Id.*
[12] *Id.* at 1949, 392 N.E.2d at 1055.
[13] *Id.*
[14] *Id.*

apartment and was invited upstairs by Mrs. Walsh. At this time Wenk admitted to Mrs. Boyle, who was also present, that he was the individual attempting to contact Mr. Walsh.[15] Mrs. Boyle told him that she had been terrified by his calls.[16] During the course of a conversation, Wenk asserted, in the presence of Mrs. Boyle, that he had been "in prison too for rape."[17] The police were called, and when they arrived the defendant falsely asserted he was a police officer.[18] Evidence introduced at trial indicated that Mrs. Boyle was visibly agitated both at her home and later at the police station. Furthermore, she began to hemorrhage at the station and was forced to leave the station to seek medical attention.[19] Mrs. Boyle underwent both physical and psychiatric care for injuries, which evidence established were causally connected to the conduct of Wenk.[20] At trial, the trial judge denied the defendant's motions for directed verdict and judgment notwithstanding the verdict.[21] The sole issue on appeal was whether the plaintiff had presented sufficient evidence to support the favorable verdict.[22]

Rejecting the defendant's contention that the evidence showed only insulting or annoying conduct, the Supreme Judicial Court held that the evidence warranted a finding that Wenk's actions were extreme and outrageous.[23] The Court observed that, while any one of the incidents might not appear particularly egregious, the jury was not bound to view the evidence in isolation.[24] Rather, the Court ruled the jury could look to the totality of the circumstances to find the element of extreme and outrageous conduct going "beyond all possible bounds of decency."[25] In conclusion, the Court stated that repeated harassment may compound the offending nature of individual incidents, which alone might not be sufficiently extreme to support a finding of liability.[26]

In reaching its decision, the Court was strongly influenced by evidence that the defendant was on notice that the plaintiff may have been particularly susceptible to emotional distress.[27] While Wenk was not actually aware of Mrs. Boyle's specific physical problems, the Court found that he had received sufficient notice of her weakened condition when

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15 *Id.*
16 *Id.*
17 *Id.*
18 *Id.*
19 *Id.*
20 *Id.* at 1950, 392 N.E.2d at 1055.
21 *Id.* at 1947, 392 N.E.2d at 1054.
22 *Id.* at 1948, 392 N.E.2d at 1054.
23 *Id.* at 1951, 392 N.E.2d at 1055.
24 *Id.* at 1951, 392 N.E.2d at 1055-56.
25 *Id.* at 1950-51, 392 N.E.2d at 1055-56.
26 *Id.* at 1051, 392 N.E.2d at 1056.
27 *Id.* at 1052, 392 N.E.2d at 1056.

she informed him in the first phone call that she had just left the hospital.[28] While the Court did not go so far as to hold that a defendant must take the plaintiff as he finds him, the Court in *Boyle* did liberally construe the evidence that the defendant was on notice of the plaintiff's infirmities. Thus, it appears that where there is a series of harassing incidents accompanied by reasonable evidence that the defendant was on notice of the plaintiff's particular vulnerability to such incidents, the Supreme Judicial Court will not overturn a jury's finding that the defendant's conduct was extreme and outrageous.

In *Harrison v. Loyal Protective Life Insurance Co.*,[29] the Supreme Judicial Court considered whether an action for intentional infliction of emotional distress survives the death of the injured party.[30] In *Harrison*, the plaintiff alleged that Fitzwilliam, an officer of the defendant corporation, knowing that the plaintiff's decedent had cancer and was unable to continue working for the defendant,[31] threatened Harrison, that, if Harrison applied for physical disability benefits, he would not be permitted to return to his job should he regain his health.[32] The plaintiff claimed that this action led to a deterioration of Harrison's physical condition, destroyed his will to live, and, ultimately, contributed to his death.[33] The defendant moved to dismiss. The trial judge granted the motion on the ground that the action did not survive the death of the injured party.[34] The judge's ruling was consistent with prior case law, which had narrowly construed the state survival statute.[35]

Finding that these prior decisions were not controlling, the Supreme Judicial Court on appeal held that the new tort of intentional infliction of emotional distress, which allows recovery for solely emotional injury,[36] does survive the death of the injured party.[37] Noting that the earlier decisions had been decided before emotional injury was recognized as a legally redressable harm, the Court applied a liberal interpretation to the "flexibly drawn" survival statute.[38] The Court construed the statu-

[28] *Id.*

[29] 1979 Mass. Adv. Sh. 2477, 396 N.E.2d 987.

[30] *Id.* at 2477, 396 N.E.2d at 988.

[31] *Id.* at 2478, 396 N.E.2d at 988.

[32] *Id.*

[33] *Id.*

[34] *Id.* at 2477-78, 396 N.E.2d at 988. G.L. c. 228, § 1, *as amended by Acts* of 1975, c. 377, § 62, reads in pertinent part: "In addition to the actions which survive by common law the following shall survive: . . . (2) Actions of tort (a) for assault, battery, imprisonment or other damage to the person . . . . " *Id.*

[35] 1979 Mass. Adv. Sh. at 2478, 396 N.E.2d at 989. *See, e.g.*, Keating v. Boston Elevated Ry., 209 Mass. 278, 95 N.E.2d 840 (1911) (action for damages to a father resulting from personal injury to his minor child did not survive under the statute).

[36] 1979 Mass. Adv. Sh. at 2480, 396 N.E.2d at 915 (1971). *See* George v. Jordan Marsh Co., 359 Mass. 244, 268 N.E.2d 915 (1971).

[37] 1979 Mass. Adv. Sh. at 2477, 396 N.E.2d at 988.

[38] *Id.* at 2479, 396 N.E.2d at 989.

tory language "damage to the person" to include injury to the emotional person as well as the physical person.[39]

Having concluded that this tort is within the purview of the survival statute, the Court in *Harrison* considered whether, as a matter of public policy, an action for intentional infliction of emotional distress should be allowed to survive.[40] In essence, the Court was concerned whether either the potential for fraud or difficulty of proof might outweigh the benefit to those plaintiffs with legally compensable damages.[41] Noting that an action for assault survives the death of a party, the Court considered that it would be "anomalous" to allow the survival of a tort like assault, which permits recovery for both emotional and physical injury, however slight, while denying the survival of a tort for severe emotional injury.[42] With respect to problems of proof, the Court did not find any of the potential evidentiary problems of sufficient moment to warrant continuance of the non-survival rule.[43] It determined that good faith statements of the plaintiff's decedent concerning susceptibility to injury or to actual injury would be admissible.[44] Any weakness in this evidence or other similar evidence would be a question of weight to be resolved by the jury.[45]

Boyle and *Harrison* indicate the Supreme Judicial Court's receptive attitude toward claims alleging significant emotional injury. Viewed in this light, it is not surprising that the Court, in *Dziokonski v. Babineau,* recognized the tort of negligent infliction of emotional distress.[46] In *Dziokonski,* the plaintiff brought an action on behalf of Mrs. Dziokonski, whose daughter was injured when she was hit by an automobile driven by the defendant.[47] The child was struck as she crossed the street after getting off a school bus.[48] The plaintiff alleged that the child's mother arrived at the accident scene, observed her injured daughter lying in the road, suffered emotional shock and resulting physical injury, and died while she was riding in the ambulance that was taking her daughter to the hospital.[49] The administratrix also brought a complaint on behalf of Mr. Dziokonski, the child's father. Mr. Dziokonski was alleged to have suffered emotional and physical trauma, ending

[39] *Id.* at 2480, 396 N.E.2d at 990.
[40] *Id.* at 2480-81, 396 N.E.2d at 990.
[41] *Id.* at 2481, 396 N.E.2d at 990.
[42] *Id.*
[43] *Id.* at 2482, 396 N.E.2d at 990-91.
[44] *Id.* at 2483, 396 N.E.2d at 991.
[45] *Id.*
[46] 375 Mass. 568, 380 N.E.2d at 1302-03.
[47] *Id.* at 557, 380 N.E.2d at 1296. The plaintiff also brought actions against the bus driver and the owner of the vehicle. *Id.*
[48] *Id.*
[49] *Id.*

ultimately in his death, as a result of the injuries to his daughter and the death of his wife.[50] Both complaints contained counts for wrongful death and for conscious suffering.[51] The trial judge, acting on the defendant's motion to dismiss for failure to state a claim upon which relief may be granted, dismissed all claims against all the defendants.[52] Upon its own motion, the Supreme Judicial Court granted direct appellate review.[53]

Overruling time-honored precedent, the Supreme Judicial Court reversed the trial judge's ruling and held that the so-called "impact rule," established in the commonwealth in *Spade v. Lynn and Boston Railroad*,[54] should be abandoned.[55] *Spade* had required that there be some impact to the person of the plaintiff—no matter how slight—to permit the plaintiff to recover for emotional distress.[56] After discussing at length the history and subsequent modification of the *Spade* rule, the Court concluded that the impact requirement was no longer a persuasive standard.[57] While the *Spade* Court had originally accepted the rule to guard against fraudulent claims, the Court in *Dziokonski* declared that "the threat of fraudulent claims" is not sufficient to warrant an absolute bar against all claims whether legitimate or not.[58] The trier of fact, the Court stated, is best equipped to determine both the question of causation and the question of reasonable foreseeability when determining whether physical injury has resulted from emotional distress.[59]

Having concluded that absence of impact should not be an automatic bar to recovery, the Court addressed the question of the causal connection between the injury to a child and the parent's emotional response to that injury.[60] The Court reasoned that if a motor vehicle is negligently operated so as to cause injury, the operator should reasonably foresee that one or more persons may be "sufficiently emotionally attached" to the injured party to be affected by such conduct.[61] Recognizing that a parent of an injured child would be such a person, the Court held that a parent may recover damages for "substantial physical harm sustained as a result of severe mental distress over some peril or

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50 *Id.*
51 *Id.*
52 *Id.* at 556, 380 N.E.2d at 1296.
53 *Id.*
54 168 Mass. 285, 47 N.E. 88 (1897).
55 375 Mass. at 556, 380 N.E.2d at 1296.
56 168 Mass. at 290, 47 N.E. at 88.
57 375 Mass. at 562, 380 N.E.2d at 1297.
58 *Id.* at 565-66, 380 N.E.2d at 1301.
59 *Id.*
60 *Id.* at 566, 380 N.E.2d at 1301.
61 *Id.* at 567, 380 N.E.2d at 1302.

harm to his minor child caused by the defendant's negligence . . . ." [62] In order to limit the scope of its holding, however, the Court further held that recovery would be permitted only "where the parent either witnesses the accident or soon comes on the scene while the child is still there." [63]

On the basis of this holding, the Court reinstated the complaints brought on behalf of both deceased parents. With respect to the claim for the mother's injury and death, the Court ruled that the complaint clearly alleged sufficient facts to withstand a motion to dismiss.[64] With respect to the claim for the father's injury and death, however, the Court noted that further information was necessary. The complaint did not allege when, where, or how the father received knowledge of the injury to his daughter.[65] Nevertheless, the Court concluded that the lack of such specific allegations did not, as a matter of law, doom the complaint. Instead, the Court noted that the allegations were sufficient to include some circumstances which would justify recovery.[66] Thus, the Court concluded that neither complaint should have been dismissed.[67]

Two questions remain to be resolved in subsequent decisions. While the facts of *Dziokonski* were those of a parent observing injury to her child, the standard would appear to include similar situations where the plaintiff is able to prove sufficient emotional attachment between the injured party and the plaintiff.[68] Thus, for example, a child may recover after observing injury to one of his parents. Second, the Court explicitly reserved the issue of whether emotional injury unaccompanied by physical injury should be compensable.[69] In its opinion, the Court gave no indication of the result it would reach should such a question be presented. Nevertheless, the requirement in *Dziokonski* of *substantial* physical harm [70] would indicate that the Court may not be receptive to a claim involving only emotional injury.

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[62] *Id.* at 568, 380 N.E.2d at 1302.

[63] *Id.*

[64] *Id.* at 568, 380 N.E.2d at 1303.

[65] *Id.* The complaint simply alleged the Mr. Dziokonski's injuries resulted from his distress over learning the news of his wife's death and his daughter's injuries. *Id.* at 562 n.9, 380 N.E.2d at 1299 n.9.

[66] *Id.* at 569, 380 N.E.2d at 1303. Justice Quirico dissented, stating that the Court "should not prescribe rules that allow or deny recovery by the parent on the basis of the speed and efficiency of an ambulance team in responding to an accident call, or on the haste with which a parent can be notified and rushed to the accident scene." *Id.* at 571, 380 N.E.2d at 1303-04 (Quirico, J., dissenting).

[67] *Id.* at 569, 380 N.E.2d at 1303.

[68] *Id.* at 567, 380 N.E.2d at 1302. Justice Quirico, who, in his dissent argued for a stricter rule than that adopted by the majority, would have, within the limits of his rule, permitted recovery to other close relatives. *Id.* at 570 n.2, 380 N.E.2d at 1303 n.2 (Quirico, J., dissenting).

[69] *Id.* at 560 n.6, 380 N.E.2d at 1298 n.6.

[70] *Id.* at 566, 380 N.E.2d at 1302.

The decision in *Dziokonski* places Massachusetts among a small minority of states recognizing the tort of negligent infliction of emotional distress.[71] Together with the decisions in *Boyle* and *Harrison,* the Supreme Judicial Court has showed a willingness to depart from prior precedent. In so doing, it has expanded the scope of protection available to plaintiffs who have experienced emotional injuries.

§14.10. Medical Malpractice Screening Tribunals—Scope and Application. In 1975, the General Court enacted a statute establishing a medical malpractice screening tribunal to review actions involving medical malpractice or mistake brought against health care providers and health care institutions.[1] In 1977, the Supreme Judicial Court in *Paro v. Longwood Hospital,*[2] upheld the constitutionality of the tribunal process. During the *Survey* year, several Supreme Judicial Court decisions [3] addressed the scope and authority of medical malpractice screening tribunals.

In *Little v. Rosenthal,*[4] the plaintiff filed four separate actions against an individual doctor and a nursing home alleging acts of malpractice and violations of chapter 93A, the Consumer Protection Act.[5] Over the plaintiff's objection, all the actions were submitted to malpractice tribunals for review.[6] With respect to all four actions, the panels found that the evidence presented was insufficient to raise a legitimate question appropriate for judicial inquiry.[7] The plaintiff therefore was required to post bond in order to continue the actions.[8] The plaintiff declined to post bond, and, when the actions were dismissed, appealed.[9]

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[71] *See, e.g.,* Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968); Leong v. Takasaki, 55 Haw. 398, 520 P.2d 758 (1974); Toms v. McConnell, 45 Mich. App. 647, 207 N.W.2d 140 (1973); D'Ambra v. United States, 114 R.I. 643, 338 A.2d 524 (1975).

§14.10. [1] G.L. c. 231, §§ 60B-60E, *added by* Acts of 1975, c. 634, § 1.

[2] 373 Mass. 645, 369 N.E.2d 985 (1977).

[3] McMahon v. Glixman, 1979 Mass. Adv. Sh. 2277, 393 N.E.2d 875; Salem Orthopedic Surgeons, Inc. v. Quinn, 1979 Mass. Adv. Sh. 661, 386 N.E.2d 1268; Little v. Rosenthal, 1978 Mass. Adv. Sh. 2793, 382 N.E.2d 1037.

[4] 1978 Mass. Adv. Sh. 2793, 382 N.E.2d 1037.

[5] G.L. c. 93A.

[6] 1978 Mass. Adv. Sh. at 2795, 382 N.E.2d at 1040. The complaints included allegations of substandard care while plaintiff was resident in a nursing home, which resulted in dehydration and bed sores requiring the plaintiff's transfer to a hospital. The complaints also alleged violations of the Department of Public Health Rules and Regulations for the Licensing of Long Term Care Facilities. *Id.*

[7] *Id.* at 2794, 382 N.E.2d at 1040.

[8] G.L. c. 231, § 60B, provides that on a finding by the screening tribunal that there is no legitimate question for judicial inquiry, the plaintiff may continue the action only by posting bond in the amount of $2,000 to cover the defendant's costs in the event that the plaintiff ultimately does not prevail. *Id.*

[9] 1978 Mass. Adv. Sh. at 2794, 382 N.E.2d at 1040.

Transferring the case on its own motion, the Supreme Judicial Court upheld the determinations of the malpractice tribunals. Rejecting the plaintiff's contention that chapter 93A claims were not proper subject matter for screening panel review, the Court held that the statute required that all treatment-related claims be referred to a malpractice tribunal.[10] The Court also rejected the plaintiff's claim that the screening panels had exceeded the scope of their authority by applying too stringent a standard to her offer of proof.[11] Section 60B of chapter 231 requires the malpractice tribunal to determine "if the evidence presented if properly substantiated is sufficient to raise a legitimate question appropriate for judicial inquiry or whether the plaintiff's case is merely an unfortunate medical result."[12] The Court rejected the plaintiff's claim that this language required the tribunal to assume a role analogous to that of a judge faced with a motion for dismissal under rule 12(b)(6) of the Massachusetts Rules of Civil Procedure.[13] Instead, it found that the statute, however imprecise, required the plaintiff to allege more than facts constituting a legal cause of action. The Court concluded that the tribunal's screening process was comparable to a trial judge's function in ruling on a motion for a directed verdict.[14] Applying this standard, the Court ruled that the screening panels were not in error in concluding that the plaintiff's allegations failed to raise a legitimate question of liability.[15]

The Court's holding in *Little*, if strictly applied, places the burden on the plaintiff to present sufficient evidence to satisfy each and every element of the tort alleged. As attorneys litigating cases in the area of law and medicine are aware, the issues that arise concerning medical-legal causation are both intriguing and complex. Because of the complexity of many injuries, a plaintiff, although able to produce evidence and expert opinion demonstrating that a physician's conduct clearly fell below acceptable standards, may nevertheless be required to undertake additional discovery[16] to obtain expert evaluation to present competent

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[10] *Id.* at 2796, 382 N.E.2d at 1040. G.L. 231, § 60B, empowers a screening panel to review "[e]very action for malpractice, error or mistake against a provider of health care." For further discussion of this aspect of *Little*, see § 12.6 *supra*.

[11] 1978 Mass. Adv. Sh. at 2798, 382 N.E.2d 1041.

[12] G.L. c. 231, § 60B.

[13] 1978 Mass. Adv. Sh. at 2798, 382 N.E.2d at 1041.

[14] *Id.* at 2799, 382 N.E.2d at 1041.

[15] *Id.*

[16] Such discovery may only be available upon deposition or subpoena after completion of the tribunal process. Since the statute requires that the tribunal convene within 15 days of the defendant's answer to the complaint, a plaintiff is foreclosed from taking advantage of interrogatories, depositions, or notices to produce prior to meeting his burden before the tribunal. G.L. c. 231, § 60B. *See also* McLaughlin, *Malpractice Tribunal System*, 3 AM. J.L. MED. 203, 204 (1977).

evidence of causation. It may be, however, that the Court was merely considering the "process" of evaluation applied to a motion for a directed verdict, without intending to require that each element of the prima facie case must be satisfied.[17] This process could include the assumption that all allegations of fact and opinion in the plaintiff's case are assumed to be true and are to be reviewed in the manner most favorable to the plaintiff. Unlike the analysis employed for a rule 12(b)(6) motion, the tribunal would not be required to assume that the plaintiff can produce a set of facts to support the general allegation that there is a legitimate issue appropriate for judicial inquiry, unless the allegation is supported by plaintiff's offer of proof to the tribunal. Under such circumstances, it cannot always reasonably be held that a complaint for malpractice is frivolous or that it does not raise a question appropriate for judicial inquiry.[18] Thus, while the *Little* decision on its face purports to settle the question of the standard of review to be applied by a medical malpractice tribunal, the practical application of this standard must await future decisions.

After deciding *Little*, the Supreme Judicial Court again considered the issue of what actions are reviewable by a medical malpractice tribunal. In *Salem Orthopedic Surgeons, Inc. v. Quinn*,[19] the defendant, in response to an action brought by a physician to recover amounts due on unpaid medical bills,[20] counterclaimed that the physician had breached a promise to produce a specific medical result.[21] When Salem Orthopedic moved for an order to refer the case to a medical malpractice screening tribunal, the judge denied the motion.[22] The Supreme Judicial Court granted direct appellate review to consider whether section 60B of chapter 231 applied to the defendant's counterclaim.[23]

On appeal, the Court ruled that actions alleging a breach of a physician's promise to produce a specific medical result should be referred

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[17] Until further interpretation is provided, however, plaintiff's counsel would be wise not to file a complaint until counsel has prepared a tribunal packet which would survive a motion for a directed finding on each element of the tort alleged.

[18] In raising this issue one is forced to consider whether everything intended to be accomplished by the tribunal process could not have been better accomplished by a judicious use of motions for summary judgment by defense counsel for those claims which were patently frivolous, or could not be supported by affidavit. The statutory mandate clearly could be interpreted as an implicit censure of the malpractice defense bar for failure to effectively use this device.

[19] 1979 Mass. Adv. Sh. 661, 386 N.E.2d 1268.

[20] *Id.* at 661, 386 N.E.2d at 1269.

[21] *Id.* at 662, 386 N.E.2d at 1269. The defendant claimed that the physician had promised to strengthen and lengthen his daughter's leg, which had been seriously injured in a car accident. *Id.* at 663, 386 N.E.2d at 1270.

[22] *Id.* at 662, 386 N.E.2d at 1269.

[23] *Id.*

to a malpractice tribunal.[24] The Court assumed that the defendant's counterclaim was based upon *Sullivan v. O'Connor*,[25] where the Court had allowed recovery against a physician who had failed, without fault, to produce an expressly agreed-upon medical result. The Court conceded that in an action for breach of promise the issue of whether the physician conformed to the appropriate professional standard is irrelevant, because fault is not an element of the claim.[26] Thus, the action is not treatment-related in the sense of *Little v. Rosenthal*.[27] The Court observed, however, that because the existence or nonexistence of an express promise is usually a question of fact, a trial judge may not be able to separate a contract claim from a tort claim until a late stage in the judicial proceedings.[28] It noted that a frivolous action alleging breach of contract could have as much nuisance value as a frivolous tort claim.[29] The Court also remarked that since a doctor would seldom in good faith promise a specific medical result, most allegations of breach of contract would in fact prove to be allegations of negligence.[30] For these reasons, the Court concluded that the defendant's counterclaim for failure to produce a guaranteed medical result was subject to the statute and should initially be screened by a malpractice tribunal.[31]

After concluding that a medical breach of contract claim should be reviewed by a malpractice panel, the Court considered what precise

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[24] *Id.*

[25] 363 Mass. 597, 296 N.E.2d 183 (1973).

[26] 1979 Mass. Adv. Sh. at 667, 386 N.E.2d at 1271. In Clevenger v. Haling, 1979 Mass. Adv. Sh. 2400, 394 N.E.2d 1119, the Court, in upholding Sullivan v. O'Connor, 363 Mass. 579, 296 N.E.2d 183 (1973), defined the "clear proof" necessary to support an action for breach of contract to provide a particular medical result:

> "Clear proof" does not require proof of special consideration for the promise nor does it heighten the burden of proof. What it does require is that the trier of fact give attention to particular facts in deciding whether the physician made a statement which, in the context of the relationship, could have been reasonably interpreted by the patient as a promise that a given result or cure would be achieved. The factors relevant in such an appraisal and their respective values or weights will vary with the circumstances of given cases. Some of the possible factors are noted in the *Sullivan* case. It should be regarded as a negative factor, although one not in itself determinative, that the physician and patient did not focus on the question whether the physician was undertaking to achieve a given result.

Id. at 2406-07, 394 N.E.2d at 1122.

[27] 1978 Mass. Adv. Sh. 2793, 382 N.E.2d 1037. See text at notes 4-17 *supra*.

[28] 1979 Mass. Adv. Sh. at 668, 386 N.E.2d at 1272.

[29] *Id.* The Court had previously observed that the legislative purpose behind the malpractice tribunal statute was to discourage "frivolous claims whose defense would tend to increase premiums charged for medical malpractice insurance." Austin v. Boston Univ. Hosp., 372 Mass. 654, 655 n.4, 363 N.E.2d 515, 516 n.4 (1977).

[30] 1979 Mass. Adv. Sh. at 669, 386 N.E.2d at 1272.

[31] *Id.* at 662, 386 N.E.2d at 1269.

issues should properly be before the panel.[32] Reviewing the requirements of section 60B, the Court determined that the panel should evaluate only the medical aspects of the claim.[33] Thus, the Court ruled that the factual issue of whether the parties made an agreement as alleged in the complaint was not before the tribunal.[34] The appropriate question for the tribunal, the Court concluded, was whether the plaintiff's offer of proof was sufficient to raise a legitimate question of whether the medical result obtained was consistent with the medical result allegedly promised by the health care provider.[35]

In reaching its decision, the Court did not comment on the form required for the offer of proof. It is unclear whether factual allegations must be supported by affidavit or whether they can be submitted as statements by counsel. In the absence of a ruling to the contrary, the latter should be sufficient. In order to avoid subsequent allegations of unethical conduct, however, counsel would be well-advised to submit supporting affidavits.

The Supreme Judicial Court decision in *Salem Orthopedic Surgeons* required a malpractice screening tribunal constituted pursuant to section 60B to confine its review of a malpractice claim to the medical aspects of the claim.[36] This decision was reinforced in another *Survey* year decision concerning the limits of tribunal jurisdiction. In *McMahon v. Glixman*,[37] the plaintiff's claim of medical malpractice was rejected on the ground that the evidence presented was insufficient to raise a legitimate question of liability.[38] The plaintiff appealed, contending, *inter alia*, that the malpractice tribunal had erroneously admitted evidence in the question of whether the plaintiff's claim was barred by the statute of limitations.[39]

The Supreme Judicial Court, transferring the case in its own motion, agreed with the plaintiff. The Court observed that about one-half of the transcript of the hearing before the tribunal was devoted to testimony or argument on this issue.[40] The tribunal's decision, however,

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[32] *Id.* at 669-70, 386 N.E.2d at 1272.
[33] *Id.* at 670, 386 N.E.2d at 1272.
[34] *Id.*
[35] *Id.*
[36] *Id.* at 669-70, 386 N.E.2d at 1272.
[37] 1979 Mass. Adv. Sh. 2277, 393 N.E.2d 875.
[38] *Id.* at 2277, 393 N.E.2d at 876.
[39] *Id.* at 2285, 393 N.E.2d at 879. G.L. c. 260, § 4, establishes a three-year statute of limitations for malpractice actions against certain defendants. One of the major points of contention between the plaintiff and the defendant was the date of the plaintiff's last consultation with the defendant. If the defendant's evidence had been accepted, the action would have been barred by the statute of limitations. *Id.*
[40] *Id.* at 2285-86, 393 N.E.2d at 879.

made no reference to the statute of limitations and gave no indication of whether evidence presented on that issue influenced its decision in favor of the defendant.[41] The Court nevertheless held that the tribunal was in error either to receive or to consider evidence on the issue of the statute of limitations.[42] Citing *Salem Orthopedic Surgeons, Inc. v. Quinn*,[43] the Court emphasized that the tribunal's role should be confined to examining evidence relevant to allegations of medical malpractice.[44] Acknowledging that allowing the tribunal to examine both medical and nonmedical issues would expedite the legislative purpose of discouraging frivolous claims, the Court declined to "turn the tribunal process into a miniature trial in all issues."[45] Hence, the Court reiterated its view expressed in *Salem Orthopedic Surgeons* that the tribunal's review process be confined to medical issues.

§14.11. Legislation—Ski Operators—Responsibility and Liability. In the 1978 decision of *Sunday v. Stratton Corp.*,[1] the Vermont Supreme Court upheld a 1.5 million dollar verdict won by a plaintiff who had been seriously injured while skiing on a novice trail at a Vermont ski resort.[2] The defendant had claimed as its principal defense that assumption of the risk by the plaintiff was a complete bar to recovery. The Court rejected this defense on the basis that Vermont's enactment of a comparative negligence statute[3] had abolished the assumption of the risk doctrine as a complete defense and retained it simply as one element of contributory negligence.[4] Following the *Sunday* decision, the Massachusetts ski industry mobilized, and, on the ground that insurance rates would be prohibitive,[5] obtained passage of the Massachusetts Ski Act.[6]

The new Massachusetts Ski Act amended the 1968 Recreational Tramway Act,[7] which was enacted to establish rules and regulations for the

[41] *Id.* at 2286-87, 393 N.E.2d at 879.
[42] *Id.* at 2287, 393 N.E.2d at 879.
[43] 1979 Mass. Adv. Sh. 661, 386 N.E.2d 1268.
[44] 1979 Mass. Adv. Sh. at 2289, 393 N.E.2d at 880.
[45] *Id.* at 2288, 393 N.E.2d at 880.

§14.11. [1] 136 Vt. 293, 390 A.2d 398 (1978).
[2] *Id.* at 310, 390 A.2d at 407.
[3] VT. STAT. ANN. tit. 12, § 1306.
[4] 136 Vt. at 297, 390 A.2d at 400-01. In other words, in measuring the degree to which the plaintiff's conduct contributed to the injury, one factor should be the plaintiff's assumption of the risk of participating in an inherently dangerous sport. The assumption of such risk would not defeat recovery altogether unless it could be shown that the plaintiff's conduct as a whole contributed more than 50 percent to the injury as compared with the conduct of the defendant. *See* VT. STAT. ANN. tit. 12, § 1036.
[5] *See* Note, *Ski Operators and Skiers—Responsibility and Liability*, 14 N. ENG. L. REV. 260, 271 (1978).
[6] G.L. c. 143, §§ 71N-71S, *as enacted by* Acts of 1978, c. 455, § 4.
[7] Acts of 1968, c. 565.

construction, operation, maintenance, inspection, and licensing of ski-lifts. The act amends that statute by adding provisions to establish further duties of ski area operators, responsibilities of skiers, and limitations of actions against ski area operators. The act requires ski area operators to mark and identify snow-making equipment "in a manner to afford skiers reasonable notice of the proximity of such equipment . . . "[8] and to equip maintenance and emergency vehicles with flashing and rotating lights.[9] Operators are also charged with the responsibility of maintaining and operating "ski areas under [their] control in a reasonably safe condition or manner; provided, however, that ski area operators shall not be liable for damages to persons or property, while skiing, which arise out of the risks inherent in the sport of skiing."[10] Skiers in turn are required to follow the instructions of ski lift operators and are charged with the general duty to "maintain control of . . . speed and course at all times, and . . . stay clear of any snow-grooming equipment, any vehicle, towers, poles, or other equipment."[11] The act establishes a presumption that where there is a collision between a skier and another skier or a properly marked obstruction, the responsibility for the collision lies with that skier and not the ski area operator.[12] As a condition precedent of bringing an action against the operator of a ski area, the plaintiff must within ninety days of the incident give the operator notice, by registered mail of the time, place, and cause of the injury.[13] Failure to give such notice may act as a bar to recovery.[14] The act further requires that actions must be brought within one year of the date of injury.[15]

The most significant section of the act is the provision releasing ski area operators from liability for injuries arising out of the inherent risks of skiing. However broad this release may appear, the scope of this provision has yet to be determined. Nevertheless, the addition of this provision appears to have reintroduced the affirmative defense of assumption of risk.[16] A reasonable analysis would indicate little basis for providing a complete bar to recovery on account of all risks inherent in recreational skiing.[17] If a ski operator's negligence is a proximate

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[8] G.L. c. 143, § 71N(1).
[9] *Id.*, § 71N(2).
[10] *Id.*, § 71N(6).
[11] *Id.*, § 71O.
[12] *Id.*
[13] *Id.*, § 71P.
[14] *Id.*
[15] *Id.*
[16] The defense of assumption of risk was abolished by statute in 1973. *See* G.L. c. 231, § 85, *as amended by* Acts of 1973 c. 1123, § 1.
[17] *Contra*, Wright v. Mt. Mansfield Lift, Inc., 96 F. Supp. 786 (D. Vt. 1951), where a federal court, applying Vermont's assumption of risk doctrine, ruled that

cause of the injury, any negligence of the skier properly should be considered an element of comparative negligence under the usual principles, regardless of its categorization in the statute.[18] Thus, a court, in construing the statute, should carefully consider whether a risk is "inherent" if an injury results from the negligence of the ski-operator.[19]

§14.12. Legislation—Abuse by Household Members—Compensatory Damages. In two 1976 decisions, *Sorensen v. Sorensen*[1] and *Lewis v. Lewis*,[2] the Supreme Judicial Court abolished, with limitations, the doctrines of interspousal and parent-child immunity as they applied to actions for negligence arising from automobile injuries.[3] Until the enactment, during the *Survey* year, of the Abuse Prevention Act,[4] neither the courts nor the legislature had addressed the issue of interspousal or parent-child immunity as it related to intentional torts.[5]

The Abuse Prevention Act permits a family or household member to file a complaint in district, superior, or probate court, for abuse committed by another family or household member.[6] By its terms abuse includes any one of the following occurrences among family members:

(a) attempting to cause or causing physical harm;

(b) placing another in fear of imminent serious physical harm;

(c) causing another to engage involuntarily in sexual relations by force, threat of force or duress.[7]

A family or household member is defined as a household member, a spouse, a former spouse, their minor children, or a blood relative.[8] The

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any individual who participated in a sport such as skiing, assumes all of the risks inherent in the sport, to the extent that they are obvious and necessary. *Id.* at 791. The court had no direct precedent in Vermont and looked to other jurisdictions. Thus, its decision was not considered as precedent in Sunday v. Stratton, 136 Vt. at 299, 390 A.2d at 401.

[18] G.L. c. 231, § 85.

[19] It has been suggested that the statute should provide a comprehensive set of all of the duties to be imposed on the ski operators, so as to bar suit if the explicit requirements of due care, and *no* victim of negligence should be left uncompensated for lack of such foresight. *See* Note, *Ski Operators and Skiers—Responsibility and Liability,* 14 N. ENG. L. REV. 260, 279 (1978).

§14.12. [1] 369 Mass. 350, 339 N.E.2d 907 (1976).

[2] 370 Mass. 619, 351 N.E.2d 526 (1976).

[3] For discussion of these cases, see Smith, *Torts,* 1976 ANN. SURV. MASS. LAW § 5.10, at 120-56.

[4] G.L. c. 209A, *as enacted by* Acts of 1978, c. 447, § 2.

[5] Actions for such intentional torts have been allowed in many other jurisdictions. *See* Smith, *Torts,* 1976 ANN. SURV. MASS. LAW § 5.10, at 124 n.34. Clearly, the policy factors of fraud and collusion that have been used to support immunity are not applicable to intentional torts.

[6] G.L. c. 209A, *as enacted by* Acts of 1978, c. 447, § 2.

[7] *Id.,* § 1.

[8] *Id.*

act provides for a broad range of remedies. Injunctive relief may include ordering the defendant to refrain from abusing the plaintiff; ordering the defendant to vacate the household; awarding temporary custody of a minor to one parent; or requiring a defendant who has a legal obligation to support the plaintiff to pay temporary support for such person.[9] The statute also permits monetary compensation for losses suffered as a direct result of the abuse.[10] These losses may include, but are not limited to, loss of earnings or support, out of pocket losses for injuries sustained, moving expenses and reasonable attorneys fees.[11]

The act was primarily intended to provide a speedy and efficient method for an abused household member to obtain court and law enforcement intervention and protection. Nevertheless, it clearly expresses the intent of the legislature to remove any bar, based upon interspousal or parent-child immunity, to the recovery of compensatory damages for certain intentional torts. The historical justifications for such immunity —supporting the family structure and maintaining parental discipline and discretion—cease to be persuasive when the family unit has broken down to the extent that abuse is occurring.[12]

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[9] *Id.*, § 3.
[10] *Id.*
[11] *Id.*
[12] *See* Note, *Parent-Child Torts,* 12 N. ENG. L. REV. 310, 330 (1976).