Annual Survey of Massachusetts Law

Volume 1982 | Article 4

1-1-1982

Chapter 1: Evidence

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Recommended Citation
Augustyn, Noel (1982) "Chapter 1: Evidence," *Annual Survey of Massachusetts Law*: Vol. 1982, Article 4.

CHAPTER 1

Evidence

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§ 1.1. Rebuttal Testimony — Presentation as a Matter of Right. During its 1982 term, in *Drake v. Goodman*,[1] the Supreme Judicial Court of Massachusetts sought to define the nature of a litigant's right to present rebuttal evidence[2] after the close of its case-in-chief.[3] The Court held that the plaintiffs did not have an absolute right to present rebuttal evidence which in effect adopted a theory of liability not presented during the plaintiffs' case-in-chief.[4] This section addresses the implications of the Court's holding in *Drake*.

In *Drake v. Goodman*,[5] the minor plaintiff, Christine Drake, sought recovery from the defendant, her physician, for medical malpractice.[6] The trial was a jury trial before a judge of the superior court.[7] The plaintiff testified to suffering an injury to her left hand on September 12, 1977 for which she sought and received treatment by the defendant.[8] The defendant placed a plaster cast on her arm extending from her fingers to her elbow.[9] Three days later Drake's fingers had become swollen, blue, and cold.[10] She returned to the defendant who removed the cast and replaced it with one of a different type.[11] A few days later Drake's fingers began to "claw up," and she returned to the defendant again, who this time recommended an operation.[12] Drake subsequently visited another physi-

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§ 1.1. [1] 386 Mass. 88, 434 N.E.2d 1211 (1982).

[2] Rebuttal evidence has been defined as "evidence given to explain, repel, counteract, or disprove facts given in evidence by the adverse party." BLACK'S LAW DICTIONARY 1139 (rev. 5th ed. 1979). *See also* Payson v. Bombardier, Ltd., 435 A.2d 411, 413 (Me. 1981); Willey v. Glass, 242 Md. 156, 161, 218 A.2d 212, 216 (1966).

[3] 386 Mass. at 88-93, 434 N.E.2d at 1212-14.

[4] *Id.* at 92-93, 434 N.E.2d at 1214.

[5] *Id.* at 88, 434 N.E.2d at 1211.

[6] *Id.* at 88-90, 434 N.E.2d at 1212-13. The suit was brought by Christine Drake and another, Albert Drake. *Id.* at 88, 434 N.E.2d at 1211.

[7] *Id.* at 88, 434 N.E.2d at 1211-12.

[8] *Id.* at 89, 434 N.E.2d at 1212.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

cian and was admitted to a hospital during September of 1977.[13] She was discharged after five days but was rehospitalized during October and November of 1977 as well as from February to June of 1978 and August of 1980.[14] Drake's hand was permanently unclenched after an operation during her final hospitalization, almost three years after her initial treatment by the defendant.[15]

During the trial, there was considerable dispute regarding whether Drake's clenched hand was caused by the inappropriate nature of her initial plaster cast, put on by the defendant, or whether it was caused by something other than the defendant's treatment of her injury.[16] According to the Court, "[t]he plaintiffs' case-in-chief was based on a claim that the defendant's negligence in putting on a cast that was too tight and in not properly supervising [Drake's] treatment *caused physical injuries*, particularly the clenched hand."[17] The Court noted that Drake provided a medical witness whose testimony supported the theory that the defendant's negligence caused the clenched hand.[18] It also pointed out that another of the plaintiffs' medical witnesses testified on cross-examination that there was a psychological element to the problem and that the defendant had caused no serious physical injury to Drake.[19] The Court then observed that while evidence at trial indicated that Drake "had certain psychological problems," the plaintiffs had made no effort during their "case-in-chief to demonstrate that a negligently caused physical injury *caused psychological problems* which in turn caused the clenched hand."[20] The defendant's expert witnesses, according to the Court, testified that Drake's clenched hand resulted from a psychological rather than a physical problem and had no connection with anything done by the defendant.[21]

After the close of the defendant's case, Drake sought to present a rebuttal witness who, according to the Court, would "testify that the physical injury [allegedly caused by the defendant] caused a psychiatric reaction."[22] The trial judge denied the plaintiffs' request to present its

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[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.* at 90, 434 N.E.2d at 1212 (emphasis added). The Court did mention in a footnote that the plaintiff may have raised an "emotional aspect" of the physical causation theory at trial. *Id.* at 93 n.5, 434 N.E.2d at 1214 n.5. The Court stated, however, that this "emotional aspect" did not warrant submission of the rebuttal testimony as a matter of right. *Id.*

[18] *Id.* at 89, 434 N.E.2d at 1212.

[19] *Id.* at 89-90, 434 N.E.2d at 1212.

[20] *Id.* at 90, 434 N.E.2d at 1212-13 (emphasis added).

[21] *Id.* at 90, 434 N.E.2d at 1213.

[22] *Id.* at 91, 434 N.E.2d at 1213.

rebuttal witness,[23] and the jury subsequently found in favor of the defendant.[24] The plaintiff appealed the trial court's decision not to allow the rebuttal witness and the Supreme Judicial Court granted direct appellate review.[25] The Court affirmed the ruling of the trial judge.[26]

The Court began its analysis of whether the trial judge erred in refusing to admit the plaintiffs' rebuttal testimony by acknowledging that "[a] trial judge has substantial discretion" in determining whether she will admit rebuttal evidence.[27] The Court noted that the rebuttal witness' availability in this case was uncertain and that the evidence could have been introduced as part of the plaintiffs' case-in-chief.[28] Moreover, the Court acknowledged that the testimony to be rebutted was known to the plaintiff prior to its entry into evidence and that the rebuttal testimony would have introduced a new theory of causation into the case.[29] Based on these facts, the Court determined that the trial judge had not abused her broad discretion in choosing to disallow presentation of the rebuttal evidence.[30] After referring to this broad discretion, however, the Court focused on an alternative theory for challenging the refusal to allow Drake's rebuttal testimony into evidence. The *Drake* Court noted that there are some situations "in which a party may present rebuttal evidence as a matter of right and in which the denial of that right would be an error of law," such as when a party seeks to present evidence to refute evidence offered by the other litigant.[31]

In analyzing whether the plaintiff had a right to present the rebuttal evidence, which would take precedence over a discretionary ruling of the trial judge,[32] the Court focused on the nature of the rebuttal evidence at issue. The Court characterized the evidence as follows:

> It did not rebut the testimony of the defendant's experts. Instead, it accepted the existence of a psychological cause of the clenched hand and sought to connect the psychological condition to the injury allegedly caused by the defendant. Of course, the new theory contradicted the defendant's contention that there was no underlying physical cause of the clenched hand. It was, however, more the making of an affirmative case than a contradiction of the defendant's evidence.[33]

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[23] *Id.* at 88-89, 434 N.E.2d at 1212.

[24] *Id.* at 88, 434 N.E.2d at 1212.

[25] *Id.* at 88-89 & n.2, 434 N.E.2d at 1212 & n.2. The plaintiff also appealed the lower court's ruling admitting into evidence testimony given by the defendant's experts. *Id.* at 89, 434 N.E.2d at 1212. The Court affirmed that ruling. *Id.* at 89, 90-91, 434 N.E.2d at 1212, 1213. The issue involved there extends beyond the scope of this section.

[26] *Id.* at 89, 434 N.E.2d at 1212.

[27] *Id.* at 92, 434 N.E.2d at 1214.

[28] *Id.* at 93, 434 N.E.2d at 1214.

[29] *Id.*

[30] *Id.* at 92-94, 434 N.E.2d at 1214-15.

[31] *Id.* at 92, 434 N.E.2d at 1214.

[32] *Id.*

[33] *Id.* at 92-93, 434 N.E.2d at 1214.

The Court stated that where rebuttal evidence only bolsters the parties' affirmative case, no right to present it exists.[34] The *Drake* Court therefore concluded that the plaintiffs had no right to present their rebuttal evidence.[35] The Court then went on to indicate that testimony regarding any psychological cause of the plaintiff Drake's clenched hand resulting from actions by the defendant more properly belonged in the plaintiffs' affirmative case and should have been raised there.[36]

The holding in *Drake* changes the Massachusetts treatment of the right to present rebuttal evidence after the close of a party's case-in-chief. For the first time the Court has affirmatively defined the right. It has done so, however, in a very restrictive fashion. A study of the authority cited by the Court in *Drake*[37] makes this implication clear.

Without explicitly so stating, the Court in *Drake* addressed an issue of Massachusetts law that has received little attention and which remains ambiguous, even after *Drake*. The issue is the extent to which a party has the right to present a rebuttal witness after the close of its case-in-chief. Prior to *Drake*, no Massachusetts decision had sketched the affirmative boundaries of the right.[38] Rather, at best, decisions mentioned the right only in a general manner before discussing the discretionary authority of the trial judge to admit or exclude rebuttal evidence where no right to admit is involved.[39] That *Drake* is the first Massachusetts case to address directly the affirmative boundaries of the right, separately from judicial discretion, becomes clear by studying the authority used by the Court as the basis for its decision.

In *Drake*, the Court relied solely on one prior case and three evidence treatises.[40] The prior case was the Court's 1939 decision in *Commonwealth v. Wood*.[41] The issue before the Court in *Wood* differed greatly from that in *Drake*. *Wood* was a combined trial of two criminal defendants.[42] In *Wood*, the prosecutor sought to introduce against the defendant Wood his own testimony obtained after the Commonwealth had rested its case against him.[43] The testimony was not being offered to rebut any evidence presented by Wood and was obtained only upon cross-examination during the other defendant's case-in-chief.[44] The trial judge

[34] *Id.* at 92, 434 N.E.2d at 1214.
[35] *Id.*
[36] *Id.* at 92-93, 434 N.E.2d at 1214.
[37] *Id.* at 92, 434 N.E.2d at 1214.
[38] *See infra* text accompanying notes 38-52.
[39] *See infra* text accompanying notes 38-52.
[40] 386 Mass. at 92, 434 N.E.2d at 1214.
[41] 302 Mass. 265, 19 N.E.2d 320 (1939).
[42] *Id.* at 266-67, 19 N.E.2d at 322.
[43] *Id.* at 267, 19 N.E.2d at 322.
[44] *Id.*

allowed the testimony in against Wood even though it did not rebut any evidence put forth by Wood, and was elicited after the Commonwealth's case against Wood was closed.[45] The *Wood* Court began its analysis of the propriety of the trial judge's ruling by stating the rule that "[a] party who has rested his case has the right to introduce, later, competent evidence of new facts appearing in the testimony of witnesses called by the opponent."[46] This language, however, is dicta in the *Wood* opinion. The evidence in question did not rebut any prior testimony and the Court upheld the trial judge's ruling based on the broad discretion of trial judges to admit "material evidence,"[47] rather than on a right to present rebuttal evidence. Moreover, even the cases cited by the *Wood* Court do not sketch any affirmative boundaries to the right to present rebuttal evidence.

The *Wood* Court cited two cases as authority for the rule quoted above. The first case was *Cobb, Bates & Yerxa, Co. v. Hills*.[48] The relevant issue in *Hills* was whether a party could introduce testimony to rebut other testimony elicited by the party during cross-examination of its opponent's witness.[49] There the Court held that such rebuttal evidence was admissible but failed to say whether it was admissible by right or judicial discretion.[50] The second case cited by the *Wood* Court was *Commonwealth v. Howe*.[51] Again, the *Howe* Court did not address directly the right of a party to introduce rebuttal testimony after the close of its case-in-chief. In *Howe* the Court held that the trial court erred in not allowing a criminal defendant to introduce evidence which, while not directly rebutting the Commonwealth's case,[52] tended to establish a fact favorable to the defendant.[53] There is no suggestion in the opinion, however, that the defendant sought to introduce the evidence after the close of his case.[54] Rather, the *Howe* Court seems to have considered only the defendant's more general right to introduce testimony during its affirmative case.

Based on this direct common law authority, *Drake* goes beyond prior Massachusetts law in sketching affirmative boundaries for a litigant's right to introduce rebuttal testimony after the close of its case-in-chief.[55] In

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[45] *Id.*
[46] *Id.*
[47] *Id.* at 267, 19 N.E.2d at 323.
[48] 208 Mass. 270, 94 N.E. 265 (1911).
[49] *Id.* at 272, 94 N.E. at 266.
[50] *Id.*
[51] 84 Mass. (2 Allen) 153 (1863).
[52] *Id.* at 355-56.
[53] *Id.* at 356.
[54] *See id.* at 355-56.
[55] *See also* Vallen v. Cullen, 238 Mass. 145, 330 N.E. 215 (1923). There the Court also mentioned the right to present rebuttal evidence without defining its exact boundaries. *Id.* at 147, 330 N.E. at 217.

doing so, the Court cited three treatises to support its position and supplement the common law authority which, as discussed above, was not directly on point.[56] These three academic authorities all address directly the right to present rebuttal evidence after a party ends its case-in-chief.[57] For example, the Court cites McCormick's treatise as authority for the proposition that a litigant has a right to present evidence in rebuttal after the close of its case if the evidence is used to refute the other party's evidence.[58] In McCormick's terms, the rebuttal evidence must be "confined to testimony which is directed to refuting the evidence of the defendant."[59] In stating that an affirmative right to rebut testimony exists but that it does not extend to evidence that only supports a party's affirmative case, therefore, the Court was being consistent with the rule adopted by the commentators on the issue.[60]

While being consistent with the academic authority regarding the right to introduce rebuttal testimony, however, the Court construed the right very narrowly. In the section of Wigmore's treatise cited by the Court, Wigmore acknowledges that separating instances of "rebuttal" testimony offered to rebut new facts put in by the opponent and those where the rebuttal evidence merely supports the party's affirmative case is difficult.[61] In *Drake*, the Court drew this line very strictly. The Court recognized that the plaintiff rejected the underlying premise of the defendant's argument — that Drake's clenched hand resulted in no way from any injury to Drake caused by the defendant.[62] Yet, the Court stated that the plaintiff "*accepted* the defendant's evidence that the clenched hand was not directly caused by any physical injury."[63] Here the Court seemed to be stressing the lack of any attempt by Drake to contradict the defendant's testimony in seeking to introduce her rebuttal testimony. The Court therefore stated that while the plaintiff rejected the premise of the defendant's causation argument, she somehow accepted the defendant's theory of causation.[64]

The Court's position on whether Drake was accepting or rejecting the defendant's testimony seems contradictory. It is difficult to see how the premise of an argument can be rejected while the argument itself is

[56] 386 Mass. at 92, 434 N.E.2d at 1214. The Court cited C. McCormick, A Handbook on the Law of Evidence § 4, at 6 (2d ed. 1972); K. Hughes, Evidence Law and Practice, 19 Mass. Practice Series § 182 (1961); 6 J. Wigmore, Evidence in Trials at Common Law § 1873 (Chadbourn rev. 1976). *Id.*

[57] *See* treatises cited *supra* note 56.

[58] 386 Mass. at 92, 434 N.E.2d at 1214.

[59] C. McCormick, *supra* note 56, at § 4, at 6.

[60] *See* treatises cited *supra* note 56.

[61] 6 J. Wigmore, *supra* note 56, at § 1873, at 672.

[62] *See* 386 Mass. at 92-93, 434 N.E.2d at 1214.

[63] *Id.* at 92, 434 N.E.2d at 1214 (emphasis added).

[64] *Id.* at 92-93, 434 N.E.2d at 1214.

accepted. The Court resolves this apparent contradiction by focusing narrowly on the issue of causation and construing strictly the plaintiff's case-in-chief.[65] According to the Court, the plaintiff never argued that the defendant caused a *physical injury* which caused a *psychological injury* which caused the clenched fist.[66] Rather, the Court stated that the plaintiff argued the defendant caused a *physical injury* which alone caused the clenched fist.[67] Conversely, the defendant had argued that a *psychological injury* alone, which was not caused by the defendant, resulted in the plaintiff's clenched fist.[68] The plaintiff's rebuttal evidence, the Court pointed out, was directed toward establishing that even if there were a psychological cause for the plaintiff's injury, it had resulted from an underlying physical injury caused by the defendant.[69] Such evidence, the Court admonished, went beyond the physical theory of causation proposed by the plaintiff in her case-in-chief.[70] The Court found the plaintiff's rebuttal evidence to propose, in effect, a new affirmative theory of causation rather than refuting a specific fact.[71] Therefore, although *Drake* rejected the factual premise of the defendant's position, the Court reasoned that no right to rebut the defendant's testimony existed because the conflict was one over theories of causation rather than contradictory facts.[72]

The Court was very restrictive in its analysis of whether to admit rebuttal evidence as a matter of right in *Drake*. The Court chose to characterize the plaintiff's rebuttal evidence as evidence supporting a new theory of causation rather than as rebutting a fact put into evidence by the defendant. To do so, the Court had to read the plaintiff's initial "physical causation" theory narrowly. In effect, the Court treated the physical causation theory as one which excluded all factual intervening causes, or variations of the physical causation theory, not explicitly advanced by the plaintiff during its case-in-chief. Had the Court not so construed the plaintiff's physical causation theory, it could not have characterized the plaintiff's rebuttal testimony as accepting a new theory of causation. This

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[65] *Id.*

[66] *Id.*; *but see id.* at 93 n.5, 434 N.E.2d at 1214 n.5.

[67] *Id.* at 90, 434 N.E.2d at 1212-13.

[68] *Id.* at 89-90, 434 N.E.2d at 1212.

[69] *Id.* at 92, 434 N.E.2d at 1214.

[70] *Id.* at 92-93, 434 N.E.2d at 1214.

[71] *Id.* The Court did not address whether the factual basis of the defendant's "psychological theory" could have been subject to attack on factual grounds under the general "physical theory" proposed by the plaintiff.

[72] *Id.* Presumably, if the plaintiff's initial physical causation theory had been broad enough to encompass the defendant's psychological causation theory, the conflict would have been over a factual issue of causation — an issue appropriate for rebuttal testimony. The Court never clearly addressed this issue. *But see id.* at 93 n.5, 434 N.E.2d at 1214 n.5.

result follows because had the initial physical cause theory been sufficiently broad to cover the defendant's psychological theory, there would have been no new theory for the plaintiff to accept. Without such a new theory, the rebuttal testimony could properly have been deemed evidence introduced to rebut the fact that a psychological cause unrelated to the defendant's actions caused the clenched fist.

In construing the right to present rebuttal testimony narrowly, the *Drake* Court acted consistently with a restrictive trend emerging from other jurisdictions.[73] For example, on March 18, 1982, the Appellate Division of New York, in *Yeomans v. Warren*,[74] construed the right narrowly. The *Yeomans* court addressed the question of whether rebuttal evidence which contradicted the defendant's testimony was proper where the contradiction had already been "established in the evidence."[75] The court held that it was not proper rebuttal evidence.[76] Reasoning that the contradictory nature of the testimony was already before the jury, the court stated that further demonstration of this contradiction through rebuttal evidence was not warranted.[77] Similarly, in the 1982 decision of *Coffman v. Austgen's Electric, Inc.*,[78] the Court of Appeals of Indiana considered a challenge by a plaintiff to the exclusion at trial of rebuttal evidence. The plaintiff sought recovery based, *inter alia*, on tort strict liability.[79] The plaintiff introduced evidence of the product's unreasonably dangerous nature during its case-in-chief.[80] The defendant, during its affirmative case, presented evidence explaining that the means suggested by the plaintiff for making the product safe were impractical.[81] In rebuttal, the plaintiff sought to disprove the testimony concerning such impracticality but was not allowed to do so.[82] The Indiana court affirmed the exclusion of this rebuttal evidence.[83] The court held that the practicality of the safety device should have been introduced during the plaintiff's case-in-chief and that it was inappropriate in rebuttal because it did not address specifically the defendant's knowledge of practicality.[84] The evidence went to the issue of practicality more generally.[85] Finally, the

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[73] *See infra* notes 74-89 and accompanying text; *but see* Pellico v. E.L. Ramm Co., 68 Ill. App.2d 332, 216 N.E.2d 258, 261 (1966).

[74] 87 A.D.2d 713, 448 N.Y.S.2d 889 (1982).

[75] *Id.* at 713, 448 N.Y.S.2d at 890.

[76] *Id.* at 713, 448 N.Y.S.2d at 890-91.

[77] *Id.*

[78] 437 N.E.2d 1003 (Ind. App. 1982).

[79] *Id.* at 1004-05.

[80] *Id.* at 1005.

[81] *Id.*

[82] *Id.*

[83] *Id.* at 1005-06.

[84] *Id.*

[85] *Id.*

Supreme Judicial Court of Maine adopted a restrictive attitude toward the right to present rebuttal testimony in *Payson v. Bombardier, Ltd.*,[86] decided on October 8, 1981. The court upheld the exclusion of rebuttal evidence which the plaintiff sought to introduce on the issue of design defect in a product's liability action.[87] The evidence related to the fact of notice, the defendant having testified to receiving no notice.[88] The court held that the evidence was properly excludable because it did not address the *specific* type of notice which the defendant claimed not to have.[89]

The factual basis and legal issues in these three decisions differ from the facts and issues in *Drake*. The decisions show in a general way, however, that *Drake's* restrictive approach to presenting rebuttal testimony is not isolated. Rather, the Court in *Drake* seems to have begun defining the right to present rebuttal testimony in a way consistent with the restrictive trend of other jurisdictions. Whether following the trend of these jurisdictions is desirable raises a separate set of issues.

As Wigmore points out, the orderly progression of a trial requires the plaintiff to present its entire substantive case during its case-in-chief.[90] Yet, unduly restricting the use of rebuttal testimony under this principle can have negative consequences as well. The specific holding in *Drake*, addressing causation in a negligence action, arguably has two such consequences.

First, *Drake* invites defendants to present frivolous defenses. A defendant after *Drake* is encouraged to propose weak defenses based on theories of causation differing from that asserted by the plaintiff, rather than directly addressing the plaintiff's claims. Defendants are so encouraged because raising such defenses puts plaintiffs in a difficult position. A plaintiff must either address the alternative theory, or variation of an already considered theory, of liability in its case-in-chief or run the risk of being unable to rebut the factual basis of alternative theories if they are raised by the defendant after the plaintiff's case is closed. This risk arises from the possibility that the court might construe the plaintiff's initial theory of liability in a way which does not include any variation of that theory. If the court does construe the plaintiff's initial theory in such a manner, it is then free to reject the plaintiff's rebuttal testimony of the defendant's facts by holding that the plaintiff is actually adopting a new affirmative theory of liability rather than rebutting the defendant's facts.

Although addressing such alternative theories or variations of theories during a plaintiff's case-in-chief is not necessarily a problem, this requirement could nevertheless be troublesome in a jury trial. For example,

[86] 435 A.2d 411 (Me. 1981).

[87] *Id.* at 411.

[88] *Id.* at 412-14.

[89] *Id.* at 413-14.

[90] 6 J. WIGMORE, *supra* note 56, at § 1873, at 672.

the plaintiff's efforts to address several theories of liability may confuse the jury. Moreover, the jury may feel that the plaintiff is being abrasive in addressing so many issues if later the defendant decides to address only the main theory of liability. In the alternative, if all possible theories or varieties of liability theories are not addressed by the plaintiff in its case-in-chief, the defendant might be able to raise them later, even if they are spurious, to confuse the jury without the plaintiff being able to rebut them. This lopsided result seems to disadvantage plaintiffs unnecessarily.

The second problem with the *Drake* decision is one of judicial economy. While the *Drake* holding is apparently based in part on judicial economy,[91] the decision seems instead to frustrate it. Plaintiffs must raise all possible theories of liability and variations of theories presented, even when they are weak and the defendant does not address them later, to be protected against the subsequent judicial admonition that issues should have been raised during the case-in-chief. The practical result of this situation is the use of court time and other resources on issues which might not need litigation. Such a waste of judicial and other resources seems particularly unfortunate in this era of clogged court calendars. Clearly, an unlimited right to reopen one's case-in-chief would more severely hinder judicial efficiency than would placing the heavy burden on plaintiffs to address all possible facts and theories during its affirmative case. Yet, this problem of unlimited abusive reopening could be curbed without unnecessarily increasing the plaintiff's burden. The courts could define the right to rebut using a case-by-case approach, and in a manner less strict than that required by *Drake*.

In addition to these two problems of trial procedure, the *Drake* decision has a conceptual ambiguity that will serve to undermine a clear definition of the right to present rebuttal evidence. The ambiguity arises from the Court's standard for determining whether rebuttal evidence is admissible by right. The Court's standard rests on the difference between evidence establishing a new affirmative legal theory and evidence establishing a fact contradicting the other party's evidence. Where rebuttal evidence is directed toward establishing a new affirmative legal theory — in *Drake*, a theory of causation — it is not admissible by right. Unfortunately, the difference between evidence bearing on a legal theory and that bearing on a fact is not always clear. While facts and legal theories are conceptually distinct, they can become difficult to distinguish. A party establishes the validity of a legal theory only by establishing facts sufficient to sustain it. Moreover, a fact is admissible only if relevant to a legal theory presented by a party. Therefore, determining whether rebuttal evidence addresses a

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[91] *See* 386 Mass. at 91-92, 434 N.E.2d at 1213 (mentioning possibility of surrebuttal where rebuttal is allowed); *id.* at 93, 434 N.E.2d at 1214 (discussing delays which would have occurred in allowing the plaintiff to present rebuttal testimony).

fact contradicting the other party's evidence rather than a new, affirmative legal theory is very difficult. The evidence serves both purposes. In trying to follow *Drake*, however, trial judges and parties will have to engage constantly in this ambiguous analysis. The result can only be to leave ill-defined the boundaries of a party's right to present rebuttal evidence after closing its case-in-chief. The Court might have put the issue on a more solid footing if it had avoided this sort of analysis completely. Instead, the Court should have tied its holding more specifically to the evidentiary facts, rather than legal theory analysis.

Regardless of the procedural problems likely to arise from *Drake* and the conceptual ambiguity of the Court's standard, *Drake* is now the law in Massachusetts. Practicing attorneys therefore must be attentive to its strict requirements. Compliance with *Drake* can be assured by following two rules. First, all legal theories, variations of legal theories and facts which are related in any way to the case and which are admissible during a case-in-chief should be presented at that time. This suggestion applies even where there is some risk of confusing a jury. Failure to raise all issues and facts might lead the opposing party to raise them, without any subsequent opportunity for the first party to rebut. Second, all rebuttal evidence should stress the precise parts of the opposition's case which are being refuted. In this way one can avoid the appearance of accepting the opposition's theory and trying to use rebuttal testimony to fashion a new counter-theory around it. Such an appearance would surely be fatal under the *Drake* Court's analysis.

In *Drake v. Goodman* the Court began defining the substantive limits of a party's right to present rebuttal testimony after the close of its case-in-chief. The Court held that the right does not extend to rebuttal evidence which accepts a theory of liability raised by a party's opponent when the theory was not included as part of the rebutting party's case-in-chief. In so holding, the Court went beyond prior Massachusetts decisions on the issue. Moreover, the *Drake* Court acted consistently with a modern trend of significantly restricting the right to present rebuttal evidence. This alignment with the restrictive trend means that the Court is likely to look unfavorably upon efforts by litigants to exercise the right to present rebuttal in the future. Therefore, parties should present all evidence related in any way to the case during the case-in-chief, even if the evidence only anticipates an opponent's argument. This need to avoid relying on rebuttal for presentation of evidence is compounded by the ambiguous standard established by the *Drake* Court for applying the right to rebut evidence. The Court drew a line between evidence submitted in support of a new, affirmative legal theory and that in support of a legal fact which contradicts the other party's evidence. Yet, the meaning of such a standard is far from clear. In any event, the Court has begun addressing an ill-defined area of evidence law and is likely to return to it for further clarification in the future.

§ 1.2. Consciousness of Guilt in Flight. A long established common law doctrine is that evidence of the flight of one accused of a crime is admissible as proof of the defendant's consciousness of guilt.[1] The assumptions underlying this doctrine, however, have not escaped judicial criticism.[2] Two cases discussing this evidentiary rule in Massachusetts during the *Survey* year were *Commonwealth v. Toney*[3] and *Commonwealth v. Booker*.[4]

Toney was a murder case where the defense was that of mistaken identity.[5] One of the issues involved evidence of flight.[6] The prosecutor introduced evidence at trial to show that law enforcement officers had unsuccessfully tried to locate the defendant by telephoning and visiting her house on several occasions after the murder in question.[7] The defendant introduced evidence that she would have been at work during the times the police came to her house and that she had no knowledge that the police were looking for her.[8] The prosecution then offered proof suggesting that the defendant also failed to report for work after the murder.[9]

The defendant did not challenge the principle that evidence of flight is admissible to prove consciousness of guilt.[10] Rather, the defendant contended that in the instant case the evidence lacked probative value since there was no proof that she actually knew of the efforts by the police to find her until just prior to surrendering herself to the authorities.[11] Moreover, the defendant appeared to argue that the prosecution was required to make a preliminary showing that she was *in fact* absent from her usual environs before the proffered evidence could be admitted.[12]

The Court accepted neither contention, holding that evidence of flight may be probative of consciousness of guilt regardless of whether a defendant has actual knowledge that she is being sought by the police and that, in any event, the evidence was sufficient here to permit an inference of such knowledge by the defendant.[13] As to the "absence in fact" argument, the Court held that it was sufficient for the prosecution to demon-

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§ 1.2. [1] *See* C. McCormick, A Handbook on the Law of Evidence § 271 (2d ed. 1972).

[2] Commonwealth v. Toney, 385 Mass. 575, 585 & n.5, 433 N.E.2d 425, 431-32 & n.5 (1982).

[3] 385 Mass. 575, 433 N.E.2d 425 (1982).

[4] 386 Mass. 466, 436 N.E.2d 160 (1982).

[5] 385 Mass. at 577, 433 N.E.2d at 427-28.

[6] *Id.* at 582-85, 433 N.E.2d at 430-32.

[7] *Id.* at 582, 433 N.E.2d at 430-31.

[8] *Id.* at 583, 433 N.E.2d at 431.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

strate that the defendant was not at her home or at work during the two week period following the murder.[14] The Court stated that the defendant could offer evidence in rebuttal, and that it was for the jury to determine which evidence was most credible.[15]

The defendant also raised an issue never fully addressed by the Court previously: whether the trial judge must, in his instructions to the jury on evidence of flight, call to the jurors' attention the defendant's innocent explanation for the alleged flight.[16] In examining this issue the court analyzed the "evidence of flight" principle, noting its two basic assumptions.[17] The first assumption, the Court stated, is that the person who flees after a criminal act has been committed does so because he feels guilt concerning the act.[18] The second assumption, the Court continued, is that one who feels guilt concerning an act has committed that act.[19] The *Toney* Court noted that both of these assumptions have been questioned and criticized by various courts.[20] After considering these assumptions and their possible shortcomings, the *Toney* Court stated that in its opinion a trial judge should instruct a jury on this matter as follows: (1) the defendant should not be convicted on the basis of evidence of flight or concealment alone, and (2) the jury may, but need not, consider such evidence as one of the factors tending to prove the defendant's guilt.[21] The Court reached the conclusion that the decision whether to call the jury's attention to the defendant's innocent explanation for the alleged flight was a matter for the trial judge's discretion.[22] Under the facts of *Toney*, the Court ruled that the instructions given to the jury by the trial judge were sufficient to indicate the "equivocal nature of evidence of flight," and therefore, there was no error in those instructions.[23]

In *Commonwealth v. Booker*,[24] an armed robbery case, the defendant also argued that evidence of flight presented by the prosecution had little, if any, probative value.[25] The prosecutor in *Booker*, over the defendant's objection, offered evidence that the defendant was hiding in a closet in his home when police came to arrest him a day after the robbery.[26] As in

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[14] *Id.* at 583-84, 433 N.E.2d at 431.
[15] *Id.*
[16] *Id.* at 584, 433 N.E.2d at 431.
[17] *Id.* at 584-85, 433 N.E.2d at 431-32.
[18] *Id.* at 584, 433 N.E.2d at 432.
[19] *Id.* at 585, 433 N.E.2d at 432.
[20] *Id.* at 585 & n.5, 433 N.E.2d at 432 & n.5.
[21] *Id.* at 585, 433 N.E.2d at 432.
[22] *Id.*
[23] *Id.* at 585 & n.6, 433 N.E.2d at 432 & n.6.
[24] 386 Mass. 466, 436 N.E.2d 160 (1982).
[25] *Id.* at 468, 436 N.E.2d at 162.
[26] *Id.*

Toney,[27] the defendant conceded the general principle that evidence of flight is admissible as some evidence of consciousness of guilt.[28] In this particular case, however, the defendant argued that the "flight as consciousness of guilt" doctrine was inapplicable, because his flight might not have been at all related to the armed robbery for which he was currently being tried, but rather may have only shown consciousness of guilt for an earlier crime for which a default warrant on the defendant was outstanding.[29] In addressing the defendant's assertions, the Court noted that the "[t]est of relevancy is a 'matter on which the opinion of the trial judge will be accepted on review except for palpable error.' "[30] The Court determined that the admission of the flight evidence was properly within the trial judge's discretion in this case because the jury "could have found that the defendant sought to hide . . . because of his consciousness of guilt of the armed robbery that occurred the night before," especially when the outstanding default warrant on the earlier offense was more than fifteen months old.[31] The Court also noted the prejudicial effect of having the defendant reveal a past crime in giving an alternate explanation for his flight.[32] The Court concluded, however, that "evidence that tends to show consciousness of guilt is relevant and is not rendered inadmissible simply because it may indicate that the defendant has committed another offense."[33] The Court distinguished *Booker* from a federal case[34] where evidence of a defendant's flight after a second robbery was excluded from his trial for the first robbery because such evidence was not probative of consciousness of guilt related to the first robbery.[35] In *Booker*, the Court noted, the defendant was on trial for his most recent offense, and his prior offense occurred more than fifteen months before his flight.[36] Under those circumstances the Court concluded that the flight evidence was sufficiently probative of consciousness of guilt for the crime the defendant was currently being tried for.[37]

Finally, *Booker*, like *Toney*,[38] involved the issue of the trial court's instruction to the jury on "flight as consciousness of guilt" evidence. In

[27] 385 Mass. at 583, 433 N.E.2d at 431.

[28] 386 Mass. at 469, 436 N.E.2d at 162.

[29] *Id.*

[30] *Id.* at 470, 436 N.E.2d at 163 (quoting Commonwealth v. Young, 1981 Mass. Adv. Sh. 280, 295, 416 N.E.2d 944, 953).

[31] *Id.*

[32] *Id.* at 471, 436 N.E.2d at 163.

[33] *Id.*

[34] United States v. Myers, 550 F.2d 1036 (5th Cir. 1977), *aff'd after remand*, 572 F.2d 506 (5th Cir. 1978), *cert. denied*, 439 U.S. 847 (1978).

[35] 386 Mass. at 471, 436 N.E.2d at 164.

[36] *Id.*

[37] *Id.*

[38] 385 Mass. at 583-85, 433 N.E.2d at 431-32.

Booker, the defense counsel cautioned the jury against placing too much weight on the evidence of defendant's "flight."[39] The prosecutor, however, did not mention the evidence in his closing, and the judge charged the jury without either referring to that evidence or instructing the jury on consciousness of guilt.[40] At the trial, the defendant made no objection to the charge.[41] In light of these facts, the Court in *Booker* concluded, "if the defendant wanted the judge to provide limiting or curative instructions, he should have made the proper request. Ordinarily judges are not required, *sua sponte*, to instruct the juries as to the purposes for which evidence is offered at trial."[42] The Court cited *Toney* as a *but see* authority.[43]

In the *Booker* decision, the Court appears to dilute even further its rather weakly worded suggestion in *Toney* that judicial instruction be given concerning evidence of flight. Considering *Booker*, defense counsel would be well advised to request instructions on flight evidence if they are desired, and to object if such a request is not complied with by the trial judge. Put another way, *Toney* can be read in light of *Booker* as meaning only that whenever a trial court comments to the jury at all upon evidence of flight, it should follow the *Toney* Court's suggestion. Apparently, a total absence of instructions to the jury on admitted evidence of flight will be equally acceptable whenever defense counsel fails to preserve his rights by requesting such instructions at trial.

§ 1.3. Hearsay — Prior Reported Testimony and Witness Unavailability. When a witness is unavailable to testify at a trial where his testimony is necessary to a fair adjudication of the issues, his testimony on those issues from a *previous* trial or hearing may become, depending on circumstances of reliability,[1] admissible evidence as an exception to the hearsay rule.[2] This hearsay exception, known as "prior reported testimony," or simply "former testimony," has long been recognized in other jurisdictions[3] and is now codified in the Federal Rules of Evidence.[4] As noted above, however, the witness' unavailability is a prerequisite to the use of this hearsay exception. During the *Survey* year, in *Commonwealth v.*

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[39] 386 Mass. at 468, 436 N.E.2d at 162.

[40] *Id.*

[41] *Id.*

[42] *Id.* at 471-72, 436 N.E.2d at 164 (quoting Commonwealth v. Roberts, 378 Mass. 116, 126, 389 N.E.2d 989, 996 (1979)).

[43] *Id.* at 472, 436 N.E.2d at 164.

§ 1.3. [1] *See infra* note 48.

[2] *See* C. McCormick, A Handbook on the Law of Evidence §§ 254-61 (2d ed. 1972).

[3] *See id.* at § 254 (cases listed in nn.2 and 3).

[4] Fed. R. Evid. 804(b)(1).

Bohannon,[5] the Massachusetts Supreme Judicial Court considered as an issue of first impression the burden upon the prosecution in a criminal trial in demonstrating the unavailability of a witness prior to introducing the "prior reported testimony" of that witness.[6]

Bohannon involved, *inter alia*, the crime of rape.[7] The defendant was convicted at a first trial, where the court refused to permit defense counsel on cross-examination to ask the witness complainant whether she had, on previous occasions, made false accusations that other men had raped her.[8] Recognizing that the complainant's credibility was the critical issue in the case, the Supreme Judicial Court on appeal held that the trial court's ruling violated the defendant's right to present a full defense, and remanded for a new trial.[9]

Thirteen months prior to the second trial the prosecution sought to secure the presence of the complainant, who had moved to Florida, through what the Court referred to as the "uniform act to secure the attendance of out-of-state witnesses."[10] Citing "undue hardship" as a reason, a Florida judge refused to compel her attendance at the trial in Massachusetts.[11] The prosecution subsequently moved that the complainant be declared an unavailable witness, hoping thereby to secure the use of the stenographic transcript of her testimony at the first trial as a substitute for her live testimony at the second trial.[12] The motion judge ruled that the complainant was indeed "unavailable," but denied the prosecution's motion to use the transcript from the first trial.[13] He emphasized the defendant's lack of an opportunity to cross-examine the complainant at the first trial in support of his ruling.[14]

Approximately eight months later, the prosecution secured a tape cassette of the complainant's testimony from the probable cause hearing, wherein she was subject to cross-examination including the line of questioning precluded at the first trial, and moved that this tape cassette be admitted in evidence in the absence of the live witness.[15] The defendant moved to suppress the tape, arguing, among other things, that complainant was not an unavailable witness and that admission of the tape would

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[5] 385 Mass. 733, 434 N.E.2d 163 (1982).
[6] *Id.* at 740, 742-46, 434 N.E.2d at 168-71.
[7] *Id.* at 734-37, 434 N.E.2d at 164-66.
[8] *Id.* at 737, 434 N.E.2d at 166.
[9] *Id.*
[10] *Id.* The "uniform act" referred to by the Court is codified at G.L. c. 233, § 13B.
[11] 385 Mass. at 738, 434 N.E.2d at 166.
[12] *Id.*
[13] *Id.*
[14] *Id.* at 738 n.4, 434 N.E.2d at 166 n.4.
[15] *Id.* at 738, 434 N.E.2d at 167.

violate defendant's constitutional right of confrontation.[16] The second motion judge ruled in favor of the prosecution, having "adopted" the ruling of the first motion judge, made eight months earlier, that the witness was unavailable.[17] Moreover, the second motion judge concluded that the tape was sufficiently reliable and comprehensible for the jury to decide the issue of credibility.[18] Accordingly, the tape-recording of the complainant's testimony from the probable cause hearing was admitted into evidence at the second trial.[19] The defendant was convicted at the second trial and appealed.[20]

The Supreme Judicial Court again reversed the conviction, citing the admission of the tape of the complainant's former testimony as an error of constitutional magnitude.[21] Relying on Massachusetts and federal authorities, the Court stated that "prior reported testimony is admissible only when it is established that (a) the witness is 'unavailable' to testify at the trial, and (b) the prior testimony is reliable."[22] The Court held that in this case the prosecution had not adequately demonstrated the witness' unavailability.[23]

The Court first noted the overlapping relationship between a criminal defendant's constitutional right to confront witnesses against him and the hearsay rules, as well as the occasional conflicts between hearsay exceptions and this confrontational right.[24] The Court noted that the sixth amendment establishes, at the very minimum, a rule of "necessity."[25] Therefore, the Court indicated, while former testimony may be introduced at a criminal trial when the defendant had an opportunity to fully cross-examine the witness at the previous hearing, and when the witness is unavailable at the trial, the prosecution must, in the first instance, demonstrate the necessity of using such former testimony because of the unavailability of that witness.[26]

The Court found no such demonstration by the prosecution in *Bohannon*.[27] The Court stated that the burden placed upon the Commonwealth in establishing the unavailability of a witness in a criminal trial is greater than that imposed in other situations because of the criminal defendant's

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[16] *Id.* at 738-39, 434 N.E.2d at 167.
[17] *Id.* at 739, 434 N.E.2d at 167.
[18] *Id.* at 739-40, 434 N.E.2d at 167.
[19] *Id.*
[20] *Id.* at 734, 434 N.E.2d at 165.
[21] *Id.* at 735, 434 N.E.2d at 165.
[22] *Id.* at 741, 434 N.E.2d at 168.
[23] *Id.* at 745-46, 434 N.E.2d at 171.
[24] *Id.* at 741, 434 N.E.2d at 168.
[25] *Id.* at 741-42, 434 N.E.2d at 168-69.
[26] *Id.* at 742, 434 N.E.2d at 169.
[27] *Id.* at 744-46, 434 N.E.2d at 170-71.

competing confrontational right.[28] The Court noted that resort to section 13B of chapter 233 by the prosecution to secure a witness and the subsequent failure to so secure that witness may be the basis for a finding of unavailability.[29] The Court also made it clear, however, that a diligent, good-faith effort by the prosecution to produce the witness must continue until a time reasonably proximate to the actual trial date.[30] In this particular case the Court found that the prosecution failed to carry its burden of proving that the witness was unavailable to testify *at the time of the trial*.[31] The Court ruled that the second motion judge had abused his discretion in relying on a finding of "unavailability" made by another judge eight months previously.[32] The Court also determined that the trial judge erred in relying on the Florida judge's ruling made in the Uniform Act proceedings some thirteen months earlier that it would be an undue hardship to compel the attendence of the complainant as a witness at the trial.[33] Hence, the Court concluded that the requirement of "unavailability" was not met in *Bohannon*, and the admission of the tape of the complainant's former testimomy was reversible error.[34]

Another case involving prior testimony and witness unavailability reported later in the *Survey* year was *Commonwealth v. Furtick*.[35] *Furtick* was an armed robbery case.[36] At the probable cause hearing one witness, Orville Johnson, testified that he was not sure whether the defendant committed the robbery.[37] Johnson also testified at this hearing that he and his family had been threatened, thus implying that this intimidation was the cause of his inability to positively identify the defendant as the person who committed the robbery.[38]

At trial, another witness, the investigating detective, testified that Johnson had identified the defendant as the robber at the probable cause hearing.[39] Despite the apparent inaccuracy of this testimony, defense counsel did not object to it.[40] It was expected that Johnson himself would subsequently testify at trial as well.[41] Johnson, however, in fact failed to appear as a witness, whereupon the defendant moved to strike the detec-

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[28] *Id.* at 745, 434 N.E.2d at 170.
[29] *Id.* at 743, 434 N.E.2d at 169.
[30] *Id.* at 744-45, 434 N.E.2d at 170.
[31] *Id.* at 745-46, 434 N.E.2d at 171.
[32] *Id.* at 744, 434 N.E.2d at 170.
[33] *Id.*
[34] *See id.* at 752, 434 N.E.2d at 174.
[35] 386 Mass. 477, 436 N.E.2d 396 (1982).
[36] *Id.* at 477, 436 N.E.2d at 397.
[37] *Id.* at 478, 436 N.E.2d at 397.
[38] *Id.*
[39] *Id.* at 479, 436 N.E.2d at 398.
[40] *Id.*
[41] *Id.*

tive's testimony concerning Johnson's prior testimony at the probable cause hearing.[42] The trial court denied the request, and the defendant then objected on the ground that allowing the detective's testimony at trial concerning Johnson's supposed identification of the defendant at the probable cause hearing to remain in evidence constituted a violation of the defendant's constitutional right to confrontation.[43]

The Supreme Judicial Court agreed with the defendant, concluding that the content of Johnson's prior testimony had not been properly introduced at trial.[44] The Court noted that the first requirement for the legitimate use of prior testimony, witness unavailability, had not been met.[45] Citing *Bohannon*, the Court stated:

> The concept of "unavailability" . . . concerns more than the mere absence of the witness. To have justified admission at trial of Johnson's identification of the defendant at the probable cause hearing, the Commonwealth would have had to prove that it made a good faith, although unsuccessful, effort to obtain Johnson's presence at trial. The record does not establish Johnson's "unavailability" in this sense.[46]

The Court ruled that defendant's motion to strike the detective's testimony should have been granted and therefore the Court reversed the lower court's judgment and set aside the verdict. [47]

In both *Furtick* and *Bohannon* the Court made it clear that witness unavailability means more than the simple fact that the witness is not present to testify at trial. This will be especially true in criminal trials, where the defendant enjoys the constitutional right to confront adverse witnesses. In order for such an adverse witness to be deemed "unavailable" by the trial court, the prosecution will be required to show that it has made a *recent* and *good faith* effort to obtain the witness' presence at trial. Absent this threshhold showing of diligence,[48] the "prior recorded testimony" exception to the hearsay rule will not apply.

§ 1.4. Hearsay — Hospital Records Exception. A traditional exception to the hearsay rule provides for the admission of regularly kept business records,[1] among which are included hospital records.[2] Massachusetts has

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[42] *Id.*

[43] *Id.* at 479-80, 436 N.E.2d at 398.

[44] *Id.* at 480-83, 436 N.E.2d at 398-400.

[45] *Id.* at 480, 436 N.E.2d at 398.

[46] *Id.* (citations omitted).

[47] *Id.* at 482-83, 436 N.E.2d at 400.

[48] Establishing the witness' unavailability is only the first step in gaining the admission of his prior reported testimony at trial. In addition, the reliability of the prior testimony must be demonstrated before this hearsay exception may be used. *See* Commonwealth v. Bohannon, 385 Mass. 733, 746-49, 434 N.E.2d 163, 171-72 (1982).

§ 1.4. [1] *See* C. McCormick, A Handbook on the Law of Evidence §§ 304-14 (2d ed. 1972).

[2] *See id.* at § 313.

codified the hospital records exception in chapter 233, section 79 of its General Laws.[3] During the *Survey* year, the Appeals Court interpreted this provision in the case of *Diaz v. Eli Lilly & Company*.[4] *Diaz* involved a tort action where the plaintiff claimed to have suffered blindness due to his use of the defendant's toxic agent in spraying roses.[5] The sole issue on appeal concerned the trial court's jury instruction that opinions and diagnoses contained in the plaintiff's hospital record could not be considered as independent evidence that the plaintiff's condition was caused by a toxic agent.[6] The Appeals Court found no error in the trial judge's instruction, holding that because the diagnoses were not routine and involved serious difficulties of interpretation, they did not possess the indicia of reliability necessary to justify the admission of hearsay statements under the hospital records exception.[7]

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[3] G.L. c. 233, § 79 provides that:

Records kept by hospitals, dispensaries or clinics, and sanatoria under section seventy of chapter one hundred and eleven shall be admissible, and records which the court finds are required to be kept by the laws of any other state or territory, or the District of Columbia, or by the laws and regulations of the United States of America pertaining to the department of national defense and the veterans administration, by hospitals, dispensaries or clinics, and sanatoria similarly conducted or operated or which, being incorporated, offer treatment free of charge, may be admitted by the court, in its discretion as evidence in the courts of the commonwealth so far as such records relate to the treatment and medical history of such cases and the court may, in its discretion, admit copies of such records, if certified by the persons in custody thereof to be true and complete; but nothing therein contained shall be admissible as evidence which has reference to the question of liability. Copies of photographic or microphotographic records so kept by hospitals, dispensaries or clinics, or sanatoria, when duly certified by the person in charge of the hospital, dispensary or clinic, or sanatorium, shall be admitted in evidence equally with the original photographs or microphotographs.

A record kept by any hospital, dispensary or clinic, or sanatorium under section seventy of chapter one hundred and eleven which is required to be produced in court by any party shall be certified by the affidavit of the person in custody thereof to be a true and complete record, and shall be delivered by such hospital, dispensary or clinic, or sanatorium to the clerk of such court, who shall keep the same in his custody until its production is called for at the trial or hearing by the party requiring the said record. Such record, so certified and delivered shall be deemed to be sufficiently identified to be admissible in evidence if admissible in all other respects. The party requiring the production of said record and, in the discretion of the court, any other party may examine said record in the custody of the clerk at any time before it is produced in court. The clerk upon completion of such trial or hearing shall notify such hospital that said record is no longer required and will be returned to the hospital by certified mail unless an authorized representative of the hospital calls for the same at the office of said clerk within seven days of said notice.

[4] 14 Mass. App. Ct. 448, 440 N.E.2d 518 (1982).

[5] *Id.* at 448-49, 440 N.E.2d at 519.

[6] *Id.* at 449, 440 N.E.2d at 519.

[7] *Id.*

In analyzing section 79, the court noted that the admissibility of hospital records, "so far as such records relate to the treatment and medical history" of the patient, was based on a presumption of reliability.[8] The court recognized that it was this presumption of reliability which justified not calling numerous hospital personnel as witnesses.[9] The court noted, however, that when this presumption was negated by the facts of a given case, no such justification for the admission of hearsay would exist.[10] In *Diaz,* the court concluded that the diagnoses in the plaintiff's hospital record did not possess the indicia of reliability found in "routine observations by hospital personnel or in conclusions on which there is a consensus among skilled physicians."[11] The observations concerning the plaintiff's condition were not routine, the *Diaz* court noted, nor was there any consensus among physicians concerning the cause of plaintiff's blindness.[12] The court indicated that the information contained in the medical record at issue in *Diaz* was to some degree speculative, and stated that "where diagnoses are more judgmental, and hence controversial, cross-examination becomes more important."[13] The court then cited, rather comprehensively, authorities establishing the distinction between diagnoses which are "routine" and those "which involve difficulties of interpretation."[14] Because the *Diaz* court found that the diagnosis contained in the medical record at issue fell into the latter category,[15] any presumption of reliability was effectively nullified, and the court held there was no abuse of discretion by the trial judge in limiting the expert testimony to be considered by the jury to the witnesses who testified at trial.[16]

The hospital records hearsay exception was also briefly treated by the Supreme Judicial Court in *Commonwealth v. Bohannon*.[17] In *Bohannon*,

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[8] *Id.* at 450, 440 N.E.2d at 520 (citing Bouchie v. Murray, 376 Mass. 524, 527-28, 381 N.E.2d 1295, 1298 (1978)).

[9] *Id.*

[10] *Id.* at 450-51, 440 N.E.2d at 520.

[11] *Id.* at 452, 440 N.E.2d at 520-21.

[12] *See id.* at 451-52, 440 N.E.2d at 521.

[13] *Id.* at 452, 440 N.E.2d at 521. Out of court statements such as a hospital record are of course not subject to cross-examination.

[14] *Id.* at 453-55, 440 N.E.2d at 521-22.

[15] *Id.* at 451-52, 440 N.E.2d at 520-21. While the reliability issue was decisive, the Court also referred to a proviso in chapter 232, section 79 which states that nothing contained in a medical record which refers to the question of liability will be admissible. *Id.* at 455, 440 N.E.2d at 522. The Court indicated that diagnosis in the medical record at issue was indeed a conclusion of a sort on the ultimate issue of liability, and that the trial judge could properly consider that content in ruling on the admissibility of the medical record. *Id.*

[16] *Id.* at 452, 440 N.E.2d at 521.

[17] 385 Mass. 733, 434 N.E.2d 163 (1982). *Commonwealth v. Bohannon* is also discussed in section 3 of this chapter.

the defendant offered the complainant's hospital records pursuant to section 79 as extrinsic evidence to prove her prior false allegations of rape.[18] These records, the defendant contended, were relevant to the issue of consent in the case at hand.[19] The *Bohannon* Court found that the information contained in these particular records was not derived from the personal knowledge of the physician or the patient, and was simply too unreliable to qualify for admission under section 79.[20] In other words, because the presumption of reliability was effectively rebutted on these facts, the records were inadmissible hearsay. Moreover, the Court noted, there was no showing by the defendant that the excluded statements were even related to the complainant's diagnosis or treatment as is required for their admission under section 79.[21]

In summary, while hospital records may customarily fall within a traditional exception to the hearsay rule, "[n]ot everything contained in hospital records is admissible. . . ."[22] The rule codified in chapter 233, section 79 of the General Laws relies upon a presumption of reliability. Where reliability is in doubt, this exception to the hearsay rule will not apply.

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[18] *See id.* at 749, 434 N.E.2d at 173.

[19] *See id.*

[20] *Id.* at 750, 434 N.E.2d at 173.

[21] *Id.*

[22] Diaz v. Eli Lilly & Co., 14 Mass. App. Ct. 448, 450, 440 N.E.2d 518, 520 (1982).