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Chapter 3: Torts

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CHAPTER 3

Torts

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§3.1. Misrepresentation: Reasonable reliance and mistake. The rule of caveat emptor, a relic of the David Harum era in America, is slowly being read out of Massachusetts law. The now famous case of *Kabatchnick v. Hanover-Elm Building Corp.*[1] did much to require greater common honesty in "seller's talk" in the bargaining stages. Now, with the case of *Yorke v. Taylor*[2] decided during the 1955 SURVEY year, the Court purports to adopt the rule that the seller cannot use the defense of a lack of reasonable investigation by the buyer to resist an action based on the seller's misrepresentation of material facts.

The cautious wording of "purports to adopt" is used above due to the fact that the *Yorke* decision is a suit for *rescission,* not a tort action. The plaintiff brought his rescission action on the grounds of "fraud and misrepresentation." [3] In the negotiations for a sale of real estate the defendant seller had asserted that the assessed valuation of his property had not been increased from 1952 to 1953, even though he had made extensive capital improvements. The buyer later discovered that the assessment had been increased from $12,500 to $26,000.

The trial court found that the defendants did not know that the assessment had been raised, that they had acted in good faith and with no intent to mislead or deceive the plaintiff. The lower court also found that the plaintiff could not reasonably rely on the defend-

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§3.1. [1] 328 Mass. 341, 103 N.E.2d 692 (1952).
[2] 332 Mass. 318, 1955 Mass. Adv. Sh. 257, 124 N.E.2d 912.
[3] Ibid.

ants' statement since the assessed value was "a matter of public information equally within the reach of the plaintiff and defendants." [4] The trial court dismissed the bill.

The Supreme Judicial Court treated the two findings above separately. First, on the issue of the defendants' liability for the statement made, the Court found that since the statement of fact was made "of one's own knowledge," it was sufficient as grounds for rescission. On the facts, this is not a startling result, since *mistake* of a material fact has always been grounds for rescission.[5] However, the "of one's own knowledge" rule has been generally recognized as the minority *tort law* rule in this country for imposing strict liability for misrepresentation.[6] The leading case for this rule is the Massachusetts decision of *Chatham Furnace Co. v. Moffat*[7] decided in 1888. For its holding in the instant case the Supreme Judicial Court cites *Chatham* and three rescission cases[8] in that order. It would seem rescission cases in Massachusetts are governed by the tort law of misrepresentation when the plaintiff's claim is based on fraud.[9]

It is, of course, on the second finding of the lower court that the *Yorke v. Taylor* case gains its importance. Again, however, the Court somewhat beclouds its significance by using language applicable to tort law, but applying it to a rescission suit.

In reaching this issue, the Court admitted the existence of a long line of Massachusetts decisions supporting the reasoning of the lower court that the plaintiff-buyer must use "due care and diligence in protecting his rights." [10] Justice Spalding replied to this, however, "But the trend of modern authority is opposed to this philosophy. Restatement: Torts, §540. Prosser on Torts, §88. Harper on Torts, §224 . . ." [11] The Court then cited authorities in other jurisdictions and an impressive line of its own decisions which has grown up seemingly independent of the contrary line of cases and culminating

4 1955 Mass. Adv. Sh. at 260, 124 N.E.2d at 915. The lower court did not specifically find that the plaintiff was unreasonable in relying on defendant's statement, but the Supreme Judicial Court treats the quoted language from the findings as necessarily implying that this conclusion was found.

5 2 Restatement of Contracts §§470(1), 476; Restatement of Restitution §28(b); 5 Williston, Contracts §1500 (rev. ed. 1937).

6 Prosser, Torts 547 (2d ed. 1955); Morris, Torts 260 (1953). In accord with Massachusetts on this rule, see Gagne v. Bertran Drilling Co., 43 Cal. 2d 481, 275 P.2d 15 (1954); Clark v. Haggard, 141 Conn. 668, 109 A.2d 358 (1954); National Bank of Pawnee v. Hamilton, 202 Ill. App. 516 (1916); Braley v. Powers, 92 Me. 203, 42 Atl. 362 (1898); Peterson v. Schaberg, 116 Neb. 346, 217 N.W. 586 (1928); Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 44, 74 A.L.R. 1139 (1931).

7 147 Mass. 403, 18 N.E. 168 (1888). See particularly discussion in Morris, Torts 260 et seq. (1953).

8 Bates v. Cashman, 230 Mass. 167, 119 N.E. 663 (1918); Rudnick v. Rudnick, 281 Mass. 205, 183 N.E. 348 (1932); Enterprises, Inc. v. Cardinale, 331 Mass. 244, 118 N.E.2d 740 (1954).

9 Harris v. Delco Products, Inc., 305 Mass. 362, 364, 25 N.E.2d 740, 742 (1940).

10 1955 Mass. Adv. Sh. 257, 260, 124 N.E.2d 912, 915.

11 1955 Mass. Adv. Sh. at 260-261, 124 N.E.2d at 915.

in a citation to the famous *Kabatchnick v. Hanover-Elm Building Corp.*[12] The Court concluded:

> But whatever our rule has been formerly on the subject of diligence — and it is not easy to reconcile all that has been said — we prefer the rule of the Restatement that "The recipient in a business transaction of a fraudulent misrepresentation of fact is justified in relying on its truth, although he might have ascertained the falsity of the representation had he made an investigation." [13]

The above would certainly seem to indicate that the Court intends to repudiate its former holdings in tort cases as well as rescission suits. The strength of the Court's conviction to discard the diligence requirement is indicated in the instant case involving public records, one of the most readily used — and most legally recognized — sources of information.[14]

There was a final point in the case which had to be treated: putting the two findings together. Here the Court ran into the objection that the Restatement rule applies, by its very language, only to an *intentional* misrepresentation. The Court had not disagreed with the lower court's finding that the misrepresentation here was innocent. However, Justice Spalding alluded again to the "as of one's own knowledge" rule:

> In this Commonwealth, where the rule is stricter than in some other jurisdictions, a false though innocent representation of a fact made as of one's own knowledge may be the basis of liability. The same legal consequences attach to this type of representation as to one that is deliberately and consciously false. On principle, lack of diligence on the part of the victim ought not to have any better standing as a defense to rescission in the one case than in the other, and we are not disposed to treat these situations differently.[15]

The language quoted above leaves unresolved whether or not the same rule would be applied in a tort case. However, since the "of one's own knowledge" rule is misrepresentation in this state, we may, perhaps, draw the cautious conclusion that the Court may be inclined to apply these same principles on the law side when the occasion arises.

12 328 Mass. 341, 103 N.E.2d 692 (1952).

13 1955 Mass. Adv. Sh. at 261, 124 N.E.2d at 916.

14 There are decisions from other jurisdictions in accord with this view in regard to public records. 3 Restatement of Torts §540, Comment *b;* Pattridge v. Youmans, 107 Colo. 122, 109 P.2d 646 (1941); Coules' Executor v. Johnson, 297 Ky. 454, 179 S.W.2d 674 (1944); Linch v. Carlson, 156 Neb. 308, 56 N.W.2d 101 (1952); Campanelli v. Vescera, 75 R.I. 71, 63 A.2d 722 (1949).

15 1955 Mass. Adv. Sh. at 262, 124 N.E.2d at 916.

§3.2. Libel and politics: Defamatory meaning. One of the most difficult, and certainly one of the most illogical, of the categories of civil actions grouped under the title of torts is defamation. The controlling primary issue in this tort is one of semantics, i.e., are the words complained of reasonably capable of a defamatory meaning? If this question is answered in the affirmative the next question is whether the words were understood in the defamatory sense in this particular instance. As in so many problems of tort law, an important aspect of these issues is who decides them, judge or jury. The general rule in this country is that the first issue above is for the court,[1] while the second is for the jury.[2] It is also the rule, in Massachusetts as elsewhere,[3] that if the court finds a statement reasonably capable of various meanings, some defamatory and some not, it is for the jury to decide which way the words were actually understood.

A significant case was decided in Massachusetts during the 1955 SURVEY year which raises problems in this area. In *Ricci v. Crowley*[4] the plaintiff was a member of the Everett Board of Appeals. He held this position on appointment by the mayor for a five-year term ending in March, 1955. In December, 1954, the incumbent mayor, the defendant, removed the plaintiff from his position. The plaintiff sued the mayor for libel alleging that the defendant "falsely and maliciously wrote and published of the plaintiff" in letters to the city clerk, the auditor, and the treasurer that the plaintiff was removed as a member of the Board of Appeals "for the good of the service."

The Supreme Judicial Court affirmed the Superior Court's action in sustaining a demurrer to the declaration. For the Court, Justice Counihan asserted:

> The words "for the good of the service" have come to have an accepted meaning and are not infrequently used by executives in all branches of the government service when the occasion arises for the removal of an appointive officer. They are not defamatory. "This is the same language employed in the notice of removal considered in *Ayers v. Hatch,* 175 Mass. 489, a case concerning the removal by the mayor of a member of the board of assessors of the same city. The court there said [page 492]: '. . . the cause assigned was "the good of the service," and manifestly it seems to us, that was good ground for removal. The natural inference would be that in some respects the petitioner had failed to

§3.2. [1] Restatement of Torts §614(1); Prosser, Torts 581 (2d ed. 1955); Patterson v. Evans, 254 Mo. 293, 162 S.W. 179 (1914); Reiman v. Pacific Development Co., 132 Ore. 82, 284 Pac. 575 (1930); Morrissette v. Beatte, 66 R.I. 73, 17 A.2d 464 (1941); Smith v. Smith, 194 S.C. 247, 98 S.E.2d 584 (1940).

[2] 3 Restatement of Torts §614(2); Prosser, Torts 581 (2d ed. 1955); Linehan v. Nelson, 194 N.Y. 482, 90 N.E. 1114, 35 L.R.A. (N.S.) 1119 (1910); Nettles v. MacMillan Petroleum Corp., 210 S.C. 200, 42 S.E.2d 57 (1947).

[3] Prosser, Torts 581 (2d ed. 1955); Twombly v. Monroe, 136 Mass. 464 (1884).

[4] 1955 Mass. Adv. Sh. 765, 127 N.E.2d 652.

perform his duties or was incompetent or inefficient, or was an unsuitable person for the position to which he was appointed.' " . . . The defendant as mayor [in Ricci v. Crowley] may well have determined for many reasons, none of which reflected upon the character or probity of the plaintiff, that another, perhaps more qualified, could do a better job for the city. Nothing defamatory may be inferred from the use of such words.[5]

This finding of the Court raises some puzzling queries. Though the Court finds that the words *cannot* be defamatory, they admit that the "natural inference" from them is that the person removed has "failed to perform his duties or was incompetent or inefficient, or was an unsuitable person for the position . . ." Can this inference not convey a defamatory meaning, i.e., discredit the plaintiff in the minds of any considerable and respectable class in the community?

Though not discussed by the Court or in the briefs of the parties, the phrase "for the good of the service" is perhaps best known in its military connotations. In U.S. Army Regulations[6] the phrase is used in regard to resignations classified as "undesirable discharges." The primary grounds for use of this separation technique are stated as follows in the Army Judge Advocate General School Manual: "An individual whose conduct has rendered him triable by court-martial for an offense punishable by dishonorable or bad conduct discharge may tender his resignation for the good of the service in lieu of trial by court-martial." [7]

Is the possibility of an unfavorable inference being drawn in the instant case weakened at all by the fact that the plaintiff *might* have been removed because "another, perhaps more qualified, could do a better job for the city"? This merely presents us with a case where a statement could be taken *two ways,* one defamatory, the other not. Was it not for the jury to decide which way it was actually taken in the community? And also, was it not a major point of inquiry to discover just what are the allowable grounds for dismissal of members of the board of appeals appointed for five-year terms? [8]

An interesting contrast may be drawn between the instant case and a recent English decision. In *Morris v. Sandess Universal Products*[9] the plaintiff had been employed by the defendant as a salesman.

5 1955 Mass. Adv. Sh. at 766-767, 127 N.E.2d at 653.

6 AR 605-275 (1952); AR 615-367 (1953).

7 1953 Special Text, J.A.G. School of Military Affairs Manual, c. 8, §8.

8 Neither the plaintiff's declaration nor the appellate brief indicates the grounds for removal. However, the plaintiff brought a separate action of mandamus for reinstatement and alleged that he could be removed only for "cause." The Supreme Judicial Court in a per curiam decision affirmed a denial of the writ on the grounds that there was nothing in the record to show that the city of Everett ever adopted a zoning ordinance under G.L., c. 40A, §14, and the Court does not take judicial notice of municipal legislation. See Ricci v. Mayor of Everett, 1955 Mass. Adv. Sh. 871, 127 N.E.2d 669.

9 [1954] 1 Weekly L.R. 67, [1954] 1 All E.R. 47.

After termination of his employment the defendant sent a circular letter to some of its customers informing them that "we have dismissed Mr. Morris from our employ." Plaintiff sued for libel asserting that the statement was meant and was understood as meaning that the plaintiff was dismissed against his will under circumstances of discredit to the plaintiff.

The English court decided that the declaration presented an issue for the jury, asserting:

> Counsel for the defendants has suggested to us a variety of meanings for the word "dismissed," and he says that it does not, by any means, necessarily have a derogatory connotation. But, in my view, the function of the judge on such a matter is to endeavour to decide what meaning the language used could reasonably be held to convey to the persons to whom the communication was addressed. Looking at this letter from that point of view, notwithstanding the various inoffensive meanings which the words: "We have dismissed [the first, or second, plaintiff]," might be said to be capable of bearing, I find myself unable to hold that the words complained of are not capable of a defamatory meaning, or that it is not possible that a reasonable jury might hold them to be defamatory. With the question whether or not they are defamatory, this court at this stage has nothing whatever to do. That will be a question for the jury when the case comes to be tried.[10]

The instant decision of the Massachusetts Court may seem, then, difficult to reconcile with its previous holding in the well-known case of *Fahy v. Melrose Free Press:* "In this Commonwealth the rule has been stated repeatedly that 'it is only when the court can say that the publication is not reasonably capable of *any* defamatory meaning, and cannot reasonably be understood in *any* defamatory sense that the court can rule as a matter of law that the publication is not libelous.' " [11]

However, the position taken by the Court in the *Ricci* case may be defended in various ways. Coming back to the actual words used, they can be viewed in an entirely different light than the semantic question of defamatory meaning. The phrase "for the good of the service" is very often used in government circles for the very purpose of *avoiding* unnecessary defamation of the person involved — as might be the result of a more plenary statement of the reasons for the dismissal.

In addition, of course, the entire case is colored by an issue of privilege. At least a qualified privilege (in good faith and without

[10] [1954] 1 Weekly L.R. at 73, [1954] 1 All E.R. at 51.
[11] 298 Mass. 267, 268-269, 10 N.E.2d 187, 188 (1937).

malice) would seem to be available to the defendant as a defense.[12] If a communication such as this does involve privilege, the mayor could have gone further in asserting express derogatory grounds for removal and still would have been shielded from a libel suit. Instead, he gave the ambivalent reason of "for the good of the service."

This decision may encourage the more restrained type of removal technique, thus accomplishing a bit of practical prophylactic treatment in everyday political life.

It is interesting to note that of the four important defamation cases coming before the Supreme Judicial Court in recent years involving political or governmental figures, three have been dismissed on demurrer on the primary grounds of a lack of defamatory meaning.[13] Joined with the defenses of privilege because of governmental activity and the privilege of fair comment, the Court would seem to be building another formidable obstacle in the path of plaintiffs in this area.

§3.3. Assumption of the risk in places of amusement. During the 1955 SURVEY year, the Supreme Judicial Court added another significant case to the growing body of Massachusetts law on assumption of the risk in places of amusement.

In *Alden v. Norwood Arena, Inc.*[1] the plaintiff and his wife were attending the "stock car races" at the defendant's outdoor arena. During one of the races, a wheel broke loose from one of the racing cars and flew over the fence in front of the grandstand at a height of fifty feet and landed in the box seats striking the plaintiff's wife on the head and neck. She died two days later.

The defense was, of course, assumption of the risk. It was claimed that the risk of being hit by a flying wheel was inherent in the sport of automobile racing and obvious to a person of ordinary intelligence. On this issue it was submitted that the plaintiff had been to the Norwood track about fifteen times in its two years of operation and his wife had accompanied him on three or four occasions. Both had observed accidents from collisions, though neither had ever seen a wheel fly off a racer into the crowd. The arena supervisor testified that he had never seen a wheel go into the box seats in the three years he had worked for the defendant but he had seen wheels fly off racers and hit the fences or guard rails (on twelve to fifteen different occasions). On two occasions he had seen them go over the bleachers and com-

12 On the municipal level, there are few decisions, even nationally, to indicate strong authority on this point. However, the leading text writers are in agreement that at least a qualified privilege is available. Prosser, Torts 612 (2d ed. 1955); Restatement of Torts §§591, 599; Smith v. Higgins, 16 Gray 251 (Mass. 1860); Bradley v. Heath, 12 Pick. 163 (Mass. 1831).

13 *Dismissed:* 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).

§3.3. 1 332 Mass. 267, 1955 Mass. Adv. Sh. 137, 124 N.E.2d 505.

pletely out of the park, and "that he saw some go into the crowd." [2] It was admitted, however, that no warning concerning the danger of flying wheels was given to patrons of the arena.

In submitting the above evidence, the defendants were relying on *Shaw v. Boston American League Baseball Co.*,[3] where the Court had held assumption of the risk applied where a spectator at a Red Sox game (and in a box seat) was hit by a foul ball. The Court had stressed in that case the fact that a person familiar with the sport of baseball must be aware of the inherent danger and must be taken to assume it. To the same effect was *Katz v. Gow*,[4] where it was held a patron at a driving range assumes the risk of being hit by a golf ball.

On the other side of the issue, the plaintiffs were arguing for the application of *Shanney v. Boston Madison Square Garden Corp.*,[5] where assumption of the risk was *not* applied when the plaintiff was struck by a flying puck at a Bruins' hockey game. There the Court stressed the fact that this was the female plaintiff's first time at a hockey game and she was unfamiliar with the sport.

In the instant case, the defendant attempted to distinguish the *Shanney* case on the grounds that the plaintiff and his wife were familiar with the sport and the risks "inherent" in it.

The Court refused to go along with the argument of the defendant, however, and found that the risk was not assumed. The Court held that, even though the plaintiff and his wife were familiar with the sport, they had never seen a wheel fly off during a race. The Court rejected the defendant's contention that this hazard was one which was so open and obvious that, as a matter of law, the patrons of the track must have assumed it. In fact, the Court asserted the evidence "shows that the flying off of a wheel is a somewhat infrequent occurrence." [6]

§3.4. Negligence in injuries to patrons in places of amusement. In the above discussed *Alden v. Norwood Arena, Inc.*[1] the holding that the risk was not assumed was not, in the words of the Court, "an end of the matter." [2] The Court still had the question of the plaintiff's case of primary negligence by the proprietor as warranting the verdict for the plaintiff.

The Court asserted that the proprietor was "not an insurer, and to recover the plaintiffs must show some breach of duty on the part of the defendant." [3] The Court pointed out that the plaintiff did not contend that greater precautions should have been taken by way of

2 1955 Mass. Adv. Sh. at 139, 124 N.E.2d at 507.
3 325 Mass. 419, 90 N.E.2d 840 (1950).
4 321 Mass. 666, 75 N.E.2d 438 (1947).
5 296 Mass. 168, 5 N.E.2d 1 (1936).
6 1955 Mass. Adv. Sh. 137, 140, 124 N.E.2d 505, 507.

§3.4. 1 332 Mass. 267, 1955 Mass. Adv. Sh. 137, 124 N.E.2d 505.
2 1955 Mass. Adv. Sh. at 140, 124 N.E.2d at 508.
3 Ibid.

screens, fences, or guard rails. It should be recalled that the wheel had gone over the fence in front of the boxes at a height of fifty feet. The Court found, however, that the breach of duty warranting the jury finding of negligence was the failure to warn patrons of the danger of being hit with a flying wheel, and the jury could find that it happened frequently enough to demand a warning.

Earlier in the opinion the Court stated the general standard of care owed by a proprietor of a place of amusement as "the duty to use due care to see that his premises are reasonably safe for the intended use or to warn them of dangers which are not obvious." [4] This would seem to have been taken from the *Shanney* case.[5] However, in the latter, the Court held the jury's finding of negligence was warranted without indicating whether the finding was supported by the defendant's failure to have a higher guard rail at the sides of the hockey rink, or because of a failure to warn, or both. In the instant case we have the Court specifically identifying the issue—that the failure to warn is *alone* sufficient grounds for recovery.

In the past the quoted general standard of care has been taken by many to mean that the proprietor is obliged to warn of non-obvious defects only where he does not furnish reasonably safe premises. This may seem a justifiable construction, since the statement above is in the disjunctive. However, in the instant case the Court may have intended to avoid the application of this general standard entirely. It should be noted that the Justices did not allude to it in their actual finding of liability. They discussed only "the breach of a duty" to warn. The breach of duty concept as a means of describing tort liability for negligence is by no means uncommon.[6] Except in rare cases of pure nonfeasance, however, it seems to this writer to present many problems in actual application.[7]

In the instant *Alden* case the avoidance of the general standard as expressed in the *Shanney* case may be justified on the grounds that it is practicable in application only for cases where the plaintiff is making a claim based on defects in the premises such as structural defects,

4 1955 Mass. Adv. Sh. at 139, 124 N.E.2d at 507.

5 296 Mass. 168, 5 N.E.2d 1 (1936).

6 Green, Judge and Jury 53 et seq. (1930); Winfield, Duty in Tortious Negligence, 34 Colum. L. Rev. 41 (1934); Seavey, Mr. Justice Cardozo and the Law of Torts, 52 Harv. L. Rev. 372 (1939). For an example of adherence to a "duty" method of classifying all negligence cases, see the chapter on Torts, 1954 Survey of Florida Law, 8 Miami L.Q. 481 et seq. (1954).

7 Prosser, Torts 165 et seq. (2d ed. 1955). Prosser does not adopt the duty-breach test for all cases. Though he adopted it to state the "elements" of the action (p. 165), he says at page 166 "It is better to reserve 'duty' for the problem of the relation between individuals which imposes upon one a legal obligation for the benefit of the other, and to deal with particular conduct in terms of a legal standard of what is required to meet the obligation."

It should also be noted that the author *reverses* the order of the chapters on Duty and Standard of Conduct from that in his first edition, placing Standard of Conduct first in his second edition.

defects in movable furniture, slipping on foreign substances, and the like. Here, the plaintiff was injured due to an *active force* in being, a flying wheel from one of the racers. The problem is, who is responsible for this? In the *Shanney* case, the Court said that the hockey players were not employees of the proprietor and he was not responsible for their negligence. Were the racing car drivers, the automobile mechanics or other persons who might have actually been negligent the employees of the arena proprietor? Is the proprietor responsible for their actions?

In the *Alden* case the Court does not discuss these problems. It solves the dilemma by finding liability on the basis of the failure to warn. And — though we may have trouble with the theory of the case — can we quarrel much with the result? Should not this type of injury be the responsibility of the proprietor? Perhaps he might be more satisfied calling it strict liability, and the fact that it can be avoided with some sort of "warning" may present practical problems, but an insurance policy to cover liability in such situations as a risk of doing business does not seem an unhappy result. This case could have far-reaching effects if the Court chose to apply its reasoning broadly in other situations of injury to business invitees.

§3.5. The notice statutes: Technical requirements. In a well-reasoned opinion by Justice Lummus, the Supreme Judicial Court clarified a possible misinterpretation of a previous case in regard to the technical requirements under the notice statutes. In *Murphy v. Boston & Maine Railroad*[1] the defendant had received a directed verdict in the trial court on the grounds of insufficiency of the notice required under G.L., c. 84, §18. The notice, as all Massachusetts lawyers know, is a prerequisite to suit against a defendant for negligence in maintaining a public way. Plaintiff was injured in a fall on the railroad tracks while crossing High Street in Medford. Under the statute the plaintiff is required to give notice within thirty days of the "cause of the injury." The only statement of cause in the notice was as follows: "As I was crossing first set of tracks, I caught my foot in some manner. I fell forward landing on both knees . . . I have been over this crossing many times and am very familiar with it. It was in the same condition as it always has been as far as I can tell. I have not any fault to find with its condition. I did catch my heel in the rail somehow." [2]

The lower court held the notice defective in not stating the existence of any defective condition for which the railroad was responsible. In fact, the defendant argued that the notice indicated there was no defect of any kind. In its holding the lower court was relying on dicta in *Pecorelli v. Worcester*[3] to the effect that the notice must contain a statement of an "actionable defect."

§3.5. [1] 332 Mass. 83, 123 N.E.2d 378 (1954).
[2] 332 Mass. at 84, 123 N.E.2d at 379.
[3] 307 Mass. 425, 30 N.E.2d 230 (1940).

The Supreme Judicial Court specifically rejected the language of the *Pecorelli* case and held that the notice was sufficient in that it stated the "cause" of her fall, i.e., catching her heel in the rail "somehow." The Court asserted that it was unnecessary either to identify the cause of the fall as one for which an action would lie, or to make a claim or threat of action.

The finding of the Court seems consistent with its assertion of the purpose of these statutes, the giving of notice to a defendant to enable it to investigate the occurrence and to determine whether it is liable. The notice was not such as to mislead the defendant in its investigation as was the notice in the *Pecorelli* case.[4]

§3.6. The notice statutes: Snow, ice, and ice cubes — A remedial statute. The General Court in 1955 passed much-needed remedial legislation in regard to the statutory thirty-day notice requirement where injury is due to a defect in premises or adjoining ways "when caused by or consisting in part of snow and ice . . ." [1] The new amendment limits the notice requirement to cases where the snow or ice results from "rain or snow and weather conditions."

The amendment was occasioned by two highly questionable, and certainly controversial,[2] decisions of the Supreme Judicial Court under the former statute. The first was *DePrizio v. Woolworth Co.*,[3] where the plaintiff slipped and was injured on snow tracked into defendant's store by customers. No notice was given under the statute. A jury found for the plaintiff on the issue of the defendant's negligence. The case was reported to the Supreme Judicial Court on the question of a requirement of notice. The Court agreed a finding of negligence was warranted, but in a split decision entered a verdict for the defendant because of lack of notice. The Court found that the notice statute applied to "all snow and ice made the basis of the action, whether inside or outside the building and whether of natural or artificial origin." [4]

The precipitating decision did not come, however, until 1952 in *Smith v. Hiatt*.[5] The facts of the case were almost like something out of a law professor's dream. The plaintiff was a practical nurse working in the defendant's home. She sustained an injury in the defendant's kitchen due to slipping and falling on an ice cube from the refrigerator. Again no notice was given and again the Court ordered a verdict for the defendant on the grounds of this failure.

4 In Pecorelli v. Worcester, note 3 *supra*, the notice identified the cause of injury as an unusual accumulation of snow and ice. At the trial the plaintiff attempted to prove that the injury was caused by the fact that the curbstone was higher than the abutting sidewalk.

§3.6. 1 Acts of 1955, c. 505, amending G.L., c. 84, §21.
2 See Notes, 15 B.U.L. Rev. 870 (1935), 33 id. 252 (1953).
3 291 Mass. 143, 196 N.E. 910 (1935).
4 291 Mass. at 147, 196 N.E. at 912.
5 329 Mass. 488, 109 N.E.2d 133 (1952).

The Court cited the above-quoted language from the *Woolworth* case as controlling: that notice was required even though the injury was sustained within the building and was due to ice of an artificial origin.

The remedial statute passed in 1955 would affect a change in the *Smith*-type case, since no notice would be required where the ice was of entirely artificial origin. The statute does *not* affect the *Woolworth*-type case, since the snow in that case *was* of a natural origin, being tracked inside by customers.

It should be noted that the original bill [6] submitted on this matter would have eliminated the notice requirement in *both* cases since it would take all cases out of the statute where injury was received *on* the premises rather than outside, whether caused by natural or artificial snow or ice. The General Court evidently did not agree with the rationale of the bill, that where injury is received inside the premises the occupier usually has actual notice of the injury and thus a statutory notice is generally unnecessary. The legislature did, however, feel that the statute should not cover injuries due to purely artificial snow or ice, and so at least this aspect of a still incongruous situation is rectified.

§3.7. The theory of the plaintiff's case: Facts and inferences. A number of cases were considered by the Supreme Judicial Court this SURVEY year which may be grouped together for examination on the basis of the fact that in each the plaintiff was attempting to get to the jury on the issue of the *interpretation* of the defendant's conduct, the basic facts of the conduct not actually being in controversy. In the cases discussed in the following three sections, there were various theories being offered by the plaintiffs, but they all resolve down to this issue. As Charles P. Curtis, Jr., puts it in his latest book, *It's Your Law:*

> The trial courts are more usually concerned with conflicting characterizations of the facts than with the facts themselves. Truth is only a part of justice . . .
>
> Two characterizations or versions of the same facts are competing for acceptance by the trial court. They are oral claims which are put in the form of characterizations or versions of what happened. These versions of fact, much more than the facts themselves, are what the judicial process is dealing with.[1]

The first of these cases was *Flynn v. Hurley*,[2] in which the defendant fell asleep at the wheel of his automobile, hit a pole, and injured plaintiff, a guest occupant. The Court there held, in a split decision and overruling a previous decision,[3] that with no other evidence

[6] House No. 845 (1955).

§3.7. [1] It's Your Law 85 (1954).
[2] 332 Mass. 182, 1955 Mass. Adv. Sh. 185, 124 N.E.2d 810.
[3] Blood v. Adams, 269 Mass. 480, 169 N.E. 412 (1929).

this was not enough to get to a jury on the issue of gross negligence. The plaintiff offered as evidence on the point only the fact that defendant had been asleep for "a considerable length of time." The Court rejected this, saying, "the test . . . is not the length of time that a person at the wheel has been asleep but whether he fell into that condition in circumstances where he might have taken steps to avoid it." [4]

Every year, the Supreme Judicial Court reviews a number of cases where plaintiffs have sued proprietors for injuries due to falls on foreign substances. During the 1955 SURVEY year, the Court affirmed verdicts for plaintiffs in two cases worthy of examination. In *Hastings v. Boston & Maine Railroad,*[5] the Court upheld a $22,000 verdict for a plaintiff who slipped descending stairs because of "a greasy substance four or five inches in diameter on one of the steps." [6] The substance was covered with dirt. The steps were dirty with rubbish, debris, cigarette and candy bar papers. Defendant excepted to the admission of the evidence of a witness in regard to the appearance of the grease a few minutes after the accident. The Supreme Court overruled the exception and said that an inference could be drawn that the condition was the same at the time of the fall. The Court affirmed the verdict saying the "condition of the grease as shown by the evidence" warranted the finding. It is difficult to distinguish the case from the many in which the Court has said the mere fact that the foreign substance is "dirty" is not enough to indicate it was there long enough to be discovered and removed.[7] It may be that the case turns on the evidence that the stairs were in a generally unclean condition, i.e., the presence of rubbish, debris, cigarette and candy bar papers, indicated they had not been cleaned in some time. The Court, as shown in the quoted holding, does not stress this factor, however.

In the second case, *Di Noto v. Gilchrist Co.,*[8] the plaintiff also slipped going downstairs. Plaintiff claimed she slipped on a wet and

[4] 1955 Mass. Adv. Sh. at 189, 124 N.E.2d at 813.

[5] 332 Mass. 42, 123 N.E.2d 211 (1954).

[6] Ibid.

[7] Both parties did an excellent job of collecting in their briefs the decided cases on both sides of the issue. The Court cited as controlling a line of cases some of which are cited on *both* sides of the case, by the parties. For cases on the defendant's side, see Kelleher v. Dini's, Inc., 331 Mass. 217, 118 N.E.2d 77 (1954); Uchman v. Polish National Home, Inc., 330 Mass. 563, 116 N.E.2d 145 (1953) (here a patron actually slipped on a banana peel in a barroom, thus proving once again that a law professor's hypothetical cases really do come true); Foley v. Hotel Touraine Co., 326 Mass. 742, 96 N.E.2d 698 (1951); DiAngelo v. United Markets, Inc., 319 Mass. 143, 64 N.E.2d 619 (1946). For plaintiff, see Scaccia v. Boston Elevated Ry., 317 Mass. 245, 57 N.E.2d 761 (1944); Berube v. Economy Grocery Stores Corp., 315 Mass. 89, 51 N.E.2d 777 (1943); Manell v. Checker Taxi Co., 284 Mass. 151, 187 N.E. 224 (1933); Tack v. Ruffo, 263 Mass. 487, 161 N.E. 587 (1928); Anjou v. Boston Elevated Ry., 208 Mass. 273, 94 N.E. 386 (1911).

[8] 332 Mass. 391, 1955 Mass. Adv. Sh. 283, 125 N.E.2d 239.

worn step. She testified that the "edge of the step was an inch worn at least." It was a slab of terrazzo which a defendant's witness claimed contained a large percentage of abrasive non-slip material and at the outer edge 3¼ inches of the step contained a greater portion than the rest of the step. The plaintiff made no claim that the step had any foreign substance or wax on it and the Court held her bound by this.

However, in a split decision the Supreme Judicial Court affirmed a refusal to direct a verdict for the defendant, asserting:

> The jury could find that the spot where she slipped was worn down at the edge at least an inch, that it was not in a reasonably safe condition, and that *considering the material* in which the wear occurred and its extent the defendant ought reasonably to have discovered it. Worn conditions in *terrazzo* or *marble stairs* either at the edge or next to the rising have been held to present a question of fact as to the negligence of the one in control of the stairway.[9] [Emphasis supplied.]

The Court did not cite any holdings on this point, however, and we are left to speculate as to the actual rationale of the decision. Is it that terrazzo and marble are known to be slippery when wet unless the abrasive is sufficient to eliminate this? If so, the verdict may be warranted either because the jury could find (1) the abrasive substance was not sufficient in the terrazzo to prevent its becoming slippery when wet, or (2) the worn condition cut down the abrasiveness to the point where it was unreasonably slippery when wet. Actually, it is very difficult to reconcile the Court's treatment of these cases with some past decisions. As noted above in regard to the *Hastings* case, parties are able to cite many decisions on either side of most of these cases, and are even citing the *same* cases on both sides.[10] The most important factor in each case, no matter what the language, is the action of the lower court. The Supreme Judicial Court in most cases will sustain the lower court action.

§3.8. The theory of the plaintiff's case: Res ipsa loquitur and enterprise liability. In another particularly interesting decision during the SURVEY year, *The Lobster Pot of Lowell, Inc. v. City of Lowell,*[1] the plaintiff sued the city of Lowell for negligence in allowing the sewer abutting plaintiff's restaurant to overflow into the restaurant property. The plaintiff's premises were *not attached* to the sewer system. On six or seven occasions between 1935 and 1951, the proprietor of the restaurant complained to the city about overflows and each time the city would come out and flush the sewer and drain in front of the restaurant and in the alleyway at the side of the restau-

9 1955 Mass. Adv. Sh. at 284, 125 N.E.2d at 241.
10 See note 7 *supra.*

§3.8. 1 1955 Mass. Adv. Sh. 769, 127 N.E.2d 659.

rant and it would be corrected. In 1951, the sewer again overflowed, this time doing damage to the restaurant's downstairs dining room. The sewer department cleaned the drain connecting the sewer on the alleyway with the sewer on the street in front of the restaurant and the flow of water was stopped.

The plaintiff sued for damages, relying on the fact that the city had made no periodic inspections of sewer lines during the two and one-half years from the last overflow complained of to this occasion.[2] The trial court directed a verdict for the defendant and the Supreme Judicial Court affirmed, asserting:

> It appears, in the present case, that the damage to the plaintiff's property was caused by some stoppage on the drain connecting the sewer in the alleyway with that [in front of the restaurant]. There was no evidence of the condition of this drain or of the material obstructing it. Although the city had the duty of using reasonable care to keep its sewers free from obstructions (*Bates v. Westborough,* 151 Mass. 174, 182) in the absence of evidence as to the nature of the obstruction it could not be found to have failed in its duty. Whether it was something which should have been anticipated or which periodic inspection would have disclosed is left to conjecture.[3]

The instant case goes along with a line of cases involving damage due to breaks in gas lines[4] and a 1931 case involving water lines[5] which, though not cited by the Court, arrive at the same conclusion.

The ultimate result of this case is an almost insurmountable burden on plaintiffs. The Court here admits that the city makes no periodic inspection of its entire sewer system. And yet, when a stoppage occurs, the plaintiff must prove the "nature of the obstruction." Even then, it would seem that the plaintiff would have to go on to connect the obstruction logically to some negligence of the city — to connect it at least with the fact that periodic inspection would have prevented the obstruction from building up to a point where it overflowed. Since the sewer system is under the exclusive control of the city it is difficult to imagine how the plaintiff could obtain evidence, let alone sustain the burden of proof, on the defendant's negligence.

In a number of other jurisdictions the courts have imposed an affirmative burden on municipalities to inspect their sewer systems periodically.[6] The Massachusetts Court in the instant case does not say

2 Plaintiff's Brief, p. 7.

3 1955 Mass. Adv. Sh. at 770-771, 127 N.E.2d at 660.

4 Musolino LoConte Co. v. Boston Consolidated Gas Co., 330 Mass. 161, 112 N.E.2d 250 (1953); Black v. Boston Consolidated Gas Co., 325 Mass. 505, 91 N.E.2d 218 (1950).

5 Goldman v. City of Boston, 274 Mass. 329, 174 N.E. 686 (1931).

6 District of Columbia v. Gray, 6 App. D.C. 314 (1895); Blood v. Bangor, 66 Me. 154 (1877); Rowe v. Portsmouth, 56 N.H. 291, 22 Am. Rep. 464 (1876); Barton v. City of Syracuse, 36 N.Y. 54 (1867).

there is no such duty, but it does not say there is.[7] It seemingly does not feel it necessary to indicate any duty where the plaintiff has proved no damage directly resulting from this failure. Again, if there is a duty to inspect, and certainly there ought to be, should the municipality be able to avoid liability by having the burden of proof of a specific causal connection placed on the person damaged?

The Court has rejected res ipsa loquitur as a means by which plaintiffs could get to the jury in these cases. In recent years some jurisdictions have used the res ipsa doctrine to thrust on defendants the burden of proving what did cause the injury in cases where all the facts are in the control of the defendants, even though the classic requirement of "exclusive control" is not met.[8] Such a procedural mechanism might be suggested for use in cases of this type. Also, even if we assume that neither can actually prove what "caused" the damage in terms of legal responsibility, it can be argued that the city should pay on the theory that (1) they are deriving the benefit from the proprietary interest in the sewer system, and (2) they can spread these losses as a cost of doing business by taking out liability insurance. The latter theory of an enterprise liability is perhaps best expressed in Professor Albert Ehrenzweig's provocatively entitled book, *Negligence Without Fault.*[9]

§3.9. The theory of the plaintiff's case: Nuisance and negligence. In *Ingram v. Tasco Hotel Corp.*,[1] the plaintiff was injured when, as she walked along the public sidewalk, a swinging front door of the defendant's hotel "was violently opened out on the sidewalk" by "departing guests." The jury returned a verdict for the plaintiff, but the trial court, on leave reserved, entered a verdict for defendant. The plaintiff had alleged nuisance in her declaration and her appeal again alleged this grounds. The Supreme Judicial Court asserted that the decisive question in the case was whether or not maintaining "a swinging door that swung out over a sidewalk of a public way in such a manner that it was likely to injure a pedestrian" [2] warranted a finding of nuisance. It found that it did, citing decisions from other states and two old Massachusetts decisions,[3] which it asserted tend "strongly" in that direction. The decision points up very well how the theory of the case can control the outcome. The nebulous concept of "nuisance" was sufficient to sustain a verdict even though the hotel may be

[7] The Court does assert in the matter quoted at note 3 *supra* that there is a duty of reasonable care to keep its sewers free from obstructions. It is difficult to see how this could be done without periodic inspections.

[8] See Jaffe, Res Ipsa Loquitur Vindicated, 1 Buffalo L. Rev. 1 (1951). For the leading case in this trend, see Ybarra v. Spangard, 25 Cal. 2d 486, 154 P.2d 687 (1944).

[9] Ehrenzweig, Negligence Without Fault 55-63, 75-80 (1951).

§3.9. [1] 332 Mass. 121, 1954 Mass. Adv. Sh. 1003, 123 N.E.2d 519.

[2] 1954 Mass. Adv. Sh. at 1004, 123 N.E.2d at 520.

[3] Commonwealth v. Blaisdell, 107 Mass. 234 (1871); Hyde v. Middlesex, 2 Gray 267 (Mass. 1854).

required to have its doors swing out because of fire regulations, even though it may not have violated any statutes or municipal regulations in regard to the position of its front door, and even though the door was swung open "violently" by departing guests. The question might be raised whether or not a door which swings *in* might not also be a nuisance in regard to persons inside the premises who also might be struck passing by it. Perhaps property owners are left in this case with a requirement that they install revolving doors, or place all doors in recessed places where persons cannot just "walk by" and be struck by some other person coming through them.