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## Chapter 5: Evidence

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## CHAPTER 5

# Evidence

SURVEY staff†

**§ 5.1. Expert Testimony in Legal Malpractice Actions.\*** Expert testimony is generally appropriate when the introduced evidence is beyond the common knowledge and experience of the average lay juror<sup>1</sup> and will assist the jury in determining a fact in issue.<sup>2</sup> Massachusetts courts have held expert testimony necessary in legal malpractice actions to establish the standard of care owed by the attorney and the attorney's alleged departure from such a standard.<sup>3</sup> In some cases, courts have held that lack of expert testimony on the determination of attorney negligence may justify a directed verdict in favor of the attorney.<sup>4</sup> However, the long standing exception to the rule has been that expert testimony is not essential in those cases where the attorney's breached duty is so clear or obvious that negligence may be inferred by the lay juror based on common knowledge and experience.<sup>5</sup> With respect to malpractice actions where the aggrieved client alleges that attorney negligence resulted in an unreasonable out-of-court settlement, Massachusetts, like many jurisdictions, has had no governing rule regarding the admissibility of expert testimony relating to the reasonableness of the settlement value. During the *Survey* year, however, the Supreme Judicial Court considered this very issue in *Fishman v. Brooks*, holding that expert testimony is admis-

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§ 5.1. <sup>1</sup> C. MCCORMICK, MCCORMICK ON EVIDENCE § 13 (E. Cleary 3d ed. 1984); FED. R. EVID. 702.

<sup>2</sup> FED. R. EVID. 702.

<sup>3</sup> The necessity of expert testimony in such actions was explicitly established in *Glidden v. Terranova*, 12 Mass. App. Ct. 597, 598, 427 N.E.2d 1169, 1170 (1981). Other cases have adopted the *Glidden* rule. *See, e.g.*, *Fall River Sav. Bank v. Callahan*, 18 Mass. App. Ct. 76, 82, 463 N.E.2d 555, 560, *further appellate review denied*, 392 Mass. 1103, 465 N.E.2d 262 (1984); *Brown v. Gerstein*, 17 Mass. App. Ct. 558, 566, 460 N.E.2d 1043, 1049, *further appellate review denied*, 391 Mass. 1105, 464 N.E.2d 73 (1984); *DiPiero v. Goodman*, 14 Mass. App. Ct. 929, 929-30, 436 N.E.2d 998, 999 (rescript opinion), *further appellate review denied*, 387 Mass. 1102, 440 N.E.2d 1177 (1982), *appeal dismissed*, 460 U.S. 1029-30 (1983).

<sup>4</sup> *See, e.g.*, *Pongonis v. Saab*, 396 Mass. 1005, 486 N.E.2d 28 (1985); *DiPiero*, 14 Mass. App. Ct. at 930, 436 N.E.2d at 999-1000.

<sup>5</sup> *See, e.g.*, *Pongonis*, 396 Mass. at 1005, 486 N.E.2d at 29; *Varnum v. Martin*, 32 Mass. (15 Pick.) 440, 442 (1834) (per curiam).

sible for determining the reasonable value of a settlement.<sup>6</sup> Hence, the Supreme Judicial Court announced for the first time that in legal malpractice actions, expert testimony addressing the reasonableness of a settlement may be admitted as evidence of an attorney's alleged negligence.

In the original action that gave rise to *Fishman v. Brooks*, the plaintiff, Brooks, suffered personal injuries when a motor vehicle traveling in the same direction struck him as he rode his bicycle in the breakdown lane of a highway.<sup>7</sup> Brooks retained Fishman to represent him in the personal injury action.<sup>8</sup> Fishman practiced mainly in real estate conveyancing and was inexperienced in personal injury cases.<sup>9</sup> The manner in which Fishman pursued his client's tort claim was questionable. Fishman did not commence suit until sixteen months after the accident, did not obtain service on the driver of the motor vehicle for more than ten months after filing the complaint, made no effort to examine the motor vehicle or to investigate what the driver had been doing immediately prior to the accident, sought no useful pretrial discovery, relied only on information the driver's insurer volunteered, and informed Brooks that the available insurance coverage was \$250,000, when in fact it was \$1,000,000.<sup>10</sup> At one point, Fishman told Brooks that he could not win if he went to trial.<sup>11</sup>

Shortly before the scheduled trial, Brooks agreed to settle his claim for \$160,000, knowing that Fishman was not prepared to try the case.<sup>12</sup> Brooks subsequently sued Fishman for malpractice,<sup>13</sup> alleging that Fishman's negligent representation in the personal injury action obliged him to settle the personal injury action for an amount substantially less than a reasonable settlement value.<sup>14</sup> At trial, the Superior Court for Middlesex County allowed, over Fishman's objections, expert testimony by an experienced personal injury attorney and a claims adjuster as to the reasonable settlement value of Brooks' personal injury action against the

<sup>6</sup> 396 Mass. 643, 647-48, 487 N.E.2d 1377, 1380 (1986).

<sup>7</sup> *Id.* at 644, 487 N.E.2d at 1378-79.

<sup>8</sup> *Id.* at 644, 487 N.E.2d at 1379.

<sup>9</sup> *Id.* at 645, 487 N.E.2d at 1379. Fishman had not tried a case of any sort since 1961, fourteen years before taking Brooks' case. *Id.*

<sup>10</sup> *Id.* In April 1978, a federal district court judge assigned the case for trial on the docket. Fishman then consulted an able attorney experienced in personal injury litigation about referring the case to him, but the negotiations failed because Fishman refused to agree to an even division of his contingency fee. *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 644, 487 N.E.2d at 1378. Brooks entered his malpractice claim as a counterclaim in an action initially brought by Fishman, alleging that Brooks violated terms of their agreement requiring Brooks to pay Fishman any amount Brooks saved in negotiating settlement of medical bills. Fishman eventually abandoned his claim. *Id.*

<sup>14</sup> *Id.*

motor vehicle driver.<sup>15</sup> The attorney testified that such a case typically would settle for \$450,000 to \$500,000.<sup>16</sup> The claims adjuster estimated a settlement range from \$400,000 to \$450,000.<sup>17</sup> The jury returned a verdict for Brooks and awarded damages.<sup>18</sup> Fishman appealed, challenging the admissibility of the expert testimony.<sup>19</sup>

On its own motion, the Supreme Judicial Court transferred the case from the appellate court and ordered direct review.<sup>20</sup> Affirming the trial court's judgment, the Supreme Judicial Court upheld the admissibility of the testimony of the two expert witnesses relating to the reasonable value of the action in establishing attorney negligence.<sup>21</sup> The Court reiterated the general principle that an attorney who does not hold himself out as a specialist owes his client a duty to exercise the degree of care and skill of the average qualified practitioner,<sup>22</sup> and that one who violates this duty is liable to his client for any reasonably foreseeable loss caused by his negligence.<sup>23</sup> The Court then stated that a plaintiff in a legal malpractice action will prevail if he proves that he probably would have obtained a better result had the attorney exercised adequate skill and care.<sup>24</sup>

Recognizing the general admissibility of expert testimony to determine attorney negligence,<sup>25</sup> the Court held that testimony by the experienced attorney and the claims adjuster was admissible to prove not only Fishman's negligence but also that his negligence caused a loss to Brooks.<sup>26</sup> The Court stated that the expert testimony relating to a fair settlement was relevant to the question of the reasonableness of the settlement, and

<sup>15</sup> *Id.* at 647–48, 487 N.E.2d at 1380. The trial judge also allowed the expert testimony of a law school professor concerning the ethical obligations of attorneys. *Id.* at 649, 487 N.E.2d at 1381.

<sup>16</sup> *Id.* at 648, 487 N.E.2d at 1380.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 645–46, 487 N.E.2d at 1379. The jury found that Fishman was negligent in his handling of the personal injury action and that Brooks was damaged thereby in the amount of \$525,000. *Id.* at 645, 487 N.E.2d at 1379. The driver's negligence was 90% and Brooks' negligence was 10% of the contributing cause of his injuries. *Id.* The jury also awarded an amount of \$10,000 on Brooks' abuse of process claim. *Id.* at 645–46, 487 N.E.2d at 1379. The judge entered judgment on the malpractice count by reducing Brooks' damages to reflect his contributory fault, the amount of medical expenses paid from the settlement, and the amount Brooks received personally from the settlement. *Id.* at 646, 487 N.E.2d at 1379. No reduction was allowed for Fishman's counsel fees collected in the original action. *Id.*

<sup>19</sup> *Id.* at 644, 487 N.E.2d at 1378.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 647–48, 487 N.E.2d at 1380.

<sup>22</sup> *Id.* at 646, 487 N.E.2d at 1379.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 647, 487 N.E.2d at 1380.

<sup>25</sup> *Id.* (citing *Pongonis*, 396 Mass. at 1005, 486 N.E.2d at 28–29).

<sup>26</sup> *Id.* at 648, 487 N.E.2d at 1380.

was not an attempt to assess the proper measure of damages in the personal injury action.<sup>27</sup> The Court rejected Fishman's argument that such evidence would impose malpractice liability by allowing the jury to second guess the attorney's judgment.<sup>28</sup> The Court elaborated that no liability would have been imposed for a settlement made within the range of the settlement value that an attorney exercising due care would have recommended.<sup>29</sup> Hence, the Court definitively declared that if the amount settled for did not equal or exceed the amount that a non-negligent attorney would have recommended for settlement, the case should not have been settled.<sup>30</sup>

*Fishman* represents a noteworthy expansion and elaboration on the use of expert testimony in legal malpractice actions. Expert witnesses are essential in cases like *Fishman*, because the jury determination of whether the attorney was negligent in advising a certain settlement amount entails presentation of evidence that is beyond the common knowledge and experience of the average layperson.<sup>31</sup> In reaching this result, however, the Court made only cursory mention of the potentially adverse impact the decision may have in legal malpractice litigation. The *Fishman* decision may encourage virtually every client, unsatisfied with the settlement which his attorney advised, to bring a subsequent legal malpractice claim against the attorney, provided that the client can find an expert witness (most likely an attorney with a different opinion) who is willing to testify that the amount of the actual settlement does not fall within what the expert witness believes to be an acceptable range.<sup>32</sup> An

<sup>27</sup> *Id.* at 648, 487 N.E.2d at 1380–81.

<sup>28</sup> *Id.* at 648, 487 N.E.2d at 1381.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 649, 487 N.E.2d at 1381. The Court dealt summarily with the issue of the admissibility of the testimony from a law school professor concerning the ethical obligations of attorneys in general and of Fishman in particular. *Id.* Because Fishman withdrew his relevance objections and failed to renew them, the matter was not reviewed. *Id.* The Court, however, discussed in dicta, the issue of the relationship between the canons of ethics and an attorney's duty of care to his client. *Id.* The Court explained that although an ethical violation is not an actionable breach of duty to a client per se, if an aggrieved client could show that a disciplinary rule was intended to protect one in his position, a violation of that rule may be relevant and admissible as evidence of an attorney's negligence. *Id.* The Court stated that expert testimony would not be appropriate in the determination of an ethical violation, because a competent judge can instruct the trier of fact concerning the requirements of ethical rules. *Id.* at 650, 487 N.E.2d at 1381–82. The Court, however, noted that an expert on the duty of care of an attorney properly could base his opinion on an attorney's failure to conform to a disciplinary rule. *Id.* at 650, 487 N.E.2d at 1382.

<sup>31</sup> See Barry, *Legal Malpractice Actions in Massachusetts*, 63 MASS. L. REV. 15, 17 (1978).

<sup>32</sup> The Court discussed the possibility that an attorney properly informed of all the relevant law and facts may still cause a client to settle a case for an amount below that which "competent counsel" would approve. *Fishman*, 396 Mass. at 646, 487 N.E.2d at

expert witness in such a case approaches the underlying action after the fact, with the benefit of hindsight, and unaware of the complexities unique to the individual case. Ideally, the witness giving expert testimony in such a case is an experienced practitioner who takes into account all the factors of the underlying case; practically, however, such a witness's testimony may have the effect of second guessing the defendant attorney's duties. Furthermore, there may be a tendency for the jury to overestimate such expert testimony which may increase the possibility of unwarranted malpractice liability.

The defendant attorney, however, can minimize the potentially adverse effects of the *Fishman* opinion by presenting expert testimony on his own behalf. Testimony by the defendant attorney's expert witnesses may contradict that given by the aggrieved client's witnesses. Where evidence presented by different expert witnesses is in dispute, concerns of the jury's overestimation of expert testimony and the possibility of imposing malpractice liability as a result of second guessing could be alleviated. In consideration of these factors, admitting expert testimony relating to the reasonableness of the settlement value seems proper. The decision seems especially justified in *Fishman*, where it was the attorney who first raised the issue of the fairness of the settlement.<sup>33</sup> As Brooks properly argued, where the attorney defends his actions based on the fairness of the original settlement, the client must have a fair opportunity to deny its fairness in the only reasonable manner possible, that is, with his own experts.<sup>34</sup>

The *Fishman* decision warns members of the bar of the Commonwealth that their advice given on claim settlements may be scrutinized by fellow members of the legal community. Although an attorney may believe that he has exercised proper professional judgment, he may face malpractice liability if the amount of the settlement does not fall within the range of a reasonable value of settlement established by another member of the

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1380. The Court, however, noted that such a situation is more theoretical than real. "The typical case of malpractice liability for an inadequate settlement involves an attorney who, having failed to prepare his case properly or lacking the ability to handle the case through trial (or both), causes his client to accept a settlement not reasonable in the circumstances." *Id.* The Court stated that a malpractice action would not prevail if the purportedly unreasonable settlement falls within an acceptable "range" of values. *Id.* at 648, 487 N.E.2d at 1381. However, this approach assumes concrete boundaries in projected settlement values.

<sup>33</sup> Appellee's Brief at 37, *Fishman v. Brooks*, 396 Mass. 643, 487 N.E.2d 1377 (No. 84-1163) (1986) [hereinafter Brief].

<sup>34</sup> Brief, *supra* note 33, at 39-40. *Fishman*'s own testimony on the reasonableness of the settlement was itself expert testimony. The attorney testified that he consulted with other experienced trial attorneys for their opinions, researched in a variety of publications for recent comparable verdicts and settlements, factored in inflation, and factored in medical facts of the case. *Id.* at 37-38.

bar.<sup>35</sup> Viewed from another perspective, the *Fishman* ruling effects a self-policing device by the bar. In *Fishman* specifically, the testimony of an experienced attorney acted as a critical element in imposing malpractice liability on a clearly inexperienced and incompetent counsel. By admitting expert testimony in legal malpractice actions, the courts encourage more adept legal representation by attorneys in the Commonwealth.

In summary, the Supreme Judicial Court in *Fishman v. Brooks* considered the issue of propriety of expert testimony in a legal malpractice action where the client alleged that his attorney's negligence caused him to accept an unreasonable settlement. Recognizing the rule that expert testimony is generally necessary to establish attorney negligence, the Court upheld the use of expert testimony concerning the reasonableness of the settlement.<sup>36</sup> Hence, the Court extended the use of expert testimony in legal malpractice actions to a broader domain, admitting such testimony as evidence of an attorney's negligent performance of his duties.

**§ 5.2. The Independent Relevance Exception to the Rule Against Admissibility of Prior Misconduct Evidence.\*** Under Massachusetts common law, and consistent with most jurisdictions<sup>1</sup> as well as with the Federal Rules of Evidence,<sup>2</sup> evidence of prior misconduct by a defendant is not admissible to show the bad character of the defendant or to show an increased likelihood that the defendant committed the offense charged in a specific case.<sup>3</sup> In a criminal case, therefore, the prosecution may not introduce evidence that a defendant has committed previous crimes to show that the defendant had a propensity to commit crime and thus to

<sup>35</sup> Attorneys, like physicians, may be hesitant to testify against one of their colleagues in a malpractice action, but they may be less reluctant to present damaging testimony in cases like *Fishman*, where the attorney's performance of his duties was far below the desired practicing standard. See *supra* note 10 and accompanying text for a discussion of attorney *Fishman's* handling of the case.

<sup>36</sup> *Fishman*, 396 Mass. at 647-48, 487 N.E.2d at 1380.

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<sup>2</sup> FED. R. EVID. 404(b). Rule 404(b) provides:

OTHER CRIMES, WRONGS, OR ACTS. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

*Id.*

<sup>3</sup> Commonwealth v. Trapp, 396 Mass. 202, 206, 485 N.E.2d 162, 165 (1985). See P.J. LIACOS, HANDBOOK OF MASSACHUSETTS EVIDENCE 420 (5th ed. 1981 & Supp. 1985) [hereinafter LIACOS]; Hughes, Evidence-Law and Practice, 19 Mass. Practice Series §§ 303, 306 (1961) [hereinafter Hughes].

create an inference that the defendant is guilty of the specific crime charged.<sup>4</sup> Regardless of whether evidence of such prior bad acts may be probative of whether the defendant committed the crime charged, courts routinely exclude such evidence to avoid the risk of unfair prejudice against the defendant. Admission of such evidence may force the defendant to defend against charges not contained in the indictment, may divert the jury's attention from the crime charged in the case, and may waste time on collateral issues.<sup>5</sup> Accordingly, Massachusetts courts generally exclude such evidence because the risks involved in admitting character evidence outweigh its probative value.<sup>6</sup>

Nevertheless, Massachusetts courts, consistent with Federal Rule of Evidence 404(b), have created an independent relevance exception to the general rule of exclusion of character evidence.<sup>7</sup> Under this exception, character evidence may be admissible when it is relevant to an issue in the case other than the defendant's propensity to commit crime, such as the existence of a plan or scheme, motive, knowledge, state of mind, identity, or existence of a particular skill.<sup>8</sup> For example, in a prosecution for first degree murder, evidence that a defendant made two previous attempts on the victim's life was admissible despite the fact that it showed the defendant's propensity to commit crime because it was relevant to the issue of premeditation and indicated the defendant's malice and hostility towards the victim.<sup>9</sup> Because the evidence had independent relevance, it fell outside the general rule of exclusion.<sup>10</sup>

Even where evidence of prior misconduct by the defendant has independent relevance, the trial judge must still determine whether the probative value of the evidence outweighs its prejudicial effect.<sup>11</sup> In Massachusetts, a trial judge's determination that the probative value outweighs the prejudicial effect will be upheld on review unless there is "palpable error."<sup>12</sup> In fact, some commentators have noted an increasing

<sup>4</sup> LIACOS, *supra* note 3, at 420.

<sup>5</sup> *Trapp*, 396 Mass. at 206, 485 N.E.2d at 165; *Hughes*, *supra* note 3, at § 301.

<sup>6</sup> *Hughes*, *supra* note 3, at § 306.

<sup>7</sup> *See, e.g.*, *Commonwealth v. Bradshaw*, 385 Mass. 244, 269, 431 N.E.2d 880, 895 (1982). *See generally* LIACOS, *supra* note 3, at 418. Massachusetts courts have also fashioned other exceptions including the use of character evidence to impeach the credibility of a witness, *id.* at 146–58, and the introduction by the defendant of evidence of his or her own good character where relevant to show that the defendant is not likely to have committed the crime charged. *Id.* at 411–12. *See also* FED. R. EVID. 404(b) advisory committee note.

<sup>8</sup> LIACOS, *supra* note 3, at 421; *Hughes*, *supra* note 3, at § 306.

<sup>9</sup> *Commonwealth v. Bryant*, 390 Mass. 729, 744, 459 N.E.2d 792, 802 (1984).

<sup>10</sup> *See id.*

<sup>11</sup> *See* FED. R. EVID. 404(b) advisory committee note; LIACOS, *supra* note 3, at 410.

<sup>12</sup> *Commonwealth v. Young*, 382 Mass. 448, 462–63, 416 N.E.2d 944, 953 (1981). *See also* *Commonwealth v. Bradshaw*, 385 Mass. 244, 269–70, 431 N.E.2d 880, 896 (1982) (after



tendency on the part of Massachusetts appellate courts to uphold admission of prior misconduct evidence without balancing the probative value against the risk of unfair prejudice when the evidence fits within one of the recognized independent relevance exceptions.<sup>13</sup>

During the *Survey* year, in *Commonwealth v. Jordan (No.1)*,<sup>14</sup> the Supreme Judicial Court reaffirmed the principles underlying the independent relevance exception to the general rule of exclusion of prior misconduct evidence. In *Jordan*, the Court upheld the admission of prior misconduct evidence in a prosecution for assault and battery with intent to murder.<sup>15</sup> The Court found that the evidence of prior misconduct by the defendant was not introduced for the purpose of showing the defendant's propensity to commit the crime charged but was properly admitted for its independent relevance in showing the defendant's state of mind and intent at the time he committed the crime charged.<sup>16</sup>

Robert Jordan was indicted for armed assault with intent to murder, assault and battery by means of a dangerous weapon and kidnapping.<sup>17</sup> The jury convicted the defendant of assault and battery by means of a dangerous weapon and kidnapping.<sup>18</sup> At trial, the evidence showed that, on November 2, 1982, the defendant beat the victim, with whom he was living at the time.<sup>19</sup> The victim testified that the defendant wrapped duct tape around her head and mouth, bound her hands and legs, beat and kicked her, pounded her face on the floor, and threatened to murder her and her father.<sup>20</sup> When she urinated on the floor, the defendant wiped

weighing probative value against prejudicial effect, Court found the trial judge did not "abuse his discretion" in admitting prior misconduct evidence).

<sup>13</sup> *LIACOS*, *supra* note 3, at 190 (Supp.); *Hughes*, *supra* note 3, at § 306. *But see* *Commonwealth v. Brown*, 389 Mass. 382, 385-86, 450 N.E.2d 172, 175 (1983) (trial court's admission of defendant's confession relating to robberies for which he was not charged held to constitute error because the "incremental value of the references to other robberies was minimal and did not outweigh the undue prejudice"). Because the risk of unfair jury prejudice against the defendant is so great with evidence of prior criminal acts, one commentator has recommended that such evidence be admitted only after careful balancing and after a "clear and convincing" showing that the evidence is both necessary and probative. *Hughes*, *supra* note 3, at § 306.

<sup>14</sup> 397 Mass. 489, 492 N.E.2d 349 (1986).

<sup>15</sup> *Jordan*, 387 Mass. at 491-92, 492 N.E.2d at 350-51 (citing G.L. c. 265, § 18 (1984)).

<sup>16</sup> *See id.* at 492, 492 N.E.2d at 351.

<sup>17</sup> *Id.* at 489, 491-92, 492 N.E.2d at 349, 350 (citing G.L. c. 265, §§ 15A, 18, 26 (1984)). The dangerous weapon used in this crime was the shod foot. Record at 141, *Jordan* (No. 84-677) (available at Boston College Law School Library). In Massachusetts, the shod foot is considered a dangerous weapon when it is used to kick someone. *Nolan, Criminal Law*, 32 *Mass. Practice Series* § 325 (1976).

<sup>18</sup> *Jordan*, 387 Mass. at 489, 492 N.E.2d at 349. *See* G.L. c. 265, §§ 15A, 26 (1984).

<sup>19</sup> *Jordan*, 387 Mass. at 490, 492 N.E.2d at 349.

<sup>20</sup> *Id.*

the floor and taped the urine-soaked rag into the victim's mouth.<sup>21</sup> After twelve hours, the defendant released the victim and her father took her to the hospital.<sup>22</sup>

During the trial, the victim testified that the defendant had beaten her several times during the nine or ten months that they had lived together.<sup>23</sup> After his conviction for assault and battery by means of a dangerous weapon and kidnapping, the defendant appealed, alleging that the trial judge erred in admitting this evidence of prior beatings.<sup>24</sup> The Supreme Judicial Court transferred the case on its own motion and affirmed the trial court's decision.<sup>25</sup>

The defendant argued on appeal that admission of the evidence regarding his prior beatings of the victim constituted reversible error.<sup>26</sup> The defendant claimed that the evidence of his prior bad acts was not admissible to show that he had a bad character or that he had the propensity to commit the crime at issue in the case.<sup>27</sup> Furthermore, the defendant

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 490–91, 492 N.E.2d at 349–50. The victim's father, accompanied by police, came to find the victim after her sister called to tell him that the dog had been left in the yard and that no one had answered when she knocked at the door. *Id.* at 490 n.2, 492 N.E.2d at 350 n.2. As the sister was driving away, the defendant drove after her and threatened to have her arrested if she went back to the house. *Id.* When she was taken to the hospital, the victim's head had to be sheared because the duct tape was stuck to her hair. *Id.* at 491, 492 N.E.2d at 350.

The victim subsequently went back to living with the defendant, but left after he hit her over the head with a thirty-pound ceramic tiger, warning her not to testify against him. *Id.*

<sup>23</sup> *Id.* Although some of these beatings had required medical attention, the victim testified that she had not informed the police or doctors of the defendant's actions. *Id.*

<sup>24</sup> *Id.* at 489–90, 492 N.E.2d at 349. The defendant also argued that it was prejudicial error for the trial judge to admit evidence suggesting that the defendant had assaulted the victim's dog. *Id.* at 492–93, 492 N.E.2d at 351. The defendant claimed that the evidence of his treatment of the dog was not relevant to any mens rea against the victim, and that the evidence's "inherently inflammatory character necessarily outweigh[ed] any probative value." *Id.* at 493, 492 N.E.2d at 351.

The Court found that, because the defendant had not raised this objection at trial, it was not properly preserved for appeal, and, therefore, the Court only reviewed the record to determine if there was a "substantial risk of a miscarriage of justice." *Id.* at 493 n.5, 492 N.E.2d at 351 n.5 (citing *Commonwealth v. McGahee*, 393 Mass. 743, 749, 473 N.E.2d 1077, 1082 (1985)). The Court determined that no such miscarriage of justice had occurred. *Id.* at 493, 492 N.E.2d at 351. The Court additionally found that the jury could infer that the defendant's mistreatment of the victim's dog was a demonstration of his hostility towards the victim herself. *Id.* Although the trial judge had excused two jurors who said they could not remain impartial after hearing the evidence regarding the dog, the Court found that this evidence was no more inflammatory than the description of the beating of the victim herself, and, therefore, that there was no "substantial likelihood of a miscarriage of justice." *Id.* at 493 & n.6, 492 N.E.2d at 351 & n.6.

<sup>25</sup> *Id.* at 490, 492 N.E.2d at 349.

<sup>26</sup> *Id.* at 491, 492 N.E.2d at 350.

<sup>27</sup> *Id.* (citing *Commonwealth v. Trapp*, 396 Mass. 202, 206, 485 N.E.2d 162, 165 (1985)).

argued, the evidence of prior beatings did not fit within any of the exceptions to the rule against character evidence and it was highly prejudicial to the defendant because it increased the jury's sympathy for the victim, who was the main prosecution witness.<sup>28</sup>

Although the Court recognized the general rule of exclusion of prior misconduct evidence,<sup>29</sup> it found that the prior beatings evidence was properly admitted in this case.<sup>30</sup> The Court noted that, in a prosecution for assault with intent to murder, the Commonwealth must prove both malice and a specific intent to murder the victim by the assault.<sup>31</sup> The Court here found that the evidence of prior beatings was probative of the defendant's mental state and intent at the time of the crime charged because it showed the defendant's malice and hostility towards the victim.<sup>32</sup> Therefore, the Court found, it was relevant to an "essential element" of the crime of armed assault with intent to murder.<sup>33</sup>

The Court held that the admissibility of the prior beatings evidence was unaffected by the fact that the jury found the defendant guilty of assault and battery by means of a dangerous weapon and not of armed assault with intent to murder.<sup>34</sup> In determining the relevance of the evi-

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<sup>28</sup> Brief for Defendant at 9–10, *Jordan* (No. 84-677) (available at Boston College Law School Library).

<sup>29</sup> *Jordan*, 397 Mass. at 491, 492 N.E.2d at 350.

<sup>30</sup> *Id.* at 492, 492 N.E.2d at 351.

<sup>31</sup> *Id.* at 492, 492 N.E.2d at 350 (citing *Commonwealth v. Burkett*, 396 Mass. 509, 512, 487 N.E.2d 478, 480 (1986) and *Commonwealth v. Henson*, 394 Mass. 584, 591, 476 N.E.2d 947, 952 (1985)). In *Henson*, the Court clarified that proof of "intent to murder" requires a showing of both malice and a specific intent to kill. *Henson*, 394 Mass. at 591, 476 N.E.2d at 952. The Court there explained that while murder may be committed without a specific intent to kill, the offense of assault with intent to murder does require a specific intent to kill. *Id.* at 591 n.4, 476 N.E.2d at 953 n.4 (quoting PERKINS, CRIMINAL LAW 763 (2d ed. 1969)).

<sup>32</sup> *Jordan*, 397 Mass. at 492, 492 N.E.2d at 351 (citing *Commonwealth v. Bryant*, 390 Mass. 729, 744, 459 N.E.2d 792, 802 (1984)). In *Bryant*, a first degree murder case, the Court affirmed the trial judge's admission of evidence that the defendant had made two previous attempts on the victim's life within a two month period. 390 Mass. at 744, 459 N.E.2d at 802. The Court reasoned that the evidence was admissible on the issue of premeditation, which is an essential element of first degree murder, and that it tended to demonstrate the defendant's hostility towards the victim. *Id.* Thus, the Court found the evidence admissible because, even though it showed the commission of other crimes, it was relevant to prove an element of the crime charged in this case. *Id.*

<sup>33</sup> *Jordan*, 397 Mass. at 492, 492 N.E.2d at 351 (citing *Commonwealth v. Little*, 376 Mass. 233, 238, 379 N.E.2d 1105, 1108–09 (1978)). In *Little*, the Court found no error in a trial judge's admission of evidence that the defendant had previously "pistol-whipped" a man as a lesson to the victim in the case being tried. 376 Mass. at 238, 379 N.E.2d at 1108–09. The Court found that the trial judge had admitted the evidence because it showed the defendant's hostility or state of mind towards the victim, even though the prior beating had occurred two years earlier. *Id.*

<sup>34</sup> *Jordan*, 397 Mass. at 492 n.4, 492 N.E.2d at 350 n.4.

dence, the Court looked to the crime charged.<sup>35</sup> Because the defendant was charged with armed assault with intent to murder, the Court found it was proper for the Commonwealth to introduce evidence tending to establish malice and the specific intent to murder.<sup>36</sup>

The Court dismissed the defendant's argument that the prior beatings occurred at a time too remote to be relevant because they occurred five to seven months before the time of the crime charged.<sup>37</sup> The Court found that the question of remoteness was "within the sound discretion of the trial judge," and that the trial judge did not abuse her discretion in this case.<sup>38</sup>

The Court in *Jordan* approved the Massachusetts courts' practice of admitting evidence of prior criminal acts when such evidence is relevant to a purpose other than the defendant's propensity to commit crime.<sup>39</sup> In *Jordan*, the Court applied the practice in the context of a prosecution for assault and battery with intent to murder, finding that because the evidence of prior beatings was relevant to elements of the prosecution's case — intent and malice — such evidence was admissible.<sup>40</sup> *Jordan* thus demonstrates that when prior misconduct evidence is offered to show some relevant fact other than the defendant's general bad character, and the trial judge's decision to admit the evidence is not clearly wrong, appellate courts in Massachusetts are not likely to find the admission erroneous.<sup>41</sup> The lack of discussion in *Jordan* of whether the independent relevance of the contested evidence gave it sufficient probative value to outweigh its prejudicial effect creates the risk that trial courts will skip this necessary balancing process once they determine that character evidence fits within one of the recognized independent relevance exceptions.

For the same reasons that the common law rule generally excludes prior misconduct evidence, the admission of such evidence, even when it fits within one of the recognized exceptions to the rule, may be unfairly prejudicial to a defendant. The danger of admitting prior criminal misconduct evidence is that it might lead the jury to infer that the defendant had a greater propensity to commit the crime charged — an inference which the rule generally excluding character evidence recognizes is im-

<sup>35</sup> See *id.* at 491–92, 492 N.E.2d at 350.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 492, 492 N.E.2d at 351.

<sup>38</sup> *Id.* (quoting *Commonwealth v. Baldassini*, 357 Mass. 670, 679, 260 N.E.2d 150, 156 (1970)).

<sup>39</sup> See *id.* at 492, 492 N.E.2d at 351. See also *LIACOS*, *supra* note 3, at 190 (Supp.).

<sup>40</sup> *Jordan*, 397 Mass. at 492, 492 N.E.2d at 351.

<sup>41</sup> See, e.g., *Commonwealth v. Young*, 382 Mass. 448, 462, 416 N.E.2d 944, 953 (1981). See also *LIACOS*, *supra* note 3, at 190 (Supp.).

permissible.<sup>42</sup> Alternatively, the jury might use the evidence of prior bad acts to justify conviction of the defendant whether or not guilt is proved in the specific case.<sup>43</sup> The danger of the jury using prior misconduct evidence in one of these impermissible ways exists even though the prior misconduct evidence fits into one of the independent relevance exceptions to the general rule of exclusion.<sup>44</sup>

Because the risk of unfair prejudice is so great, even when the prior misconduct evidence is relevant to an issue other than the defendant's propensity to engage in criminal activity, the trial judge should carefully balance the probative value of and the prosecution's need for the evidence against its prejudicial effect on the jury and its tendency to waste time on collateral issues.<sup>45</sup> Such balancing in individual instances would decrease the danger of unfair jury prejudice against the defendant.<sup>46</sup> Despite the rule that the trial court should balance the probative value against the risk of undue prejudice for prior misconduct evidence, however, the tendency of trial courts is simply to admit the evidence if it fits one of the recognized exceptions to the rule of exclusion.<sup>47</sup>

In *Jordan*, the Supreme Judicial Court appears to affirm a trend in the Massachusetts appellate courts to uphold admission of prior misconduct evidence so long as it can be "pigeonholed" into one of the independent relevance exceptions, without reviewing the trial court's balancing of the competing interests involved in the specific case.<sup>48</sup> The Court in *Jordan* held that evidence of the defendant's previous beatings of the victim was properly admitted as relevant to the independent purpose of establishing the malice element of an assault with intent to murder charge.<sup>49</sup> The Court, however, simply affirmed the trial court's judgment without reference to the trial court's weighing of potential prejudicial impact on the jury of the prior beatings evidence or the importance of the evidence to the prosecution's case.<sup>50</sup> The lack of discussion of this important balancing process even for character evidence that fits within the independent

<sup>42</sup> See FED. R. EVID. 404(a) & advisory committee's note.

<sup>43</sup> See WIGMORE, *supra* note 1, at § 58.2. Indeed, evidence of prior misconduct has been called the "prosecutor's delight" because of its potential to affect the outcome of a trial. E. Imwinkelried, *The Plan Theory for Admitting Evidence of the Defendant's Uncharged Crimes: A Microcosm of the Flaws in the Uncharged Misconduct Doctrine*, 50 Mo. L. REV. 1, 2 (1985).

<sup>44</sup> See FED. R. EVID. 404(b) advisory committee's note.

<sup>45</sup> MCCORMICK, EVIDENCE § 190 (3d ed. 1984); Hughes, *supra* note 3, at § 306.

<sup>46</sup> See Hughes, *supra* note 3, at § 306.

<sup>47</sup> *Id.*

<sup>48</sup> See *Jordan*, 397 Mass. at 492, 492 N.E.2d at 351. See also Hughes, *supra* note 3, at § 306; LIACOS, *supra* note 3, at 190 (Supp.).

<sup>49</sup> *Jordan*, 397 Mass. at 492, 492 N.E.2d at 351.

<sup>50</sup> See *id.*

relevance exception creates the risk that trial courts will follow the lead and admit independently relevant prior misconduct evidence regardless of its probative value or prejudicial effect.

In *Jordan*, the Supreme Judicial Court reaffirmed the general rule of exclusion of prior misconduct evidence and the exception to that rule when the evidence has relevance to an element of the crime charged.<sup>51</sup> The Court held that in a prosecution for assault with intent to murder, evidence that the defendant had beaten the victim on previous occasions was properly admitted as relevant to the intent and state of mind elements of the prosecution's case.<sup>52</sup> The Court, however, did not discuss the trial judge's weighing of the probative value of the evidence as compared to its prejudicial effect. The Court's decision thus suggests that it will not examine the potential for unfair prejudice of prior misconduct evidence once it is established that this damaging evidence fits within one of the independent relevance exceptions to the general rule of excluding character evidence.

**§ 5.3. Social Worker Privilege.\*** Massachusetts courts have interpreted the social worker privilege contained in chapter 112, section 135<sup>1</sup> broadly to prevent disclosure at trial of communications to a social worker whether the social worker acquired the communication from consulting with a specific client or with a third party.<sup>2</sup> Although the statute limits the scope of the privilege to communications from a person "consulting" with the social worker,<sup>3</sup> the Supreme Judicial Court has indicated that, as long as the informant "appears to be a person who consulted" the social worker, the communication is within the scope of the social worker privilege.<sup>4</sup> Therefore, because the Court has upheld the application of the privilege to communications from people other than specific clients,<sup>5</sup> and because the Court has not strictly construed the statutory requirement that the communication arise from a consultation,<sup>6</sup> the social worker privilege potentially protects all communications a social worker acquires

<sup>51</sup> See *id.* at 491, 492, 492 N.E.2d at 350, 351.

<sup>52</sup> *Id.* at 492, 492 N.E.2d at 351.

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§ 5.3. <sup>1</sup> G.L. c. 112, § 135 provides in part: "No social worker . . . shall disclose any information he may have acquired from a person consulting him in his professional capacity or whom he has served in his professional capacity . . . ."

<sup>2</sup> *Commonwealth v. Collett*, 387 Mass. 424, 430, 439 N.E.2d 1223, 1227 (1982); *Commonwealth v. LeCain*, 19 Mass. App. Ct. 1034, 1035, 477 N.E.2d 205, 206 (1985).

<sup>3</sup> G.L. c. 112, § 135.

<sup>4</sup> *Collett*, 387 Mass. at 429, 439 N.E.2d at 1227.

<sup>5</sup> *Id.* at 430, 439 N.E.2d at 1227.

<sup>6</sup> See *id.* at 429, 439 N.E.2d at 1227.

in his or her professional capacity,<sup>7</sup> unless an exception to the privilege applies.<sup>8</sup>

Massachusetts is unique in its broad interpretation of the social worker privilege. Other state courts construing statutes creating a similar social worker privilege have taken a less liberal approach in defining the scope of the privilege.<sup>9</sup> These courts, unlike Massachusetts courts, have required an examination of the actual social worker-informant relationship to determine whether the privilege applies.<sup>10</sup> Underlying the approach of other state courts is the premise that a broad interpretation of any privilege conflicts with the general common-law rule that testimonial privileges should not be construed expansively.<sup>11</sup>

During the *Survey* year, in *Allen v. Holyoke Hospital*,<sup>12</sup> the Supreme Judicial Court reaffirmed its broad interpretation of the social worker privilege, and held that information a social worker acquires from any informant is privileged if the social worker acquired the information during a consultation.<sup>13</sup> By not requiring a specific finding that a social worker acquire the information during a consultation in which the informant sought advice or assistance, the Court indicated that an informant

<sup>7</sup> *Id.* at 441, 439 N.E.2d at 1233 (Lynch, J., dissenting).

<sup>8</sup> Communications which are otherwise privileged are subject to disclosure where the informant waives the privilege by written consent, G.L. c. 112, § 135(a), or by bringing an action against the social worker, G.L. c. 112, § 135(c), where the communication "reveals the contemplation or commission of a crime or harmful act," G.L. c. 112, § 135(b), where the information is needed in certain child custody proceedings, G.L. c. 112, § 135(d), (e), or where a social worker acquires the information while conducting an investigation pursuant to chapter 119, section 51B, G.L. c. 112, § 135(f).

<sup>9</sup> *People v. Lipsky*, 102 Misc. 2d 19, 423 N.Y.S.2d 599 (1979) (construing what is currently N.Y. CIV. PRAC. L. & R. § 4508 (McKinney Supp. 1987)); *State v. Martin*, 274 N.W.2d 893 (S.D. 1979) (construing what is currently S.D. CODIFIED LAWS ANN. § 36-26-30 (1986)), *cert. denied*, 444 U.S. 883 (1979).

<sup>10</sup> For example, in *State v. Martin*, the Supreme Court of South Dakota held that S.D. CODIFIED LAWS ANN. § 36-26-30, which limits the privilege to a communication to a social worker "in his professional capacity that was necessary to enable him to render services," required an examination of the facts and circumstances of each social worker-informant relationship. *Martin*, 274 N.W.2d at 895. The *Martin* court held that a conversation between the defendant and his social worker of six to eight months was not privileged because the record did not indicate that the defendant made the statements with the expectation of privacy. *Id.* at 896. Similarly, in *In re Koretta W.*, the New York Family Court construed N.Y. CIV. PRAC. L. & R. § 4508 which limits the privilege to communications from a client, to require an examination of the social worker-informant relationship. *See In re Koretta W.*, 118 Misc. 2d 660, 661-62, 461 N.Y.S.2d 205, 206-07 (1983). The *Koretta* court further determined that even if a person is a social worker's client, the privilege will not protect statements unless they were made with the expectation of privacy. *See id.* at 662, 461 N.Y.S.2d at 207.

<sup>11</sup> 8 J. WIGMORE, EVIDENCE § 2192 (McNaughton rev. ed. 1961).

<sup>12</sup> 398 Mass. 372, 496 N.E.2d 1368 (1986).

<sup>13</sup> *Id.* at 377, 378 n.5, 496 N.E.2d at 1371, 1372 n.5.

may “consult” with a social worker for the purposes of establishing a privilege merely by giving the social worker information during an investigation.<sup>14</sup> Thus, the Court in *Allen* found that the privilege protected information a social worker acquired from a child’s grandparents and foster parents during a Department of Social Services investigation,<sup>15</sup> without requiring a finding that the foster parents or grandparents sought the social worker’s advice or assistance during the “consultations.”<sup>16</sup>

The plaintiff in *Allen*<sup>17</sup> alleged that Holyoke Hospital<sup>18</sup> negligently caused the death of her four year old son.<sup>19</sup> In response, the defendants claimed that because the decedent had received inadequate care during the early years of his life, the plaintiff’s negligence contributed to his death.<sup>20</sup> To support their claim of contributory negligence, the defendants sought evidence regarding the nature of the care the plaintiff provided the decedent, and requested all documents in the possession of the Department of Social Services (Department) relating to the removal of the decedent from the plaintiff’s custody.<sup>21</sup>

When the defendants requested the Department’s records in discovery, the plaintiff claimed that the records were protected by the social worker privilege contained in chapter 112, section 135.<sup>22</sup> The defendants con-

<sup>14</sup> See *id.* at 377–78, 496 N.E.2d at 1371–72; *cf. id.* at 386–87, 496 N.E.2d at 1376–77 (Liacos, J., dissenting).

<sup>15</sup> *Id.* at 375, 378, 496 N.E.2d at 1370, 1372.

<sup>16</sup> See *id.* at 378, 496 N.E.2d at 1372.

<sup>17</sup> The Court referred to the decedent’s natural mother, Dawn M. Allen, in her individual capacity as the plaintiff. *Id.* at 372 n.2, 496 N.E.2d at 1368 n.2. Ms. Allen also sued in her capacity as administratrix of decedent’s estate. *Id.* at 372 & n.1, 496 N.E.2d at 1368 & n.1. Ms. Allen’s estranged husband also sued in his individual capacity. *Id.* at 372 n.2, 496 N.E.2d at 1368 n.2.

<sup>18</sup> The plaintiff also sued, among others, Holyoke Pediatric Associates, *id.* at 372 n.3, 496 N.E.2d at 1368 n.3, to whom the decedent’s foster mother brought the decedent the day before his death. *Id.* at 373, 496 N.E.2d at 1369.

<sup>19</sup> *Id.* at 373, 496 N.E.2d at 1369. The cause of the child’s death was septic shock secondary to a kidney infection. *Id.* at 374, 496 N.E.2d at 1369.

<sup>20</sup> *Id.* at 374, 496 N.E.2d at 1370.

<sup>21</sup> *Id.* Approximately one year after his birth, the Department removed the decedent and his older brother from the plaintiff’s custody for six months. *Id.* at 374, 496 N.E.2d at 1371. Approximately eighteen months later, when the decedent was almost three, the Department again removed the decedent and his brother from the plaintiff’s custody, and placed the decedent with foster parents, with whom he lived until his death. *Id.* The defendants sought the records to determine the decedent’s health at the time he was removed from his mother, his health prior to death, and whether the plaintiff’s conduct contributed to the decedent’s condition or justified reducing the plaintiff’s damages. *Id.* at 376, 496 N.E.2d at 1371.

<sup>22</sup> *Id.* at 374, 496 N.E.2d at 1370. The plaintiff also claimed that the department’s records were privileged under the provisions of the Fair Information Practices Act (FIPA), G.L. c. 66A. *Id.*



tended that the records of the Department were not privileged, and that, even if a privilege applied, the plaintiff had waived this privilege by bringing her suit.<sup>23</sup> The trial judge reviewed the records in camera,<sup>24</sup> and, instead of addressing the privilege issues in the trial court and risking reversal on appeal, reported a number of questions concerning the scope of the social worker privilege.<sup>25</sup> The judge's specific concern was whether the privilege protected information acquired by the social worker from the decedent's grandparents and foster parents, and the social worker's recorded personal observations of the decedent's parents.<sup>26</sup> The Supreme Judicial Court transferred the questions on its own motion for review.<sup>27</sup>

The Court first considered the scope of the social worker privilege created by chapter 112, section 135,<sup>28</sup> and found that except in circumstances specified in the statute<sup>29</sup> the privilege protects from disclosure all information acquired from a person consulting a social worker in his or

<sup>23</sup> *Id.* at 376, 496 N.E.2d at 1371.

<sup>24</sup> *Id.* at 375, 496 N.E.2d at 1370. The trial judge determined that the records would aid the defendants in proving contributory negligence, and that the records might cast light on the cause of the decedent's illness. *Id.* The Supreme Judicial Court previously endorsed the use of an in camera hearing between a judge and a social worker to determine whether or not the privilege covers a particular communication. *Collett*, 387 Mass. at 436, 439 N.E.2d at 1230. The in camera hearing is not to determine whether an informant sought the social worker's advice or assistance; rather it is to determine whether a particular communication falls within an exception to the privilege enumerated in G.L. c. 112, section 135(a)-(f). See *id.* at 438, 439 N.E.2d at 1231-32.

<sup>25</sup> *Allen*, 398 Mass. at 375, 496 N.E.2d at 1370. The trial judge reported the questions pursuant to Mass. R. Civ. P. 64, which provides in part:

If the trial court is of opinion that an interlocutory finding or order made by it so affects the merits of the controversy that the matter ought to be determined by the Appeals Court before any further proceedings in the trial court, it may report such matter, and may stay all further proceedings . . . .

*Id.*

<sup>26</sup> *Allen*, 398 Mass. at 375, 496 N.E.2d at 1370. The judge reported the questions concerning the scope of the social worker privilege as follows:

(1) Is a licensed social worker in the employ of the Massachusetts Department of Social Services precluded by the provisions of G.L. c. 112, section 135 from disclosing information relative to a child who was the subject of a departmental investigation which the social worker acquired: (a) from the child's maternal grandparents with whom the child did not reside; (b) from the child's foster parents with whom the child had been placed by the department; and (c) from the social worker's personal observations made within the home of the child's parents in the course of the investigation?

*Id.* The judge also reported a question concerning whether the department records were privileged under FIPA. *Id.*

<sup>27</sup> *Id.* at 373, 496 N.E.2d at 1369.

<sup>28</sup> *Id.* at 376, 496 N.E.2d at 1371.

<sup>29</sup> G.L. c. 112, § 135. Section 135 enumerates a number of specific circumstances where the social worker privilege will not apply. G.L. c. 112, § 135 (a)-(f).

her professional capacity.<sup>30</sup> According to the Court, the privilege indicated a legislative determination that, in order for social work intervention to be successful, communications acquired by a social worker must remain confidential.<sup>31</sup>

To determine the meaning of the statutory requirement that the social worker obtain the information from a “person consulting” him or her,<sup>32</sup> the *Allen* Court referred to the Court’s 1982 decision of *Commonwealth v. Collett* and to the legislative history of section 135.<sup>33</sup> In *Collett*, the Court held that the privilege protects communications a social worker acquires from people who technically are not the social worker’s clients.<sup>34</sup> In addition, the Court did not strictly construe the requirement that a person consult with a social worker in order to establish a privilege under chapter 112, section 135.<sup>35</sup> Instead, the *Collett* Court held that an informant could claim the privilege as long as the informant “appears to be a person who consulted” the social worker in his or her professional ca-

<sup>30</sup> *Allen*, 398 Mass. at 376–77, 496 N.E.2d at 1371.

<sup>31</sup> *Id.* at 377, 496 N.E.2d at 1371 (citing *Collett*, 387 Mass. at 428, 439 N.E.2d at 1226. In *Collett*, the Court stated:

Disclosures of confidential information can harm more than the individual social worker-client relationship involved. If it becomes known that confidences are violated, other people may be reluctant to use social work services, and may be unable to use them to maximum benefit. The purpose of enacting a social worker-client privilege is to prevent the chilling effect which routine disclosures may have in preventing those in need of help from seeking that help.

*Id.*

<sup>32</sup> G.L. c. 112, § 135. For the text of chapter 112, section 135, see *supra* note 1.

<sup>33</sup> *Allen*, 398 Mass. at 377, 496 N.E.2d at 1371.

<sup>34</sup> *Collett*, 387 Mass. at 430, 439 N.E.2d at 1227. In *Collett*, the defendant was charged with the second degree murder of his girlfriend’s seven month old child. 387 Mass. at 425–26, 439 N.E.2d at 1224–25. Prior to his indictment, a social worker had interviewed the defendant in the course of the social worker’s treatment of the victim’s family. *Id.* at 426, 439 N.E.2d at 1225. When questioned as to her interviews with the defendant and the victim’s family, the social worker claimed a privilege based on G.L. c. 112, § 135. *Id.* The Commonwealth asserted that the privilege only applied where the informant was the social worker’s client, and therefore, because the defendant and others whom the social worker interviewed were not technically her clients, communications from them were not privileged. *Id.* at 428–29, 439 N.E.2d at 1226–27.

The Court rejected the Commonwealth’s proposed narrow reading of § 135 by examining the legislative history of the statute. Because the legislature had previously considered, but not enacted, an earlier version of the statute which would have restricted the privilege to communications acquired from a client, the Court concluded that the legislature intended the privilege to protect communications from people other than those who were technically the social worker’s client. *Id.* at 430, 439 N.E.2d at 1227 (citing 1972 House Doc. No. 1997; 1971 House Doc. No. 4877). Therefore, the Court held that the privilege protects communications acquired from a person consulting a social worker in his or her professional capacity. *Id.*

<sup>35</sup> See *id.* at 429, 439 N.E.2d at 1227.

capacity.<sup>36</sup> Consequently, the *Collett* Court allowed the boyfriend of the mother of a child whose death a social worker was investigating to claim the privilege without a specific showing that the boyfriend had consulted with the social worker by seeking her advice or assistance.<sup>37</sup>

Because the legislature reenacted section 135 subsequent to *Collett* with more expansive language,<sup>38</sup> the *Allen* Court interpreted this reenactment as an endorsement of the *Collett* Court's broad interpretation of section 135.<sup>39</sup> The *Allen* Court therefore relied on *Collett*, and without requiring a showing that the informants "consulted" with the social worker by seeking the social worker's advice or assistance, concluded that communications from the decedent's grandparents and foster parents were privileged under section 135, unless an exception to the privilege applied.<sup>40</sup>

The Court determined, however, that the social worker's personal observations while in the plaintiff's home would not be privileged.<sup>41</sup> The Court reasoned that section 135 limits the privilege to communications "from a person."<sup>42</sup> Because the social worker's personal observations did not meet this criterion, the Court held they were not privileged.<sup>43</sup>

The Court then addressed the defendants' contention that by bringing her wrongful death action, the plaintiff had waived the social worker privilege with respect to the facts at issue in the action.<sup>44</sup> The Court reasoned that the privilege belongs to the person who makes the disclo-

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 430, 439 N.E.2d at 1227; *cf. id.* at 442, 439 N.E.2d at 1233 (Lynch, J., dissenting).

<sup>38</sup> Chapter 524 of the Acts of 1985 amended § 135 to read: "No social worker . . . shall disclose any information he may have acquired from a person consulting him in his professional capacity or whom he has served in his professional capacity . . ." (italics added to indicate amendment).

<sup>39</sup> *Allen*, 398 Mass. at 377, 496 N.E.2d at 1372.

<sup>40</sup> *Id.* at 378, 496 N.E.2d at 1372; *cf. id.* at 387, 496 N.E.2d at 1377 (Liacos, J., dissenting). The Court did not address the issue of whether, based on the record, an exception to the social worker privilege applied, especially exception (b) which removes the privilege for communications revealing harmful acts, because the reported questions did not raise the issue and the judge indicated that the exceptions were immaterial to the case. *Id.* at 378 n.5, 496 N.E.2d at 1372 n.5.

<sup>41</sup> *Id.* at 378, 496 N.E.2d at 1372.

<sup>42</sup> *Id.* (quoting G.L. c. 112, § 135). The Court was interpreting communications to mean only verbal communications. *See id.*

<sup>43</sup> *Id.* The Court did, however, indicate that FIPA may bar the defendants' access to records containing the social worker's personal observations. *Id.* at 381-82, 496 N.E.2d at 1374. The Court held that disclosure would be improper if it would cause an unwarranted invasion of the plaintiff's privacy. *Id.* at 382, 496 N.E.2d at 1374. The Court noted, however, that because the social worker would not be prevented from testifying about her recorded observations by FIPA, disclosure of her recorded observations may not be an unwarranted invasion of the plaintiff's privacy. *Id.* at 381-82, 496 N.E.2d at 1374.

<sup>44</sup> *Id.* at 378, 496 N.E.2d at 1372.

sure, and therefore only that person has the power to waive the privilege.<sup>45</sup> Consequently, the Court held, the plaintiff's initiation of a lawsuit did not waive the privilege protecting communications acquired from the decedent's grandparents and foster parents.<sup>46</sup>

Justice Liacos, in a dissenting opinion, disagreed with the majority's broad interpretation of the social worker privilege.<sup>47</sup> Justice Liacos asserted that the statutory obligation to maintain confidentiality is not necessarily the equivalent of a testimonial privilege.<sup>48</sup> According to Justice Liacos, the *Collett* opinion, upon which the majority in part based its reasoning, failed to distinguish between an obligation not to disclose and a testimonial privilege.<sup>49</sup> Limiting section 135 to an obligation not to disclose, Justice Liacos reasoned, would largely fulfill the legislative purpose of the statute, which is to prevent routine access to information a social worker may obtain.<sup>50</sup> Furthermore, because certain exceptions to the statute allow for disclosure without utilizing the concept of a testimonial privilege,<sup>51</sup> Justice Liacos argued that the statute was not concerned solely with a testimonial privilege.<sup>52</sup> In particular, Justice Liacos noted that exception (b), which permits the disclosure of a "communication that reveals the contemplation or commission of a crime or harmful act" is not concerned with merely disclosure at trial.<sup>53</sup> Justice Liacos therefore concluded that the majority had misconstrued legislative intent by assuming that the statute uniformly created a testimonial privilege.<sup>54</sup>

According to Justice Liacos, a correct interpretation of the statute would restrict the privilege to confidential communications generated during a social worker-client relationship.<sup>55</sup> Justice Liacos reasoned that the statute would oblige a social worker not to disclose information acquired from any source, but that information from sources other than

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* The Court did not address whether the plaintiff's bringing a suit would waive the privilege concerning any information a social worker may have acquired from her. *See id.*

<sup>47</sup> *Id.* at 387, 469 N.E.2d at 1377 (Liacos, J., dissenting).

<sup>48</sup> *Id.* at 384, 469 N.E.2d at 1375 (Liacos, J., dissenting).

<sup>49</sup> *Id.* at 384 & n.2, 469 N.E.2d at 1375 & n.2 (citing *Collett*, 387 Mass. at 426–27, 439 N.E.2d at 1225–26).

<sup>50</sup> *Id.* at 384–85, 496 N.E.2d at 1376 (Liacos, J., dissenting).

<sup>51</sup> *Id.* at 385 & n.3, 496 N.E.2d at 1376 & n.3 (Liacos, J., dissenting) (citing G.L. c. 112, § 135(a),(b),(d),(f)).

<sup>52</sup> *Id.* at 385, 496 N.E.2d at 1376 (Liacos, J., dissenting).

<sup>53</sup> *Id.* at 385 n.3, 496 N.E.2d at 1376 n.3 (Liacos, J., dissenting) (quoting G.L. 112, § 135(b)).

<sup>54</sup> *Id.* at 387, 496 N.E.2d at 1377 (Liacos, J., dissenting).

<sup>55</sup> *Id.* at 385, 496 N.E.2d at 1376 (Liacos, J., dissenting) (citing *Collett*, 387 Mass. at 440–42, 439 N.E.2d at 1232–33 (Lynch, J., dissenting)).

a client would not be privileged at trial.<sup>56</sup> Therefore, in contrast to the majority, Justice Liacos argued that section 135 obliged a social worker to maintain the confidentiality of personal observations.<sup>57</sup> Because the social worker's personal observations were not confidential communications revealed in the course of a social worker-client relationship, however, Justice Liacos stated that they were not covered by a testimonial privilege.<sup>58</sup> Therefore, Justice Liacos agreed with the majority's conclusion that the social worker's personal observations within the plaintiff's home were subject to disclosure at trial.<sup>59</sup>

To limit the testimonial privilege to communications arising from only the social worker-client relationship, Justice Liacos advocated a narrower interpretation of the statutory requirement that the information be obtained from a "person consulting" the social worker.<sup>60</sup> According to Justice Liacos, in order to "consult" a social worker for the purposes of establishing a privilege, a person must seek the social worker's advice and assistance.<sup>61</sup> Under the majority's definition of "consult," Justice Liacos stated, a person "consults" with a social worker merely by giving the social worker information.<sup>62</sup> Justice Liacos stated that this interpretation of "consult" is too broad, and would result in a blanket privilege for all communications to a social worker based merely on his or her status as a social worker.<sup>63</sup>

Therefore, Justice Liacos argued that there must be evidence that an informant sought the social worker's advice or assistance before a testi-

<sup>56</sup> *Id.* at 385, 496 N.E.2d at 1376 (Liacos, J., dissenting).

<sup>57</sup> *Id.* (Liacos, J., dissenting).

<sup>58</sup> *Id.* (Liacos, J., dissenting).

<sup>59</sup> *Id.* (Liacos, J., dissenting). Justice Liacos did not address whether FIPA would prevent the disclosure of the social worker's recorded personal observations. *Id.* at 382, 496 N.E.2d at 1374 (Liacos, J., dissenting).

<sup>60</sup> *Id.* at 385-86, 496 N.E.2d at 1376 (Liacos, J., dissenting).

<sup>61</sup> *Id.* at 386, 496 N.E.2d at 1376 (Liacos, J., dissenting) (citing *Collett*, 387 Mass. at 440, 439 N.E.2d at 1232 (Lynch, J., dissenting)). In a dissenting opinion in *Collett*, Justice Lynch advocated a more exacting definition of "consult":

To "consult" a social worker or other professional means, in the common understanding of the term, to seek that professional's advice or opinion. It is the confidences of persons *seeking* such advice that the statute in question was intended to protect. There is nothing in the record on which to base the conclusion that the defendant *consulted* with the social worker, in the sense of seeking her advice or opinion, at any time.

*Collett*, 387 Mass. at 440, 439 N.E.2d at 1232 (emphasis in the original) (citations omitted).

<sup>62</sup> *Allen*, 398 Mass. at 386, 496 N.E.2d at 1376 (Liacos, J., dissenting).

<sup>63</sup> *Id.* (Liacos, J., dissenting). Justice Liacos rejected the majority's interpretation of the 1985 amendment to § 135, *see supra* notes 38-39 and accompanying text, and argued the amendment required that a "professional relationship" exist between the social worker and informant in order for the privilege to exist. *Allen*, 398 Mass. at 387 n.5, 496 N.E.2d at 1377 n.5 (Liacos J., dissenting).

monial privilege can protect communications arising from the social worker-informant relationship.<sup>64</sup> Justice Liacos stated that the majority's expansive construction of *Collett* incorrectly suggested that the privilege extends to police officers, teachers, neighbors, and all others from whom a social worker acquires information in his or her professional capacity.<sup>65</sup> Because on the record there was no finding that the decedent's grandparents or foster parents sought the advice or assistance of the social worker, Justice Liacos stated that communications from them were not privileged.<sup>66</sup>

In contrast to Justice Liacos, Justice Abrams, in her dissenting opinion, did not urge a more restrictive scope for the privilege, but rather suggested that the Court should have allowed disclosure of the Department's report under an exception to the privilege.<sup>67</sup> Although the Court was not specifically confronted with exceptions to the privilege, Justice Abrams reasoned that the reported questions concerned chapter 112, section 135 in general, and thereby also concerned each of the specifically enumerated exceptions to the statute.<sup>68</sup> Justice Abrams was concerned that clarifying the scope of the social worker privilege without addressing the scope of the exceptions to that privilege would provide insufficient instruction to the trial judge.<sup>69</sup> Therefore, Justice Abrams concluded, the application of exceptions to the social worker privilege was properly before the Court, and should have been addressed.<sup>70</sup>

Justice Abrams argued in particular that exception (b) of section 135,<sup>71</sup> which exempts from the privilege a communication which "reveals the contemplation or commission of . . . a harmful act,"<sup>72</sup> required that the social worker's report be disclosed.<sup>73</sup> According to Justice Abrams, parental neglect, as well as physical abuse, may constitute a harmful act

<sup>64</sup> *Id.* at 387, 469 N.E.2d at 1377 (Liacos, J., dissenting).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 391, 496 N.E.2d at 1379 (Abrams, J., dissenting).

<sup>68</sup> *Id.* at 388 & n.1, 496 N.E.2d at 1377 & n.1 (Abrams, J., dissenting).

<sup>69</sup> *See id.* at 388, 496 N.E.2d at 1377 (Abrams, J., dissenting).

<sup>70</sup> *Id.* at 387–88, N.E.2d at 1377–78 (Abrams, J., dissenting).

<sup>71</sup> Justice Abrams also suggested that exception (f) which allows for disclosure of information a social worker acquires while conducting a chapter 119, section 51B investigation may apply. *Id.* at 387–88, 496 N.E.2d at 1377–78. The Department conducts an investigation pursuant to G.L. c. 112, § 51B after receiving a report of child abuse which G.L. c. 112, § 51A requires certain professionals to file. Justice Abrams did not address whether exception (f) applied, however, because she assumed that the language of G.L. c. 112, § 135(f) was clear enough so that if G.L. c. 112, § 51B reports existed, the trial judge would have ordered their disclosure. *Id.* at 389 n.2, 496 N.E.2d at 1378 n.2.

<sup>72</sup> G.L. c. 112, § 135(b).

<sup>73</sup> *Id.* at 391, 496 N.E.2d at 1378–79.

for the purposes of exception (b).<sup>74</sup> Examining the statutory scheme concerning the welfare of children, Justice Abrams noted that a professional who suspects a child is suffering from neglect must file a report with the Department,<sup>75</sup> which then initiates a Department investigation.<sup>76</sup> Similarly, Justice Abrams noted that by statute a juvenile court's finding of neglect is sufficient to transfer custody of the child to the Department.<sup>77</sup> Because the statutory provisions indicated that the legislature considered parental neglect to be injurious to children, Justice Abrams concluded that neglect constituted a harmful act for the purposes of exception (b).<sup>78</sup> Therefore, Justice Abrams stated that under chapter 112, section 135(b), communications which relate directly<sup>79</sup> to either the abuse or neglect of a child are subject to disclosure notwithstanding the social worker privilege.<sup>80</sup>

<sup>74</sup> *Id.* at 389–90, 496 N.E.2d at 1378–79.

<sup>75</sup> *Id.* at 388, 390, 496 N.E.2d at 1378–79 (citing G.L. c. 119, § 51A). Chapter 119, section 51A requires that:

Any physician, medical intern, hospital personnel engaged in the examination, care or treatment of persons, medical examiner, psychologist, emergency medical technician, dentist, nurse, chiropractor, podiatrist, osteopath, public or private school teacher, educational administrator, guidance or family counselor, day care worker, probation officer, clerk/magistrate of the district courts, social worker, foster parent, firefighter, or policeman, who, in his professional capacity shall have reasonable cause to believe that a child . . . is suffering from serious physical or emotional injury resulting from abuse . . . or from neglect, . . . shall immediately report such condition to the department.

*Id.* Professionals who fail to make these required reports are subject to fines. *Id.*

<sup>76</sup> *Allen*, 398 Mass. at 390, 496 N.E.2d at 1378–79 (Abrams, J., dissenting). Chapter 119, 51B requires the Department to investigate section 51A reports. Information the Department compiles in a section 51B investigation is subject to disclosure under G.L. c. 112, § 135(f).

<sup>77</sup> *Allen*, 398 Mass. at 390, 496 N.E.2d at 1379 (Abrams, J., dissenting) (citing G.L. c. 119, § 24). Chapter 112, section 135(d) and (e) permit the disclosure of information compiled for child custody cases.

<sup>78</sup> *See id.* at 390–91, 496 N.E.2d at 1378–79 (Abrams, J., dissenting).

<sup>79</sup> In *Collett*, the Court narrowly construed G.L. c. 112, § 135(b) to require only disclosure of communications which relate directly to a crime or harmful act. 387 Mass. at 435, 439 N.E.2d at 1230. Thus, the Court held, communications which did not implicate the defendant directly in criminal activity, but merely indicated his consciousness of guilt were privileged. *Id.*

<sup>80</sup> *Allen*, 398 Mass. at 391, 496 N.E.2d at 1379 (Abrams, J., dissenting). Interpreting “harmful acts” to include physical abuse as well as neglect, Justice Abrams concluded that the trial judge had misconstrued exception (b) in light of his findings with regard to the contents of the social worker’s report. *Id.* at 389, 496 N.E.2d at 1378 (Abrams, J., dissenting). Justice Abrams noted that the trial judge found that the report might support the defendants’ claim of contributory negligence, and cast light on the cause of the decedent’s illness. *Id.* (Abrams, J., dissenting). Thus, Justice Abrams concluded that the report contained communications which related directly to the commission of harmful acts and consequently was exempt from the social worker privilege under exception (b). *Id.* at 391, 496 N.E.2d at 1379 (Abrams, J., dissenting).

The *Allen* Court interpreted recent amendments to chapter 112, section 135 to be a legislative endorsement of a broad application of the social worker privilege. In *Allen*, therefore, the Court reaffirmed its holding in *Collett* that the social worker privilege broadly applies to communications a social worker acquires during consultations with a specific client or with a third party.<sup>81</sup> The *Allen* Court did not clarify how a person must “consult” with a social worker for the purposes of establishing a privilege.<sup>82</sup> The Court suggested, however, that it would adhere to its position in *Collett*,<sup>83</sup> where it held that those people who would be likely to consult with a social worker during an investigation could claim the privilege.<sup>84</sup> As it did in *Collett*, the Court in *Allen* did not require that a person actually seek the social worker’s advice or assistance in order to establish the privilege.<sup>85</sup> Thus, a reasonable interpretation of *Allen*, as well as *Collett*, is that communications from all people who would be likely to consult with a social worker in his or her professional capacity are privileged under chapter 112, section 135.<sup>86</sup>

Under *Allen*, the social worker privilege has a broader scope in Massachusetts than in other jurisdictions which recognize the privilege.<sup>87</sup> Nonetheless, the *Allen* Court’s expansive interpretation of the social worker privilege is reasonable. First, the language of chapter 112, section 135, which extends the privilege to information from “a person consulting [the social worker] in his professional capacity or whom [the social worker] has served in his professional capacity,” is expansive.<sup>88</sup> Other state legislatures drafting a social worker privilege have been more restrictive, and have limited the privilege to communications arising from

<sup>81</sup> *Id.* at 377–78, 496 N.E.2d at 1371–72 (citing *Collett*, 387 Mass. at 428–30, 439 N.E.2d at 1226–27).

<sup>82</sup> *See id.* at 378, 496 N.E.2d at 1372; *cf. id.* at 386, 496 N.E.2d at 1376 (Liacos, J., dissenting).

<sup>83</sup> *Id.* at 378, 496 N.E.2d at 1372.

<sup>84</sup> *Collett*, 387 Mass. at 429, 439 N.E.2d at 1227.

<sup>85</sup> *See Allen*, 398 Mass. at 378, 496 N.E.2d at 1372; *cf. id.* at 386–87, 496 N.E.2d at 1376–77 (Liacos, J., dissenting); *see also Collett*, 387 Mass. at 429–30, 439 N.E.2d at 1227; *cf. id.* at 442, 439 N.E.2d at 1233 (Lynch, J., dissenting).

<sup>86</sup> *Allen*, 398 Mass. at 386, 496 N.E.2d at 1376 (Liacos, J., dissenting); *Collett*, 387 Mass. at 441, 439 N.E.2d at 1233 (Lynch, J., dissenting).

<sup>87</sup> For a discussion of cases construing the social worker statutes of other jurisdictions, see *supra* note 10.

<sup>88</sup> G.L. c. 112, § 135. Other statutory privileges in Massachusetts are more restrictive. For example, the priest-penitent privilege only precludes disclosure of a “confession made to [the priest] in his professional character, in the course of discipline enjoined by the rules or practice of the religious body to which he belongs.” G.L. c. 233, § 20A. Similarly, the psychotherapist-patient privilege protects from disclosure only communications between the psychotherapist and patient “relative to the diagnosis or treatment of the patient’s mental or emotional condition.” G.L. c. 233, § 20B.



a social worker-client relationship,<sup>89</sup> or within a therapeutic setting.<sup>90</sup> A broad interpretation of the privilege, therefore, is consistent with the language of chapter 112, section 135.

Second, by extending the privilege to people other than the social worker's specific client, the *Allen* Court maximizes a social worker's ability to obtain candid information and perform his or her duties. A social worker, unlike an attorney or doctor,<sup>91</sup> rarely has a single client.<sup>92</sup> Particularly in cases of child abuse and neglect, a social worker's duties require communicating with a wide network of people.<sup>93</sup> Because the assurance of confidentiality will encourage people to provide social workers with information, a broad privilege allows social workers to utilize this informational network and provide quality services.<sup>94</sup> Thus, the need for social workers to obtain sensitive information from a number of sources, and the expansive language of chapter 112, section 135 support a broad application of the social worker privilege.

Restricting the privilege, as Justice Liacos suggested, to communications during only those "consultations" in which a person actually seeks the social worker's advice or assistance is problematic. Regardless of the meaning of "consult," the language of the current section 135 specifies that the privilege is not limited only to people who consult a social worker.<sup>95</sup> Communications from any person whom the social worker serves in his or her professional capacity are also privileged.<sup>96</sup> Thus, the language of section 135, as amended,<sup>97</sup> undercuts Justice Liacos' restrictive interpretation of the social worker privilege.

The *Allen* Court left open the issue of which activities constitute "harm-

<sup>89</sup> *E.g.*, MICH. STAT. ANN. § 18.425(1610) (Callaghan 1986); N.Y. CIV. PRAC. LAW § 4508 (McKinney Supp. 1987).

<sup>90</sup> *E.g.*, CAL. EVID. CODE §§ 1010-1012 (West Supp. 1987); KY. REV. STAT. ANN. § 335.170 (Michie 1986).

<sup>91</sup> Massachusetts courts have recognized common law privileges for attorney-client and physician-patient relationships. *See e.g.*, *Alberts v. Devine*, 395 Mass. 59, 479 N.E.2d 113 (1985) (physician-patient); *Drew v. Drew*, 250 Mass. 41, 144 N.E. 763 (1924) (attorney-client). The Court has construed these privileges narrowly. In *Alberts*, the Court held that the privilege precludes disclosure of information a physician acquires during the course of a professional relationship with his or her client. *See Alberts*, 395 Mass. at 69, 479 N.E.2d at 120. In *Drew*, the Court held that if some party other than the attorney's client was present, the privilege will not apply. *Drew*, 250 Mass. at 44-45, 144 N.E.2d at 764.

<sup>92</sup> Note, *The Social Worker-Client Privilege — Commonwealth v. Collett*, 6 W. NEW ENG. L. REV. 1103, 1122 (1984).

<sup>93</sup> *Id.*

<sup>94</sup> *See id.*

<sup>95</sup> For the text of G.L. c. 112, § 135, see *supra* note 1.

<sup>96</sup> *Id.*

<sup>97</sup> For the text of the relevant amendment, see *supra* note 38.

ful acts” for the purposes of exception (b).<sup>98</sup> The Court has recognized that the exceptions to the privilege indicate that the legislature considered other societal interests to be more important than the social worker privilege in certain circumstances.<sup>99</sup> Justice Abrams, in her dissent in *Allen*, forcefully argued that there is a strong societal interest in the welfare of children.<sup>100</sup> This interest, she maintained, would be furthered by interpreting “harmful acts” in exception (b) to include not only child abuse but also neglect.<sup>101</sup> If the Court subsequently adopts Justice Abrams’ interpretation of the “harmful acts” exception, the social worker privilege will be unavailable in cases of child abuse and neglect, and the resulting disclosure will further the legislative goal of protecting children.

In sum, the *Allen* Court reaffirmed its previous holding in *Collett* that the social worker privilege applies to communications a social worker obtains from consulting with either a specific client or a third party. Although the Court did not clarify how a person “consults” with a social worker for the purpose of establishing a privilege, the Court indicated that it will not closely investigate a specific social worker-informant relationship to determine whether the two consulted; instead, the Court suggested that those persons who are likely to consult with a social worker during an investigation may claim the privilege. Thus, under *Allen*, the social worker privilege potentially may protect all communications a social worker acquires during an investigation.

**§ 5.4. Impeaching a Defense Witness’ Credibility for Failure to Provide Exculpatory Information to Law Enforcement Officials.\*** Massachusetts prosecutors, may, under certain circumstances, impeach a defense witness’ testimony by establishing that, in certain situations, the witness failed to provide exculpatory information to law enforcement officials prior to testifying at trial.<sup>1</sup> A witness’ prior silence in situations where one would naturally step forward to exonerate an accused implies that the witness did not possess the information earlier, and that the testimony is a recent fabrication.<sup>2</sup> Accordingly, evidence of prior silence is relevant

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<sup>98</sup> *Allen*, 398 Mass. at 378 n.5, 496 N.E.2d at 1372 n.5, *cf. id.* at 391, 496 N.E.2d at 1379 (Abrams, J., dissenting).

<sup>99</sup> *Collett*, 387 Mass. at 428, 439 N.E.2d at 1226.

<sup>100</sup> *See Allen*, 398 Mass. at 390–91, 496 N.E.2d at 1379 (Abrams, J., dissenting).

<sup>101</sup> *Id.* (Abrams, J., dissenting).

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§ 5.4. <sup>1</sup> *Commonwealth v. Berth*, 385 Mass. 784, 790, 434 N.E.2d 192, 196 (1982); *Commonwealth v. Brown*, 11 Mass. App. Ct. 288, 295–97, 416 N.E.2d 218, 224–25 (1981); P. LIACOS, HANDBOOK OF MASSACHUSETTS EVIDENCE 52 (Supp. 1985) [hereinafter HANDBOOK].

<sup>2</sup> HANDBOOK, *supra* note 1, at 52. Massachusetts has not codified rules of evidence, although model rules were proposed at one time. All Massachusetts rules of evidence,

when the witness had no legitimate reason for remaining silent.<sup>3</sup> To preclude prosecutors from inappropriately offering evidence that the witness did not provide information to the police, some jurisdictions require the prosecution to first lay a foundation showing that circumstances were such that the witness would have naturally come forward.<sup>4</sup> In 1981, the Massachusetts Appeals Court explicitly detailed the elements of such a foundation in *Commonwealth v. Brown*.<sup>5</sup> The *Brown* court held that, before cross-examining a witness, a Massachusetts prosecutor must show that the witness understood the pending charges in sufficient detail before trial to realize that the information was exculpatory, had reason to provide the information, was familiar with the means of reporting the information, and must not have been asked by the defendant or defense attorney to refrain from providing the information.<sup>6</sup> The following year, the Supreme Judicial Court adopted the *Brown* foundation in *Commonwealth v. Berth*.<sup>7</sup>

During the *Survey* year, in *Commonwealth v. Rivers*,<sup>8</sup> the Appeals Court reversed a defendant's conviction because the prosecutor cross-examined defense witnesses regarding their failure to provide information to police even though the foundation did not establish that the witnesses understood the charges in sufficient detail to know they possessed exculpatory information, as required by *Brown*.<sup>9</sup> The court went on, however, to reason that the cross-examination was also improper because the witnesses reasonably may have believed themselves vulnerable to prosecution, and thus, would not naturally come forward.<sup>10</sup> In so holding, the *Rivers* court correctly followed both the policy and explicit requirements of *Brown*. The court's reasoning, however, created confusion about the proper approach for preventing cross-examination regarding a witness' prior silence where the witness may have feared prosecution. It is unclear whether prosecutors must now establish, as a fifth foundational element, that the witness had no fear of prosecution, or whether trial

therefore, are developed by common law. See HANDBOOK, *supra* note 1, for a compilation of the Massachusetts law of evidence.

<sup>3</sup> HANDBOOK, *supra* note 1, at 53.

<sup>4</sup> See, e.g., *People v. McMath*, 104 Ill. App. 2d 302, 244 N.E.2d 330 (1968), *aff'd* 45 Ill. 2d 33, 256 N.E.2d 835 (1970), *cert. denied*, 400 U.S. 846 (1970); *People v. Dawson*, 50 N.Y.2d 311, 406 N.E.2d 771, 428 N.Y.S.2d 914 (1980).

<sup>5</sup> 11 Mass. App. Ct. at 295-97, 416 N.E.2d at 224.

<sup>6</sup> *Brown*, 11 Mass. App. Ct. at 295-97, 416 N.E.2d at 224. The *Brown* court adopted the specific foundation recommended in *Dawson*, 50 N.Y.2d at 321-22 n.4, 406 N.E.2d at 777 n.4, 428 N.Y.S.2d at 921 n.4. See *Brown*, 11 Mass. App. Ct. at 296, 416 N.E.2d at 224.

<sup>7</sup> 385 Mass. 784, 790, 434 N.E.2d 192, 196 (1982).

<sup>8</sup> 21 Mass. App. Ct. 645, 489 N.E.2d 206 (1986).

<sup>9</sup> *Id.* at 648, 489 N.E.2d at 208.

<sup>10</sup> *Id.*

judges must simply consider, when exercising discretion to allow the cross-examination, the possibility that the witness' silence was fear-related.

In *Rivers*, the Appeals Court reviewed the jury trial conviction of Richard Rivers for possessing and intending to distribute a controlled substance.<sup>11</sup> At trial, the prosecution and the defense presented two different versions of the events leading to Rivers' arrest.<sup>12</sup> The prosecution's case consisted of the testimony of Michael Bean, who claimed that Rivers handed him a bag of pills, later identified by laboratory examination as lysergic acid diethylamide (LSD).<sup>13</sup> Bean stated that when he approached Rivers' parked car, Rivers and his girlfriend, Sharon Holmes, were seated inside the car and two men, Michael Donnelly and Andrew Morrow, were standing outside.<sup>14</sup> As he passed by, Bean testified, Rivers called out to him, asking if Bean wanted to purchase some LSD.<sup>15</sup> Bean stated that he responded affirmatively, and got into Rivers' car.<sup>16</sup> Bean further claimed that Rivers handed Bean the bag of pills, and at that moment, a policeman shined a flashlight into the car.<sup>17</sup> Bean stated that he then threw the bag out the driver's side window and fled on foot.<sup>18</sup> A police officer testified that, upon being called in for questioning the following day, Bean related the events testified to at trial.<sup>19</sup>

The defense offered a different version of the story, which attempted to show that Bean offered to sell the LSD.<sup>20</sup> Both Donnelly, who was standing outside the car, and Rivers' girlfriend Holmes, who was seated inside the car, testified that Bean was selling the drugs.<sup>21</sup> Holmes also testified that, once inside the car, it was Bean, not the defendant Rivers, who produced the pills.<sup>22</sup>

Before allowing the prosecutor to ask Donnelly and Holmes whether

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<sup>11</sup> *Id.* at 645, 489 N.E.2d at 207.

<sup>12</sup> *Id.* at 646, 489 N.E.2d at 207.

<sup>13</sup> *Id.* at 646 & n.1, 489 N.E.2d at 207 & n.1.

<sup>14</sup> *Id.* at 646, 489 N.E.2d at 207.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 646–47, 489 N.E.2d at 208. The parties did not dispute the events that took place following Bean's departure. See generally *id.* at 646–47, 489 N.E.2d at 207–08. The police officer found the pills on the ground, and asked the three men if the pills belonged to them. *Id.* at 646, 489 N.E.2d at 207. When they responded negatively, the officer arrested Rivers. *Id.* The officer also took Donnelly to the police station, where he spent several hours in protective custody. *Id.* at 647, 489 N.E.2d at 208. While in custody, Donnelly supplied Bean's name to the police. *Id.*

they told police that Bean, rather than Rivers, produced the pills, the trial judge required the prosecutor to lay the *Brown*-mandated foundation.<sup>23</sup> Preliminary questioning revealed that Holmes and Donnelly knew Rivers was arrested for possession of LSD, but neither witness understood that Rivers was also being charged with intent to distribute the drug.<sup>24</sup> After the prosecutor completed this line of questioning, the trial judge allowed him to ask both Donnelly and Holmes whether they had gone to the police prior to trial.<sup>25</sup> Both responded negatively.<sup>26</sup>

The superior court jury convicted Rivers, who then appealed.<sup>27</sup> The only issue before the Appeals Court was whether the trial judge erred in allowing cross-examination about Donnelly's and Holmes' failure to go to the police.<sup>28</sup> Reviewing the rationale in *Brown*, the court first noted that, although citizens have no duty to offer exculpatory information to police, there are many situations in which a person would naturally offer police information on behalf of a relative or friend.<sup>29</sup> Under such circumstances, the court stated, a witness' silence may be probative as a prior inconsistent statement.<sup>30</sup> Nevertheless, because there may be other reasons for a witness' silence, the court cautioned, Massachusetts law requires a prosecutor to lay a foundation before impeaching a witness' testimony in this manner.<sup>31</sup> Once the prosecutor lays the foundation, the court stated, the trial judge possesses wide discretion in determining whether the information reaches the jury.<sup>32</sup>

After summarizing the Massachusetts position, the court addressed the adequacy of the prosecutor's foundation in *Rivers*.<sup>33</sup> The court ruled that

<sup>23</sup> *Id.* at 647, 489 N.E.2d at 208.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* The prosecutor further questioned the witnesses about why they did not provide the exculpatory information to the police. *Id.* The opinion does not detail the witnesses' reasons.

<sup>27</sup> *Id.* at 645, 489 N.E.2d at 206.

<sup>28</sup> *Id.* at 645, 489 N.E.2d at 207.

<sup>29</sup> *Id.* at 647, 489 N.E.2d at 208 (quoting *Brown*, 11 Mass. App. Ct. at 295, 416 N.E.2d at 224).

<sup>30</sup> *Id.* (quoting *Brown*, 11 Mass. App. Ct. at 296, 416 N.E.2d at 224).

<sup>31</sup> *Id.* The required foundation includes:

[E]stablishing that the witness knew of the pending charges in sufficient detail to realize that he possessed exculpatory information, that the witness had reason to make the information available, that he was familiar with the means of reporting it to the proper authorities, and that the defendant or his lawyer, or both, did not ask the witness to refrain from doing so.

*Id.* at 647-48, 489 N.E.2d at 208 (quoting *Brown*, 11 Mass. App. Ct. at 296-97, 416 N.E.2d at 224).

<sup>32</sup> *Id.* at 648, 489 N.E.2d at 208 (quoting *Brown*, 11 Mass. App. Ct. at 297, 416 N.E.2d at 224-25).

<sup>33</sup> *Id.*

the prosecutor failed to establish in the foundation that either Donnelly or Holmes understood that Rivers was charged with intent to distribute LSD as well as with possession of LSD.<sup>34</sup> The court explained that the witnesses could not have understood the importance of information about who produced the pills without knowing of the charge for intent to distribute.<sup>35</sup>

The court continued by offering a second reason why the cross-examination in *Rivers* was improper.<sup>36</sup> It was likely, the court suggested, that the witnesses felt that they, too, were vulnerable to prosecution for events surrounding the police officer's discovery of the LSD.<sup>37</sup> The court analogized the witnesses' silence to the pre-arrest silence of a defendant, which has extremely minimal probative value because people generally understand that they have the right to remain silent.<sup>38</sup> The court reasoned that it would be reasonable for Donnelly and Holmes to assume that their participation in the unlawful drug transaction was culpable and that the content of their trial testimony, if revealed earlier, might be used against them.<sup>39</sup> Under such circumstances, the court stated, the witnesses would not be expected to come forward with information.<sup>40</sup> The court concluded that, because the witnesses' credibility was critical, the trial judge erred in allowing the cross-examination.<sup>41</sup>

In holding that the foundation was insufficient because the witnesses may not have known they possessed exculpatory information, the *Rivers* court correctly applied the rule established in *Brown*. *Brown* explicitly requires prosecutors to demonstrate that a witness understood the charges in sufficient detail to realize he or she possessed exculpatory information.<sup>42</sup> Without knowing that the charge related to distribution of the LSD, Donnelly and Holmes could not understand the relevance of information concerning who produced the drug. The *Rivers* court needed only to apply the *Brown* mandate to find the cross-examination improper.

The *Rivers* court went beyond the *Brown* court's reasoning, however, in also finding the cross-examination inappropriate because the witnesses may have believed themselves vulnerable to prosecution and thus would not naturally have come forward.<sup>43</sup> This reasoning is consistent with the

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 648, 489 N.E.2d at 208–09 (citing *Commonwealth v. Nickerson*, 386 Mass. 54, 60–61, 434 N.E.2d 992, 996 (1982)).

<sup>39</sup> *Id.* at 649, 489 N.E.2d at 209.

<sup>40</sup> *Id.* at 648, 489 N.E.2d at 208.

<sup>41</sup> *Id.* at 649, 489 N.E.2d at 209.

<sup>42</sup> *See* 11 Mass. App. Ct. at 296, 416 N.E.2d at 224.

<sup>43</sup> *Rivers*, 21 Mass. App. Ct. at 648, 489 N.E.2d at 208.

policy of *Brown*, permitting the cross-examination only where the witness would naturally have provided exculpatory information but did not.<sup>44</sup> *Brown*, however, does not explicitly require a showing that the witness did not fear prosecution.<sup>45</sup> The *Rivers* court attributed its reasoning to *Brown* by linking the witnesses' fear of prosecution to the first foundational element, understanding the charges.<sup>46</sup> That link, however, is unclear. It is possible for a witness to possess complete understanding of the charges, yet remain fearful of self-incrimination. This is particularly true where the witness' fears are well-founded because he or she committed an illegal act.

The facts in *Rivers* also illustrate a situation where the witnesses' knowledge of the charges was irrelevant to a concern over their own culpability. From the witnesses' perspective, it made little difference whether the charge was for trying to sell or for merely possessing LSD. Either way, the witnesses were on the scene during a drug transaction and were nearby when the police officer found LSD pills on the ground.<sup>47</sup> It is unlikely that an enhanced understanding of the charges would have alleviated the witnesses' concern. Rather, they may have been even more fearful, believing themselves vulnerable to prosecution for more serious charges related to drug trafficking. Thus, although prohibiting the cross-examination because witnesses who fear prosecution do not naturally volunteer information to police is consistent with *Brown*'s policy, such reasoning goes beyond the *Brown* court's required foundational elements.

As a result of the court's reasoning in *Rivers*, the procedural requirements for impeaching a witness' credibility with his or her prior silence remain unclear. Although the *Rivers* court explained that trial judges must consider a witness' vulnerability when determining whether to allow a cross-examination about prior silence,<sup>48</sup> the court did not clarify how this should be done. There are two possibilities. The first is that prosecutors must now establish, as a fifth foundational element, that the witness had no reason to fear prosecution. The second is that trial judges must simply consider, when exercising discretion to allow the cross-examination, the possibility that the witness' silence was fear-related. Because of this ambiguity, prosecutors should, if possible, show in the foundation that it was unlikely the witness remained silent for fear of his or her own criminal prosecution.

In *Rivers*, the Appeals Court reversed a defendant's conviction because the prosecution impermissibly impeached the defense witnesses' credi-

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<sup>44</sup> See *Brown*, 11 Mass. App. Ct. at 295, 416 N.E.2d at 224.

<sup>45</sup> See *id.* at 296-97, 416 N.E.2d at 224.

<sup>46</sup> *Rivers*, 21 Mass. App. Ct. at 648, 489 N.E.2d at 208.

<sup>47</sup> See *id.* at 646, 489 N.E.2d at 207.

<sup>48</sup> *Id.* at 648, 489 N.E.2d at 208.

bility by bringing out their failure to provide exculpatory information to the police. The court relied on *Brown*, holding that the prosecution failed to establish that the witnesses knew the charges in sufficient detail to realize that they possessed exculpatory information and that they may not have come forward because they feared prosecution for their own involvement. The *Rivers* court followed both the policy and explicit requirements of *Brown*, but failed to explain the procedural requirements for future cases. It remains unclear whether prosecutors must now establish during the foundation for impeachment that the witness had no reason to fear prosecution. Because *Rivers* does not adequately illustrate the procedural requirements for impeachment, a cautious practitioner's approach would include proving, if possible, that the witness' silence was unrelated to a concern regarding his or her own criminal involvement in the case.

**§ 5.5. Expanding the Scope of the Spontaneous Exclamation Exception to the Rule Against Hearsay.\*** For over one hundred years, Massachusetts courts refused to admit hearsay statements under the spontaneous exclamation exception to the rule against hearsay unless the statements were contemporaneous with an event causing excitement or shock.<sup>1</sup> In 1960, however, the Supreme Judicial Court, in *Rocco v. Boston-Leader, Inc.*, abandoned the strict contemporaneous approach in favor of a more subjective approach which allows statements made subsequent to an event causing excitement to be admitted.<sup>2</sup> The *Rocco* court, in defining the parameters of admissibility under the spontaneous exclamation exception incorporated the language of Professor Wigmore's popular treatise, noting:

The utterance must have been before there has been time to contrive and misrepresent . . . . It is to be observed that the statements need not be strictly contemporaneous with the exciting cause; they may be subsequent to it provided there has not been time for the exciting influence to lose its sway and to be dissipated . . . . [T]here can be no definite and fixed limit of time. Each case must depend upon its own circumstances.<sup>3</sup>

While many Massachusetts courts have followed the *Rocco* doctrine,<sup>4</sup> during the *Survey* year, the Appeals Court, in *Commonwealth v. Fuller*, broadened the scope of the spontaneous exclamation exception by upholding a trial judge's decision to admit noncontemporaneous statements

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§ 3.6. <sup>1</sup> See LIACOS, HANDBOOK OF MASSACHUSETTS EVIDENCE, 350 (1981).

<sup>2</sup> 340 Mass. 195, 196-97, 163 N.E.2d 157, 158 (1960).

<sup>3</sup> *Id.* at 197, 163 N.E.2d at 158 (citing 6 WIGMORE, EVIDENCE § 1750 (1976)).

<sup>4</sup> LIACOS, *supra* note 1, at 351 (citing *Commonwealth v. Sellon*, 380 Mass. 220, 402 N.E.2d 1329 (1980); *Commonwealth v. McLaughlin*, 364 Mass. 211, 303 N.E.2d 338 (1973); *Commonwealth v. Hampton*, 351 Mass. 447, 221 N.E.2d 766 (1966)).



made by one not clearly in an excited or troubled state.<sup>5</sup> In *Fuller*, the trial judge allowed a three-year-old girl's mother to relate out-of-court statements made by the child to the mother concerning sexually abusive acts committed by the defendant.<sup>6</sup> Although the child did not appear in court, the trial judge ruled that the statements of the child, as testified to by the mother, were admissible under the spontaneous exclamation exception to the rule against hearsay.<sup>7</sup>

The mother testified that on the afternoon of October 12, 1984, she left the child at home in the care of the defendant, who was then seventeen years old and had previously babysat for the child.<sup>8</sup> When she returned home two hours later, she heard "shuffling" noises in the upstairs bathroom.<sup>9</sup> She called out, and in response the child emerged from the bathroom.<sup>10</sup> The mother observed that the child's pants and underwear were down below her knees.<sup>11</sup> At the same time, the mother observed the defendant in the bathroom zipping up his trousers.<sup>12</sup> In response to the mother's inquiry, the defendant explained that he had been using the bathroom when the child entered claiming that she also needed to use the bathroom.<sup>13</sup>

While the defendant remained upstairs, the mother took the child downstairs to examine the child for signs of touching.<sup>14</sup> The mother became extremely upset, and decided to drive one block to the office of a local doctor to see if he would be willing to examine the child.<sup>15</sup> Upon hearing the mother relate the events, the doctor agreed to see the child immediately.<sup>16</sup> The mother quickly returned home to pick up the child and bring her to the doctor's office.<sup>17</sup>

During the short drive, the mother asked the child if the defendant had touched her.<sup>18</sup> When the child answered affirmatively, the mother asked the child where the defendant had touched her.<sup>19</sup> The child told the mother that the defendant had touched her vagina.<sup>20</sup> Upon further inquiry,

<sup>5</sup> 22 Mass. App. Ct. 152, 156, 491 N.E.2d 1083, 1086 (1986).

<sup>6</sup> *Id.* at 153, 491 N.E.2d at 1084.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 153-54, 491 N.E.2d at 1084.

<sup>15</sup> *Id.* at 154, 491 N.E.2d at 1084.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

the child said that she had placed her mouth on the defendant's penis.<sup>21</sup> At trial, in addition to reciting the child's statements, the mother also testified that during the conversation in the car the child had not acted upset or troubled, but instead seemed more curious about what was happening.<sup>22</sup> After being arrested and questioned, the defendant signed a statement admitting to the incidents related by the child.<sup>23</sup> However, the defendant asserted that the acts did not occur in the manner testified to by the child's mother.<sup>24</sup>

The significant issue addressed by the Appeals Court was whether the mother's testimony concerning the child's statements was properly ruled admissible under the spontaneous exclamation exception to the rule against hearsay.<sup>25</sup> Before concluding that the trial judge's ruling allowing the statements was within his range of discretion,<sup>26</sup> the Appeals Court reviewed the basic principles governing admissibility of statements under exceptions to the rule against hearsay. The court first noted that hearsay may be admitted only when the circumstances negate the probability that the statement in question was fabricated or contrived.<sup>27</sup> Next, the court explained that the spontaneous exclamation exception rests upon the general premise that a spectator who observes or is involved in an event that produces extreme excitement or shock, will often remain in a state of nervous excitement that eliminates the ability of the spectator to contrive or fabricate.<sup>28</sup> Thus, the court noted, under the spontaneous exclamation exception to the rule against hearsay, statements made by a spectator within a short period of time following an event causing great excitement may be considered reliable, and hence, admissible, if there is a showing that the event produced a state of nervous excitement sufficient to render the spectator uttering the statements incapable of fabricating or misrepresenting the incidents pertaining to the event.<sup>29</sup>

The Appeals Court cited three cases as support for the admissibility of noncontemporaneous statements under the spontaneous exclamation exception.<sup>30</sup> The first, *Commonwealth v. McLaughlin*, decided by the Supreme Judicial Court in 1973, held that statements made by a witness

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 154, 491 N.E.2d at 1084–85.

<sup>24</sup> *See id.* at 155, 491 N.E.2d at 1085.

<sup>25</sup> *Id.* at 153, 491 N.E.2d at 1084.

<sup>26</sup> *Id.* at 156, 491 N.E.2d at 1086.

<sup>27</sup> *Id.* at 155, 491 N.E.2d at 1085.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 155, 491 N.E.2d at 1085 (citing *McLaughlin*, 364 Mass. at 223, 303 N.E.2d at 347; *Sellon*, 380 Mass. at 229–30, 402 N.E.2d at 1337; *Commonwealth v. Puleio*, 394 Mass. 101, 104–05, 474 N.E.2d 1078, 1081 (1985)).

to a fatal shooting uttered within minutes of the event were sufficiently spontaneous to be admissible under the *Rocco's* sufficiently reliable, noncontemporaneous doctrine.<sup>31</sup> Similarly in 1980, the Supreme Judicial Court, in *Commonwealth v. Sellon*, upheld a trial judge's decision to allow a third party to relate the statements of a manslaughter victim made several minutes after the event which ultimately resulted in the victim's death.<sup>32</sup> Again, in 1985, in *Commonwealth v. Puleio*, the Supreme Judicial Court affirmed a trial judge's decision to admit statements uttered by a spectator who observed a fatal shooting although the statements were made in response to a direct inquiry by a third party and they occurred a short time after the shooting.<sup>33</sup>

The *Fuller* court then cited *Rocco* as requiring that a trial judge be given broad discretion in determining the admissibility of statements under the spontaneous exclamation exception.<sup>34</sup> The court stated that a trial judge's decision should be reversed only when it is clearly erroneous.<sup>35</sup> Analyzing the trial judge's decision in *Fuller* in light of this principle, the Appeals Court noted that the judge had offered several reasons for determining that the child's out-of-court statements were admissible under the spontaneous exclamation exception.<sup>36</sup> Included among these were the child's age,<sup>37</sup> the fact that the child did not answer the questions with a simple yes or no or adopt facts suggested by the mother,<sup>38</sup> and the close proximity in time between the event and the statements.<sup>39</sup> Although the mother's testimony indicated that the child was not clearly excited when she made the statements,<sup>40</sup> the Appeals Court reasoned that excitement alone does not determine admissibility.<sup>41</sup> Instead, the court noted, according to *Rocco*, admissibility of statements must depend on whether the statements were uttered spontaneously within a short time after the event such that the ability to fabricate or misrepresent was eliminated.<sup>42</sup> Further, the *Fuller* court reasoned, when the statement is uttered by a young child not capable of fully appreciating the gravity of the event, it is more appropriate to determine admissibility on the basis of spontaneity rather than the extent of the excitement.<sup>43</sup>

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<sup>31</sup> 364 Mass. at 223-24, 303 N.E.2d at 347.

<sup>32</sup> 380 Mass. at 229, 402 N.E.2d at 1337.

<sup>33</sup> 394 Mass. at 104-05, 474 N.E.2d at 1081.

<sup>34</sup> 22 Mass. App. Ct. at 155, 491 N.E.2d at 1084.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 154, 491 N.E.2d at 1084.

<sup>41</sup> *Id.* at 156, 491 N.E.2d at 1085.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 156, 491 N.E.2d at 1086.

In concluding that the child's statements fell within the limits of the spontaneous exclamation exception although uttered in response to non-contemporaneous direct inquiry,<sup>44</sup> the court relied on two additional cases.<sup>45</sup> First, the court cited *Commonwealth v. Rivera*, in which the Supreme Judicial Court affirmed the admissibility of statements made by a fifteen-year-old rape victim to her mother concerning the victim's ability to identify the defendant.<sup>46</sup> Noting that the statements were made by the victim within thirty minutes after she had been subjected to an extremely traumatic event,<sup>47</sup> the Court in *Rivera* concluded that the trial judge was justified in ruling that the statements were admissible because they were uttered before the victim had time to contrive or fabricate.<sup>48</sup>

Second, the *Fuller* court cited *Commonwealth v. Burden* in which an Appeals Court upheld a trial judge's decision to allow statements made by a dying rape victim to a third party in response to the third party's inquiry as to the identity of the victim's attackers.<sup>49</sup> While the *Burden* court noted that questioning was a factor that could be considered by the trial judge,<sup>50</sup> the mere fact that statements had been uttered in response to inquiry did not render the statements unreliable.<sup>51</sup> Hence, the *Fuller* court, relying on *Burden* and *Rivera*, concluded that it was within the trial judge's range of discretion to rule that the mother's inquiry did not diminish the spontaneity of the child's statements.<sup>52</sup> In light of the defendant's corroboration and the totality of the circumstances, the *Fuller* court concluded that the trial judge had sufficient basis to determine that the child's statements were "within the ambit of the spontaneous exclamation exception to the rule against hearsay."<sup>53</sup>

The Appeals Court's decision in *Fuller* is noteworthy in several respects. First, the decision follows the *Rocco* line of cases which limits appellate review of trial judges' decisions concerning admissibility. The *Fuller* court stated that a trial judge must be given "broad discretion" in determining the admissibility of statements under the spontaneous exclamation exception to the rule against hearsay.<sup>54</sup> Further, the court noted that the decision of the trial judge should only be revised in "clear

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.* (citing *Commonwealth v. Rivera*, 397 Mass. 244, 248, 490 N.E.2d 1160, 1163 (1986); *Commonwealth v. Burden*, 15 Mass. App. Ct. 666, 676, 448 N.E.2d 387, 395 (1983)).

<sup>46</sup> 397 Mass. at 248, 490 N.E.2d at 1163.

<sup>47</sup> *Id.* at 247, 490 N.E.2d at 1162.

<sup>48</sup> *Id.* at 248, 490 N.E.2d at 1163.

<sup>49</sup> 15 Mass. App. Ct. at 676, 448 N.E.2d at 395.

<sup>50</sup> *Id.* at 676, 448 N.E.2d at 395.

<sup>51</sup> *Id.* at 676-77, 448 N.E.2d at 395.

<sup>52</sup> 22 Mass. App. Ct. at 156, 491 N.E.2d at 1086.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 155, 491 N.E.2d at 1085.

cases.”<sup>55</sup> For future courts focusing on the admissibility of hearsay evidence, the *Fuller* court’s straightforward language provides a clear message: decisions of admissibility are subject to revision only when the decision of the trial judge is clearly erroneous.

Second, *Fuller* adds support to the current trend away from strict contemporaneity. *Fuller* adopts the approach of *Rocco* which allows statements made subsequent to an event causing excitement to be admitted under the spontaneous exclamation exception. In *Fuller*, as in *Rocco*, *Sellon* and *Puleio*, the statements were uttered some time after the event. Although not contemporaneous, the court upheld the trial judge’s conclusion that the statements were close enough in time to the event to be admissible under the exception.<sup>56</sup> For future cases, the *Fuller* court’s holding makes clear that trial judges are free to follow a more flexible approach and admit statements made subsequent to an event under the spontaneous exclamation exception to the rule against hearsay.

Lastly, an aspect of *Fuller* that does not follow precedent concerns the extent to which the individual making the statements must be in an excited state in order for the statements to be admissible under the spontaneous exclamation exception. Whereas prior cases stressed that the individual uttering the statements was in a state of hysteria or nervousness,<sup>57</sup> the *Fuller* court noted that the child was too young to appreciate the gravity of the situation and become excited within the usual meaning of the word.<sup>58</sup> To overcome the requirement that the individual be in an excited state, the court focused on the importance of spontaneity. Thus, by de-emphasizing excitement and stressing spontaneity, the court achieved the desired outcome. According to *Fuller*, the appropriate test is not whether the individual was excited, rather it depends on whether the statements, when considered under the totality of the circumstances were sufficiently spontaneous.

*Fuller*, although properly decided when considered in light of other evidence, is likely to be limited to its facts on the issue of the importance of the individual’s excited state. The requirement that the individual making the statements be in a state of hysteria or excitement so as to render him or her incapable of contriving or misrepresenting is the cornerstone of the spontaneous exclamation exception.<sup>59</sup> In *Fuller*, the court substituted the child’s age for the requirement of an excited state. Although the statements admitted in *Fuller* were noncontemporaneous and

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 155–56, 491 N.E.2d at 1085–86.

<sup>57</sup> *See, e.g., Rivera*, 397 Mass. at 248, 490 N.E.2d at 1163; *McLaughlin*, 364 Mass. at 215, 303 N.E.2d at 342.

<sup>58</sup> 22 Mass. App. Ct. at 156, 491 N.E.2d at 1086.

<sup>59</sup> *See generally*, WIGMORE, EVIDENCE *supra* note 3, at § 1750.

uttered in response to direct inquiry by one not clearly in an excited state, the court concluded that the child's young age rendered her incapable of contriving or misrepresenting.<sup>60</sup> In addition, the court noted that the defendant's admission corroborated the child's statements, thereby rendering them reliable.<sup>61</sup> Thus, while the court's holding runs contrary to the traditional requirement that statements admitted under the spontaneous exclamation exception be uttered by one in a state of hysteria or excitement, under the specific circumstances, it is understandable. Absent such circumstances, however, it is unlikely that the decision in *Fuller* will be followed by future courts.

In conclusion, it is important to note that *Fuller* supports the current trend towards broadening the scope of the spontaneous exclamation exception. In Massachusetts, cases such as *Fuller* require that trial judges be given great discretion in determining admissibility of hearsay statements. While *Fuller* indicates that courts are likely to continue to admit noncontemporaneous statements under the spontaneous exclamation exception, the *Fuller* court's de-emphasis of the requirement that the individual making the statements be in an excited state is not likely to be followed. Thus, even after *Fuller*, for noncontemporaneous statements to be admissible under the spontaneous exclamation exception to the rule against hearsay, Massachusetts courts require that it be shown that the statements to be admitted were made by an individual in a state of nervous excitement such that the individual's ability to contrive or misrepresent the details of the event is eliminated.

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<sup>60</sup> See 22 Mass. App. Ct. at 156, 491 N.E.2d at 1086.

<sup>61</sup> *Id.*

