Annual Survey of Massachusetts Law

Volume 1956 Article 7

1-1-1956

Chapter 3: Torts

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CHAPTER 3

Torts

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§3.1. Return to the auditor system. A change in judicial procedure of major importance to the trial bar was the re-establishment of the auditor system in motor vehicle tort cases. This innovation was announced in an order of the Superior Court in March, 1956, and became effective as of April 2, 1956.

The initial requirement is that the appointment of attorneys as auditors will be limited to members of the bar who do not handle motor tort cases and who agree to refrain from taking or handling such cases during their period of service as auditors. References to auditors can be made either on motion of a party or in the discretion of a judge without motion. No motion for reference can be made until after the expiration of one year from the date of entry, except in Suffolk, Middlesex, and Worcester counties, where said period is eighteen months, except in cases where the parties agree that the auditor's findings of fact shall be final and in cases where it appears that unusual or extraordinary hardship will result from delay. In cases where the parties agree that the auditor's findings of fact are final, they are given the right to name any lawyer as auditor subject to the approval of the court.

§3.2. Res ipsa loquitur. The complex doctrine of res ipsa loquitur came before the Supreme Judicial Court once again in *Couris v. Casco Amusement Corp.*[1] The plaintiff, a ticket holder, was watching the motion picture show in defendant's theater, when the seat in which he was sitting "suddenly collapsed" and he fell to the floor. This seat was one of some five or six hundred wooden seats provided for patrons. A bolt which had come out of the seat was later found. There was evidence that "children would come into the theatre building sometimes to play and break the seats."[2] No other evidence of liability was presented. The jury returned a verdict for the plaintiff, but the court below granted a motion by the defendant for judgment in accordance with leave reserved.

Since no specific evidence had been presented on the question of the

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§3.2. [1] 333 Mass. 740, 133 N.E.2d 250 (1956).
[2] 333 Mass. at 741, 133 N.E.2d at 251.

cause of the collapse of the seat, the jury verdict could be upheld only by applying res ipsa. The Supreme Judicial Court, through Justice Williams, held that this doctrine did apply to the situation:

> This doctrine is a rule of evidence which applies where the direct cause of the accident and so much of the circumstances as were essential to its occurrence were within the sole control of the defendant . . . and permits the fact finding tribunal to infer from the occurrence itself that in the light of ordinary experience the accident would not have happened unless the defendant had been negligent. . . .
>
> The jury would be warranted in finding that the unexplained collapse of the seat in question while being used in a normal manner was due either to defective construction or to lack of repair, and that its unsafe condition was more likely attributable to negligence on the part of the defendant than to some other cause.[3]

The defendant had relied on *Briggs v. New Bedford Amusement, Inc.*[4] In that case a theater patron, passing down an aisle to leave the theater, got a splinter in her right leg as it came in contact with the woodwork on a seat. The day after the injury the plaintiff notified the theater manager and showed him the place "about" where she had been sitting. The manager examined the seats in the vicinity and found that the wood around them was not perfectly even and smooth. In response to the question, "There was some indication that particles of the wood had been broken away from the original piece at some time?" he replied, "Maybe at some time, but it was like little nicks." [5]

The Court ruled that there was not sufficient evidence to warrant a finding that the condition had existed long enough so that a reasonably diligent theater proprietor should have known of its existence, and consequently the trial court was correct in ordering a verdict for the defendant.

In the *Couris* case, the Court distinguished the *Briggs* case on one ground that the nature of the defect in the earlier decision indicated that there was a "reasonable probability that it was of recent origin." [6] And yet there was no evidence presented in the *Couris* case to indicate how long the defective condition in the chair had existed. From the nature of the fact situation, the defendant would be negligent only if the defect had existed long enough so that the defendant should reasonably have known about and repaired it. Certainly, it was possible that children had entered the theater very shortly before the accident and tampered with the seat on which the plaintiff later sat. The conclusion, therefore, would seem to be that this decision reflects a liberal policy toward the doctrine of res ipsa loquitur and extends that doctrine beyond its application in the *Briggs* case.

[3] 333 Mass. at 742, 133 N.E.2d at 251, 252.
[4] 315 Mass. 84, 51 N.E.2d 779 (1943).
[5] 315 Mass. at 85, 51 N.E.2d at 780.
[6] 333 Mass. 740, 742, 133 N.E.2d 250, 252 (1956).

Wardwell v. George H. Taylor Co.,[7] also decided during the 1956 SURVEY year, is a case in which the Court might have applied the doctrine of res ipsa loquitur but did not do so. The plaintiff employed one Turilli to remove the wallpaper in the living room of her home, and Turilli in turn hired one Publisi to do this work. Turilli and Publisi rented a kerosene wallpaper steaming machine from the defendant. Publisi returned to the plaintiff's premises and ran the machine for fifteen or twenty minutes to get steam up. Then he applied the steam to the wallpaper for a further fifteen or twenty minutes, when he noticed that the machine was on fire. Plaintiff sued for damages to her premises caused by the fire.

There was evidence that after the fire the filler cap valve of the machine was not working properly. Publisi, who was qualified as an expert by the trial judge, testified that in his opinion the defective condition of this valve caused the fire and that possibly the explanation for the defective valve was the presence of dirt in it. On this theory of the cause of the fire, the plaintiff would have to prove that such dirt was present in the valve at the time that the machine was rented from the defendant.

The Court held that there was no evidence of the presence of dirt in the valve at any time before or after the accident. It held that the plaintiff's expert could testify only that it was possible that there was dirt in the valve at the time of the renting, and that a possibility is not enough to warrant a finding of negligence. The Court asserted that the presence of dirt or other defects at the time the machine was rented was "purely speculative." [8] It concluded:

> The occurrence of an accident, standing alone, is not always evidence of negligence. It may be as consistent with the innocence as with the fault of the person controlling the agency by which the accident happened. When the precise cause is left to conjecture and may be as reasonably attributed to a condition for which no liability attaches as to one for which it does, then a verdict should be directed against the plaintiff.[9]

The problem whether to make use of the doctrine of res ipsa loquitur occurs frequently, and usually the determination on this question controls the outcome of the case. Unfortunately for tort practitioners, it remains as difficult as ever to predict which way the Supreme Judicial Court will go on a particular fact situation.

§3.3. **Voluntary undertakings: Duty of care.** *Barrett v. Wood Realty, Inc.*,[1] appears to have further weakened, if not wholly overruled, the holding of the earlier case of *Rudomen v. Green*.[2]

7 333 Mass. 302, 130 N.E.2d 586 (1955).
8 333 Mass. at 305, 130 N.E.2d at 588.
9 Ibid. This language of the Court is quoted from a prior decision: Ryan v. Fall River Iron Works Co., 200 Mass. 188, 192, 86 N.E. 310, 312 (1908).

§3.3. 1 1956 Mass. Adv. Sh. 881, 135 N.E.2d 660.
2 299 Mass. 485, 13 N.E.2d 416 (1938).

The plaintiff in the *Barrett* case was a tenant at will in defendant's apartment house. On the evening on which the accident occurred, plaintiff returned to her apartment and found that the fixtures in the bathroom were all overflowing. She called the janitor who tried without success to stop the flow of water. He then called a plumber who cleared an obstruction in the main drain from the house, and the overflow of water in the plaintiff's bathroom thereupon stopped. The janitor then returned to plaintiff's apartment and cleaned up the water on the bathroom floor. Later that night the plaintiff entered her bathroom and slipped on water-soaked papers that had been scattered over the floor. The implication was that the janitor had put these papers on the floor to absorb the water.

The Court started off with the general rule enunciated in *Bergeron v. Forest* [3] that a landlord owes no duty to a tenant at will to keep the premises in proper repair. It then questioned whether the janitor was acting as an agent of the defendant in cleaning up the bathroom, but went on to hold that even if he were authorized, his action was in the nature of a voluntary or gratuitous undertaking, and that it is well established that a landlord performing gratuitous undertakings is only liable for gross negligence.[4]

The plaintiff had relied on *Rudomen v. Green*.[5] There the defendant, plaintiff's landlord under a tenancy at will, entered plaintiff's apartment to make repairs, and left a board with protruding nails on the floor. The plaintiff subsequently stepped on this board and was injured. The Court held:

> The finding was permissible that the defendant as landlord undertook voluntarily to make repairs and that, when they were finished, he notified the tenant, invited him to make use of the tenement, and assured him that he might do so with safety. In these circumstances, if the tenement was unsafe by reason of want of ordinary care and skill on the part of the defendant, and the tenant sustained personal injuries thereby, he may recover compensation from the defendant. That principle is the established law.[6]

A number of precedents were cited for this proposition, including *Buldra v. Henin*[7] and *Thomas v. Lane,*[8] all deriving from *Gill v. Middleton*.[9] However, this line of cases starting with the *Gill* case was overruled in *Massaletti v. Fitzroy*[10] which was subsequent to *Thomas v. Lane,* the latest decision cited in *Rudomen v. Green.* The

3 233 Mass. 392, 398, 124 N.E. 74, 84 (1919).
4 Ibid. See also Ryan v. Boston Housing Authority, 322 Mass. 299, 77 N.E.2d 399 (1948).
5 299 Mass. 485, 13 N.E.2d 416 (1938).
6 299 Mass. at 487, 13 N.E.2d at 417.
7 212 Mass. 275, 98 N.E. 863 (1912).
8 221 Mass. 447, 109 N.E. 363 (1915).
9 105 Mass. 477 (1870).
10 228 Mass. 487, 118 N.E. 168 (1917).

Massaletti case held that a landlord who voluntarily undertakes repairs is only liable for gross negligence. This rule has been followed in numerous decisions[11] both before and after *Rudomen v. Green*. *Massaletti* was not mentioned in the *Rudomen* decision, and it is significant that the defendant in *Rudomen* did not offer either a brief or an argument for the Court's assistance.

The Court in *Barrett v. Wood Realty, Inc.*, attempts to distinguish *Rudomen v. Green* from the line of cases going the other way by adopting the theory of *Ryan v. Boston Housing Authority*[12] that "The true ground of the decision in *Rudomen v. Green* . . . was not any technicality of the law of landlord and tenant as to the duty to repair but rather the leaving of a dangerous article in circumstances amounting to a violation of the simple duty of the defendant to refrain from negligent conduct causing injury to the plaintiff." [13] This would seem to be a rationalization rather than a correct statement of the basis for the decision in *Rudomen*. That decision held that the landlord voluntarily made repairs and that this situation was governed by the line of cases beginning with *Gill v. Middleton* which held that ordinary negligence was sufficient.

The conclusion is that *Rudomen v. Green* is an eccentric decision, out of line with all cases on this issue since the time of *Massaletti v. Fitzroy;* and, after the lengthy and explicit discussion and rejection of *Rudomen* in the *Barrett* case, plaintiffs will no longer be able to use it with any force as precedent for their position.

§3.4. Conversion: Set-off by a creditor-converter. *Nelson Anderson, Inc. v. McManus*[1] is a case of first impression in Massachusetts on the law of conversion. It holds that one who wrongfully converts the property of another, who is also his debtor, cannot reduce the amount of damages he must pay by offsetting against the amount converted the sum owed to him.

The plaintiff was the assignee of the mortgagor of a chattel mortgage on certain restaurant equipment. The mortgage covered the existing equipment together with replacements or substitutions for it. The defendant was the assignee of the original mortgagee. He sold all the property on the premises at a foreclosure sale, acting as his own auctioneer. The court below found that just before the sale the plaintiff notified the defendant that there were articles of property on the premises obtained subsequent to the mortgage which were not replacements or substitutes for articles covered by the mortgage. Hence, the unauthorized taking of possession by the defendant and

11 Collins v. Goodrich, 324 Mass. 251, 85 N.E.2d 771 (1949); Ryan v. Boston Housing Authority, 322 Mass. 299, 77 N.E.2d 399 (1948); McDermott v. Merchants Co-operative Bank, 320 Mass. 425, 69 N.E.2d 675 (1946); Diamond v. Simcovitz, 310 Mass. 150, 37 N.E.2d 258 (1941); Bell v. Siegel, 242 Mass. 380, 136 N.E. 109 (1922); Bergeron v. Forest, 233 Mass. 392, 124 N.E. 74 (1919).

12 322 Mass. 299, 77 N.E.2d 399 (1948).

13 322 Mass. at 303, 77 N.E.2d at 401.

§3.4. 1 1956 Mass. Adv. Sh. 911, 135 N.E.2d 302.

his subsequent sale of the articles constituted a conversion. The value of the property converted was $2390.

The defendant contended that the amount of damages he would be obligated to pay should be reduced by the sums paid to himself as first mortgagee, to the second mortgagee, and to two encumbrancers by trustee process. He relied on the old case of *Pierce v. Benjamin*,[2] where a tax collector failed to obey the relevant statutory provisions for the sale of seized property and consequently was held to have committed a conversion. The Court there found an exception to the general rule as to the measure of damages for conversion, the value of the property taken, where in that case a tax collector-converter had applied the proceeds of the property sold to the payment of the plaintiff's taxes, a just debt. This holding was followed and extended as late as *Clabburn v. Phillips*,[3] which made a sweeping generalization that "It is plain that in ordinary actions to recover damages for the conversion of personal property, the defendant may show in reduction of damages that he has sold the property and applied the proceeds to the payment of a debt due to him from the plaintiff."

In the *McManus* case, the Court re-examined this doctrine, noting that in other jurisdictions mitigation of damages "is generally limited to cases where the converter has acted under color of legal process and has used the proceeds of the conversion in accordance with his conception of official duty." [4] The Restatement of Torts, Section 923, takes a similar attitude, holding that as a general rule a tortfeasor cannot diminish damages for conversion by paying the plaintiff's debts without his consent. An exception is made for the situation where an official, such as a sheriff, by mistake of law or fact, has improperly taken the property of a debtor and pays some or all of the debt from the proceeds of this property.

The Court, apparently swayed by these authorities, decided to limit the scope of the rule of *Pierce v. Benjamin,* holding that it should apply only "where the enforcement of the full measure of damages for conversion would effect a manifest injustice." [5]

In applying this general statement to the facts of the *McManus* case, the Court first held that the amount of damages should be reduced by the sums which the defendant used in paying off the second mortgage (which covered all of the property sold by the defendant including the converted articles) and in satisfying the two creditors who had trusted him, on the theory that these payments enured "to the benefit of the plaintiff corporation by relieving it of obligations which could not be disputed and should be credited to the defendant in mitigation of the damages which he must pay." [6] But the Court concluded that the defendant could not have his damages reduced by the

2 14 Pick. 356 (Mass. 1833).
3 245 Mass. 47, 49, 139 N.E. 498, 499 (1923).
4 1956 Mass. Adv. Sh. 911, 914, 915, 135 N.E.2d 302, 305.
5 1956 Mass. Adv. Sh. at 915, 135 N.E.2d at 305.
6 1956 Mass. Adv. Sh. at 916, 135 N.E.2d at 306.

sum which he retained to offset the debt owed to himself. "To credit him with this amount would have the inequitable result of permitting a tort-feasor to pay the debts owed to him by converting to his own use his debtor's property." [7]

The result of this decision, greatly narrowing the broad statement of *Clabburn v. Phillips,* would appear to be a desirable one. It seems clear that the converter cannot offset the amount of a debt owed to him. The holding would indicate further that damages should be reduced by the sum of undisputed debts paid to third parties. The refinement of this latter statement awaits further litigation.

§3.5. "Hold harmless" clauses and public policy. In a significant, though brief, decision the Supreme Judicial Court during the 1956 SURVEY year construed an important ordinance of the city of Boston upon which the city has relied for many years. *Iver Johnson Sporting Goods Co. v. Boston*[1] was a tort action for damage caused by a break in one of the defendant's water mains which resulted in the flow of water into plaintiff's building. There was sufficient evidence to submit to the jury the question whether the defendant acted with reasonable diligence in shutting off the water.

The basement of the plaintiff's building extended out under the sidewalks of both streets of the corner lot where the building was located. The defendant relied on the following city ordinance:

> Every owner of an estate hereafter maintaining any cellar, vault, coal hole or other excavation under the part of the street which is adjacent to, or a part of his estate, shall do so only on condition that such maintenance shall be considered as an agreement on his part to hold the city harmless from any claims for damage to himself or the occupants of such estate resulting from gas, sewage or water leaking into such excavation or upon such estate. . . .[2]

Under the provisions of this ordinance the plaintiff would be barred from recovery. The Court, however, held that "a city cannot by an ordinance create immunity from its own negligence causing damage to an abutter who has made no use of the way which interferes with the public easement." [3] The Court pointed out that the location of the basement beneath the street in no way contributed to the break in the water main, and that, in the absence of a causal relationship, it is an unreasonable imposition upon the rights of abutting property owners for the city to attempt to avoid liability for its own negligence.[4]

[7] Ibid.

§3.5. [1] 1956 Mass. Adv. Sh. 919, 135 N.E.2d 658.

[2] Revised Ordinances of 1947, c. 27, rec. 18.

[3] 1956 Mass. Adv. Sh. 919, 921, 135 N.E.2d 658, 660.

[4] The Court cited no authority for its holding. In an independent search of the cases, there appeared to be a dearth of authority. However, there are two Texas cases which seem in accord with the Massachusetts Court: Christopher v. City of El Paso, 98 S.W.2d 394 (Tex. Civ. App. 1936); City of Amarillo v. Tutor, 267 S.W. 697 (Tex. Comm. App. 1924).

§3.6. Defamation actions: Functions of judge and jury. In the 1955 SURVEY chapter on torts[1] an important decision of that year, *Ricci v. Crowley*,[2] was examined. It was there suggested that the *Ricci* case indicated a tendency by the Supreme Judicial Court to impose a somewhat strict rule on the issue of what types of statements are "defamatory." It was pointed out that in three of the four most recent cases[3] to go to the Supreme Judicial Court on this issue, all involving political figures, the Court had, on a demurrer, found the language not to be defamatory.

In the 1956 SURVEY year, the Court has again followed this trend in *Grande & Son, Inc. v. Chace*.[4] There the defendant, a superintendent of schools, caused newspaper publication of articles criticizing the slowness of the plaintiff, a construction corporation, in building an addition to the local high school. The defendant brought an action for libel. The Superior Court sustained a demurrer to the declaration and the defendant appealed. The Supreme Judicial Court affirmed the Superior Court's action.

According to the declaration, the plaintiff construction corporation was engaged in contracting work throughout eastern Massachusetts. Under its agreement with the town of Scituate, it was to complete the high school addition on or before November 1, 1953. This date was not met. On December 10 and 11, the defendant caused newspaper publication of articles criticizing the delay. Some of the published statements were as follows:

> ". . . the stumbling block appears to be the small number of workmen in the addition each day . . . there are no more than 10 at the building each day." . . .
>
> " 'The firm told me that work would be completed by December 15 . . . yet not a half day's work has been done there since Nov. 24. Even a blind man could walk through the hall and see that it will never be ready on time . . . I believe the firm has a job in Winchester . . . and if it rains up there they send their plasterers and other men down here to work.' " [5]

The plaintiff alleged that these words were libelous, since they accused the corporation of being "inefficient in its work, untruthful, lacking in integrity and construction ability, thus endangering the good-will and favorable reputation of the business of the plaintiff." [6]

The Supreme Judicial Court asserted that to sustain a libel action against a corporation the words complained of must attack the corpora-

§3.6. 1 1955 Ann. Surv. Mass. Law §3.2.

2 1955 Mass. Adv. Sh. 765, 127 N.E.2d 652.

3 *Not defamatory:* Ricci v. Crowley *supra;* Poland v. Post Publishing Co., 330 Mass. 701, 116 N.E.2d 860 (1953); Tobin v. Boston Herald-Traveler Corp., 324 Mass. 478, 87 N.E.2d 116 (1949). *Demurrer overruled:* Muchnick v. Post Publishing Co., 332 Mass. 304, 125 N.E.2d 137 (1955).

4 1955 Mass. Adv. Sh. 941, 129 N.E.2d 898.

5 1955 Mass. Adv. Sh. at 942, 129 N.E.2d at 899.

6 1956 Mass. Adv. Sh. at 943, 129 N.E.2d at 899.

tion in its method of doing business, must accuse it of fraud or mismanagement, or must attack its financial position. Justice Williams held that the statements made did claim that the plaintiff was slow in finishing the work, but did not contain any suggestion that the plaintiff was "intentionally dilatory," or "habitually slow in performing work, or that it was guilty of fraud or dishonesty." [7] The Court further concluded:

> Whether the statements would be understood as imputing mismanagement and poor business methods is the only issue requiring discussion. Assertion merely of delay in performing a contract does not in itself imply bad management. There might be many reasons which would have made it unavoidable. In the performance of a construction contract, such as this, which was to run substantially for a year, labor and material difficulties might and frequently would be likely to intervene. We think that readers of the published articles would be cognizant of such possibility or probability. As the statements of the superintendent contained no information as to the state of the plaintiff's work, whether ten men were inadequate to perform the work then required, or why work had been, for a time, substantially suspended, such readers could not reasonably conclude that the matters alleged indicated faulty management or method.[8]

No citations of prior authority accompanied the above holding. It would seem that Justice Williams is asserting that as long as readers are cognizant of the "possibility or probability" that these delays were occasioned by circumstances not due to the plaintiff's fault, there is no question of a libel action.

Considering the traditional unfavorable American attitude toward defamation actions as a whole,[9] it may be that this is a very salutary way of dealing with the cases, since it keeps a large number of them away from the jury and decides them for the defendant. It is difficult, however, to reconcile these recent decisions of the Court with the earlier precedents in Massachusetts[10] and with the weight of American authority on the subject, [11] which hold that the court need find only that the statements *could* reasonably be found to be defamatory and it is for the jury to determine whether they *were* so taken. These

[7] Ibid.

[8] 1956 Mass. Adv. Sh. at 944, 129 N.E.2d at 900.

[9] Prosser, Torts 573 (2d ed. 1955).

[10] Stanton v. Sentinel Printing Co., 324 Mass. 13, 84 N.E.2d 461 (1949); Epstein v. Dun and Bradstreet, 306 Mass. 595, 29 N.E.2d 123 (1940); Ingalls v. Hastings & Sons Publishing Co., 304 Mass. 31, 22 N.E.2d 657 (1939); Twombly v. Monroe, 136 Mass. 464 (1884).

[11] 3 Restatement of Torts §614(1), (2); Prosser, Torts 581 (2d ed. 1955); 58 C.J.S., Libel and Slander 198; Albert Miller & Co. v. Corte, 107 F.2d 432 (5th Cir. 1939), *cert. denied*, 309 U.S. 688 (1940); Swift & Co. v. Gray, 101 F.2d 976 (9th Cir. 1939); Nichols v. Item Publishers, Inc., 309 N.Y. 596, 132 N.E.2d 860 (1956); Mencher v. Chesley, 297 N.Y. 94, 75 N.E.2d 257 (1947).

cases, particularly *Fahy v. Melrose Free Press,*[12] were discussed in the 1955 SURVEY.[13]

However, considering the fact that the *Grande* case is the second on this point in two years and the fourth case in recent years to be lost on demurrer on similar issues, it is perhaps not out of order to caution the profession against too much reliance on the earlier precedents.

[12] 298 Mass. 267, 10 N.E.2d 187 (1937).
[13] 1955 Ann. Surv. Mass. Law §3.2.