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Chapter 4: Torts

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CHAPTER 4

Torts

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The survey year was an important one in the law of torts. Considerable activity on the part of the Judicial Council and the various bar associations to relieve congestion in the courts — mainly in tort litigation — resulted initially in the re-enactment of the Fielding Act, placing in the District Courts exclusive original jurisdiction over automobile tort actions. This activity also gave indication of other possible changes in jurisdiction and practice which may vitally affect tort litigation.

In one significant decision in the tort field the Supreme Judicial Court overruled long-standing precedent in two separate areas and in another reaffirmed precedent against a trend to the contrary in various other jurisdictions. Tort cases during the survey year involved such varied topics as gross negligence, malicious prosecution, civil conspiracy, the tort liability of charitable institutions, and the immunity of witnesses in judicial proceedings.

A. Court Decisions

§4.1. Absolute privilege of witnesses in judicial proceedings. The concept of absolute privilege, or immunity from liability for damages, extended to participants in judicial proceedings is an old but not entirely settled concept in tort law. The open questions today concern the peripheral areas, i.e., when does the privilege begin to operate, and what is its full extent?

Both of these problems were before the Supreme Judicial Court in *Mezullo v. Maletz.*[1] There the plaintiff alleged in the second court of her declaration that the defendant, a physician, had conducted the psychiatric examination and signed the certificate of insanity required

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§4.1. [1] 1954 Mass. Adv. Sh. 259, 118 N.E.2d 356

by law[2] as a prerequisite to the Probate Court's action to commit the plaintiff to a mental institution. The plaintiff alleged that the defendant had made the certification "maliciously and in bad faith" when he knew "or should have known" that the plaintiff was sane.

The Court affirmed the Superior Court's action in sustaining a demurrer to the declaration on the ground that the defendant had an absolute privilege in making the certification. In so doing the Court specifically overruled an earlier decision on the point. In *Niven v. Boland*,[3] decided in 1900, the Court had held the privilege to be only a qualified one, that is, available only where the physician acts in good faith and without malice.

In its holding in the instant case the Court broke new ground in two directions. First, it applied the absolute privilege in a pretrial area of the proceedings. There are very few American decisions extending the privilege to include preliminaries to the trial.[4] The extension of the privilege in the instant case may indicate a liberality on the part of the Massachusetts Court in granting immunity at various pretrial stages of the proceedings.

The second, and perhaps the more important, development evidenced in the *Mezullo* case is the extension of the privilege beyond the common area of an immunity from defamation suits into an immunity from an action of wrongful commitment. Dean Prosser in his treatise on torts discusses the privilege in judicial proceedings only in regard to defamation.[5] The privilege extended by the Court in the *Mezullo* case was not in regard to a collateral result of the original trial, such as defamation, but to an immunity from suit for the *direct* act of aiding in the bringing of the action itself, i.e., a commitment proceeding.

Though the Court in the instant case speaks of an extension of the privilege accorded witnesses in regard to defamation, it would seem to be more analogous to the privilege of witnesses in malicious prosecution actions. In malicious prosecution cases, witnesses are afforded immunity from suit as long as they do not "advise and assist" the person who brought the proceedings.[6] If the Court had analogized the case to one in malicious prosecution, the plaintiff would have had to allege that the defendant had aided and abetted her husband, who had instituted the proceedings. She did not make this allegation in the second count. It might be noted, however, that the plaintiff did make what amounted to this allegation in the third count, by alleging a conspiracy on the part of her husband and the defendant to have

[2] It is not clear whether the commitment was under Section 51 or Section 77 of Chapter 123 of the General Laws. For the purposes of the case, the distinctions between the procedures under each section are immaterial.

[3] 177 Mass. 11, 58 N.E. 282, 52 L.R.A. 786.

[4] Beggs v. McCrea, 62 App. Div. 39, 70 N.Y.S. 864 (1901) (pretrial deposition); Reynolds v. McDonald, 174 Mich. 500, 160 N.W. 836 (1916); Ried v. Thomas, 99 Cal. 719, 279 Pac. 226 (1926) (the latter two cases also involve commitment of the mentally ill).

[5] Prosser, Torts 821-852 (1941).

[6] Id. at 865.

her wrongfully committed. The third count, which is discussed in the next section, was predicated solely on a statute making it a criminal offense to conspire to wrongfully commit. The Court dismissed this count on the independent ground that no cause of action in civil conspiracy would lie as a result of the statute. The Court would seem to have acted on the assumption, however, that there was an immunity existent here as well.[7]

To explore the point one step further, if the Court had analogized the case to one of malicious prosecution, the plaintiff's case could have been dismissed much more summarily. In malicious prosecution the criminal proceeding must terminate in the plaintiff's favor. This is true because the malicious prosecution action cannot be used as a means of collateral attack on the criminal proceedings. In the instant case the plaintiff *was* committed to a mental institution in the first proceeding and so the Court could have dismissed the action on that ground.

§4.2. **Civil conspiracy.** One of the least explored areas of tort liability is conspiracy. It has had its fullest development in the criminal law. The subject of civil conspiracy receives only *one paragraph* of sparse attention in Dean Prosser's classic treatise on torts.[1]

In *Mezullo v. Maletz*,[2] discussed above, the plaintiff alleged in the third count of her declaration a conspiracy on the part of her husband and the defendant, a physician, to have the plaintiff wrongfully committed to a mental institution. Chapter 123, Section 79 of the General Laws makes such a conspiracy a crime.

The Supreme Judicial Court in a split decision[3] affirmed the action of the lower court in sustaining a demurrer to this count. The Court asserted that civil liability could not be created by the enactment of a criminal statute without a clear indication of such a purpose on the part of the legislature. None being found here, the Court dismissed the count. In so holding the Court specifically rejected the dictum to the contrary on this statute as expressed in *Karjavainen v. Buswell*.[4]

In refusing to follow the dictum in the *Karjavainen* case the Court would also seem to have qualified the language of a line of labor law cases,[5] not mentioned in the decision, and best exemplified by the language of *Carew v. Rutherford:*

> . . . if two or more persons combine to accomplish an unlawful purpose, or a purpose not unlawful by unlawful means, their con-

[7] "The statute . . . fills what otherwise would be a gap, at least with respect to those statutes dealing with commitment proceedings, by providing a penalty for conspiracy to engage in conduct which is exempt from civil liability." 1954 Mass. Adv. Sh. 259, 264, 118 N.E.2d 356, 360.

§4.2. [1] Prosser, Torts 1095, 1096 (1941).

[2] 1954 Mass. Adv. Sh. 259, 118 N.E.2d 356.

[3] The Court indicated in the last sentence of the opinion that the decision on the third count was the "opinion of a majority of the court."

[4] 289 Mass. 419, 194 N.E. 295 (1935).

[5] A few of the better known cases are as follows: Vegelahn v. Guntner, 167 Mass.

> duct comes within the definition of a criminal conspiracy . . . If, in pursuance of such a conspiracy, they do an act injurious to any person, he may have an action against them to recover the damage they have done to him.[6]

Examination of the American decisions on the law of conspiracy does not reveal any difference in the essential characteristics of the crime and the tort. They are both defined as set out above in the *Carew* case.[7] If this is the definition, it is difficult to see why it was not satisfied in the *Mezullo* case. The purpose of the alleged conspiracy was certainly unlawful, in fact, the entire conspiracy was defined as criminal.

Should the law of conspiracy, therefore, be an exception to the usual Massachusetts rule that no new causes of action are created by criminal statutes? If, as the instant case seems to hold, there is a difference between criminal and civil conpiracy, it would have been helpful in future cases if the Court had pointed out those distinctions more clearly.

Because of the way in which the Court treated the *Mezullo* case it did not discuss the possibility of there being a common law civil conspiracy on the facts alleged.[8] The Court's discussion of the issues does indicate, however, that it assumes that the defendant has an absolute immunity from common law liability.[9] The Court would seem to have relied on the finding on the second count of the declaration to the effect that there is an immunity. Yet the second count did not contain an allegation that the defendant aided and abetted, i.e., conspired, to bring the proceedings to commit. Where the defendant does aid and abet, it would seem that the immunity is not available.[10]

The decision in the *Mezullo* case, that of a rarely divided court, illustrates the difficulties of dealing with civil conspiracy, one of the most elusive concepts in American tort law today.

§4.3. Tort liability and criminal statutes: A problem of interpretation. The majority of American states hold that the establishment of criminal liability for a particular action necessarily creates civil liability as well.[1] The *Mezullo* case, however, is an illustration of the application in Massachusetts of the minority rule that the court will ex-

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92, 44 N.E. 1077 (1896); Plant v. Woods, 176 Mass. 492, 57 N.E. 1011, (1900); Sweetman v. Barrow, 263 Mass. 349, 161 N.E. 272 (1928); Saveall v. Demers, 322 Mass. 70, 76 N.E.2d 12 (1947).

[6] 106 Mass. 1, 10 (1870).

[7] Arens, Conspiracy Revisited, 3 Buffalo L. Rev. 242 (1954); Charlesworth, Conspiracy as a Ground of Liability in Tort, 36 L.Q. Rev. 38 (1920); Burdick, Conspiracy as a Crime and as a Tort, 7 Col. L. Rev. 229 (1907).

[8] "The plaintiff does not contend that a case at common law is made out by the allegations of the third count; she relies exclusively on the statute. But that, as we have seen, gives her no rights." 1954 Mass. Adv. Sh. 259, 265, 118 N.E.2d 356, 360.

[9] See the language of the opinion quoted in Section 4.1 *supra,* note 7.

[10] See Section 4.1 *supra,* note 6.

§4.3. [1] Prosser, Torts 274 (1941); 2 Restatement, Torts §286 (1934).

amine the criminal statute to ascertain whether or not the legislature in the particular instance intended to establish civil liability.

The minority position seems well reasoned, since it forces the courts to look beyond the mere fact of the criminal statute to examine the purposes and effects of the criminal legislation on the field of civil liability. Certainly this examination cannot be harmful and it may prevent an unjust and unintended extension of legislative purposes.

However, though the minority would seem to be following the better rule, it may often result in a process just as mechanical as that necessitated by the majority rule. The Massachusetts Court requires that the purpose to create civil liability appear by "express terms or clear implication" [2] in the enactment of the criminal statute. Since there is very little in this state in the way of legislative history materials, a heavy burden is placed on a party where the criminal statute does not expressly provide a civil remedy.

Another point might be noted in regard to the application of this minority rule in the *Mezullo* case. The doctrine has generally been limited to negligence cases involving nonfeasance. It is often stated as a "no duty" rule,[3] i.e., where there is no duty to act at common law, the criminal statute must clearly assert the establishment of this duty. The *Mezullo* case, on the other hand, involves intentional misconduct or malfeasance, there being alleged a conspiracy to falsely commit the plaintiff to a mental institution. The *Mezullo* case is therefore an assertion by the Court that this doctrine is not limited to " no duty" situations.

In summary, it would seem that in the instant case the Court was influenced by a desire to afford physicians complete immunity from civil liability in a certification of commitment papers, the certification being an act in their professional capacity and in aid of the courts. The Court may have felt that the doctor should not be hampered by the fear of civil liability, particularly in commitment of the mentally ill, where perhaps more than in most other areas the physician may need protection from possible harassment and baseless claims. The Court seems to have felt that this protective policy extends to conspiracy actions, and finding no evidence in the criminal statute to abrogate it, applied it in this case.

Certainly the action of the Court in this case can be defended in the justice of its result as well as in its theory. The freedom of action to apply policy decisions of this type is perhaps one of the best features of the minority rule that criminal statutes do not always create civil liability. It leaves us, however, with the anomalous situation, in this case, of a defendant immune from civil liability but subject to criminal penalty for exactly the same action.

[2] Mezullo v. Maletz, 1954 Mass. Adv. Sh. 259, 264, 118 N.E.2d 356, 359. See also Barboza v. Decas, 311 Mass. 10, 40 N.E.2d 10 (1942); Richmond v. Warren Institution for Savings, 307 Mass. 483, 30 N.E.2d 40 (1940); Wynn v. Sullivan, 294 Mass. 562, 3 N.E.2d 236 (1936).

[3] Morris, Treatise on Torts 157 et seq. (1953).

§4.4. Malicious prosecution: Probable cause. One of the most difficult concepts in the action of malicious prosecution is the requirement of a want of probable cause for the defendant to believe the plaintiff guilty of the offense charged.

In *Willis v. Gurry*[1] the Supreme Judicial Court was presented with the question of whether a finding of "probable cause" by a District Court judge to hold the person charged for grand jury action forecloses the issue of probable cause in a later malicious prosecution action. The Court held that the District Court's finding was only evidence of probable cause and affirmed the trial court's action in sending the case to the jury over the defendant's motion for a directed verdict.[2]

The ruling of the Court seems in accord with the other American decisions on the point, though some other states give the judge's finding a stronger effect by making it prima facie evidence of probable cause.[3]

In support of its holding in the *Willis* case the Court cited *Keefe v. Johnson,*[4] the only other Massachusetts decision clearly on the point. The Court cited language in the *Keefe* case to the effect that the issuance of a criminal complaint by a District Court judge is "at least evidence to be considered on probable cause." [5]

The *Keefe* case did, however, raise the question of whether or not this action of the District Court judge should foreclose the issue in favor of the existence of probable cause just as does action on the advice of counsel.[6] The Court in the *Keefe* case would seem to have leaned toward such a conclusion and toward holding probable cause established on the basis of the finding of the judge, but the Court found it unnecessary to go that far, since an auditor had found probable cause to exist on the facts. It therefore made the finding quoted, that the judge's finding was *"at least* evidence to be considered on probable cause." (Emphasis supplied.) The Supreme Judicial Court in the *Willis* case, however, seized on the actual finding in the *Keefe* case and put at rest any speculation that the Court might hold such a finding of a District Court judge to "establish" probable cause.

The *Willis* case raises fundamental issues in regard to this requirement of probable cause — mainly in terms of who decides the issue, judge or jury. The American decisions on this point indicate a policy

§4.4. [1] 1954 Mass. Adv. Sh. 21, 116 N.E.2d 689.

[2] The defendant conceded in his brief that there was sufficient evidence of lack of probable cause in the case to sustain the burden of proof and prevent a directed verdict. The Court asserted that this was concession enough to dispose of the case, but it went on to make the findings here discussed.

[3] 3 Restatement, Torts §§663, 664 (1934); Green, Judge and Jury 346 (1930).

[4] 304 Mass. 572, 24 N.E.2d 520 (1939).

[5] 304 Mass. at 579, 24 N.E.2d at 524.

[6] Action on the advice of counsel is universally recognized as "establishing" probable cause. Prosser, Torts 873-875 (1941); 3 Restatement, Torts §666 (1934). In Massachusetts, see Higgins v. Pratt, 316 Mass. 700, 56 N.E.2d 595 (1944); Boylen v. Tracy, 254 Mass. 105, 149 N.E. 669 (1925).

of retaining control of this issue in the judge.[7] Massachusetts decisions have indicated accord with this policy, at least in part,[8] but the *Willis* and *Keefe* cases show a disposition to allow juries to decide the ultimate issue.

§4.5. Tort liability of charities. It is not often that a review of significant decisions over a period of one year will include a rescript without opinion. However, that is the situation this survey year, since in a rescript the Supreme Judicial Court reaffirmed its long-standing rule of complete civil immunity for charitable organizations. The decision was *Mastrangelo v. Maverick*,[1] an action against a hospital for negligence in the death of a patient.

The decision is significant in that it goes against a well-developed trend in recent years all over the country toward lifting this immunity in whole or in part.[2] Today only ten jurisdictions retain the rule of absolute immunity.[3]

The doctrine of charitable immunity was introduced into the United States in a Massachusetts decision in 1876, *McDonald v. Massachusetts General Hospital*.[4] In that case the Court followed an English decision which, apparently unknown to the Massachusetts judges, had been overruled ten years before.[5] Despite this questionable beginning, the doctrine spread in the United States and it is only in recent times that most of the American states have definitely swung away from the Massachusetts rule.

The *Mastrangelo* case not only indicates that the rule is still quite vigorously alive in Massachusetts, but the cursory treatment by rescript only one week after argument certainly indicates no inclination to change. It is now thirty-four years since the Court has engaged in a full discussion of the issue in its decisions.[6] Any treatment of the problem in the interim has been directed toward a determination of the exact boundaries of the rule. Thus, immunity was denied to a charitable institution where the liability arose in regard to a part of the charity's property leased to a private tenant,[7] and was also denied

[7] Green, Judge and Jury 341 et seq. (1930).

[8] See Keefe v. Johnson, 304 Mass. 572, 577, 24 N.E.2d 520, 523 (1939): "It has been said repeatedly that when the facts are fully established or undisputed, probable cause becomes a question of law." See also Bannon v. Auger, 262 Mass. 427, 160 N.E. 255 (1928); Griffin v. Dearborn, 210 Mass. 308, 96 N.E. 681 (1912); Casavan v. Sage, 201 Mass. 547, 87 N.E. 893 (1909).

§4.5. [1] 330 Mass. 708, 115 N.E.2d 455 (1953).

[2] See particularly an excellent and well-documented annotation in 25 A.L.R.2d 29 (1952).

[3] Arkansas, Idaho, Kentucky, Maine, Maryland, Massachusetts, Missouri, Oregon, Pennsylvania, and South Carolina.

[4] 120 Mass. 432, 21 Am. Rep. 529.

[5] Holliday v. St. Leonard's, 11 C.B. (N.S.) 192 (1862); overruled in Mersey Dock's Trustees v. Gibbs, 11 H.L. Cas. 686 (1866).

[6] Roosen v. Peter Bent Brigham Hospital, 235 Mass. 66, 126 N.E. 392, 14 A.L.R. 563 (1920).

[7] Holder v. Massachusetts Horticultural Society, 211 Mass. 370, 97 N.E. 630 (1912).

where a charity was engaged in business for profit.[8] Immunity has been applied whether the plaintiff was a beneficiary of the trust,[9] a paying patient,[10] or a stranger.[11] The Court has also rejected the contention, accepted by some other states,[12] that the plaintiff should be able to reach any liability insurance held by the charity where it covers the matter involved.[13] In the only decision indicating any weakness in this wall of immunity the Court did not allow a hospital to set up immunity as a defense to a counterclaim for negligence in treatment where the hospital was suing a patient on an unpaid bill for that treatment.[14]

The *Mastrangelo* case is, therefore, of importance mainly in indicating that the doctrine of absolute immunity of charitable organizations is still quite settled law in Massachusetts despite a definite trend to the contrary throughout the United States. Those who would seek a change in this doctrine in the future would seem better directed to the legislature, where changes of this magnitude may perhaps best be treated.

§4.6. Gross negligence and the guest occupant of an automobile: An evaluation. Negligence is a difficult enough concept without confounding it with *degrees* of negligence. The courts have determined to use degrees of negligence in only a minority of jurisdictions.[1] They seem to be a favorite of some legislatures, however, to the discomfort of the courts forced to apply them.[2]

The concept of degrees of negligence — slight, ordinary, and gross — was first introduced in regard to bailments,[3] but it has spread to other areas. One of the most common applications is in regard to guest (nonpaying) occupants of automobiles in cases where it is said that the operator is responsible to the guest only for gross negligence or worse.[4] Some recent law review articles have been severely critical of the trials and mistrials of the courts in attempting to deal with the

[8] McKay v. Morgan Memorial Co-operative Industries and Stores, 272 Mass. 121, 172 N.E. 68 (1930).

[9] McDonald v. Massachusetts General Hospital, 120 Mass. 432, 21 Am. Rep. 529 (1876).

[10] Roosen v. Peter Bent Brigham Hospital, 235 Mass. 66, 126 N.E. 392, 14 A.L.R. 563 (1920).

[11] Foley v. Wesson Memorial Hospital, 246 Mass. 363, 141 N.E. 113 (1923).

[12] Slenker v. Gordon, 344 Ill. App. 1, 100 N.E.2d 354 (1951); O'Connor v. Boulder, Colorado Sanitarium Assn., 105 Colo. 259, 96 P.2d 835 (1939); McLeod v. St. Thomas Hospital, 170 Tenn. 423, 95 S.W.2d 917 (1936).

[13] Enman v. Trustees of Boston University, 270 Mass. 299, 170 N.E. 43 (1930).

[14] Beverly Hospital v. Early, 292 Mass. 201, 197 N.E. 641, 100 A.L.R. 1338 (1935).

§4.6. [1] Prosser, Torts 258 (1941).

[2] See, for example, Sorrel v. White, 103 Vt. 277, 153 Atl. 359 (1931).

[3] Coggs v. Bernard, 2 Ld. Raym. 909, 92 Eng. Rep. 107 (1704); Actman v. Aronson, 231 Mass. 588, 121 N.E. 505, 4 A.L.R. 1185 (1913); 1 Street, Foundations of Legal Liability 100 (1906). The doctrine has been repudiated as to bailments in England. Grill & General Iron Screw Collier Co., L.R. 1 C.P. 600 (1866).

[4] Massaletti v. Fitzroy, 228 Mass. 487, 118 N.E. 168 (1917).

concept.[5] Most of the authors conclude that the doctrine is of limited utility, confusing to the jury, and productive of litigation, particularly in appeals to the higher courts.

The doctrine is, however, firmly entrenched in Massachusetts. It has been the source of a large number of appellate decisions testing the sufficiency of the evidence and the correctness of the trial court's decision either in directing a verdict for the defendant or in allowing a jury verdict for the plaintiff to stand.

Most of the decisions turn on the particular facts involved and the Court constantly reasserts that each case is tested independently. However, this now very long line of decisions involving as it does one type of activity, the operation of a motor vehicle, has built up a large body of law in the field.

There were before the Supreme Judicial Court during the survey year three cases of significance on the issue of gross negligence in the operation of a motor vehicle.

The first was *Reynolds v. Sullivan,*[6] which involved an assumption of the risk of negligence on the part of the guest occupant. The Court clearly differentiated this issue from that of gross negligence and placed the burden of proof of assumption of the risk on the defendant. The defendant should not be aided in this effort by the fact that the plaintiff must prove gross negligence on the defendant's part.

The other two decisions, *Welts v. Caldwell*[7] and *Vallas v. Carzis,*[8] illustrate the practice of the Massachusetts Court in using other cases and fact situations in determining which way the instant case should be decided.

In *Welts v. Caldwell* the evidence examined in the light most favorable to the plaintiff revealed that the defendant had allowed two boys, one of them the fourteen-year-old plaintiff, to ride on the rear bumper of his car down a driveway and into the street. As the car passed into the street it went over a bump, accelerated, and turned left. The plaintiff was thrown off into the street and injured.

The lower court held the plaintiff a guest occupant and allowed the case to go to the jury, which returned a verdict for the plaintiff. The Supreme Judicial Court reversed the decision as error in not granting the defendant's motion for a directed verdict.

[5] Comment, Paradox of the Colorado Guest Statute, 25 Rocky Mt. L. Rev. 68 (1952); Richards, Another Decade Under the Guest Statute, 24 Wash. L. Rev. 101 (1949); Morris, The Guest Statute Today, 22 Ohio Bar 224 (1949); Morlay, Liability Under the Automobile Guest Statute, 1 Wyo. L.J. 182 (1947); Georgetta, Major Issues in a Guest Case, [1954] Ins. L.J. 583; The Arkansas Guest Statute, 1 Ark. L. Rev. 50 (1946); Wilkinson, What Has Happened to the Colorado Guest Statute, 19 Rocky Mt. L. Rev. 91 (1946); Spikes, Gross Negligence Under the Guest Statute, 22 Neb. L. Rev. 264 (1943). The reader might also see the yearly discussion of the more significant cases in this area in the article on torts in the Annual Survey of American Law.

[6] 330 Mass. 549, 116 N.E.2d 128 (1953).

[7] 1954 Mass. Adv. Sh. 567, 120 N.E.2d 280.

[8] 1954 Mass. Adv. Sh. 535, 120 N.E.2d 294.

The Court in arriving at this conclusion asserted [9] that the case fell "within the class of cases illustrated by" four cases[10] which were cited, though not discussed.

In the second case, *Vallas v. Carzis,* the defendant was driving about forty or fifty miles per hour down a residential street in Cohasset, Massachusetts, about 2:00 A.M., when his attention was called to a friend walking on the sidewalk nearby. The defendant took his right hand from the wheel, reached across the plaintiff, a guest occupant in the front seat of the car, and waved his hand out the right front window, and said, "Hi, Herb." The defendant had been in this position for six or seven seconds when the car left the road and struck a tree.

The trial court sent the case to the jury on the issue of gross negligence and a verdict was returned for the plaintiff. The Supreme Judicial Court affirmed. In this opinion the Court did not cite a "class" of cases into which this decision fell.

The two cases above discussed do, however, seem to fit into distinct groups of fact situations with which the Supreme Judicial Court has dealt in recent years.[11] The *Welts* case seems to be part of a class of cases involving guests riding on bumpers or running boards of automobiles, or in other insecure positions. The question of liability in these decisions seems to turn on such factors as the security of the position taken by the guest, the speed of the vehicle, and any sudden stops or turns taken by the driver.[12]

The *Vallas* case also seems easily classified with other cases of deliberate inattention to driving, involving as it does the defendant's taking his eyes off the road or his hands off the wheel. In these cases the issue seems to turn on the speed of the car, the road conditions, and the length of time of the inattention or lack of control over the vehicle.[13] The decisions in this group seem more apt to go to a jury on the question of gross negligence.

In conclusion, it might be said that the wealth of decisions in this field rather forces the development of patterns of conduct definable as clearly not gross negligence or as warranting a verdict of gross negligence. Whether or not these patterns are sufficiently developed to be utilized to any great extent by the courts is, however, another question. The *Welts* case would seem to be an indication of the Court's

[9] 1954 Mass. Adv. Sh. 567, 568-569, 120 N.E.2d 280, 281.

[10] Forman v. Prevoir, 266 Mass. 111, 164 N.E. 818 (1929); Byrne v. Daley, 288 Mass. 51, 192 N.E. 201 (1935); Polcari v. Cardello, 316 Mass. 421, 55 N.E.2d 681 (1944); Thomas v. Fritz, 318 Mass. 622, 63 N.E.2d 357 (1945).

[11] See Martin and Hennessey, Automobile Law and Practice §§391-420 (1954), which agrees with the attempted classification of automobile guest gross negligence cases as herein suggested. The instant cases are not discussed, of course, since the book was already in print when they were decided. Two of the classes of cases suggested by the authors are (1) removing hands from steering wheel (§399), and (2) guest on running board or in another insecure position (§§411, 412). The same thesis is proposed in Allen, A Classification of the Automobile Guest Cases, 32 B.U.L. Rev. 162 (1952).

[12] See Martin and Hennessey, id. §§411, 412, and cases there cited; Allen, id. at 177.

[13] See Martin and Hennessey, id. §399, and cases there cited; Allen, id. at 172.

willingness to examine the patterns and to fit the instant case into them. The *Vallas* case, on the other hand, does not conform to this tendency.

It may well be that appellate advocacy has a great deal to do with whether or not the Court uses this method of dealing with these cases. If the attorneys do not argue in terms of "patterns" of cases, it is understandable that the Court does not do it. There undoubtedly will be many more of these cases. They will bear watching in this regard in future issues of the ANNUAL SURVEY.

B. LEGISLATION

§4.7. Re-enactment of the Fielding Act. A concerted effort on the part of the Judicial Council [1] and the state's two largest bar associations[2] to present statutory remedies for the relief of congestion in the Superior Court has resulted in the support by these organizations of a number of procedural bills, among them bills to establish a jury fee of $15,[3] to re-enact the Fielding Act,[4] to establish a procedure for pretrial depositions,[5] and to make a change in the venue provisions of the District Courts.[6]

Only the bill to re-enact the Fielding Act was passed at the 1954 session of the General Court.[7] Under this legislation the District Courts will again, as they did from 1934 to 1943, have exclusive original jurisdiction of all tort cases arising out of the operation of motor vehicles. As under the previous legislation, either party may, after the case is entered in the District Court, remove it to the Superior Court for trial.

It was this easy removal procedure which resulted in the repeal of the Fielding Act in 1943. The advocates of re-enactment[8] were well aware of this, but they felt that the legislation still kept a significant number of cases in the District Court which might otherwise have been entered in the Superior Court.

For a more extensive examination of these efforts toward reform in judicial administration, see Section 27.5 *infra*.

§4.8. Proposal for comparative negligence. Bills defeated in the legislature are often as important in indicating trends in the law as bills that pass. This is particularly true if the defeated bills embody principles which have gained favor in other areas in recent years.

§4.7. [1] Pub. Doc. 144, Twenty-ninth Report of the Judicial Council of Massachusetts 6 (1953).

[2] Congestion in the Superior Court, Executive Committee Report, 38 Mass. L.Q., No. 5, p. 5 (1953); Report of the Special Committee on Court Congestion, 25 Boston Bar Bull. 219 (1954).

[3] House No. 2631 (1954).

[4] House No. 2629 (1954).

[5] Ibid.

[6] House No. 2630 (1954).

[7] Acts of 1954, c. 616.

[8] Pub. Doc. 144, Twenty-ninth Report of the Judicial Council of Massachusetts 6 (1953).

The defeat of a proposal [1] for the adoption of the comparative negligence doctrine in Massachusetts is therefore worthy of note. Various authors assert that it is the "coming rule" of liability for negligence in the United States.[2] It is pointed out that Great Britain and nearly all of the members of the British Commonwealth have abandoned the severe doctrine of contributory negligence as a complete defense in negligence actions.[3] Comparative negligence has always been the rule of the civil law.[4] This leaves the United States as the lone bulwark of the contributory negligence rule.

Actually, the United States has already begun to break away from the doctrine. Five states have now adopted the comparative negligence test in some form.[5] The comparative negligence test is also applied in admiralty law,[6] under the Federal Employers' Liability Act,[7] and under several state employers' liability acts.[8]

In the face of this development, numerous bills have been introduced before the state legislatures throughout the country in recent years to bring about the change to a comparative negligence test. These bills have not met with success, either in Massachusetts or in the other states where they have been entered.

The most recent efforts in Massachusetts might not warrant more than passing attention were it not for the outstanding legal authorities who proposed and advocated the measure. One of the sponsors of the bill was Roscoe Pound, Dean Emeritus of the Harvard Law School, in his capacity as Editor in Chief of the NACCA Law Journal. One of those who spoke in favor of the bill at the committee hearing was Professor Warren Seavey of the Harvard Law School, one of the country's greatest tort law authorities.

The bill submitted in 1954 has an interesting genesis. It was taken verbatim from a suggested draft for such a statute in a law review article[9] by Dean William L. Prosser of the University of California School of Law. The NACCA organization has chosen to recommend the

§4.8. [1] House No. 1669 (1954).

[2] Pound, Comparative Negligence, 13 Nacca L.J. 195 (1954); James, Contributory Negligence, 62 Yale L.J. 691, 704 (1953); Musser, Answer for Kansas — Comparative Negligence, 21 J.B.A. Kan. 232 (1953); Duniway, California Should Adopt a Comparative Negligence Law, 28 Calif. S.B.J. 23 (1953); Turk, Comparative Negligence on the March, 28 Chi-Kent L. Rev. 189 (1950).

[3] Law Reform Act of 1945, 8 & 9 Geo. VI, c. 28. See Williams, The Law Reform Act, 1945, 9 Mod. L. Rev. 105 (1945).

[4] For a recent examination, with an excellent historical treatment, see Turk, Comparative Negligence on the March, 28 Chi-Kent L. Rev. 189, 238, 244 (1950).

[5] Neb. Rev. Stat. §25-1151 (1943); Laws of South Dakota, c. 160 (1943); Ga. Code Ann. §105-603 (1947); Miss. Code §1454 (1910); Wis. Stat. §331.045 (1931).

[6] The Schooner Catherine, 17 How. 170 (1855); see Derby, Divided Damages in Maritime Cases, 33 Va. L. Rev. 389 (1947).

[7] 45 U.S.C. §§51-60 (1946).

[8] See references to these statutes, too numerous and varied to be noted here, in Prosser, Comparative Negligence, 51 Mich. L. Rev. 465, 478, 479 (1953).

[9] Id. at 508.

draft as a legislative proposal on the part of its members in the various states not now applying the comparative negligence test.[10]

The opposition to the comparative negligence rule is directed as much to the difficulties in its administration as to its substance. The difficulties lie in the application of the rule to particular cases. Basically, the American statutes in the field have chosen either a percentage apportionment test or a "degrees of negligence" test (i.e., slight and gross negligence are compared). The Prosser draft introduced in Massachusetts adopts the apportionment test.

The difficulties in application of either of these theories is illustrated by the fact that the two main proponents of the bill, Dean Pound and Professor Seavey, offered tests different from the bill and different from one another's proposals.

Dean Pound asserted the proper test to be not a percentage of liability based on causation (the test in the bill), but a liability based on an evaluation of which person's conduct is the greater threat to the general security.[11] Professor Seavey rejected the test in the bill and asserted that he favored the American admiralty law rule under which the total damages are divided evenly where both are negligent.

Opponents of the bill cited the difficulties in administration of the test and offered the usual objections that the proposal would amount to a "universal recovery" in negligence cases, would increase litigation, and would cause a substantial rise in liability insurance rates.

Judging from the results on the 1954 bill and similar bills in recent years, any proposal for a comparative negligence test in Massachusetts faces an uphill fight in the immediate future unless greater general public interest and support can be generated in its favor.

§4.9. The right of privacy. Another defeated bill worthy of consideration in this year's SURVEY is the bill sponsored by the Judicial Council [1] to clarify the law of Massachusetts in regard to the so-called "right of privacy."

The decisions on this point, as the Judicial Council aptly observes,[2] leave entirely open the question of whether or not the Massachusetts Court would recognize the existence of the right in a proper case.[3] By the Resolves of 1953, Chapter 23, the Judicial Council had referred to it a bill to establish such a right in this state.[4] The bill was

[10] 13 NACCA L.J. 301, 302 (1954).

[11] Pound, Comparative Negligence, 13 NACCA L.J. 198 (1954).

§4.9. [1] Pub. Doc. 144, Twenty-ninth Report of the Judicial Council of Massachusetts 23-27 (1953). See also Bulletin of Committee Work and Business of the Legislature 88 (final ed. 1954), where the bill here discussed is noted, though not by number, and is listed as defeated on March 12, 1954 on the report "No legislation necessary."

[2] Pub. Doc. 144, Twenty-ninth Report of the Judicial Council of Massachusetts 24 (1953).

[3] See Kelley v. Post Publishing Co., 327 Mass. 275, 277, 98 N.E.2d 286, 287 (1951); Themo v. New England Publishing Co., 306 Mass. 54, 27 N.E.2d 753 (1940).

[4] House No. 1370, §2 (1953).

modeled on the present New York statute on the right of privacy.[5]

The Council rejected this proposal as not covering the subject matter of the right sufficiently and as productive of litigation. The Council offered in its place an amendment[6] to the general equity jurisdiction statute,[7] extending that jurisdiction to include "the protection, with or without damages, of the equitable interest in personality sometimes called 'the right of privacy' of a person against unreasonable and serious interference with such person's interest in not having his affairs known to others or his likeness exhibited to the public."

The Council based the draft of the bill on the Restatement of Torts provision on the subject,[8] but applied it to equity jurisdiction rather than tort law. In so doing, the Council seems to have been convinced that it was too difficult to draw a statute codifying the tort law principles in this area of personal rights. It therefore hit upon the solution of creating a "purely equitable right" [9] of privacy defined as set out above, but including the power in the equity court to "protect" this right "with or without damages."

It would seem that if the statute had passed it would have at least "established" in Massachusetts a right of privacy in rather broad terms. Whether the form of establishment selected would have caused less or more difficulties in drawing the area lines of the right than the same statute enacted as tort law is certainly speculative. The proposal would still have to be interpreted by the courts. A statute restricting the court's powers to an equity jurisdiction might cause much greater difficulty than a statute merely declaring the existence of the right and allowing the courts to determine the best remedies to enforce it.

The practice of adding specific areas of equity jurisdiction to the general equity jurisdiction statute seems unwise in any event, since the Massachusetts statute was enacted after a long and troubled history of limited equity jurisdiction.[10] The statute was intended to declare the Massachusetts Supreme Judicial Court and Superior Court possessed of complete equity jurisdiction and thereby to end the General Court's practice of passing statute after statute giving the courts equity jurisdiction in certain specific areas.

The defeat of the proposal of the Judicial Council leaves us with the still unresolved question of whether the Massachusetts courts will recognize a "right of privacy" which is subject to "protection" and for the violation of which compensation can be demanded. We can only assume that the legislature indicated a purpose to leave the question to the courts for determination.

[5] New York Civil Rights Law §§50, 51 (1930).

[6] The amendment would have added a new section, Section 1A, to Chapter 214 of the General Laws.

[7] G.L., c. 214, §1.

[8] 4 Restatement, Torts §867 (1934).

[9] Pub. Doc. 144, Twenty-ninth Report of the Judicial Council of Massachusetts 26 (1953).

[10] Curran, The Struggle for Equity Jurisdiction in Massachusetts, 31 B.U.L. Rev. 269 (1951).