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SELECTED DEVELOPMENTS IN MASSACHUSETTS LAW

I. SELECTED DEVELOPMENTS IN CRIMINAL LAW AND PROCEDURE

During the *Selected Developments* year, Massachusetts courts focused on a number of substantive and procedural criminal law issues. Noteworthy judicial developments addressed constitutional rights under the United States Constitution and the Massachusetts Declaration of Rights, as well as responded to modern social developments. In the area of search and seizure, the Supreme Judicial Court limited a Massachusetts statute authorizing police officers to engage in warrantless electronic surveillance. The Court held that such surveillance constitutes a search under article 14 of the Declaration of Rights where the participant recording the conversation is not known to the nonconsenting party and the recording occurs in a private home, thus infringing on that party's reasonable expectation of privacy. In so ruling, the Court granted nonconsenting parties greater protection under article 14 than under the federal equivalent in the fourth amendment of the United States Constitution. The Supreme Judicial Court limited another statute that prohibited a person from permitting a child to pose nude for the purpose of taking a photograph. The Court ruled that the statute was unconstitutionally overbroad in violation of the first amendment of the United States Constitution because such acts could not be isolated from the constitutionally permissible expressive act of taking a photograph.

In the area of ineffective assistance of counsel, both the Supreme Judicial Court and the Massachusetts Appeals Court decided a number of cases that underscored the difficulties for a defendant attempting to demonstrate ineffective assistance of counsel. Absent a clearly egregious error by the attorney, such as failing to pursue the only reasonable defense available to the criminal defendant, these courts have demonstrated a reluctance to grant relief to defendants on the basis of an ineffective assistance of counsel claim. In addition to these procedural and constitutional issues, Massachusetts courts have focused on a number of social issues. One important social development addressed by the Supreme Judicial Court and the Appeals Court revolves around the increased awareness of drunken driving. These courts have evidenced a trend towards

stiffening the penalties for driving under the influence, as well as restricting the opportunity for crafty defendants to escape prosecution through artful interpretations of statutory language and constitutional challenges to the booking procedures following the defendant's arrest. Finally, although not specifically adopted by Massachusetts courts, the Appeals Court demonstrated a willingness to adopt the battered woman's syndrome, if future advocates complied with the necessary evidentiary requirements for admitting scientific evidence and expert testimony, as a viable supplement to self-defense law for women who kill abusive husbands after living in conditions of physical and psychological torment.

A. **Limiting Warrantless Participant Monitoring by Undercover Law Enforcement Officers*

Under chapter 272, section 99 of the Massachusetts General Laws, "investigative or law enforcement officers" may engage in warrantless electronic surveillance under certain circumstances.¹ In particular, section 99(B)(4) allows such officers to record or transmit wire or oral communications² without a warrant during investigations of designated offenses if they participate in the communication or have received prior consent to record or transmit by a party to the communication.³ This type of electronic surveillance, in which

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¹ MASS. GEN. L. ch. 272, § 99 (1986). Section 99(B)(8) states that "investigative or law enforcement officer" means any officer of the United States, a state or a political subdivision of a state, who is empowered by law to conduct investigations of, or to make arrests for, the designated offenses, and any attorney authorized by law to participate in the prosecutions of such offenses."

² "[W]ire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception." *Id.* § 99(B)(1).

"[O]ral communication" means speech, except such speech as is transmitted over the public air waves by radio or other similar device." *Id.* § 99(B)(2).

The federal electronic surveillance statute — Title III of the Omnibus Crime Control and Safe Streets Act of 1968 — is codified at 18 U.S.C. §§ 2510–2521 (1982 & Supp. IV 1986). For a thorough discussion of federal and state electronic surveillance laws, see J. CARR, *THE LAW OF ELECTRONIC SURVEILLANCE* (2d ed. 1987).

³ Section 99(B)(4) authorizes this warrantless electronic surveillance by defining "interception" to exclude certain forms of electronic surveillance. See MASS. GEN. L. ch. 272, § 99(B)(4). Section 99(B)(4) states that:

"Interception" means to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication through the use of any intercepting device by any person other than a person given prior authority by all parties to such communication; provided that it shall not constitute an interception for an investigative or law enforcement

one party to a conversation has consented to the taping, is referred to as "participant monitoring."⁴ This statutory scheme complies with current fourth amendment doctrine, which allows all warrantless participant monitoring.⁵ Similarly, until 1987, section 99(B)(4) complied with article 14 of the Massachusetts Declaration of Rights, which closely parallels the language and purposes of the fourth amendment of the United States Constitution.⁶

In 1987, the Supreme Judicial Court, over a strong dissent, held that certain types of warrantless participant monitoring violate article 14.⁷ Thus, the Court ruled that article 14 requires the suppression of evidence derived from such monitoring. In *Commonwealth v. Blood*, the Court held that, where the participant who records the conversation is not known to the nonconsenting party as a police officer, and where the interception occurs in a private home, the recording invades the nonconsenting party's reasonable expectation of privacy.⁸ Thus, according to the *Blood* Court, such electronic surveillance constitutes a search for purposes of article 14.⁹ The Court further held that, if the police did not obtain a warrant authorizing the search, an unreasonable search occurs in violation of article 14.¹⁰

officer . . . to record or transmit a wire or oral communication if the officer is a party to such communication or has been given prior authorization to record or transmit the communication by such a party and if recorded or transmitted in the course of an investigation of a designated offense as defined herein.

Id.

⁴ "Participant monitoring" refers to three distinct forms of consensual electronic surveillance: a participant's 1) recording the communication, 2) using an electronic device to transmit the communication to a third party or 3) consenting to a third party's interception. Greenawalt, *The Consent Problem in Wiretapping and Eavesdropping: Surreptitious Monitoring with the Consent of a Participant in a Conversation*, 68 COLUM. L. REV. 189, 190 n.9 (1968). For a discussion of the federal electronic surveillance statute's provisions regarding the exclusion of evidence derived from participant monitoring, see Note, *Interceptors and Innocent Recipients: Applying the Federal Wiretapping Law's Exclusionary Rule to Private Participant Monitoring*, 30 B.C.L. REV. 901 (1988).

⁵ See *United States v. Caceres*, 440 U.S. 741, 750-51 (1979); *United States v. White*, 401 U.S. 745, 751 (1971).

⁶ *Commonwealth v. Thorpe*, 384 Mass. 271, 286, 424 N.E.2d 250, 259 ("Because on the facts of this case we find no violation of the State Constitution, we need not decide whether other forms of warrantless surveillance would violate art. 14."), *cert. denied*, 454 U.S. 1147 (1982).

⁷ *Commonwealth v. Blood*, 400 Mass. 61, 62, 66 n.6, 507 N.E.2d 1029, 1030, 1032 n.6 (1987).

⁸ *Id.* at 70, 507 N.E.2d at 1034.

⁹ *Id.* at 68-71, 507 N.E.2d at 1033-35.

¹⁰ *Id.* at 70, 507 N.E.2d at 1034.

The *Blood* Court recognized that the fourth amendment of the United States Constitution does not proscribe the warrantless participant monitoring authorized by section 99(B)(4).¹¹ Under current fourth amendment doctrine, the Court noted, participant monitoring does not invade a person's reasonable expectation of privacy because a person assumes the risk that others with whom he or she speaks are police informants and may be recording their conversation.¹² Accordingly, the Court conceded that participant monitoring does not constitute a search or seizure for purposes of the fourth amendment. The Court stated, however, that article 14 of the Massachusetts Declaration of Rights affords more substantive protection.¹³

In *Blood*, the defendants James Blood and Ernest Lorenzen were found guilty of conspiracy to break and enter a building and conspiracy to commit larceny.¹⁴ In furtherance of their plan, they conspired to break into a building at the Eastern Smelting & Refining Company in Lynn, and steal \$3,000,000 in gold bars stored there.¹⁵ The police prevented the theft because an alleged third conspirator, Charles Hudson, acted as a police informant.¹⁶

At the police's request, Hudson recorded two conversations that he had with the defendants.¹⁷ Both conversations took place in homes of conspirators not on trial with the defendants.¹⁸ Hudson failed to obtain the consent of any of the conspirators before the tapings.¹⁹

The *Blood* Court noted the general rule that police activity must invade a defendant's reasonable expectation of privacy in order to constitute a search for purposes of the fourth amendment and article 14 of the Massachusetts Declaration of Rights.²⁰ The Court ruled that the informer's participant monitoring invaded the defendants' reasonable expectation of privacy.²¹ Privacy, according to the

¹¹ *Id.* at 67, 507 N.E.2d at 1032.

¹² *Id.* at 72 n.12, 507 N.E.2d at 1035 n.12.

¹³ *Id.* at 62, 66 n.6, 507 N.E.2d at 1030, 1032 n.6.

¹⁴ *Id.* at 62, 507 N.E.2d at 1030.

¹⁵ *Id.*

¹⁶ *Id.* at 62-63, 507 N.E.2d at 1030.

¹⁷ *Id.* at 63-64, 507 N.E.2d at 1030-31.

¹⁸ *Id.*

¹⁹ *See id.*

²⁰ *See id.* at 68, 507 N.E.2d at 1033. The fourth amendment "reasonable expectation of privacy" test originated in Justice Harlan's concurring opinion in *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

²¹ *Blood*, 400 Mass. at 68, 507 N.E.2d at 1033.

Court, is the right of individuals to control the extent to which personal information is communicated to others.²² Because the conversations occurred in private homes, without the defendants' manifest intent to make the contents of the communication known to the general public, the Court concluded that the defendants exhibited an actual expectation of privacy.²³

The Court also ruled that society recognized the defendants' actual expectations of privacy as reasonable.²⁴ In so ruling, the Court examined common law notions of privacy, legislative recognition of privacy, the purposes underlying article 14, and the peculiarly intrusive nature of electronic surveillance.²⁵ The Court concluded that these sources demonstrated that the defendants enjoyed reasonable expectations of privacy.²⁶

The Court first examined common law notions of privacy.²⁷ At common law, according to the Court, persons had the right to control the extent to which their own words were made public.²⁸ The Court also pointed to certain pieces of state legislation evidencing the reasonableness of persons' claims to control the flow of personal information.²⁹ The Fair Information Practices Act,³⁰ the statutory right to privacy,³¹ and other portions of the state wiretapping statute that outlawed electronic surveillance absent the consent of all parties to the conversation,³² according to the Court, demonstrated the reasonableness of the defendants' expectation of privacy.³³

In addition to finding support in the common and statutory law, the Court buttressed its conclusion by looking to the Massachusetts Declaration of Rights.³⁴ The Court held that the drafters of article 14 intended it to protect Americans in the "right to be let alone — the most comprehensive of rights and the right most valued

²² *Id.* (citing A. WESTIN, *PRIVACY AND FREEDOM* (1967)).

²³ *Id.*

²⁴ *Id.* at 68-70, 507 N.E.2d at 1033-34.

²⁵ *Id.*

²⁶ *Id.* at 70, 507 N.E.2d at 1034.

²⁷ *Id.* at 69, 507 N.E.2d at 1033.

²⁸ *Id.*

²⁹ *Id.*

³⁰ MASS. GEN. L. ch. 66A (1986).

³¹ MASS. GEN. L. ch. 214, § (1)(B).

³² *See* MASS. GEN. L. ch. 272, §§ 99(B)(4), 99(C)(1).

³³ *Blood*, 400 Mass. at 69, 507 N.E.2d at 1033.

³⁴ *Id.* at 69-70, 507 N.E.2d at 1034.

by civilized men."³⁵ The Court also reasoned that, because the peculiarly intrusive nature of electronic surveillance greatly threatened personal privacy, article 14 required the Court to extend the article's protection to such intrusions.³⁶ The Court therefore held that the defendant's expectation of privacy was reasonable, thus placing the participant monitoring within the scope of article 14 searches.³⁷

The *Blood* Court then considered the reasonableness of the warrantless search.³⁸ The Court stated that the exception for warrantless participant monitoring institutionalized the precise danger that article 14 sought to protect, and concluded that it was an unreasonable search.³⁹ In holding that the search was unreasonable, the Court analogized to the writs of assistance, which British officers used to justify general searches during the colonial period before the Revolution.⁴⁰ Such writs, according to the Court, placed the liberty of citizens in the hands of British officers.⁴¹ Similarly, the Court argued, warrantless participant monitoring places personal liberty at the hands of any police officer fortunate enough to find a consenting informant.⁴² The Court concluded that such electronic surveillance should only be acceptable when a neutral and detached magistrate first authorizes it by issuing a warrant.⁴³

Justice Nolan wrote a vigorous dissent, which Justice Lynch joined.⁴⁴ Justice Nolan first disputed the majority's holding that the police conduct constituted a search.⁴⁵ According to Justice Nolan, the Massachusetts Legislature properly decided that members of organized crime who converse about designated offenses do not have reasonable expectations of privacy in those conversations.⁴⁶ Thus, according to Justice Nolan, the informant's warrantless surveillance did not rise to the level of a search for purposes of article

³⁵ *Id.* at 69, 507 N.E.2d at 1034, (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1938) (Brandeis, J., dissenting)).

³⁶ *Id.* at 70, 507 N.E.2d at 1034.

³⁷ *See id.*

³⁸ *Id.* at 70-71, 507 N.E.2d at 1034-35.

³⁹ *Id.* at 70, 507 N.E.2d at 1034.

⁴⁰ *Id.* at 71-72, 507 N.E.2d at 1035.

⁴¹ *Id.* at 71, 507 N.E.2d at 1035.

⁴² *Id.* at 71-72, 507 N.E.2d at 1035.

⁴³ *See id.* at 75-77, 507 N.E.2d at 1037-38.

⁴⁴ *Id.* at 78-81, 507 N.E.2d at 1039-40 (Nolan, J., dissenting).

⁴⁵ *Id.* at 79-80, 507 N.E.2d at 1039-40 (Nolan, J., dissenting).

⁴⁶ *Id.*

14.⁴⁷ Even if the police activity constituted a search, Justice Nolan stated that the warrantless participant monitoring was constitutional because it was not unreasonable.⁴⁸

Justice Nolan first noted that, according to current search and seizure analysis, a search cannot occur where a person does not have a reasonable expectation of privacy.⁴⁹ Justice Nolan stated that section 99(B)(4), the statutory provision authorizing certain warrantless participant monitoring, represented a sound legislative judgment that members of organized crime who converse about certain designated offenses do not have a reasonable expectation of privacy in those conversations.⁵⁰ Thus, according to the dissent, the police conduct in question did not constitute a search for purposes of the fourth amendment and article 14.⁵¹

Justice Nolan then questioned the sources from which the majority determined that the defendants had a reasonable expectation of privacy in the conversations.⁵² The majority, according to Justice Nolan, relied on dissenting opinions and Massachusetts legislative provisions other than section 99(B)(4) to determine which expectations of privacy the people of Massachusetts consider reasonable.⁵³ Justice Nolan stated that the majority, by failing to use such external sources as section 99(B)(4), had substituted their own values for society's to determine what constitutes a reasonable expectation of privacy.⁵⁴

Justice Nolan argued further that, even if the defendants had a reasonable expectation of privacy and, therefore, the police conduct rose to the level of a search, the search was not unreasonable because the benefits from such surveillance outweighed any danger to personal liberty.⁵⁵ Section 99(B)(4) lists four criteria that the police must satisfy before they may bypass the warrant process: "[t]he police must (1) have the consent of a party to the conversation which (2) they reasonably suspect will (3) involve organized criminals (4) planning a designated offense."⁵⁶ These four criteria, according to Justice Nolan, represented a sound legislative determi-

⁴⁷ *Id.*

⁴⁸ *Id.* at 80-81, 507 N.E.2d at 1040 (Nolan, J., dissenting).

⁴⁹ *Id.* at 79, 507 N.E.2d at 1039 (Nolan, J., dissenting).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 79-80, 507 N.E.2d at 1039-40 (Nolan, J., dissenting).

⁵³ *Id.* at 79, 507 N.E.2d at 1039.

⁵⁴ *Id.* at 80, 507 N.E.2d at 1039-40 (Nolan, J., dissenting).

⁵⁵ *Id.* at 80, 507 N.E.2d at 1040 (Nolan, J., dissenting).

⁵⁶ *Id.* (citing MASS. GEN. L. ch. 272, § 99(B)(4) (1986)).

nation that the benefits to law enforcement officers from these searches outweighed the intrusion on personal privacy.⁵⁷

Justice Nolan also stated that the majority used a "truncated analysis" to conclude that the statute's exception for warrantless electronic surveillance violated article 14's proscription of unreasonable searches and seizures.⁵⁸ Because the majority, according to Justice Nolan, framed the issue in such a way that it only considered one of the four statutory criteria, and thus failed to perform the same balancing test as the legislature, the majority "ask[ed] and answer[ed] the wrong question."⁵⁹ Justice Nolan concluded that the majority's liberal interpretation of article 14, which protected modern privacy rights but ignored the needs of modern law enforcement, had, "in the guise of protecting privacy," protected "only . . . those who are [privacy's] greatest threat."⁶⁰

The Supreme Judicial Court's decision in *Commonwealth v. Blood* marks another instance in which state courts have interpreted their own constitutions to afford more substantive rights than the analogous provisions of the United States Constitution.⁶¹ The *Blood* decision also answers a question left unanswered by *Commonwealth v. Thorpe*, a previous Supreme Judicial Court decision involving the constitutionality of section 99(B)(4). *Thorpe* left open the question of whether section 99(B)(4) violated article 14 in situations other than those in which a police officer, known to the nonconsenting party as an officer, taped a conversation.⁶² Although the *Blood* decision may represent sound policy, it lacks a principled constitutional analysis.

One important aspect of *Blood* is that it answers the question left open by *Commonwealth v. Thorpe*.⁶³ In *Thorpe*, the Court found that participant monitoring by a police officer, who was known to the nonconsenting party as a police officer, did not violate article 14.⁶⁴ The *Thorpe* Court explicitly left open the question of whether other forms of warrantless participant monitoring may violate ar-

⁵⁷ *Blood*, 400 Mass. at 80, 507 N.E.2d at 1040.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 81, 507 N.E.2d at 1040 (Nolan, J., dissenting).

⁶¹ *Cf.* *Commonwealth v. Upton*, 394 Mass. 363, 371-73, 476 N.E.2d 548, 555-56 (1985), and cases cited.

⁶² *See Blood*, 400 Mass. at 67-68, 507 N.E.2d at 1032-33; *see also Commonwealth v. Thorpe*, 384 Mass. 271, 285-86, 424 N.E.2d 250, 259, *cert. denied*, 454 U.S. 1147 (1982).

⁶³ *Thorpe*, 384 Mass. at 285-86, 424 N.E.2d at 259.

⁶⁴ *Id.*

ticle 14.⁶⁵ The *Blood* Court, by grounding its decision in the fact that the interceptor, Hudson, was not known to the nonconsenting parties as a police officer, distinguished and affirmed *Thorpe*.⁶⁶

Although the *Blood* decision may represent sound social policy, the Court applied flawed reasoning and analysis. One flaw is that the Court used questionable sources to conclude that the defendants had a reasonable expectation of privacy. In addition, even if the participant monitoring at issue constituted a search, the majority failed to demonstrate persuasively its unreasonableness. Finally, the Court offered no principled reasons for reconciling its conclusion that the participant monitoring at issue was an unreasonable search and seizure with the fact that an informant's actions fail to constitute a search.

To justify its conclusion supporting the defendants' reasonable expectation of privacy, the *Blood* Court pointed to legislative recognition of the right to privacy and dissenting opinions from United States Supreme Court cases that upheld the constitutionality of warrantless participant monitoring.⁶⁷ As Justice Nolan pointed out in his dissent, however, the Court ignored the fact that, although the legislature recognizes certain rights to privacy, it explicitly authorized this participant monitoring.⁶⁸ It seems difficult to argue, therefore, as the Court does, that society recognizes the defendants' expectations of privacy as reasonable because the legislature has recognized various privacy rights, when the same legislature passed section 99(B)(4), which rejected the reasonableness of the precise privacy claim at issue.

Even if the participant monitoring constituted a search under article 14, the Court failed to offer persuasive reasons why it was an unreasonable search. Section 99(B)(4) contains four criteria that the police must satisfy before they may bypass the warrant process: (1) consent by a party to a conversation which (2) the police reasonably suspect (3) will involve organized criminals (4) planning a designated offense.⁶⁹ These criteria limit the circumstances under which the police may use section 99(B)(4). Although the Supreme Judicial Court has held these criteria sufficient in the past to find a

⁶⁵ *Id.* at 286, 424 N.E.2d at 259.

⁶⁶ See *Blood*, 400 Mass. at 66 n.6, 507 N.E.2d at 1032 n.6.

⁶⁷ See *supra* notes 25-37 and accompanying text for a discussion of the Court's conclusion that the defendants possessed a reasonable expectation of privacy.

⁶⁸ See *Blood*, 400 Mass. at 79, 507 N.E.2d at 1039 (Nolan, J., dissenting).

⁶⁹ See MASS. GEN. L. ch. 272, § 99(B)(4) (1986).

search reasonable,⁷⁰ the *Blood* Court ruled that, when the informant is not generally known to be a police officer, and the conversations take place in a private home, these criteria do not suffice. In reaching this conclusion, the Court ruled that the language and purposes of article 14 demanded such an interpretation.⁷¹ The Court failed to apply the cost-benefit analysis it frequently used to decide the reasonableness of a search.

The third shortcoming in the *Blood* decision is its failure to explain why the Court's conclusion did not compel a finding that the use of informants also implicates article 14 and the fourth amendment. The police may place an informant in the midst of a conspiracy for the purpose of eliciting incriminating testimony, even if the informant is not known as a police officer, without implicating article 14, but, under *Blood*, may not allow the informant to preserve a more accurate record of his or her findings on tape without causing an unreasonable search and seizure.⁷² The Court failed to explain why this distinction exists. Instead, the Court simply pointed to the fact that those Supreme Court justices most adamantly opposed to warrantless surveillance do not hold that an informer's testimony implicates the fourth amendment.⁷³ If privacy is, as the Court claimed, the right of an individual to control the extent to which personal information is communicated to others, then it is unclear why an informant's actions constitutionally differ from electronic surveillance when informants also significantly intrude on that definition of privacy.

In addition, article 14, according to the Court, protects persons in their "right to be let alone." Informants, however, also intrude on the right to be let alone. The Court failed to explain why it did not extend the privacy protection to informants, and thus require the police to obtain some kind of warrant before using informants.

In sum, the Supreme Judicial Court's decision in *Blood* offers more protection from police surveillance than the fourth amendment. Its decision answers the question left open by *Thorpe*, but also leaves several questions unanswered. The Court ignored the legislature's conclusion as to what society finds to be a reasonable ex-

⁷⁰ See *Commonwealth v. Thorpe*, 384 Mass. 271, 286, 424 N.E.2d 250, 259, cert. denied, 454 U.S. 1147 (1982).

⁷¹ See *Blood*, 400 Mass. at 70-72, 507 N.E.2d at 1034-35.

⁷² Compare *Commonwealth v. Jarabek*, 384 Mass. 293, 297-300, 424 N.E.2d 491, 492-93 (1981) with *Blood*, 400 Mass. at 66 n.6, 507 N.E.2d at 1032 n.6.

⁷³ *Blood*, 400 Mass. at 78, 507 N.E.2d at 1038-39.

pectation of privacy and replaced the legislature's conclusion with its own.

B. **The Regulation of Non-Obscene Nude Photography of Children*

The United States Supreme Court accords states great leeway in regulating the pornographic depiction of children.¹ Restrictions on child pornography are permissible, despite any incidental infringement of first amendment freedoms, because of the state's compelling interest in preventing the psychological and physical harm suffered by children who are subjects of pornographic works.² In *New York v. Ferber*, the Supreme Court upheld a statute that criminalized the dissemination of material depicting sexual conduct by children.³ In so doing, the *Ferber* Court held that the entire category of child pornography is unprotected by the first amendment.⁴ The *Ferber* Court did not, however, define the category of child pornography, other than to state that it includes visual depictions of sexual conduct by children.⁵ The *Ferber* Court left open the question of whether the visual depiction of child nudity could be classified as child pornography.⁶

During the *Selected Developments* year, the Massachusetts Supreme Judicial Court, in *Commonwealth v. Oakes*, struck down as constitutionally overbroad in violation of the first amendment a Massachusetts statute that prohibits causing, encouraging, or knowingly permitting a child to pose in a state of nudity for the purpose

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¹ *New York v. Ferber*, 458 U.S. 747, 756 (1981) (unanimous decision).

² *Id.* at 756-58.

³ *Id.* at 774. The statute, N.Y. PENAL LAW § 263 (McKinney 1980), provides, in pertinent part:

§ 263.15

A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a child less than sixteen years of age. . . .

§ 263.00(5)

"Promote" means to . . . disseminate

§ 263.00(3)

"Sexual conduct" means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals.

⁴ *Ferber*, 458 U.S. at 763-64.

⁵ *Id.* at 764.

⁶ See *Ferber*, 458 U.S. at 764-65.

of taking a photograph.⁷ The statute defines nudity to include "uncovered post-pubertal . . . genitals, pubic areas, [or] . . . the female breast."⁸ The statute at issue in *Oakes* differs in two significant respects from the one at issue in *Ferber*: first, the conduct proscribed by the *Oakes* statute includes simple nudity,⁹ whereas the conduct proscribed by the *Ferber* statute extended only to sexual conduct and the lewd exhibition of the genitals;¹⁰ second, the *Oakes* statute proscribed the act of permitting a child to pose in a state of nudity,¹¹ rather than the dissemination of a photograph.¹² In striking down the statute, the *Oakes* Court held, first, that the defendant's conduct in permitting his stepdaughter to pose naked from the waist up could not be isolated from the expressive process of photographing her;¹³ and, second, that the statute was overbroad because it included within its ambit depictions that could be considered neither obscene nor pornographic.¹⁴

⁷ 401 Mass. 602, 518 N.E.2d 836, *cert. granted*, 108 S. Ct. 1994 (1988). The statute struck down in *Oakes* as overbroad provides:

Whoever with knowledge that a child is under eighteen years of age, or whoever while in possession of such facts that he should have reason to know that such person is a child under eighteen years of age, hires, coerces, solicits or entices, employs, procures, uses, causes, encourages, or knowingly permits such child to pose or be exhibited in a state of nudity or to participate or engage in any act that depicts, describes or represents sexual conduct for purpose of visual representation or reproduction in any book, magazine, pamphlet, motion picture film, photograph, or picture shall be punished by imprisonment in the state prison for a term of not less than twenty years, or by a fine of not less than ten thousand dollars nor more than fifty thousand dollars, or by both such fine and imprisonment.

MASS. GEN. L. ch. 272, § 29A (1986).

⁸ MASS. GEN. L. ch. 272, § 31 (1986). Section 31 defines nudity as uncovered or less than opaquely covered post-pubertal human genitals, pubic area, the post-pubertal human female breast below a point immediately above the top of the areola, or the covered male genitals in discernibly turgid state. For purposes of this definition a female breast is considered uncovered if the nipple or the nipple or areola only are covered. In the case of pre-pubertal persons nudity shall mean uncovered or less than opaquely covered pre-pubertal human genitals or pubic area.

Id.

⁹ MASS. GEN. L. ch. 272, §§ 29A, 31 (1986). For the full text of §§ 29A and 31, see *supra* notes 7, 8 respectively.

¹⁰ N.Y. PENAL LAW § 263.15 (McKinney 1980). For the full text of § 263.15, see *supra* note 16.

¹¹ MASS. GEN. L. ch. 272, § 29A (1986). For the full text of § 29A, see *supra* note 7.

¹² See *supra* note 3 and accompanying text.

¹³ *Commonwealth v. Oakes*, 401 Mass. 602, 603-04, 518 N.E.2d 836, 837, *cert. granted*, 108 S. Ct. 1994 (1988).

¹⁴ *Id.* at 604-05, 518 N.E.2d at 837-38.

In *Oakes*, the defendant had permitted his fifteen year old stepdaughter to pose naked from the waist up for photographs that the defendant took of her within their home.¹⁵ The state prosecuted the defendant under a law making it illegal to permit a child to pose naked for a photograph.¹⁶ A jury convicted the defendant of violation of the statute.¹⁷ The defendant challenged his conviction on two grounds: first, that his conduct was speech protected by the first amendment;¹⁸ and, second, that the statute was substantially overbroad, and therefore facially invalid.¹⁹

The Massachusetts Supreme Judicial Court declined to rule on whether the first amendment protected the defendant's conduct, instead holding that the statute was unconstitutionally overbroad.²⁰ The *Oakes* Court began by stating that photography is speech protected by the first amendment.²¹ Going further, the Court reasoned that the defendant's conduct in permitting his stepdaughter to pose could not be isolated from the expressive process of actually taking the picture.²²

Where activity involves both speech and conduct, the *Oakes* Court noted, a substantial government interest can justify incidental restrictions on first amendment guarantees.²³ The *Oakes* Court questioned, however, whether the instant case presented a substantial government interest, given that, as the Court found, the photographs taken by the defendant were neither obscene nor pornographic, and were not intended for distribution.²⁴ Whether the state had demonstrated a substantial government interest was irrelevant, however, because the Court found that the sweep of the statute extended substantially beyond any possible legitimate interest.²⁵ If the plain meaning of the statute were given effect, the Court found, a parent could be penalized as a result of, for example, taking a

¹⁵ *Id.* at 603, 518 N.E.2d at 837. The dissent in *Oakes* further provides that the daughter was "atop a bar, clad only in a red scarf around her neck and bikini type white panties, and with her breasts exposed — if not highlighted." *Id.* at 606, 518 N.E.2d at 838 (O'Connor, J., dissenting).

¹⁶ MASS. GEN. L. ch. 272, §§ 29A, 31 (1986). For the full text of §§ 29A and 31, see *supra* notes 7, 8, respectively.

¹⁷ *Oakes*, 401 Mass. at 602, 518 N.E.2d at 836.

¹⁸ *Id.* at 603, 518 N.E.2d at 837.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 603-04, 518 N.E.2d at 837.

²² *Id.*

²³ *Id.* at 604, 518 N.E.2d at 837.

²⁴ *Id.*

²⁵ *Id.* at 605, 518 N.E.2d at 837-38.

picture of his or her naked one year old child, an act that the government could hardly demonstrate a legitimate interest in preventing.²⁶

Justice O'Connor, joined by Justices Nolan and Lynch, dissented from the majority's holding that the defendant's act of permitting his stepdaughter to pose naked was inseverable from the expressive conduct of actually taking or disseminating a photograph.²⁷ Justice O'Connor reasoned that a distinction exists between the dissemination of a photograph, which is protected speech, and the conduct required to set up the photograph.²⁸ Only conduct that directly and immediately communicates constitutes speech for the purposes of the first amendment, according to Justice O'Connor.²⁹ In support of his position, Justice O'Connor cited two other state supreme court opinions upholding similar statutes. Both opinions stressed that nonexpressive conduct, rather than speech, was at the "epicenter" of the offense for which the defendants had been prosecuted.³⁰ To punctuate his conclusion, Justice O'Connor pointed out that setting a house on fire is not conduct entitled to first amendment protection, even where the purpose is to photograph a burning house.³¹

The *Oakes* Court's ruling raises three issues: first, whether photographs of nude children constitute child pornography unprotected by the first amendment. If photographs of nude children are child pornography, then the collateral act of permitting a child to pose for such photographs is also unprotected. Second, if photographs of nude children are protected speech, whether the conduct of obtaining a model to pose for the photographs is inextricably intertwined with taking and disseminating the photographs. If the latter activities are dependent on the former, then a prohibition on the use of nude children as models constitutes an unconstitutional restriction of the photographer's freedom of expression. Third, whether the scope of the conduct prohibited by the statute in *Oakes* extends substantially beyond a state's interest in prohibiting at least some nude photography of children.

Photographs of nude children, absent some element of lewd exhibition or commercial exploitation, probably do not constitute

²⁶ *Id.*

²⁷ *Id.* at 607, 518 N.E.2d at 839 (O'Connor, J., dissenting).

²⁸ *Id.*

²⁹ *Id.* at 608, 518 N.E.2d at 839-40 (O'Connor, J., dissenting).

³⁰ *Id.* at 609-10, 518 N.E.2d at 840 (O'Connor, J., dissenting).

³¹ *Id.* at 610, 518 N.E.2d at 841 (O'Connor, J., dissenting).

child pornography. Thus, the photography of nude children is entitled to some first amendment protection. In defining child pornography, the United States Supreme Court in *New York v. Ferber* failed to indicate whether nudity is included within the category of sexual conduct whose depiction the first amendment does not protect.³² The conduct proscribed by the statute upheld in *Ferber* did include, however, the "lewd exhibition of the genitals."³³ Although this suggests that the state may constitutionally proscribe lewd or sexually suggestive photographs of nude children, it provides little guidance in determining whether the state may constitutionally classify all nude photographs of children as child pornography.³⁴

In deciding that states may constitutionally regulate child pornography, the *Ferber* Court relied heavily on the emotional and physical harm suffered by children that engage in sexual conduct for the production of pornographic materials.³⁵ If the same type and degree of harm can be attributed to, for example, a child's exposure of her breasts, then simple nudity should logically be included in the category of unprotected child pornography. Although a definitive resolution will require empirical evidence, it is at least arguable that the harm attributable to the exposure of one's genitals or breasts would not be as severe as that attributable to coerced sexual intercourse. This does not imply that emotional or psychological harm could not result where, for example, children are coerced into displaying themselves in a lewd or highly suggestive way, or where children are required to expose themselves repeatedly. Similarly, one would expect such harm to occur where commercial exploitation of the photographs is intended. In sum, although situations may arise where nude photography of children may sink to the level of child pornography, a generalization that all photographs of nude children fall within this category seems unwarranted.

Assuming that some photographs of nude children are entitled to first amendment protection, the question becomes whether the protection extends to the act of obtaining a model to pose for the photographs. The Constitution mandates such protection if the act of obtaining a model is essential to the expressive process of taking

³² *New York v. Ferber*, 458 U.S. 747, 764 (1981).

³³ N.Y. PENAL LAW § 263 (McKinney 1980). For the full text of the relevant portions of the statute, see *supra* note 3.

³⁴ *Ferber*, 458 U.S. at 765.

³⁵ *Id.* at 756-58.

and disseminating photographs. On one end of the spectrum certain types of conduct, such as the distribution of leaflets, have traditionally been regarded as so integral to a speaker's ability to communicate that they are protected by the first amendment in the absence of an extremely compelling justification for their regulation.³⁶ On the other end of the spectrum, in contrast, activities that are neither necessary to a speaker's ability to communicate, nor traditionally associated with expressive activity, may be regulated without offending the first amendment, regardless of any incidental negative effect on the speaker's ability to deliver his or her message.³⁷ In *Clark v. Community for Creative Non-Violence*, the United States Supreme Court held that the government could constitutionally prohibit protestors from camping on the Mall in Washington, D.C. to protest the plight of the homeless.³⁸ The activity regulated by the statute in the present case, causing or permitting children to pose nude or partially nude, is essential to the taking of photographs of nude children. In the child pornography context, the Supreme Court has suggested that persons over the statutory age that appear younger could be substituted for children where necessary.³⁹ Although the same technique could be used when photographs of older nude children are desired, an eighteen year-old adult could hardly serve as a replacement where a parent wishes to take pictures of his or her two year-old infant.

Given the close relationship between the conduct that the state seeks to prohibit and the expressive activity at issue, the state must demonstrate both a compelling justification for prohibiting the use of nude child models, and that the prohibition is the least restrictive alternative for achieving its end.⁴⁰ The state's interest in protecting its children, while not sufficient to thrust nude photography outside the first amendment and into the category of child pornography, is nonetheless compelling. One could hardly question that photographing nude children does contain the *potential* for exploitation and abuse.⁴¹

The statute at issue in *Oakes* is not, however, the least restrictive alternative for preventing the exploitation and abuse of children

³⁶ *United States v. Grace*, 461 U.S. 171, 177 (1983) (distribution of leaflets accorded first amendment protection). See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 829-30 (2d ed. 1988).

³⁷ See L. TRIBE, *supra* note 36, at 831.

³⁸ *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294 (1984).

³⁹ *Ferber*, 458 U.S. at 763.

⁴⁰ See *Grace*, 461 U.S. at 177.

⁴¹ *Oakes*, 401 Mass. at 606, 518 N.E.2d at 838 (O'Connor, J., dissenting).

involved in nude photography. The legislature could have limited the statute to, for example, lewd photographs of nude children, or to photographing nude children for sexual or commercial exploitation. Either of these alternatives would have been more closely tailored to the prevention of exploitation and abuse.

Whether the statute is substantially overbroad is related to whether the statute represents the least restrictive alternative for achieving the state's goal.⁴² If the statute is not the least restrictive alternative, then by definition it infringes upon some protected activity.⁴³ Where the amount of infringed constitutionally protected activity is substantial, the statute is constitutionally overbroad.⁴⁴

In *Oakes*, as the Supreme Judicial Court found, the statute extended to a substantial amount of protected activity.⁴⁵ For example, any photograph, film, or painting that depicted a naked infant involved a violation of the statute, regardless of whether the photograph formed part of a family album, or part of a collection of pornographic stills. Similarly, the *Oakes* statute criminalized the relatively mild act of photographing a seventeen year-old female model who is nude from the waist up. Although such conduct may be open to moral criticism, the assertion that the evil feared of is at all related to the harm suffered by, for example, an eight year old child forced to perform sexual intercourse is hardly credible. In sum, the Supreme Judicial Court correctly held that the statute at issue in *Oakes* was substantially overbroad in violation of the first amendment, and was therefore facially invalid.

C. **Proving Ineffective Assistance of Counsel: The Burden of Sisyphus Under the Commonwealth v. Saferian Standards*

The Supreme Judicial Court promulgated the Massachusetts ineffective assistance of counsel standard in 1974 in *Commonwealth v. Saferian*.¹ In *Saferian*, the Supreme Judicial Court held that:

what is required in the actual process of decision of claims of ineffective assistance of counsel . . . is a discerning examination and appraisal of the specific circumstances of the given case to see whether there has been serious in-

⁴² See *Broderick v. Oklahoma*, 413 U.S. 601, 615 (1973).

⁴³ See *id.*

⁴⁴ *Id.* at 616.

⁴⁵ *Oakes*, 401 Mass. at 604-05, 518 N.E.2d at 837-38.

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¹ *Commonwealth v. Saferian*, 366 Mass. 89, 315 N.E.2d 878 (1974).

competency, inefficiency, or inattention of counsel — behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer — and, if that is found, then, typically, whether it has likely deprived the defendant of an otherwise available, substantial ground of defence.²

In effect, *Saferian* established a two-prong test that a defendant must satisfy to demonstrate ineffective assistance of counsel.³ First, the defendant must show that his lawyer's efforts deviated from those expected from the "ordinary fallible lawyer."⁴ When determining this question, the Supreme Judicial Court will not "second guess competent lawyers working hard for defendants who turn on them when the jury happens to find their clients guilty."⁵ Rather, the Court requires that the defendant show that his or her lawyer's tactical or strategic judgment was "manifestly unreasonable."⁶ Second, once the defendant has shown that his or her lawyer's efforts failed to meet the "ordinary fallible lawyer" standard, the defendant must then demonstrate that his or her lawyer's deficient efforts deprived him or her of "an otherwise available, substantial ground of defence"⁷ — in other words, that "better work [by his or her lawyer] might have accomplished something material for the defense."⁸ In short, the defendant must show that his or her defense incurred actual harm as a result of his or her lawyer's sub-standard efforts.

² *Id.* at 96, 315 N.E.2d at 883. The Supreme Judicial Court has held that if the *Saferian* test is met, then the federal standard has necessarily been met. *Commonwealth v. Fuller*, 394 Mass. 251, 256 n.3, 475 N.E.2d 381, 383 n.3 (1985). The United States Supreme Court set forth the federal standard in *Strickland v. Washington*, holding:

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. 668, 687 (1984).

³ *Commonwealth v. Rondeau*, 378 Mass. 408, 412, 392 N.E.2d 1001, 1003 (1979); *Saferian*, 366 Mass. at 96, 315 N.E.2d at 883.

⁴ *Saferian*, 366 Mass. at 96, 315 N.E.2d at 883.

⁵ *Commonwealth v. Stone*, 366 Mass. 506, 517, 320 N.E.2d 888, 896 (1974).

⁶ *Commonwealth v. Adams*, 374 Mass. 722, 728, 375 N.E.2d 681, 685 (1978).

⁷ *Saferian*, 366 Mass. at 96, 315 N.E.2d at 883.

⁸ *Commonwealth v. Satterfield*, 373 Mass. 109, 115, 364 N.E.2d 1260, 1264 (1977).

During the *Selected Developments* year, the Supreme Judicial Court and the Appeals Court have decided a number of cases in which the defendant had raised the issue of ineffective assistance of counsel.⁹ Throughout each of these cases, the Supreme Judicial Court and the Appeals Court consistently applied the standard set forth in *Saferian*. Furthermore, these cases clearly illustrated the difficulty of proving ineffective assistance of counsel under this standard.

In *Commonwealth v. Haggerty*, the Supreme Judicial Court found ineffective assistance of counsel when the defendant's attorney failed to pursue the only defense available to the defendant.¹⁰ The defendant assaulted and robbed an eighty-two year old woman on June 16, 1982.¹¹ The woman was hospitalized as a result of the assault and remained hospitalized until August 11, 1982 when she died of a heart attack.¹² The jury convicted the defendant of first degree murder. The defendant thereafter appealed from his conviction and from his motion for a new trial, claiming that at trial he was denied effective assistance of counsel because his attorney failed to pursue the issue of causation in regard to the victim's death.¹³

At the hearing on the defendant's motion for a new trial, the defendant's lawyer acknowledged that he believed that the period between the two traumas was sufficiently distant so that "someone could conclude something else . . . intervene[d]," to cause the victim's death.¹⁴ The defendant's attorney then sought funds for a medical expert, but decided not to pursue the strategy of asserting that the defendant had not proximately caused the victim's death.¹⁵ He reasoned that if the expert's opinions adversely affected his client, the Commonwealth could gain access to them and use them against his client at trial.¹⁶ The Supreme Judicial Court rejected the defense attorney's reasoning, stating that he had misread the Com-

⁹ See, e.g., *Commonwealth v. Callahan*, 401 Mass. 627, 519 N.E.2d 245 (1988); *Commonwealth v. Reid*, 400 Mass. 534, 511 N.E.2d 331 (1987); *Commonwealth v. Haggerty*, 400 Mass. 437, 509 N.E.2d 1163 (1987); *Commonwealth v. Doherty*, 399 Mass. 193, 503 N.E.2d 644 (1987); *Commonwealth v. Thomas*, 399 Mass. 165, 303 N.E.2d 456 (1987); *Commonwealth v. Silva*, 25 Mass. App. Ct. 220, 517 N.E.2d 182 (1987); *Commonwealth v. Williams*, 25 Mass. App. Ct. 210, 517 N.E.2d 176 (1987).

¹⁰ *Haggerty*, 400 Mass. at 438, 442, 509 N.E.2d 1163-64, 1166 (1987).

¹¹ *Id.* at 438-39, 509 N.E.2d at 1164-65.

¹² *Id.* at 439-40, 509 N.E.2d at 1164-65.

¹³ *Id.* at 437-38, 509 N.E.2d at 1163-64.

¹⁴ *Id.* at 440, 509 N.E.2d at 1165.

¹⁵ *Id.*

¹⁶ *Id.* at 440-41, 509 N.E.2d at 1165.

monwealth's reciprocal discovery rule.¹⁷ The Court asserted that Rule 14(a)(3)(A) of the Massachusetts Rules of Criminal Procedure allows reciprocal discovery only of material which the defendant intends to use at trial.¹⁸ Thus, if the expert's opinions weakened the defendant's case, the Commonwealth could not have gained access to them so long as the defendant did not use them at trial.

The Supreme Judicial Court concluded that this case was not one where an attorney made "arguably reasoned tactical or strategic judgments."¹⁹ Rather, the Court stated that the defense counsel failed to investigate the only "realistic defense" which the defendant had to the charge of first degree murder, and thus, the defense counsel's actions were analogous to "leav[ing] the defendant without any defense at all."²⁰ In sum, the Supreme Judicial Court held that the defense attorney's efforts fell below those which would be expected from an "ordinary fallible lawyer," and that such conduct deprived the defendant of not only a "substantial ground of defence," but of his only "realistic defense," and therefore constituted ineffective assistance of counsel.²¹

In *Commonwealth v. Doherty*²² and *Commonwealth v. Reid*,²³ the Supreme Judicial Court found that the defense counsels' efforts in both cases fell below the "ordinary fallible lawyer" standard; the Court, however, did not find ineffective assistance of counsel because the second prong of the *Saferian* test had not been met. The Court ruled that although the defense attorneys' efforts were substandard, they did not actually harm or prejudice the defendants, and thus did not constitute ineffective assistance of counsel.

In *Doherty*, the defendant appealed from his conviction on two counts of rape, claiming that he was denied effective assistance of counsel because his lawyer failed to object to the admission of a Roman Catholic priest's testimony which fell within the ambit of

¹⁷ *Id.* at 441, 509 N.E.2d at 1165.

¹⁸ *Id.* at 441, 442 n.10, 509 N.E.2d at 1165, 1166 n. 10. Counsel also argued that the prosecution would discover the identity of his experts as a result of his having to submit his expert's bill to the Commonwealth. The Court chastised counsel for imputing unethical conduct on the part of the Commonwealth and asserted that counsel's reasoning was no more than mere conjecture and did not absolve him from his failure to investigate fully the question of proximate cause. *Id.* at 441, 509 N.E.2d at 1165-66.

¹⁹ *Id.* at 441, 509 N.E.2d at 1166 (quoting *Commonwealth v. Rondeau*, 378 Mass. 408, 413, 392 N.E.2d 1001, 1003-04 (1979)).

²⁰ *Id.* at 441-42, 509 N.E.2d at 1166.

²¹ *Id.* at 438, 442, 509 N.E.2d at 1164, 1166.

²² 399 Mass. 193, 193-94, 200, 503 N.E.2d 644, 644-45, 648 (1987).

²³ 400 Mass. 534, 535-37, 511 N.E.2d 331, 332-33 (1987).

privilege provided in Massachusetts General Laws Chapter 233, section 20A.²⁴ The defendant had confessed his crimes to the priest while seeking the priest's advice, and the priest testified as to his confession at trial.²⁵ The day after the priest testified, the defendant's attorney moved for a mistrial and conceded that he should not have allowed the priest to testify and placed "99 per cent of the blame" upon himself, stating that he failed to object to the priest's testimony because of his failure to focus on the pertinent part of the statute.²⁶

The Supreme Judicial Court, however, refused to find ineffective assistance of counsel because the defense attorney's actions did not meet the second prong of the *Saferian* test.²⁷ The Court stated that, although the defense attorney's efforts were sub-standard, no ineffective assistance of counsel occurred because the Commonwealth presented a strong case even without the priest's testimony, and because the defendant failed to demonstrate that the exclusion of the priest's testimony would have "accomplished something material for the defense."²⁸ In short, the defendant simply failed to demonstrate that his lawyer's incompetence clearly harmed his defense.

In *Reid*, the jury convicted the defendant of rape of a child without force.²⁹ The defendant claimed on appeal that he was denied effective assistance of counsel because his lawyer failed to move in limine or at trial to exclude certain prior convictions or to request limiting instructions.³⁰ The Supreme Judicial Court concluded that "no apparent reason" existed for counsel's failure to at least object to the introduction of the defendant's prior convictions and that such a failure "constitute[d] behavior which fell measurably below that of an ordinary fallible lawyer."³¹ The Court ruled, however, that the defense counsel's failures did not prejudice the defendant

²⁴ *Doherty*, 399 Mass. at 193-94, 503 N.E.2d at 644-45. MASS. GEN. L. ch. 233, § 20 A (1984) states in pertinent part that no "priest, rabbi or ordained or licensed minister of any church or an accredited Christian Science practitioner shall testify as to any communication made to him by any person in seeking religious or spiritual advice or comfort . . . without the consent of such person." *Id.*

²⁵ *Doherty*, 399 Mass. at 196-97, 503 N.E.2d at 646-47.

²⁶ *Id.* at 198, 503 N.E.2d at 647.

²⁷ *Id.*

²⁸ *Id.* at 194, 200, 503 N.E.2d at 644-45, 648 (quoting *Commonwealth v. Satterfield*, 373 Mass. 109, 115, 364 N.E.2d 1260, 1264 (1977)).

²⁹ 400 Mass. at 535, 511 N.E.2d at 332.

³⁰ *Id.*

³¹ *Id.* at 537, 511 N.E.2d at 333.

because the prior convictions were not similar to rape of a child without force, so that "under any hypothesis" his convictions would have been admitted even if his attorney had objected.³²

The Supreme Judicial Court in *Commonwealth v. Callahan*³³ and *Commonwealth v. Thomas*³⁴ and the Appeals Court in *Commonwealth v. Silva*³⁵ and *Commonwealth v. Williams*³⁶ refused to find ineffective assistance of counsel because the defendant in each case failed to satisfy the first prong of the *Saferian* test — that their attorney's conduct fell below the "ordinary fallible lawyer" standard. In *Callahan*, the defendant was convicted of first degree murder and appealed, claiming that his attorney failed to argue adequately the *McHoul* defense because he failed to mention the specific language of that defense.³⁷ The Supreme Judicial Court concluded that the defendant's attorney clearly presented the facts supporting the *McHoul* defense to the jury³⁸ and that simply presenting the evidence which supports that defense and leaving the discussion of its specifics to the judge was not "manifestly unreasonable," did not "denude" the defendant of a defense, and thus did not constitute ineffective assistance of counsel.³⁹

In *Thomas*, the defendant was convicted of rape and abuse of a child without force and appealed, arguing that he was denied effective assistance of counsel because his lawyer had been suspended from the practice of law in the Commonwealth for failure to register with the Board of Overseers, and because his counsel's

³² *Id.* at 537-40, 511 N.E.2d at 333-34.

³³ 401 Mass. 627, 634-36, 519 N.E.2d 245, 250-51 (1988).

³⁴ 399 Mass. 165, 166, 168-69, 503 N.E.2d 456, 458-59 (1987).

³⁵ 25 Mass. App. Ct. 220, 226, 517 N.E.2d 182, 185-86 (1987).

³⁶ 25 Mass. App. Ct. 210, 214, 517 N.E.2d 176, 179 (1987).

³⁷ *Callahan*, 401 Mass. at 628, 634-36, 519 N.E.2d at 250-51. The *McHoul* defense states: "[a] person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law." *Commonwealth v. McHoul*, 352 Mass. 544, 546-47, 226 N.E.2d 556, 557-58 (1967).

³⁸ *Callahan*, 401 Mass. at 635, 519 N.E.2d at 251. The Court stated:

Trial counsel in this case forcefully presented the theory that the defendant was unable to control his conduct on the night of the killing and thus was not responsible for his actions. Counsel recounted the evidence of the defendant's long history of manic-depressive mental illness, his medication, his consumption of alcohol which exacerbates his condition, the stress he was under, his history of suicide attempts, and the fact that he neither fled nor tried to conceal the killing. Counsel marshalled the facts in favor of the defense of lack of substantial capacity and conveyed clearly to the jury the essential factors to be considered under *McHoul*. *Id.*

³⁹ *Id.* at 636, 519 N.E.2d at 251.

representation was sub-standard.⁴⁰ The defendant argued that representation by a suspended attorney constituted *per se* ineffective assistance of counsel and thus did not require a showing of prejudice resulting from his attorney's incompetence.⁴¹ The Supreme Judicial Court refused outright to adopt a rule which stated that representation by unregistered counsel constituted *per se* ineffective assistance of counsel.⁴²

The defendant argued further that even if the Court refused to adopt a *per se* rule, such representation by his counsel in this particular case was ineffective.⁴³ The defendant asserted that his attorney's suspension for failure to register with the bar was "indicative of a certain cavalier attitude with respect to the duties and responsibilities of an attorney," and thus it was "entirely possible, and perhaps even likely" that his counsel failed to prepare adequately his defense.⁴⁴ The Court rejected the defendant's argument, stating that ineffective assistance of counsel must be demonstrated by "specific instances of attorney incompetence, not by mere speculation."⁴⁵

In *Silva*, the jury convicted the defendant of second degree murder, kidnapping, and one count of larceny of a motor vehicle.⁴⁶ The defendant filed a motion for a new trial claiming ineffective assistance of counsel because his lawyer failed to object to the judge's charge regarding the Commonwealth's standard for felony-murder.⁴⁷ The Appeals Court ruled that although the present felony-murder standard in the Commonwealth differed from the standard the trial judge enunciated, at the time of the trial the judge expressed the correct felony-murder standard in the Commonwealth.⁴⁸ The defendant, however, argued that he was deprived of

⁴⁰ *Thomas*, 399 Mass. at 165-66, 503 N.E.2d at 457 (1987).

⁴¹ *Id.* at 168, 503 N.E.2d at 458-59.

⁴² *Id.*

⁴³ *Id.* at 168-69, 503 N.E.2d at 459.

⁴⁴ *Id.* at 169, 503 N.E.2d at 459.

⁴⁵ *Id.*

⁴⁶ *Silva*, 25 Mass. App. Ct. at 220, 517 N.E.2d at 183 (1987).

⁴⁷ *Id.* at 222, 517 N.E.2d at 184.

⁴⁸ *Id.* at 225-26, 517 N.E.2d at 185-86. Three years after the defendant's trial, the Supreme Judicial Court enunciated a new felony-murder standard, holding that: where the underlying crime is not inherently dangerous to human life the judge must instruct the jury that it cannot find the accused guilty of felony-murder unless it finds 'that the [crime] involved circumstances demonstrating the defendant's conscious disregard of the risk to human life.'

Id. at 225, 517 N.E.2d at 185 (footnote omitted) (quoting *Commonwealth v. Matchett*, 386 Mass. 492, 508, 436 N.E.2d 400, 410 (1982)).

a substantial defense because his lawyer lacked the foresight to object to the former felony-murder standard.⁴⁹ The court held that the "ordinary fallible lawyer" could not be expected to object to jury instructions which, when given, were free from error, and thus the defendant did not suffer from ineffective assistance of counsel.⁵⁰

In *Williams*, the defendant was convicted of both assault with intent to murder, and assault and battery by means of a dangerous weapon.⁵¹ The defendant appealed, claiming that defense counsel's failure to ask certain questions of one of the Commonwealth's witnesses on cross-examination amounted to ineffective assistance of counsel.⁵² During cross-examination of the witness, the defendant told his attorney that he wanted him to question the witness regarding the witness' previous conversation with the defendant.⁵³ The defendant's attorney refused to ask the questions, and the Appeals Court refused to find ineffective assistance of counsel, stating, "we do not believe that, in order to prevent a charge of ineffective assistance of counsel, trial counsel must ask questions to which he does not know the answers."⁵⁴

In sum, in recent cases, the Supreme Judicial Court and the Appeals Court have continued to apply the standard for ineffective assistance of counsel which the Supreme Judicial Court promulgated in 1974 in *Commonwealth v. Saferian*. These recent cases underscore the difficulty a defendant confronts in trying to show ineffective assistance of counsel under this standard. Even if a defendant successfully demonstrates that his or her attorney's efforts fell below the "ordinary fallible lawyer" standard, the defendant must still show that his or her attorney's sub-standard efforts actually harmed his or her defense. Furthermore, recent cases have clearly demonstrated that when determining whether the defendant's defense was actually harmed, the Supreme Judicial Court and the Appeals Court use broad discretionary authority and as a result do not readily find actual harm. Thus, although the first prong of the *Saferian* test is objective in nature, the second prong is clearly subjective and affords courts virtually unchecked veto power over an ineffective assistance of counsel claim. In short, in order for a defendant to prevail on an ineffective assistance of

⁴⁹ *Id.* at 226, 517 N.E.2d at 185-86.

⁵⁰ *Id.*

⁵¹ *Williams*, 25 Mass. App. Ct. at 211, 517 N.E.2d at 177 (1987).

⁵² *Id.* at 215, 517 N.E.2d at 179-80.

⁵³ *Id.*

⁵⁴ *Id.*

counsel claim, he or she must present a clearly egregious case in which his or her attorney not only performed incompetently, but clearly harmed his or her defense, such as in *Commonwealth v. Haggerty* where the defendant's attorney failed to pursue the defendant's only "realistic defense."

D. **Developments in Drunken Driving Laws*

Under Section 24(1)(A) of the Massachusetts General Laws, the offense of driving while under the influence of intoxicating liquors requires the state to prove not only the defendant's intoxication, but also that he or she "operated" a vehicle on a "public way."¹ In attempting to prove intoxication the state may, under Section 24(1)(e), introduce evidence of the percentage of alcohol in the defendant's blood as adduced by chemical tests.² Five one-hundredths percent or less triggers a presumption of sobriety while fifteen one-hundredths percent triggers a presumption of intoxication, leaving a gray area between five one-hundredths and fifteen one-hundredths percent in which no presumption exists.³ If the state proves the necessary elements and obtains a conviction, the registrar may immediately revoke the defendant's license to drive.⁴

During the *Selected Developments* year, Massachusetts appellate courts handed down several decisions affecting the law on drunk driving in the Commonwealth. The Supreme Judicial Court, for example, upheld a new statute imposing a mandatory sentence of one year on those convicted of committing vehicular homicide while intoxicated.⁵ Interpreting existing statutes in other cases, the courts shed light on what constitutes a "public way" and "operation" of a motor vehicle.⁶ In another group of cases the courts ruled on the validity of various methods of testing for intoxication.⁷ Thus, the courts not only clarified existing law but also ruled on new innovations in the war against drunk driving.

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¹ MASS. GEN. L. ch. 90, § 24(1)(a) (1986).

² *Id.* § 24(1)(e).

³ *Id.*

⁴ *Id.* § 24(1)(b).

⁵ *Commonwealth v. Therriault*, 401 Mass. 237, 242-43, 515 N.E.2d 1198, 1202 (1987).

⁶ *Commonwealth v. Ginnetti*, 400 Mass. 181, 508 N.E.2d 603 (1987); *Commonwealth v. Colby*, 23 Mass. App. Ct. 1008, 505 N.E.2d 218 (1987).

⁷ See *Commonwealth v. Sargent*, 24 Mass. App. Ct. 657, 512 N.E.2d 285, review denied, 401 Mass. 1101, 517 N.E.2d 1289 (1987); *Commonwealth v. Smythe*, 23 Mass. App. Ct. 348, 502 N.E.2d 162 (1987); *Commonwealth v. Cochran*, 25 Mass. App. Ct. 260, 517 N.E.2d 498 (1988).

1. Upholding the Mandatory Sentencing Statute

In *Commonwealth v. Therriault*, the Supreme Judicial Court upheld a statute imposing a minimum one-year mandatory sentence on a defendant convicted of committing vehicular homicide while intoxicated.⁸ In *Therriault*, the defendant claimed that the statute violated the federal and state constitutional provisions against cruel and unusual punishment.⁹ The Court applied a three-part test to determine whether the statute ran afoul of the cruel and unusual punishment clause.¹⁰ Conceding that the punishment in question satisfied the first prong's consideration of the nature of the offense and the offender in light of the degree of harm to society,¹¹ the defendant based his challenge on the second and third prongs.¹² These prongs compare the challenged punishment with the punishments imposed for similar crimes within the state and with the punishments for the same or similar crimes in other jurisdictions.¹³

Noting the defendant's contention that a comparison of the punishments for similar crimes within the Commonwealth shows that some felonies do not have a mandatory minimum sentence, the Court placed more weight on a comparison of the challenged statute's range with the ranges of other felony statutes.¹⁴ According to the Court, the felonies the defendant cited as lacking a mandatory minimum sentence have a maximum punishment of life imprisonment.¹⁵ Because the maximum punishment for vehicular homicide while driving under the influence is only ten years,¹⁶ the Court

⁸ *Commonwealth v. Therriault*, 401 Mass. 237, 242-43, 515 N.E.2d 1198, 1202 (1987). Section 24G(a) of chapter 90 of the Massachusetts General Laws provides that

Whoever . . . shall be guilty of homicide by motor vehicle while under the influence of an intoxicating substance . . . shall be punished by imprisonment in the state prison for not less than two and one-half years or more than ten years and a fine of not more than five thousand dollars, or by imprisonment in a jail or house of correction for not less than one year nor more than two and one-half years and a fine of not more than five thousand dollars.

Id. at 239 n.2, 515 N.E.2d at 1200 n.2 (quoting MASS. GEN. L. ch. 90, § 24G(a) (1984)).

⁹ *Id.* at 239, 515 N.E.2d at 1200. The defendant also argued that the statute violated his right to due process and the doctrine of separation of powers under article 30 of the Massachusetts Declaration of Rights. *See id.* at 241-42, 515 N.E.2d 1201-02.

¹⁰ *Id.* at 239. The court adopted this test in *Commonwealth v. Jackson*, 369 Mass. 904, 344 N.E.2d 166 (1976).

¹¹ *Therriault*, 401 Mass. at 240, 515 N.E.2d at 1200.

¹² *Id.* at 240-41, 515 N.E.2d at 1201.

¹³ *Id.* at 240, 515 N.E.2d at 1200.

¹⁴ *Id.* at 241, 515 N.E.2d at 1201.

¹⁵ *Id.*

¹⁶ MASS. GEN. L. ch. 90, § 24G(a) (1986).

concluded that the challenged statute's range is comparable to the range of sentences for other felonies within the Commonwealth.¹⁷ The Court also observed that the range of sentences in other jurisdictions for vehicular homicide were comparable.¹⁸ Thus, concluding that the mandatory sentencing provision of Massachusetts General Laws chapter 90, section 24G(a) passed all three prongs of the test, the Court upheld the statute against eighth amendment attack.¹⁹

2. Allowing Admittance of Videotape Evidence in Drunken Driving Prosecutions

Addressing a different constitutional question in *Commonwealth v. Mahoney*, the Supreme Judicial Court upheld the admission of a videotape of the booking procedure into evidence in a drunk driving case.²⁰ The defendant contended that the use of the videotape as evidence violated the fourth, fifth, and sixth amendments to the U.S. Constitution as well as his rights under *Miranda v. Arizona*.²¹ The Court rejected the fourth amendment argument outright, concluding that videotaping the defendant involved no search or seizure.²² The Court likewise dismissed the fifth amendment claim because a defendant's right to be free from compelled self-incrimination excludes only "testimonial" or "communicative" evidence and therefore does not apply to photographic or video recordings.²³ Because the sixth amendment right to counsel does not attach at

¹⁷ *Therriault*, 401 Mass. at 241, 515 N.E.2d at 1201.

¹⁸ *Id.*

¹⁹ *See id.* at 240-41, 515 N.E.2d 1200-01.

²⁰ *See Commonwealth v. Mahoney*, 400 Mass. 524, 526-30, 510 N.E.2d 759, 761-63 (1987).

²¹ *Id.* at 526, 510 N.E.2d at 761.

²² *Id.* at 527, 510 N.E.2d at 761-62. The court concluded that since the observations of the police officers during the booking process did not constitute a search, the mere taping of these observations likewise did not constitute a search. *Id.* at 527, 510 N.E.2d at 762 (citing *United States v. Caceres*, 440 U.S. 741, 750-51 (1979)).

²³ *Id.* at 527, 510 N.E.2d at 762 (citing *Schmerber v. California*, 384 U.S. 757, 764 (1966)). The court relied on the *Schmerber* Court's conclusion that the fifth amendment "offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture." *Id.* at 527-28, 510 N.E.2d at 762.

The court refused to conclude that the fact that the videotape included the defendant's responses to police questioning during the booking process made the videotape "testimonial" evidence. *Id.* at 528, 510 N.E.2d at 762. Relying on *Commonwealth v. Brennan*, 386 Mass. 772, 483 N.E.2d 60 (1982), the court ruled that the videotape did not contain testimonial evidence because it did not force the defendant "to reveal knowledge or thoughts concerning some fact." *Id.*

the time of an arrest, the Court also found no merit to the defendant's sixth amendment challenge.²⁴ Finally, the Court concluded that the admissibility of the videotape did not violate *Miranda v. Arizona* because the taped interrogation did not resemble a "custodial interrogation," essential to a *Miranda* challenge.²⁵ Thus, the Court rejected each of the defendant's constitutional challenges to the videotape of the booking procedure's admission into evidence.²⁶

3. Rulings on Admissibility of Intoxication Tests

Massachusetts appellate courts ruled recently on three cases involving admission of intoxication tests into evidence. In *Commonwealth v. Sargent* the defendant challenged the admission into evidence of a blood alcohol reading because the test was neither requested by the attending physician nor used in treating the defendant but rather was conducted as "normal procedure" on every "trauma patient."²⁷ According to the defendant the test therefore did not come under the medical records exception to the rule against hearsay evidence providing that "[r]ecords kept by hospitals . . . under [G.L. c. 111, § 70] shall be admissible . . . as evidence . . . so far as such records relate to the treatment and medical history of such cases . . . but nothing therein contained shall be admissible as evidence which has reference to the question of liability."²⁸ The Appeals Court, however, ruled that the statute's express language requires only that the "records relate to the treatment" and therefore held the blood alcohol test admissible.²⁹ Although the defendant further argued that the Commonwealth should not be allowed to satisfy the burden of proof with mere hearsay evidence, the court also rejected this argument.³⁰ Finding the hearsay evidence in the present case to be reliable, the court noted that even if the blood alcohol test provided the only evidence of intoxication presented

²⁴ *Id.* at 528-29, 510 N.E.2d at 762 (citing *Commonwealth v. Mandeville*, 386 Mass. 393, 436 N.E.2d 912 (1982); *Commonwealth v. Smallwood*, 379 Mass. 878, 401 N.E.2d 802 (1980)).

²⁵ *Id.* at 529, 510 N.E.2d at 762-63. The court relied on the Supreme Court's conclusion in *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980), that "[T]he term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.* (emphasis in original).

²⁶ *Id.* at 526-30, 510 N.E.2d at 761-63.

²⁷ *Commonwealth v. Sargent*, 24 Mass. App. Ct. 657, 658, 512 N.E.2d 285, 286 (1987).

²⁸ *Id.* at 660, 512 N.E.2d at 287.

²⁹ *Id.* at 660-61, 512 N.E.2d at 287.

³⁰ *Id.* at 661, 512 N.E.2d at 287.

by the Commonwealth, the case would have nonetheless gone to the jury.³¹

In *Commonwealth v. Smythe*, the Appeals Court affirmed the validity of the "Intoxilyzer 5000" as a method of testing for blood alcohol level.³² The defendant claimed the "Intoxilyzer 5000" did not perform a "chemical test or analysis of his breath" within the meaning of Massachusetts General Laws chapter 90, section 24(1)(e).³³ Noting that the legislature could not have intended to limit the methods of testing by the technology available at the time of the statute's adoption in 1961, the court refused to construe the statute narrowly.³⁴ Thus, because the "Intoxilyzer 5000" analyzes the suspect's breath for a chemical compound and measures concentration of that compound by means of a test "routinely used by chemists," the court held the test results admissible.³⁵ At the same time, however, the court did grant the defendant a new trial due to the trial court's refusal to allow expert testimony regarding the reliability and accuracy of the breath test results.³⁶

In *Commonwealth v. Cochran*, the Appeals Court held that admission of breathalyzer results from a Smith and Wesson model 2000, which failed to pass an accuracy check after the defendant's test,³⁷ could not be discounted as harmless error.³⁸ Two separate samples of the defendant's breath registered alcohol readings of .24 and .25 respectively.³⁹ After these tests, however, the operator conducted a "simulator test" for accuracy on the machine and obtained a reading outside the acceptable level of error.⁴⁰ Because the Com-

³¹ *Id.* at 661, 512 N.E.2d at 287-88.

³² *Commonwealth v. Smythe*, 23 Mass. App. Ct. 348, 349, 502 N.E.2d 162, 163 (1987).

³³ *See id.* Section 24(1)(e) provides that, so long as certain conditions are met, including the consent of the defendant to the test,

[i]n any prosecution for [operating a motor vehicle while under the influence of intoxicating liquor], evidence of the percentage, by weight, of alcohol in the defendant's blood at the time of the alleged offense, as shown by chemical test or analysis of his blood or as indicated by chemical test or analysis of his breath, shall be admissible and deemed relevant to the determination of the question of whether such defendant was at such time under the influence of intoxicating liquor

MASS. GEN. L. ch. 90, § 24(1)(e) (1986), *quoted in Smythe*, 23 Mass. App. Ct. at 349-50, 502 N.E.2d at 163.

³⁴ *See id.* at 351, 502 N.E.2d at 164.

³⁵ *Id.*

³⁶ *Id.* at 349, 502 N.E.2d 162, 163.

³⁷ *Commonwealth v. Cochran*, 25 Mass. App. Ct. 260, 264, 517 N.E.2d 498, 501 (1988).

³⁸ *Id.* at 265, 517 N.E.2d at 502.

³⁹ *Id.* at 261, 517 N.E.2d at 500.

⁴⁰ *Id.* at 262, 517 N.E.2d at 500.

monwealth carries the burden of showing the accuracy of the breath tests, the court concluded that the trial court should have excluded the breath test results.⁴¹ Furthermore, because of the "scientific approval" behind the results as submitted to the jury, the court held that the admission of the breathalyzer results did not constitute harmless error even though other strong evidence demonstrated the defendant's intoxication.⁴²

4. Statutory Scope of "Operation of a Vehicle" and "Public Way"

Interpreting the language of existing drunk driving statutes, Massachusetts appellate courts further clarified the meaning of "public way" and "operation" of a motor vehicle. In *Commonwealth v. Ginetti*, for example, the Supreme Judicial Court ruled that a vehicle with a running engine satisfies the operation requirement for purposes of the drunk driving statute, even though the vehicle cannot be moved due to conditions "not involving the vehicle itself."⁴³ In *Ginetti*, a police officer found the defendant in his car with the engine running.⁴⁴ The defendant was attempting to move the car but, although the wheels spun, the car remained stationary.⁴⁵ Thus, although the vehicle never actually moved as the result of the defendant's efforts, the Court ruled that the mere "setting in motion of the operative machinery" sufficiently constituted operation of the vehicle.⁴⁶

In *Commonwealth v. Colby*, the Appeals Court relied on similar reasoning in ruling that a sleeping defendant in a stationary vehicle with the engine running "operated" the vehicle within the meaning of the drunk driving statute.⁴⁷ The police found the defendant asleep in his car with the engine running and headlights on.⁴⁸ Two of the vehicle's wheels rested on the road while the other two remained on the shoulder.⁴⁹ Although there was no evidence that anybody saw the defendant drive or move the vehicle,⁵⁰ the court

⁴¹ See *id.* at 264-65, 517 N.E.2d at 501-02.

⁴² *Id.* at 265, 517 N.E.2d at 502.

⁴³ *Commonwealth v. Ginetti*, 400 Mass. 181, 184, 508 N.E.2d 603, 605 (1987) (citing *State v. Standish*, 116 N.H. 483, 484 (1976)).

⁴⁴ *Id.* at 183, 508 N.E.2d at 604.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See *Commonwealth v. Colby*, 23 Mass. App. Ct. 1008, 1010-11, 505 N.E.2d 218, 220-21 (1987).

⁴⁸ *Id.* at 1008-09, 505 N.E.2d at 218.

⁴⁹ *Id.* at 1010, 505 N.E.2d at 220.

⁵⁰ See *id.* at 1011, 505 N.E.2d at 220.

concluded that the circumstantial evidence supported submission of the case to the jury.⁵¹ The court also ruled that the prosecution presented enough evidence for the jury to find that the occupied car was on a "public way" within the meaning of the statute even though only two of the wheels actually rested on the road.⁵²

In *Commonwealth v. Leonard*, however, the Supreme Judicial Court held that the defendant's uncorroborated admission that he drove the vehicle provided insufficient evidence to send the case to the jury.⁵³ The police found the defendant, with his wife on his lap, seated in the vehicle on the side of the road attempting to place the keys in the ignition.⁵⁴ The defendant's wife struggled to stop the defendant from starting the car.⁵⁵ Upon arriving, the police physically removed the defendant from the car.⁵⁶ On the way to the station, the defendant admitted to the police that he had picked his wife up from work and thus had driven the car before the police arrived.⁵⁷ Relying on *Commonwealth v. Forde*,⁵⁸ the Supreme Judicial Court refused to allow the case to go to the jury based solely upon the uncorroborated confession.⁵⁹

5. Granting Stays of License Revocation

Finally, in *Commonwealth v. Yameen*, the Supreme Judicial Court held that a judge has discretion to grant a stay of a license revocation pending the outcome of a defendant's appeal from a conviction of operating under the influence.⁶⁰ The Commonwealth argued that the language of the statute in question "specifically prohibits" courts from granting stays of license revocations pursuant to a conviction of driving under the influence.⁶¹ The Court, however, ruled that the language of the statute prohibited only automatic stays and therefore did not preclude the possibility of allowing judges to grant discretionary stays.⁶²

Because a defendant who was successful on appeal could not be made whole for the license revocation in the interim between

⁵¹ See *id.* at 1011, 505 N.E.2d at 221.

⁵² *Id.* at 1010, 505 N.E.2d at 220.

⁵³ See *Commonwealth v. Leonard*, 401 Mass. 470, 473, 517 N.E.2d 157, 159 (1988).

⁵⁴ *Id.* at 471, 517 N.E.2d at 158.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Commonwealth v. Forde*, 392 Mass. 453, 466 N.E.2d 510 (1985).

⁵⁹ *Leonard*, 401 Mass. at 472-73, 517 N.E.2d at 158-59.

⁶⁰ *Commonwealth v. Yameen*, 401 Mass. 331, 335, 516 N.E.2d 1149, 1151-52 (1987).

⁶¹ *Id.* at 333, 516 N.E.2d at 1151.

⁶² *Id.* at 334, 516 N.E.2d at 1151-52.

the initial judgment and the outcome of the appeal, the Court concluded that the legislature could not have intended to prohibit the granting of stays.⁶³ Thus, the Supreme Judicial Court decided that the only way to safeguard a meaningful opportunity to appeal was to allow judges to grant stays.⁶⁴ Therefore, the Court held that in future cases judges may grant stays of license revocations at their discretion.⁶⁵

In sum, Massachusetts appellate courts have stiffened the drunk driving laws within the Commonwealth. Upholding the mandatory sentencing of one year upon conviction of vehicular homicide while under the influence of alcohol, the Supreme Judicial Court insured that persons who carelessly and needlessly take human lives will not escape punishment.⁶⁶ In *Commonwealth v. Sargent*, the Appeals Court liberally interpreted the medical records exception of the hearsay rule to allow the admission of a blood alcohol test and noted that the blood alcohol evidence by itself sufficed to get the case to the jury.⁶⁷ Moreover, the Supreme Judicial Court upheld the admissibility of a videotape of the booking procedure against constitutional attack and thus increased the means by which intoxication can be proved.⁶⁸ Finally, the courts refused to allow defendants to escape through use of technicalities such as the definition of "public way" and "operation" of a motor vehicle.⁶⁹ Thus, Massachusetts appellate court decisions have reflected the increased societal awareness of the danger of driving under the influence.

E. **Domestic Violence: Massachusetts Courts and the "Battered Woman's Syndrome"*

Domestic violence by men against women occurs frequently in this country.¹ In fact, an estimated "one-third to one-half of all

⁶³ *Id.* at 334-35, 516 N.E.2d at 1151.

⁶⁴ *Id.*

⁶⁵ *Id.* at 335, 516 N.E.2d at 1151-52.

⁶⁶ See *Commonwealth v. Theriault*, 401 Mass. 237, 242-43, 515 N.E.2d 1198, 1202 (1987).

⁶⁷ *Commonwealth v. Sargent*, 24 Mass. App. Ct. 657, 660-61, 512 N.E.2d 285, 287 (1987).

⁶⁸ See *Commonwealth v. Mahoney*, 400 Mass. 524, 526-30, 510 N.E.2d 759, 761-63 (1987).

⁶⁹ See *Commonwealth v. Ginnetti*, 400 Mass. 181, 183-184, 508 N.E.2d 603, 604-05 (1987); *Commonwealth v. Colby*, 23 Mass. App. Ct. 1008, 1010-11, 505 N.E.2d 218, 219-221 (1987).

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¹ See *State v. Kelly*, 97 N.J. 178, 191, 478 A.2d 364, 370 (1984); see also C.P. EWING, BATTERED WOMEN WHO KILL 5 & n.20 (1987); Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 HARV. C.R.-C.L. L. REV. 623, 624-25 (1980).

women who live with male companions experience such forms of brutality as threats of severe harm, degradation, beatings, or torture."² In addition, cases of women killing the male figure in their lives, although rare, occur with increasing frequency.³ Many of these women plead self-defense when prosecuted for taking the life of their husband or boyfriend.⁴ Their pleas often fail, however, because these women typically cannot adapt the law of self-defense to their situations.⁵ In recent years, many women facing prosecution for killing their mates have offered evidence on the "battered woman's syndrome" to broaden the scope of the law of self-defense.⁶

The battered woman's syndrome is a condition characterizing many women caught in an abusive relationship and unable to leave.⁷ According to Dr. Lenore Walker, a leading expert in the area, the syndrome consists of a three-stage cycle.⁸ The first stage, which Walker describes as the "tension-building" stage, is marked by escalating minor physical and verbal abuse by the man against the woman.⁹ The second stage involves an "acute battering incident," which occurs when the tension in the relationship becomes intolerable.¹⁰ In the third stage the male shows extreme contrition and behaves lovingly toward his mate.¹¹

According to Dr. Walker, a woman who remains in an abusive relationship after going through the cycle more than once suffers from the battered woman's syndrome.¹² Reasons that women remain in such relationships include lack of self-esteem, lack of independent resources, fear of reprisal by their mate, guilt that the failure of the relationship is their fault, and fear of reaching out toward friends, family, and the police.¹³ Ultimately, battered women "sink into a state of psychological paralysis and become unable to take any action at all to improve or alter the situation."¹⁴

Women who kill their batterers frequently offer expert testimony on the battered woman's syndrome to buttress their claims

² Schneider, *supra* note 1, at 624-25 & n.6.

³ C.P. EWING, *supra* note 1, at 5 & n.21.

⁴ *Id.* at 5 & n.22.

⁵ *Id.* at 46-50; see also Schneider, *supra* note 1, at 632-36.

⁶ C.P. EWING, *supra* note 1, at 51.

⁷ Kelly, 97 N.J. at 193, 478 A.2d at 371.

⁸ *Id.* (citing L. WALKER, *THE BATTERED WOMAN* 55-70 (1979)).

⁹ Kelly, 97 N.J. at 193, 478 A.2d at 371.

¹⁰ *Id.*

¹¹ *Id.* at 193-94, 478 A.2d at 371.

¹² *Id.* at 193, 478 A.2d at 371 (citing L. WALKER, *supra* note 8, at xv).

¹³ *Id.* at 194-96, 478 A.2d at 371-72.

¹⁴ *Id.* at 194, 478 A.2d at 372.

that they acted honestly and reasonably in self-defense.¹⁵ Proponents of such testimony, however, meet with mixed success in the courts. Some jurisdictions admit the testimony, finding it relevant, helpful to the jury, and reliable.¹⁶ Others refuse to admit the testimony, on the grounds that it is unreliable, invasive of the province of the jury, touching too closely on the ultimate issue at trial, or likely to prejudice the jury.¹⁷ On the whole, however, the trend in the courts seems to be toward admitting testimony on the battered woman's syndrome.¹⁸

Massachusetts courts have yet to rule on the admissibility of testimony on the battered woman's syndrome. In the 1987 decision *Commonwealth v. Moore*, however, the Massachusetts Appeals Court upheld a trial court's exclusion of expert testimony on the syndrome on the grounds that it was irrelevant to the defendant's case.¹⁹ The *Moore* court reasoned that testimony on the syndrome was not germane to the defendant's argument that she had not killed her boyfriend in the first place.²⁰

Moore was convicted of second-degree murder for stabbing her former boyfriend.²¹ According to the evidence adduced at trial, the defendant and her boyfriend had a stormy relationship, in which the victim frequently harassed and struck the defendant.²² The two had lived together for a few months, but the victim moved out shortly after the defendant asked him to leave.²³ On the day of the killing, the victim accosted the defendant outside a store, and the two struggled.²⁴ The jury found that the defendant stabbed the victim with a knife, causing his death.²⁵ The defendant, however, contended that she ran away from the victim, did not stab him, and did not have a knife at the time.²⁶

¹⁵ *Commonwealth v. Moore*, 25 Mass. App. Ct. 63, 66, 514 N.E.2d 1342, 1344 (1987).

¹⁶ See, e.g., *People v. Torres*, 128 Misc. 2d 129, 488 N.Y.S.2d 358 (1985); *State v. Kelly*, 97 N.J. 178, 478 A.2d 364 (1984); *Hawthorne v. State*, 408 So.2d 801 (Fla. Dist. Ct. App. 1982); *State v. Anaya*, 438 A.2d 892 (Me. 1981); *Smith v. State*, 247 Ga. 612, 277 S.E.2d 678 (1981).

¹⁷ See, e.g., *State v. Thomas*, 66 Ohio St. 2d 518, 423 N.E.2d 137 (1981) (finding the testimony irrelevant to whether the defendant actually and reasonably feared bodily harm, not beyond the ken of the jury, unreliable, and overly prejudicial); *Buhrle v. State*, 627 P.2d 1374 (Wyo. 1981) (finding the testimony unreliable and invasive of the province of the jury).

¹⁸ C.P. Ewing, *supra* note 1, at 54.

¹⁹ 25 Mass. App. Ct. 63, 68-69, 514 N.E.2d 1342, 1345 (1987).

²⁰ *Id.*

²¹ *Id.* at 63, 514 N.E.2d at 1342.

²² *Id.* at 67-68, 514 N.E.2d at 1344-45.

²³ *Id.* at 67, 514 N.E.2d at 1344.

²⁴ *Id.* at 68, 514 N.E.2d at 1345.

²⁵ *Id.* at 64, 514 N.E.2d at 1343.

²⁶ *Id.* at 68, 514 N.E.2d at 1345.

When the defendant called an expert on the battered woman's syndrome, the trial judge qualified the witness, but excluded testimony about the syndrome.²⁷ The expert was prepared to speak about the syndrome in general, as well as to testify that the defendant exhibited some of the characteristics of a battered woman.²⁸ The defendant appealed her conviction on the basis of the excluded testimony.²⁹

Affirming the trial court, the Appeals Court noted that the testimony on the battered woman's syndrome would be relevant only if the defendant pled self-defense.³⁰ In passing, however, the court briefly summarized the syndrome and noted its legal significance.³¹ The court also stated that a future proponent of testimony on the syndrome would need to "produce evidence to a judge whether the battered woman's syndrome possesses that degree of reliability to have gained general acceptance by the community of scientists involved."³² The court also observed that the defendant did not appear to fit the stereotype of a battered woman.³³

Several jurisdictions have admitted testimony on the battered woman's syndrome, including New York, New Jersey, Maine, Florida, and Georgia.³⁴ Although the law of self-defense varies somewhat from state to state, in general a killing in self-defense is justified if the defendant honestly and reasonably believes at the time of the act that deadly force is necessary to avert death or serious bodily injury at the hands of the victim.³⁵ Most states, including Massachusetts, apply an objective standard to the reasonableness of the defendant's belief.³⁶ Thus, in most states, the jury compares the

²⁷ *Id.* at 65, 514 N.E.2d at 1343.

²⁸ *Id.* at 64-65, 514 N.E.2d at 1343.

²⁹ *Id.* at 63, 514 N.E.2d at 1342.

³⁰ *Id.* at 68-69, 514 N.E.2d at 1345.

³¹ *Id.* at 66-67, 514 N.E.2d at 1344.

³² *Id.* at 67 n.3 (citing *Commonwealth v. Fatalo*, 346 Mass. 266, 269 (1963)).

³³ *Id.* at 69 n.6. According to Elda James, of the Springfield, Massachusetts, Office of the Committee for Public Counsel Services, plans to introduce expert testimony on the battered woman's syndrome have enabled at least one defendant to plea bargain successfully. Telephone interview with Elda James, Office of the Committee for Public Counsel Services (May 6, 1988) [hereinafter cited as Interview]. In addition, as of May, 1988, a prosecution for first-degree murder in which a woman plans to proffer testimony on the syndrome is pending in Hampden Superior Court. Interview. This case, *Commonwealth v. Grimshaw*, involves a woman who solicited others to kill her batterer. Interview. According to James, because the charge is murder in the first degree, a plea bargain is unlikely, and the court may have to rule on the admissibility of the expert testimony. Interview.

³⁴ See *supra* note 16 and accompanying text.

³⁵ C.P. EWING, *supra* note 1, at 47.

³⁶ See, e.g., *Commonwealth v. Albert*, 391 Mass. 853, 861 (1984).

defendant's actions to those of an ordinary prudent person in the defendant's position.

Women who kill their batterers often have difficulty adapting their cases to the law of self-defense, because that law tends to focus on the traditional notion of a "fair fight" between men.³⁷ Thus, the law generally requires the defendant not to resort to weapons greater in kind than those used by the victim.³⁸ This is often a difficult standard for women to meet, however, because they are often socialized to be weaker and less resourceful.³⁹ The law of self-defense also focuses narrowly on the situation in which the killing occurs, requiring the woman to show an overt, immediate threat to her safety and a physical impossibility of escape.⁴⁰

Defendants use testimony on the battered woman's syndrome in the hope of broadening traditional notions of self-defense.⁴¹ This testimony serves to explain "why a battered woman might reasonably perceive danger, use a deadly weapon, or fear bodily harm under circumstances in which a man or non-battered woman might not."⁴² Several courts have held such testimony admissible.

In *State v. Kelly*, the New Jersey Supreme Court admitted testimony on the syndrome, finding the testimony relevant, reliable, and helpful to the jury.⁴³ In *Kelly*, the defendant had suffered abuse at the hands of her husband from the very beginning of their marriage.⁴⁴ On the day of the killing, the defendant went to the home of a neighbor to find her husband and ask for food money.⁴⁵ After they left, a fight ensued, in which the victim, Mr. Kelly, hit the defendant, Ms. Kelly, severely.⁴⁶ At trial, Ms. Kelly testified that after bystanders broke up the fight, Mr. Kelly ran at her with his arms raised and that, fearing for her life, she tried to ward him

³⁷ See Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 HARV. WOMEN'S L.J. 121, 126-27 (1985); C.P. EWING, *supra* note 1, at 47-50.

³⁸ See Crocker, *supra* note 37, at 126.

³⁹ Crocker, *supra* note 37, at 127.

⁴⁰ Crocker, *supra* note 37, at 126; see also *Commonwealth v. Epsom*, 399 Mass. 254, 257-58, 503 N.E.2d 954, 957 (1987) (noting that, to raise the issue of self-defense, the defendant must show "evidence of an overt act against the defendant constituting an assault or threat . . . [and] evidence that the defendant availed himself of all proper means to avoid physical combat before resorting to the use of deadly force").

⁴¹ Schneider, *supra* note 1, at 639-40; Crocker, *supra* note 37, at 129-30.

⁴² Crocker, *supra* note 37, at 130.

⁴³ 97 N.J. 178, 478 A.2d 364 (1984).

⁴⁴ *Id.* at 189, 478 A.2d at 369.

⁴⁵ *Id.*

⁴⁶ *Id.*

away with a pair of scissors, but stabbed him instead.⁴⁷ The prosecution, by contrast, contended that Ms. Kelly was the aggressor in the killing.⁴⁸

The *Kelly* Court admitted testimony on the battered woman's syndrome on several grounds. First, the Court stated that the testimony buttressed the defendant's claim that she honestly believed she was in imminent danger of great bodily harm.⁴⁹ Second, the Court reasoned that the testimony reinforced the defendant's claim that she reasonably feared for her safety.⁵⁰ Thus, the Court noted that testimony on the battered woman's syndrome countered the jury's natural misconception that the relationship could not have been life-threatening if the defendant did not leave.⁵¹ The Court observed that the expert's opinion offered an explanation for why a battered woman would stay in an abusive relationship, despite escalating violence.⁵² Finding, in addition, that the expert's testimony was beyond the ken of the jury⁵³ and sufficiently reliable, the New Jersey Supreme Court held the proffered testimony admissible.⁵⁴

In a similar decision, *People v. Torres*, a New York court admitted testimony on the battered woman's syndrome.⁵⁵ The defendant in *Torres* had suffered frequent beatings at the hands of her common-law husband.⁵⁶ According to the defendant, on the night of the killing the victim accused her of having sexual relations with his son by a previous marriage.⁵⁷ Screaming "this is going to be your last night," the victim placed a pistol against the defendant's mouth.⁵⁸ The victim then placed the gun on a night table and left the room.⁵⁹ Convinced that this time the victim really meant to kill her, the defendant grabbed the gun and shot him.⁶⁰

The *Torres* court admitted testimony on the battered woman's syndrome on similar grounds as the *Kelly* Court. The court observed

⁴⁷ *Id.* at 189-90, 478 A.2d at 369.

⁴⁸ *Id.* at 190 n.1, 478 A.2d at 369 n.1.

⁴⁹ *Id.* at 201-02, 478 A.2d at 375.

⁵⁰ *Id.* at 205, 478 A.2d at 377.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 209, 478 A.2d at 379.

⁵⁴ *Id.* at 211, 478 A.2d at 379-80.

⁵⁵ 128 Misc. 2d 129, 488 N.Y.S.2d 358 (N.Y. Sup. Ct. 1985).

⁵⁶ *Id.* at 131, 488 N.Y.S.2d at 360.

⁵⁷ *Id.*

⁵⁸ *Id.* at 131, 488 N.Y.S.2d at 361.

⁵⁹ *Id.*

⁶⁰ *Id.* at 132, 488 N.Y.S.2d at 361.

that the testimony demonstrated that, as a battered woman, the defendant could distinguish between "ordinary" violence and life-threatening violence.⁶¹ Moreover, the court reasoned that the expert's testimony tended to dispel lay misconceptions about the ability of a battered woman to leave an abusive relationship.⁶² Thus, the court observed, the testimony enhanced the defendant's credibility on the life-threatening nature of the relationship, and countered the jury's notion that if the defendant did not leave, the situation could not have been intolerable.⁶³ Finding the testimony reliable and beyond the ken of the jury, the *Torres* court held the proffered evidence admissible.⁶⁴

Some courts, however, have excluded testimony on the battered woman's syndrome. In *State v. Thomas*, for instance, the Ohio Supreme Court upheld a trial court's exclusion of testimony on the grounds that it was irrelevant, within the general understanding of the jury, unreliable, and overly prejudicial.⁶⁵ In *Thomas*, the victim had abused his common-law wife for a period of years.⁶⁶ In the course of an argument, the facts of which were disputed at trial, the defendant shot her husband.⁶⁷ The defendant testified at trial that she had shot the victim "because she feared for her life, that he had made a move toward her, and that she knew he would take the gun and kill her for daring to pick it up."⁶⁸ At trial, the defendant offered evidence on the battered woman's syndrome to buttress her claim of self-defense, but the trial court ruled the evidence inadmissible.⁶⁹

Upholding the trial court's ruling, the Ohio Supreme Court reasoned that the jury did not need expert assistance in determining whether the defendant "had a bona-fide belief that she was in imminent danger . . . and that the only means of escape was through the use of deadly force."⁷⁰ The Court also held that the evidence was unreliable and likely to prejudice the jury.⁷¹ Thus, the Ohio Supreme Court joined other jurisdictions that have rejected the

⁶¹ *Id.* at 133, 488 N.Y.S.2d at 362.

⁶² *Id.*

⁶³ *Id.* at 134, 488 N.Y.S.2d at 362.

⁶⁴ *Id.* at 134-35, 488 N.Y.S.2d at 362-63.

⁶⁵ 66 Ohio St. 2d 518, 423 N.E.2d 137 (1981).

⁶⁶ *Id.* at 519, 423 N.E.2d at 138.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 520-21, 423 N.E.2d at 139.

⁷¹ *Id.* at 521-22, 423 N.E.2d at 140.

utility of testimony on the battered woman's syndrome in homicide trials.

Despite the general trend in the courts toward admitting testimony on the battered woman's syndrome, such testimony does not necessarily help battered women facing prosecution for killing their batterers.⁷² Most of the women who have been able to introduce evidence on the syndrome have nevertheless been convicted of murder, manslaughter, or reckless homicide.⁷³ Trial courts impose such punishments because women who kill their batterers generally do so *after* a battering incident, not to avert an impending deadly blow, but, instead, to extricate themselves from a psychological nightmare.⁷⁴ Thus, for the majority of women who have killed their batterers, expert testimony does little to adapt their actions to the law of self-defense.⁷⁵

Some commentators argue that testimony on the battered woman's syndrome actually undermines a defendant's contention that she acted reasonably.⁷⁶ These commentators contend that jurors often construe the syndrome as a form of insanity, offered to excuse *irrational* behavior, rather than to justify rational behavior.⁷⁷ In addition, commentator Phyllis Crocker contends that in admitting testimony on the syndrome, courts may be establishing a separate standard for "reasonable" behavior by a battered woman.⁷⁸ This approach, she argues, makes it impossible for a woman to convince a jury that she acted reasonably and justifiably.⁷⁹ In addition, Crocker also argues that the courts' use of a separate category for battered women compels female defendants to fit their actions either within traditional notions of self-defense, or squarely within a "battered woman's defense."⁸⁰ Crocker contends that this approach is misguided, because the issue at trial is not whether the defendant is a battered woman, but whether her actions were justified.⁸¹

Commentator Charles P. Ewing has proposed a new standard of self-defense that he believes addresses the plight of women who

⁷² C.P. EWING, *supra* note 1, at 55-59.

⁷³ *Id.* at 55.

⁷⁴ *Id.* at 56, 61-76.

⁷⁵ *Id.* at 55-60.

⁷⁶ *Id.* at 56.

⁷⁷ *Id.* at 56-57.

⁷⁸ See Crocker, *supra* note 37, at 144.

⁷⁹ *Id.*

⁸⁰ *Id.* at 144-50.

⁸¹ *Id.* at 149.

kill their batterers.⁸² Describing the standard as one of "psychological self-defense," Ewing argues that it should be justifiable to use deadly force "where such force appear[s] reasonably necessary to prevent the infliction of severe psychological injury."⁸³ Ewing defines such injury as "gross and enduring impairment of one's psychological functioning which significantly limits the meaning and value of one's physical existence."⁸⁴ Thus, Ewing argues, a battered woman faced with the options of killing her batterer, killing herself, or living a life utterly without meaning, should be justified in killing her batterer.⁸⁵

Women who kill their batterers often attempt to introduce evidence on the battered woman's syndrome in the hope of buttressing their claims of self-defense. Although some jurisdictions have declined to admit such testimony, the trend seems to be toward admission. Courts that admit testimony on the syndrome generally cite its utility in enhancing the defendant's credibility, as well as its reliability and helpfulness to the jury.

Nevertheless, most defendants who offer testimony on the battered woman's syndrome are convicted for killing their batterers because of the strictures of the law of self-defense. In addition, commentators also argue that testimony on the syndrome can actually undermine defendants' claims that they acted reasonably, because jurors tend to interpret battered women's behavior as understandable but nonetheless unreasonable. One commentator, Phyllis Crocker, contends that, instead of broadening the law of self-defense, testimony on the syndrome may only be creating a separate, narrowly defined category for "battered women." Finally, commentator Charles Ewing has proposed a broader standard of self-defense based on psychological self-defense. Under this defense, a person may use deadly force to prevent the infliction of serious psychological injury. Even if Massachusetts courts accept testimony of the battered woman's syndrome to explain the actions of an abused wife, the traditional law of self-defense might eviscerate the utility of such evidence. Only if the law of self-defense expands to accommodate the realities of domestic violence can such testimony provide a truly sound defense for the actions of physically and psychologically tormented women.

⁸² See C.P. EWING, *supra* note 1, at 77-94.

⁸³ *Id.* at 79.

⁸⁴ *Id.*

⁸⁵ *Id.* at 77-78.

II. SELECTED DEVELOPMENTS IN DOMESTIC RELATIONS LAW

During the *Selected Developments* year, both the Massachusetts Legislature and the Massachusetts Judiciary effected noteworthy changes in domestic relations law. The Massachusetts Legislature promulgated child support guidelines that sought to reduce the broad discretion of trial judges, resulting in forum shopping and inconsistent child support awards, by creating standards for the appropriate allocation of child support payments between the spouses. In the judicial branch, the Supreme Judicial Court and the Appeals Court, in the area of child custody, utilized the "best interests of the child" standard to reject challenges to Massachusetts courts' jurisdiction to adjudicate cases involving paternity and child custody issues. By applying this standard, the courts exercised broad discretion to achieve result-oriented decisions in accordance with the needs of the children at the center of these custody battles.

In other areas, the Supreme Judicial Court refused to recognize the patient-psychotherapist privilege and the patient-social worker privilege, and allowed parties to introduce the testimony of psychotherapists and social workers into evidence, in the context of judicial proceedings to dispense with parental consent to a child's adoption. In paternity cases, the Supreme Judicial Court rejected the rule that alleged fathers lack standing to sue when the child is conceived while the mother is lawfully married to another man, in cases where there is no "intact" family unit which can be disrupted by allowing the paternity suit. Finally, in the area of alimony and property settlements, the Supreme Judicial Court focused on the role of speculation in determining whether certain types of future income constituted property subject to equitable distribution upon divorce. In one case, the Court allowed the inclusion of pension benefits that accrued during the marriage in the category of property subject to equitable division upon divorce. In another case, however, the Court excluded the income earned from a medical degree from the category of divisible marital property because such earnings were too speculative to be treated as marital assets subject to permanent assignment.

A. **Massachusetts Child Support Guidelines of 1988*

In 1984, Congress amended Title IV of the Social Security Act by enacting Federal Child Support Amendments.¹ Through these

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¹ Act of August 16, 1984, Pub. L. No. 98-378, reprinted in 1984 U.S. CODE CONG. &

amendments, Congress required each state to establish guidelines for child support by legislative, judicial, or administrative action.² The federal statute provided that the states' guidelines, due on October 1, 1987, were to direct but not bind judges and other state officials empowered to determine child support awards.³ In addition, the amendments, as a prerequisite of state eligibility for federal funding under Title IV of the Social Security Act, provided for each Governor to appoint a State Commission on Child Support in order to investigate and report its findings for improving that state's child support system by December 1, 1984.⁴

In response to the Federal Child Support Amendments of 1984, Massachusetts Governor Michael Dukakis established a Commission on Child Support by Executive Order on January 28, 1985. Throughout the summer of 1985, the commission conducted hearings, developed a set of principles, and recommended to the Governor that the office of the Chief Administrative Justice of the Trial Court promulgate the child support guidelines. Consequently, on July 22, 1986, the Massachusetts Legislature approved chapter 310 of the 1986 Regular Session Laws to improve the collection of child support in the Commonwealth.⁵

Chapter 310 amended the Massachusetts General Laws in two very significant ways. First, the Act created a new chapter 119A entitled "Child Support Enforcement."⁶ The new chapter 119A transferred child support collection responsibility from the Department of Public Welfare to the Department of Revenue (DOR) in order to centralize collection.⁷ The DOR established a division on

ADMIN. NEWS (98 Stat.) 1320, 1321-22 (codified at 42 U.S.C. § 667 (1984)). The purpose of the Act was to amend part D of Title IV of the Social Security Act in order to "assure, through mandatory income withholding, incentive payments to states, and other improvements in the child support enforcement program, that all children in the United States who are in need of assistance in securing financial support from their parents will receive such assistance regardless of their circumstances." *Id.*

² Act of August 16, 1984, Pub. L. No. 98-378 § 18, 1984 U.S. CODE CONG. & ADMIN. NEWS (98 Stat.) 1322.

³ *Id.*

⁴ Act of August 16, 1984, Pub. L. No. 98-378 § 15(a), 1984 U.S. CODE CONG. & ADMIN. NEWS (98 Stat.) 1320, 1321. The deadline for the reports of the State Commissions was October 1, 1985. Congress directed the Commissions to pay particular attention to such areas as: "visitation; the establishment of appropriate standards for support; the enforcement of interstate obligations; the availability, cost, and effectiveness of services both to children who are eligible for such aid and to children who are not; and the need for additional state or federal legislation to obtain support for all children." *Id.* at section 15(c).

⁵ 1986 Mass. Acts 310.

⁶ MASS. GEN. L. ch. 119A, § 1 (1986).

⁷ *Id.* §§ 1-2 (1986) ("The department of revenue shall be the single state agency within the Commonwealth that is designated the IV-D agency pursuant to Title IV-D of the Social Security Act").

Child Support Enforcement (CSE) to perform child support collection.⁸ Additionally, section 1 of chapter 119A established a Child Support Enforcement Commission (CSEC), within the executive office of administration and finance, to advise DOR and other agencies on improving the collection system.⁹ The remaining sections of chapter 119A specified the services of the agency,¹⁰ the enforcement powers and methods,¹¹ collection procedures,¹² and disbursement mechanisms.¹³

Second, chapter 310 of the 1986 Session Laws amended chapter 211B of the Massachusetts General Laws, adding a new section 15 to comply with the Federal Child Support Enforcement Amendments of 1984.¹⁴ The legislature, in creating section 15, established a Committee on Child Support Guidelines to advise the Chief Administrative Justice of the Trial Court.¹⁵ The Advisory Committee was scheduled to file the guidelines on January 1, 1987 with the clerks in the house of representatives and the senate.¹⁶ Within 90 days after filing, on April 1, 1987, the Chief Administrative Justice was scheduled to promulgate these support guidelines for use by other judges and hearing officers.¹⁷

During the *Selected Developments* year, the Advisory Committee developed and revised the guidelines. Prior to the April 1987 initial deadline, the Committee published a draft guideline in *Massachusetts*

⁸ *Id.*

⁹ *Id.* The CSEC consists of six members: the Secretary of the Executive Office for Administration and Finance as chairman, the Commissioner of Revenue, the Attorney General, the Chief Administrative Justice of the Trial Court, the Commissioner of Public Welfare, and a district attorney appointed by the Governor. *Id.*

¹⁰ MASS. GEN. L. ch. 119A, § 2 (1986) (location of absent parents, establishment of paternity, establishment of child support orders, and collection and disbursement of payments).

¹¹ *Id.* § 3 (1986). DOR may file an action in either the name of the recipient of public assistance or in the name of the department. *Id.*

¹² *Id.* §§ 6-7 (wage assignment, demand letters, notification of obligor, state and federal tax intercepts, contempt and capias). On November 16, 1987, the Massachusetts Legislature passed chapter 490 of the 1987 Regular Session, amending Massachusetts General Laws chapter 119A, and broadened the collection powers of the CSE units in the DOR. *Id.* The broader procedure allows CSE to use lien, seizure, and levy as powers to collect amounts in arrears.

¹³ MASS. GEN. L. ch. 119A, § 12 (1986).

¹⁴ 1986 Mass. Acts 310, § 16A.

¹⁵ MASS. GEN. L. ch. 211B, § 15 (1986). The committee included fifteen members: seven appointed by the Chief Administrative Justice, six appointed by the Governor (five of whom had served on the commission initially established by executive order in 1985), the Commissioner of Revenue, and the Chief Administrative Justice of the Trial Court as chairman. *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

Lawyer's Weekly in order to solicit practitioners' comments.¹⁸ In response to lawyers' concerns, the Committee revised the guidelines.¹⁹ On May 1, 1987 the Chief Administrative Justice, Arthur M. Mason, promulgated interim guidelines effective until December 31, 1987 to better assess their effect.²⁰ Moreover, in November 1987, to elicit further recommendations, Judge Mason's office mailed 700 questionnaires to judges, probation officers and child support workers.²¹

On January 1, 1988, Judge Mason promulgated the final draft of the child support guidelines.²² The guidelines focused on such principles as minimizing the economic impact of family breakup on the child, encouraging joint parental responsibility for child support in proportion to income, providing the standards of living the child would have enjoyed had the divorce not occurred, meeting the child's survival needs and entitling the child to enjoy the standard of living of the higher-income parent, protecting a subsistence level of income for parents at the low end of the income scale, considering either parent's non-monetary contributions, minimizing problems of proof and administration, and allowing for adjustable orders and wage assignments.²³

First, in examining the guidelines, the practitioner must note that the guidelines only apply to current child support.²⁴ The guidelines seek to provide judges with a formula to use in setting temporary, permanent, or final orders for current child support, in deciding whether to approve private support agreements, and in adjudicating cases where the parties seek modification of existing agreement.²⁵ Therefore, under Massachusetts law which requires a "sufficient change of circumstances" to provide an independent

¹⁸ 15 Mass. Law. W. 821, 832 (1987); see Ryan, *An Overview of the Massachusetts Child Support Guidelines*, 5 MASS. FAM. L.J. 1 (May 1987).

¹⁹ 15 Mass. Law. W. 1217, 1256 (1987). This article presents the various revisions which encompassed: income definition, the factors in setting orders, time-sharing, and health insurance. *Id.* The article notes that the Committee viewed the guidelines as "evolutionary." *Id.*

²⁰ The text and implications of the interim guidelines are presented in Ryan, *supra* note 18, at 7-10.

²¹ 16 Mass. Law. W. 669, 700 (1988).

²² *Id.*

²³ *Id.* These principles are enumerated in MASS. GEN. L. ch. 211B, § 15 (1986), as developed by the original Governor's Committee on Child Support in 1985.

²⁴ 16 Mass. Law. W. 689-90. The preamble of the guidelines notes that they do not apply to: alimony, division of marital property, the payment of arrears, restitution or reimbursement, and to situations where the parties have made a court-approved private agreement. *Id.*

²⁵ *Id.*

claim for modification, the guidelines in and of themselves do not constitute such a basis for modification.²⁶

The Advisory Committee divided the guidelines into three major sections.²⁷ The first section defines income in terms of gross rather than net income.²⁸ The guidelines direct the judges to look at gross income "from whatever source."²⁹ The guidelines, however, do not apply where the combined income of the parents exceeds \$100,000 per year, or where the non-custodial parent's annual income exceeds \$75,000 per year.³⁰ The second section of the guidelines lists factors the judges should consider in setting child support orders. The third section provides a worksheet and example of how the formula actually works.

In addition, the subsections of the guidelines further assist judges fashioning child support orders. In regard to the factors the judges should consider in setting child support orders, subsections A and B allow the court to classify an order in whole or in part as either alimony or as a separate maintenance payment.³¹ The court may also decide the claims of personal exemptions for child dependents between the parties.³²

Under subsection C, the guidelines set minimum and maximum levels of deduction and support. If a custodial parent decides to work, the guidelines allow the court to factor this income into the support formula only if it exceeds \$15,000 after deducting the costs of day care.³³ In addition to this "disregard formula," the guidelines ensure a minimum subsistence level for the non-custodial parent whose income is less than \$200 per week.³⁴ In keeping with the principle that parents should remain responsible for their children, however, the guidelines require all non-custodial parents to contribute a minimum of \$50 per month.³⁵

²⁶ *Id.* This provision prevents opening a floodgate of appeals for modification. *Id.*

²⁷ *Id.*

²⁸ *Id.* at 689.

²⁹ *Id.* The section enumerates, not by limitation, twenty-five sources of gross income ranging from salary to prizes and awards. *Id.*

³⁰ *Id.*

³¹ *Id.* The guidelines note that individual counsel are responsible for notifying their clients of tax consequences. *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* This minimum does not prevent the court from setting higher orders if appropriate. *Id.*

Subsection D of the guidelines outlines another set of factors to guide the court in custody and visitation decisions.³⁶ In order to maximize the child's ability to "enjoy the society and companionship of both parents," the court may consider how much time the parties actually spend with the child.³⁷ The court may factor into the support award any extraordinary travel-related expenses the non-custodial parent incurs in the exercise of court-ordered visitation rights.³⁸

Pursuant to subsection E, the guidelines note that child care expenses do not constitute separate support items, and remain the responsibility of the custodial parent.³⁹ Day care, however, constitutes a separate item which the non-custodial parent must share.⁴⁰ The guidelines direct the court to subtract the cost of day care from the custodial parent's gross income before it applies the disregard formula.⁴¹

The guidelines also provide that the judge should consider the children's age in setting the support orders. In subsection F, the guidelines classify the children's age into four groups: 0-6, 7-12, 13-18, and over 18.⁴² The guidelines call for a percentage increase in the basic support order based on the age of the oldest child.⁴³ The guidelines leave the amount of support for an 18-21 year-old to the court's discretion.⁴⁴

In determining support orders, the court should further consider health insurance and medical costs. The court, pursuant to subsection G, may oblige a non-custodial parent on an employee

³⁶ *Id.* The court is neither to apply the guidelines in cases of shared custody of one child nor where each parent has custody of one or more children. *Id.*

³⁷ *Id.*

³⁸ *Id.* This represents a revision in the previous interim guidelines.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* The addition of the age group 18-21 is a new provision in response to concerns of the costs of college education.

⁴³ *Id.* Where the age of the oldest child is 0-6, the basic order applies. *Id.* The order then increases by the following schedule:

Age	%
0-6	basic order
7-12	basic order + 10% of basic order
13-18	basic order + 15% of basic order
18-21	discretion of the court

Id.

⁴⁴ *Id.*

group health insurance plan to exercise any options available to include the child.⁴⁵ The support order should reflect this coverage by crediting the non-custodial parent with a deduction for the full cost of the health insurance.⁴⁶ Where the child has no insurance and incurs routine medical expenses, the custodial parent must pay the first \$100, and the court must determine responsibilities for the remaining expenses on a case-by-case basis.⁴⁷ If the medical expenses are extraordinary, the court shall similarly treat the matter on a case-by-case basis.⁴⁸

The guidelines, in subsection H, allow the court to consider potential earning capacity when the court determines that either or both parties earn substantially less than he or she could "through reasonable effort."⁴⁹ Such situations occur when either parent is fully employable, but chooses to remain unemployed or underemployed.⁵⁰ The guidelines, however, limit the court's discretion to consider potential earning capacity by excluding custodial parents with children under age 6.⁵¹

Finally, the guidelines direct the court on how to accommodate prior and subsequent families. The guidelines recommend that the court apply a first-in-time/first-in-right rule. First, if a non-custodial parent is *actually paying* a prior order for spousal or child support, the court should deduct those payments from the non-custodial parent's gross income before determining the current support order.⁵² Moreover, if a non-custodial parent remarries and has children by the second marriage, and subsequently the custodial parent of the first marriage seeks support, the court may then consider the non-custodial parent's obligations to the second family in determining the amount of the award.⁵³

In light of these factors, part III of the guidelines provides a sample worksheet of a child support order. A judge calculates a basic order by multiplying the non-custodial parent's gross weekly income (less any prior support orders) by a set percentage corre-

⁴⁵ *Id.*

⁴⁶ *Id.* This clarifies an ambiguity in the interim guidelines. *Id.* at 700.

⁴⁷ *Id.* at 689.

⁴⁸ *Id.* In this case a deduction in the order may be considered.

⁴⁹ *Id.* (The court should consider "education, training, and past employment history.").

⁵⁰ *Id.*

⁵¹ *Id.* The interim guidelines included a clause also exempting a custodial parent "who chooses to be home with the children when they are not at school." *Id.* at 700. The final guidelines delete this clause. *Id.*

⁵² *Id.* at 690. This provision is consistent with the interim guidelines. *Id.* at 669.

⁵³ *Id.* at 690.

lated to his or her gross income.⁵⁴ Recognizing that raising older children involves greater expenditures than raising younger children, the judge then increases the basic order according to a percentage schedule based on the age of the oldest child.⁵⁵ The judge then reduces the amount by the percentage of the custodial parent's calculated contribution.⁵⁶ The resulting figure equals the amount of the appropriate support order.

The final text of the guidelines promulgated by the Chief Administrative Justice represents a well-reasoned attempt to direct judges in determining child support awards. One may, however, critique the effects of the guidelines on two levels: the general and the specific. Generally, although the guidelines are not mandatory, they represent an improvement from the prior, traditional case-by-case judicial approach. At least two commentators have demonstrated the positive aspects of a quantitative guideline approach.⁵⁷ First, a set of guidelines that focuses on quantitative standards can correct dramatically the inadequacy of court-ordered support orders to provide for sufficient child support awards.⁵⁸ Studies demonstrate that discretionary judicial awards should be two and one-half times higher than they are presently.⁵⁹ The average discretion-

⁵⁴ *Id.* The guidelines provide the following chart:

Gross Weekly Income	Number of Children		
	1	2	3
0-200	Discretion of the court but not less than \$50/mo.		
201-500	25%(+/-2%)	28%(+/-2%)	31%(+/-2%)
500-max.	27%(+/-2%)	30%(+/-2%)	33%(+/-2%)

Id.

⁵⁵ *Id.* See *supra* note 43 and accompanying text.

⁵⁶ *Id.*

⁵⁷ See Williams, *Guidelines for Setting Levels of Child Support Orders*, FAM. L.Q., Volume XXI, Number 3, 281-86 (Fall 1986); see also Goldfarb, *A Model for Fair Allocation of Child Support*, FAM. L.Q., Volume XXI, Number 3, 325-27 (Fall 1987).

⁵⁸ Williams, *supra* note 57, at 283-84. The author quotes a 1985 study by the U.S. Office of Child Support Enforcement which estimated that \$26.6 billion in child support "would have been due in 1984 if child support was set based on either of two alternative guidelines." *Id.* In fact, the author points out that a Census Bureau study found that only \$10.1 billion was reported due in 1983 (\$7.1 billion of which was actually collected)—an "adequacy gap" of \$15 billion. *Id.* (citing Haskins, *Estimates of National Child Support Collection Potential and the Income Security of Female-Headed Families*, Report to Office of Child Support Enforcement, Bush Institute for Child and Family Policy, University of North Carolina at Chapel Hill (1985)).

⁵⁹ Goldfarb, *supra* note 57, at 326; see also Williams, *supra* note 57, at 283. Both authors note that a United States Census Bureau study of child support in 1983 estimated the mean court-ordered obligation to be \$191 per month. Williams, however, quotes a study that "an order of \$191 is equivalent to only 25% of the average expenditures on children in a middle income household." Williams, *supra* note 57, at 283 (citing Epensshade, *Investing in Children: The New Estimates of Parental Expenditures* (1984)).

ary child support order provided support twenty percent below the poverty level, illustrating the need for quantitative guidelines.⁶⁰

Moreover, quantitative guidelines provide a needed consistency in child support orders.⁶¹ The Massachusetts guidelines will not only close the disparity in court awards, but will also eliminate the forum-shopping present in the less equitable discretionary system. Moreover, consistency in awards will lead to a more predictable system, and aid attorneys in counseling their clients.⁶² This predictability will improve the efficiency of the adjudication process. If attorneys can calculate an accurate estimate of support, they will be more willing to settle voluntarily rather than burden the courts.⁶³

Although the Massachusetts guidelines would improve the general defects inherent in a case-by-case approach, the Advisory Committee's specific approach offers both positive and negative qualities. In regard to positive qualities, the Massachusetts guidelines represent a version of the support theory that focuses on parental income rather than computing and allocating the actual costs of rearing a child.⁶⁴ By rejecting a "cost-sharing" approach, the Advisory Committee avoided the subjective disputes that inherently arise in attempting to determine such costs.⁶⁵

Rather than adopt cost-sharing, the Advisory Committee decided to utilize a system based on a theory that calculates the amount spent on children as a percentage of household income.⁶⁶ Prior to the Massachusetts guidelines, four variations of support guidelines based on proportion of parental income existed: the flat percentage guideline,⁶⁷ the income shares

⁶⁰ Williams, *supra* note 57, at 284 (citing 48 FED. REG. 7010-11 (1983)).

⁶¹ *Id.* at 284-85. Williams quotes a Colorado study that demonstrates that a case-by-case approach resulted in orders ranging from 6% to 33% of the non-custodial parent's income. *Id.* (citing Yee, *What Really Happens in Child Support Cases: An Empirical Study of Establishment and Enforcement in the Denver District Court*, 57 DEN. L.J. 21, 38-42 (1979)).

⁶² Goldfarb, *supra* note 57, at 326-27.

⁶³ Williams, *supra* note 57, at 286.

⁶⁴ Goldfarb, *supra* note 57, at 329 (the cost-sharing approach "aims to compute the costs of rearing a child or children and then allocate those costs between the parents, usually in proportion to the parents' income").

⁶⁵ *Id.* No state has yet adopted a pure cost-sharing approach.

⁶⁶ Williams, *supra* note 57, at 288-89 (quoting Epensshade, *Investing in Children: New Statistics of Parental Expenditures* (1984)). From Epensshade's study, Williams notes that states can develop estimates of the proportion of family consumption devoted to children. *Id.* at 289.

⁶⁷ Williams, *supra* note 57, at 290-309. The author presents an excellent overview of the four models. The flat percentage guidelines set child support as a percentage of the non-custodial parent's gross or net income which varies according to the number of children. *Id.* This formula ignores the income of custodial parents as well as extraordinary expenses. *Id.*

model,⁶⁸ the Delaware-Melson formula,⁶⁹ and the income equalization (Cassetty) model.⁷⁰ The four models present different levels of support depending on various factors.⁷¹

The Massachusetts model represents a new variation of the income shares model.⁷² Several of its features offer an improvement over existing models. First, by focusing on gross income instead of net income, the guidelines prevent parents from concealing income through intricate deductions. In bypassing the danger of "concealed income," the Advisory Committee intended to provide a list of income definitions that would guide litigants prior to adjudication.⁷³

Second, the Massachusetts guidelines, unlike other income shares models, graduate the percentages of parental contribution upward as income levels increase.⁷⁴ "Graduated contribution" appears to be more equitable and comparable to graduated state and federal income tax schemes.⁷⁵ The Massachusetts guidelines attempt to include equitably the majority of non-intact households by dividing the gross weekly income of parents into three strata.⁷⁶

Moreover, the guidelines uniquely recognize that child rearing costs increase as children get older. The guidelines represent a well-planned policy by adjusting the formula to compensate for these increasing costs.⁷⁷ The Advisory Committee dealt with the added costs of a college education by adding a new age group from 18–21.

⁶⁸ *Id.* at 291–95. The income shares model is a general framework based on the theory "that the child should receive the same proportion of parental income that would have been received if the parents lived together." *Id.* The model looks to the combined income of the parents and then prorates the total obligation based on the proportionate shares of each parent's income. *Id.* at 293.

⁶⁹ *Id.* at 295–302. The Delaware-Melson formula is a three-step process that determines: the minimum amount each parent needs for their own self support, the minimum amount required to maintain a child at subsistence level (which amount the court then prorates between the parents), and a percentage of any remaining income which is allocated for additional child support (15% for 1 child, 25% for 2 children, 35% for 3 children). *Id.*

⁷⁰ *Id.* at 302–03. The income equalization (Cassetty) model is a complicated formula that attempts to provide equivalent living standards for each parent's household. *Id.* This model has yet to be adopted in any jurisdiction. *Id.*

⁷¹ *Id.* at 303–09. Williams presents a comprehensive summary of the similarities and differences of each model. *Id.*

⁷² Ryan, *supra* note 18, at 2. Ryan terms the guidelines as the "Massachusetts Modified Income Shares Approach." *Id.*

⁷³ *Id.* at 3.

⁷⁴ *Id.* at 5.

⁷⁵ *Id.*

⁷⁶ See *supra* note 46 and accompanying text.

⁷⁷ Ryan, *supra* note 18, at 4.

Also, the guidelines represent a consistent policy of minimizing the impact of divorce on the children by allowing the court to consider any extraordinary expenses incurred by the custodial parent. Whether this policy will actually increase the amount of time the non-custodial parent spends with the child remains unanswered. Underlying the extraordinary expense concept is the hope that the parents themselves will act maturely after a divorce.

In regard to allowing the court to look to potential earning capacity when either party chooses to remain unemployed or underemployed, the guidelines represent a sound public policy measure to alleviate the pressure on public welfare. Whether the judge should use this judicial discretion to penalize custodial parents who take part-time positions in order to remain with their children during after-school hours, however, remains an important question. It may be in the best interests of the child to allow the custodial parent to pursue an option of part-time employment.

The Massachusetts guidelines, however, have some negative aspects. At least one author has noted that guidelines similar to those in Massachusetts do not sufficiently differentiate between ordinary and extraordinary expenses.⁷⁸ While the court should treat ordinary expenses as part of the basic formula for child support, the commentator argues that a model guideline should mathematically prorate extraordinary expenses according to the parents' relative income.⁷⁹ Thus, the commentator believes ideal guidelines should specifically apportion these extraordinary expenses rather than leave them to the discretion of the court.⁸⁰ The Massachusetts guidelines do not specifically provide such a formula for extraordinary expenses. Rather, the court determines how to apportion extraordinary expenses, such as educational costs of children between the ages of 18–21 and extraordinary medical expenses, absent a guideline specifically providing a formula for the payment of such extraordinary expenses.

Finally, the Massachusetts guidelines provide a "windfall" to non-custodial parents who opt to include the child on their group

⁷⁸ Goldfarb, *supra* note 57, at 330–49. The author notes that ordinary child care expenses include: occasional babysitting, minor medical expenses, and ordinary educational expenses. *Id.* at 330–31. Extraordinary expenses include full-time child care, major medical bills, and private or college educational expenses. *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 336 (relying on judicial discretion would "undermine the goal of greater consistency and certainty in support awards").

insurance plans.⁸¹ The guidelines overcompensate the non-custodial parent by allowing the court to reduce a support order by the full amount of the cost of the entire insurance.⁸² To avoid this inequitable reduction of a support order, the guidelines should only reduce a support order by subtracting the difference between the individual and family policy, rather than allowing a reduction for the costs of the whole policy.⁸³

In sum, the guidelines promulgated by the Chief Administrative Justice on January 1, 1988 provide a consistent approach to child support awards. While one may criticize the guidelines on certain enumerated provisions, the overall results are very favorable. The guidelines strive to minimize the impact of divorce on children by requiring the custodial and non-custodial parent to contribute to the child's welfare. By providing a mathematical formula, the Advisory Committee added a degree of predictability that should alleviate the judicial role by promoting settlements. These guidelines, coupled with a stronger enforcement policy, should result in an improved child support system.

B. **Result-Oriented Decisions in Child Custody Cases: Massachusetts Courts and the "Best Interests of the Child" Standard*

Massachusetts General Laws chapter 208, section 31 codifies the historical rule governing parental rights in custody cases: "[t]he rights of the parents shall, in the absence of misconduct, be held to be equal, and the happiness and welfare of the children shall determine their custody or possession."¹ In *Jenkins v. Jenkins*, the Massachusetts Supreme Judicial Court interpreted section 31, and stated that, although the judge should not disregard the parents' feelings and wishes, the child's happiness and welfare constitute the controlling consideration in determining custody of a minor child.² The *Jenkins* court further stated that the judge has a duty to determine the custodial disposition that promotes the child's best interests.³ Thus, the child's best interests constitute the controlling factor in a judicial determination of parental custody.

⁸¹ *Id.* at 342

⁸² *Id.*

⁸³ *Id.*

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¹ MASS. GEN. LAWS ANN. ch. 208, § 31 (West 1982).

² 304 Mass. 248, 250, 23 N.E.2d 405, 406 (1939).

³ *Id.*

Judges nonetheless enjoy considerable discretion in deciding custody battles between divorcing parents.⁴ In determining which parent will be the custodial parent, Massachusetts courts have articulated several guiding factors. The courts may consider the experience, attitudes, and progress of the child while in the custody of either parent, and the physical and economic capabilities of the mother and father.⁵ Courts may also consider the fears, desires, and welfare of the child as affected by the outcome of the litigation.⁶ Further, courts consider which parent primarily acts as the child's caretaker or nurturer,⁷ as well as which custodial arrangement lessens disruption and promotes a healthy environment for the child's growth and development.⁸ No set formula exists, however, for determining the custodial arrangement that promotes the best interests of the child, and each case rests on its own facts.

Massachusetts General Laws chapter 210, section 3 governs custody cases arising neither from divorce nor separation, but instead from an allegation of parental unfitness and the child's need for nonparental care and protection.⁹ Like the best interests standard for custody determinations after divorce, section 3 provides a flexible standard that grants broad judicial discretion.¹⁰ The Massachusetts courts consider several factors dispositive. The emotional shock of the child were he or she to be uprooted; the serious, continuing emotional problems of the parents; and the parents' realistic approach to problems.¹¹ The state may not remove a child from the parental home unless an affirmative reason exists for doing so, such as a serious problem with a parent, or a long sepa-

⁴ The Massachusetts courts prefer that both parents participate in the childrearing process. See *Felton v. Felton*, 383 Mass. 232, 234, 418 N.E.2d 606, 607 (1981). For joint custody to work, however, both parties must be able to agree on decisions affecting their children. *Rolde v. Rolde*, 12 Mass. App. Ct. 398, 404, 425 N.E.2d 388, 392 (1981). When the parties have undergone a particularly difficult divorce, joint custody may prove too emotionally difficult for the parents, thereby jeopardizing the child's well-being. *Id.* Thus, the courts usually award physical custody to one parent, and legal custody to both, with visitation rights in the noncustodial parent. See *Yannas v. Frondistou-Yannas*, 395 Mass. 704, 481 N.E.2d 1153 (1985).

⁵ *Smith v. Smith*, 361 Mass. 855, 855, 279 N.E.2d 693, 694 (1972).

⁶ *Id.*

⁷ *Rolde*, 12 Mass. App. Ct. at 405, 425 N.E.2d at 392.

⁸ *Id.* at 406, 425 N.E.2d at 392-93.

⁹ MASS. GEN. LAWS ANN. ch. 210, § 3 (West 1982).

¹⁰ *Petition of New England Home for Little Wanderers*, 367 Mass. 631, 644, 328 N.E.2d 854, 862 (1975).

¹¹ *Id.* at 641, 645, 328 N.E.2d at 857.

ration that has allowed the child to develop strong bonds with someone other than the custodial parents.¹²

Custody cases arising from divorce and separation often involve questions of jurisdiction, because deterioration of the marriage frequently results in one parent moving to another state or even another country.¹³ The general jurisdictional rule in Massachusetts custody cases requires the child to be a resident of, or domiciled in, the state in which the proceedings are brought.¹⁴ The Massachusetts courts, however, have stated that *in personam* jurisdiction over the child's parents is a sufficient basis for exercising jurisdiction in custody cases.¹⁵ The Supreme Judicial Court in *Green v. Green* stated that the parents' presence before a judge will afford the court a good chance to determine which party should prevail.¹⁶ The Massachusetts rule, furthermore, prevents a parent who secretly removes a child from the Commonwealth from controlling jurisdictional considerations.¹⁷

During the *Selected Developments* year, the Massachusetts courts adjudicated several cases involving questions of jurisdiction in paternity and custody disputes.¹⁸ In the 1987 decision of *R.L.H. v. T.E.L.*,¹⁹ a mother, a Connecticut resident, attempted to file a paternity complaint pursuant to Massachusetts General Laws chapter 209C against T.E.L., the putative father of her minor child.²⁰ The complaint alleged that T.E.L. resided in Springfield, Massachusetts.²¹ The register of the Probate and Family Court Department refused to file the complaint. According to the Department, when the mother and child reside outside Massachusetts, Massachusetts courts lack jurisdiction.²² R.L.H. filed a motion to compel the ac-

¹² *Id.* at 642, 328 N.E.2d at 861.

¹³ See *Bak v. Bak*, 24 Mass. App. Ct. 608, 511 N.E.2d 625 (1987).

¹⁴ *Green v. Green*, 351 Mass. 466, 469, 221 N.E.2d 857, 859 (1966).

¹⁵ *Id.* at 471, 221 N.E.2d at 860.

¹⁶ *Id.* The court stated that the ideal situation in determining custody is one in which both the child's parents are in the presence of the court. *Id.* Such a situation, however, may not be feasible. *Id.*

¹⁷ See *id.*

¹⁸ *R.L.H. v. T.E.L.*, 401 Mass. 101, 514 N.E.2d 855 (1987); *Vertrees v. Vertrees*, 24 Mass. App. Ct. 918, 508 N.E.2d 868 (1987); *Bak v. Bak*, 24 Mass. App. Ct. 608, 511 N.E.2d 625 (1987).

¹⁹ 401 Mass. 101, 514 N.E.2d 855 (1987).

²⁰ *Id.* at 101, 514 N.E.2d at 855.

²¹ *Id.*

²² *Id.*

ceptance of the complaint.²³ The probate judge allowed R.L.H. to file the complaint, but then dismissed it for lack of jurisdiction thus triggering R.L.H.'s appeal.²⁴

The Massachusetts Supreme Judicial Court reversed the probate court's dismissal. The Court held that a nonresident mother and child may establish the paternity of a Massachusetts defendant in a Massachusetts court under chapter 209C.²⁵ The court reasoned that although the first two sentences of chapter 209C, section 4 do not provide for the establishment of paternity where the child lives with a nonresident parent,²⁶ the plain meaning of the third sentence of section four did provide for the establishment of such paternity suits.²⁷ Further, the Court noted that the statute's purpose and precedent supported allowing R.L.H. to file the complaint.²⁸

In 1987, the Massachusetts Appeals Court adjudicated another custody dispute involving jurisdiction in *Vertrees v. Vertrees*.²⁹ In *Vertrees*, a divorced father appealed from a modification of a custody award allowing the custodial mother to move to Illinois with their two children.³⁰ In affirming the modification, the Appeals Court reaffirmed its decision in *Yannas v. Frondistou-Yannas*, and applied the "real advantage" standard to the case.³¹ The real advantage standard recognizes that after a divorce, a minor child's quality of life becomes "interwoven with the well-being of the custodial parent."³² Thus, in determining whether the move serves the minor's best interests, courts consider whether a good reason, or a "real advantage," exists for the move.³³

The court in *Vertrees* stated that moving to Illinois would benefit the mother emotionally, socially, and possibly financially.³⁴ The

²³ *Id.*

²⁴ *Id.* at 102, 514 N.E.2d at 855.

²⁵ *Id.*

²⁶ The first sentence of chapter 209C, section 4, of the Massachusetts General Laws Annotated states that a paternity complaint "[s]hall be filed in the judicial district or county in which the child and one of the parents lives." MASS. GEN. LAWS ANN. ch. 209C, § 4 (West 1982).

²⁷ The third sentence of section 4 states that "[t]he fact that the child was conceived, was born, or lives outside the Commonwealth does not bar a proceeding to establish paternity pursuant to this chapter." *Id.* § 4.

²⁸ 401 Mass. 101, 102, 514 N.E.2d 855, 856 (1987).

²⁹ 24 Mass. App. Ct. 918, 508 N.E.2d 868 (1987).

³⁰ *Id.* at 918, 508 N.E.2d at 869.

³¹ *Id.* at 919, 508 N.E.2d at 869.

³² *Id.*

³³ *Id.* (citing *Yannas v. Frondistou-Yannas*, 395 Mass. 704, 710-12, 481 N.E.2d 1153, 1157-58 (1985)).

³⁴ 24 Mass. App. Ct. at 919, 508 N.E.2d at 869-70. The court stated that the mother

court balanced these benefits to the mother against the detriments that the move might impose on the children.³⁵ Although the move would remove the children from their school and friends, and would reduce contact with their father, the court noted that they would be moving to an area that offered a strong school system and a network of relatives.³⁶ Thus, according to the court, the benefits of the move outweighed any detrimental effects that might flow from reduced contact with their father.³⁷

In *Bak v. Bak*,³⁸ another custody case raising jurisdiction issues, a divorced father appealed from a judgment awarding the mother custody of two of their three minor children. The Appeals Court affirmed the judgment, stating that the award promoted the best interests of the children.³⁹ In *Bak*, the parties, Anthony and Sonja, were married in 1967. The couple and their two children moved to Bielefeld, West Germany, where a third child was born.⁴⁰ After Anthony engaged in an extramarital affair, Sonja moved to Massachusetts with the three children.⁴¹ Soon after moving back to the Commonwealth, she applied to the Massachusetts Probate Court for a divorce and seeking custody of the children.⁴²

Anthony frequently visited the children in Massachusetts.⁴³ As the parties redeveloped trust and confidence, Sonja agreed to allow the youngest, Tony, to go to Bielefeld for the school year.⁴⁴ Anthony never allowed Tony to return to Massachusetts, and thereafter filed a petition for custody in the Bielefeld Family Court.⁴⁵ Anthony failed to inform the Bielefeld court that custody proceedings were already in progress in Massachusetts.⁴⁶ The Bielefeld court sent

had good reasons to move to Illinois. *Id.* She was born and raised in Illinois, and most of her relatives still lived there. *Id.* at 919, 508 N.E.2d at 869. According to the court, she would benefit from her relatives' support. *Id.* at 919, 508 N.E.2d at 870. Furthermore, Illinois offered more opportunities for career advancement. *Id.*

³⁵ *Id.* at 920, 508 N.E.2d at 570.

³⁶ *Id.*

³⁷ *Id.*

³⁸ 24 Mass. App. Ct. 608, 511 N.E.2d 625 (1987).

³⁹ *Id.* at 618, 511 N.E.2d at 631-32.

⁴⁰ *Id.* at 609-10, 511 N.E.2d at 626-27. Anthony had secured a tenured faculty position at the University of Bielefeld. *Id.* at 610, 511 N.E.2d at 627.

⁴¹ *Id.* at 611, 511 N.E.2d at 627. Anthony told Sonja that he would no longer live with her. *Id.* at 610, 511 N.E.2d at 627.

⁴² *Id.* at 611, 511 N.E.2d at 627.

⁴³ *Id.*

⁴⁴ *Id.* at 611, 511 N.E.2d at 627. The eldest daughter had visited Anthony the previous summer. That visit went without incident. *Id.*

⁴⁵ *Id.* at 611, 511 N.E.2d at 628.

⁴⁶ *Id.*

notice of the proceedings to Sonja.⁴⁷ Thereafter, Sonja obtained orders from the Massachusetts Probate Court instructing Anthony to send Tony back to Massachusetts.⁴⁸ Anthony not only ignored this order, but also took Linnea, the eldest, to Germany.⁴⁹

On August 24, 1984, the Bielefeld court granted Anthony custody of Tony.⁵⁰ By coincidence, Sonja's attorney sent a letter to the Bielefeld court on August 25, stating that the Massachusetts Probate Court action was pending, and that Anthony was in violation of several court orders.⁵¹ The Bielefeld court treated this letter as an appeal from its custody order, and remanded the case.⁵² The Bielefeld court has yet to reach a decision, although it has granted Anthony temporary custody of Linnea and Tony.⁵³

In 1985, the Hampshire County Probate Court held four days of hearings, which Anthony failed to attend.⁵⁴ Anthony subsequently returned to Massachusetts and moved to reopen the Probate Court hearings.⁵⁵ The Probate Court granted the motion and placed Rosemary, the middle child, and Tony, the youngest child, in Sonja's custody.⁵⁶

Anthony asserted that the Massachusetts courts lacked subject matter jurisdiction over the question of Tony's custody.⁵⁷ In response to this assertion, the Appeals Court cited Massachusetts General Laws chapter 209B, which states that a Probate Court has jurisdiction to make a custody determination if Massachusetts is the child's home state.⁵⁸ Because the children had resided in Massachu-

⁴⁷ *Id.* at 612, 511 N.E.2d at 628. The notice was in German, and Sonja apparently did not understand it. *Id.*

⁴⁸ *Id.* The notice also instructed Anthony not to remove the two other children from Massachusetts. *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 613, 511 N.E.2d at 628.

⁵⁵ *Id.*, 511 N.E.2d at 628-29.

⁵⁶ *Id.*, 511 N.E.2d at 629.

⁵⁷ Apart from the jurisdictional issue, Anthony also stated that the probate court's decision to grant custody of Rosemary and Tony to Sonja was wrong. *Id.* at 616, 511 N.E.2d at 630. The Appeals Court disagreed, and stated that a court must consider the best interests of the child when making custody determinations. *Id.* at 616, 511 N.E.2d at 630. The record, the court noted, contained substantial evidence indicating that the mother's custody would further Rosemary's and Tony's best interests. *Id.* at 617-18, 511 N.E.2d at 631. Furthermore, although Sonja's finances were more limited than Tony's, the court noted that "[m]aterial advantage alone should not be determinative of custody." *Id.* at 618, 511 N.E.2d at 631.

⁵⁸ See MASS. GEN. LAWS ANN. ch. 209B (West 1982).

setts for thirteen months prior to institution of the divorce proceedings, the Appeals Court stated that Massachusetts was the home state of the children, and that the Probate Court had subject matter jurisdiction to place the children in Sonja's custody.⁵⁹

These custody cases involving jurisdiction impact Massachusetts law in varying degrees. The Supreme Judicial Court's decision in *R.L.H. v. T.E.L.* is an important one because it clarifies the ambiguity surrounding the statute. This decision also strengthens the rights of children born out of wedlock, by recognizing a means through which such children may seek their parents' acknowledgment and support.⁶⁰ The court further reconciled the interpretation of Massachusetts General Laws, chapter 209C, section 4, with established jurisdictional principles in questions of support and custody that do not require that the plaintiff-parent reside in the Commonwealth.⁶¹

In *Vertrees*, the Appeals Court's reaffirmation of the "real advantage" standard, originally adopted in *Yannas v. Frondistou-Yannas*, emphasized the Massachusetts judiciary's view that the child's well-being becomes intertwined with the custodial parent's well-being.⁶² The *Vertrees* court's recognition that children might suffer if their custodial parent is unhappy living in a particular jurisdiction takes into account a child's perception and sensitivity towards parental happiness. The court's adoption of the real advantage standard also balances the noncustodial parent's visitation rights with the best interests of the children.

The Appeals Court's holding in *Bak*, that Massachusetts courts have jurisdiction in custody disputes pursuant to Massachusetts General Laws chapter 209B if the child lives in the state for at least six consecutive months before the commencement of the custody proceeding, clarifies the breadth of this chapter.⁶³ The *Bak* court adhered to a literal interpretation of chapter 209B by granting jurisdiction over the custody proceedings because the children had

⁵⁹ *Bak*, 24 Mass. App. Ct. at 613-14, 511 N.E.2d at 629. Anthony also argued that if the probate court had jurisdiction over the question of Tony's custody, then the Court should have deferred to the Bielefeld Family Court. *Id.* at 615, 511 N.E.2d at 630. The Appeals Court stated that, because the Probate Court had jurisdiction, the judge had discretion to decide whether to defer. *Id.* According to the court, the judge's decision not to defer was not an abuse of his discretion. *Id.* at 615-16, 511 N.E.2d at 630.

⁶⁰ The purpose of chapter 209C is to grant children born out of wedlock "the same rights and protections of the law as all other children." 401 Mass. 101, 102, 514 N.E.2d 855, 866 (1987) (quoting MASS. GEN. L. ch. 209C, § 1 (1982)).

⁶¹ *Id.* at 103, 514 N.E.2d at 856.

⁶² See *supra* note 32 and accompanying text.

⁶³ 24 Mass. App. Ct. 608, 614, 511 N.E.2d 625, 629 (1987).

lived in Massachusetts for thirteen months.⁶⁴ By refusing to entertain an exception to the law, the Appeals Court contributed to the stability of Massachusetts custody law.

The year 1987 brought with it no major changes in the area of Massachusetts custody law. Probably the most significant development occurred in *R.L.H. v. T.E.L.*,⁶⁵ in which the Supreme Judicial Court interpreted Massachusetts General Laws chapter 209C, section 4, the statute that governs jurisdiction in paternity suits. The court's interpretation of the statute changes Massachusetts law so that the Massachusetts courts now have jurisdiction over a nonresident child and mother who files a paternity complaint.

In 1987 the Massachusetts courts also reaffirmed some general principles of child custody law. In *Vertrees v. Vertrees*,⁶⁶ the Appeals Court applied the "real advantage" standard first articulated in *Yannas v. Frondistou-Yannas*.⁶⁷ In doing so, the Court reaffirmed that a child's quality of life is affected by and interwoven with the custodial parent's well-being. In *Bak v. Bak*,⁶⁸ the Appeals Court applied the best interests standard to the particular fact situation and once again affirmed the principle that the courts have considerable discretion in determining what constitutes a child's best interests. Thus, using the "best interests of the child standard," Massachusetts courts exercised judicial discretion to achieve result-oriented decisions furthering the needs of the children trapped at the center of custody battles.

⁶⁴ In determining which parent to award custody to, the *Bak* court also looked to the best interests of the children. *Id.* at 616, 511 N.E.2d at 630. The court's determination that the mother should retain custody of Rosemary, the middle child, fully comports with the best interests standard. It was clearly in the best interests of Rosemary to reside with her mother. She had lived with her mother since her parents' separation; maintained a good relationship with her grandmother, who lived near her mother; and had developed bonds with the community. *Id.* at 617, 511 N.E.2d at 630.

The *Bak* court had a more difficult time determining who should be Tony's custodial parent. *Id.* at 617, 511 N.E.2d at 631. Because the father apparently had imbued Tony with bad feelings toward his mother, Tony expressed a desire to remain with his father. *Id.* Many of the same factors that indicated that Rosemary's best interests would be served by staying with her mother applied to Tony's case as well. The court thus balanced Tony's preference to stay with his father against the court's perception that it would be in Tony's best interests to remain with his mother, and determined that it would be in Tony's best interests to remain with his mother. *Id.* at 618, 511 N.E.2d at 631.

⁶⁵ 401 Mass. 101, 514 N.E.2d 855 (1987).

⁶⁶ 24 Mass. App. Ct. 918, 508 N.E.2d 868 (1987).

⁶⁷ 395 Mass. App. Ct. 704, 481 N.E.2d 1153 (1985).

⁶⁸ 24 Mass. App. Ct. 241, 608 N.E.2d 511 (1987).

C. **Limits on Privileged Communications in Proceedings to Dispense with Parental Consent to Adoption*

The United States Supreme Court has long recognized that the fourteenth amendment concept of "liberty" includes the freedom to marry, establish a home and to raise children.¹ The Supreme Court holds that, absent a compelling interest, the State cannot interfere with these freedoms.² According to the *parens patriae* doctrine, under which the State can intervene to protect its citizens' health, safety and welfare,³ the State has a compelling interest in protecting the health and life of children.⁴

In actions to terminate parental rights, the United States Supreme Court recognizes that parents' fundamental right to raise their children cannot be undermined simply by their failure to act as ideal parents.⁵ To satisfy fourteenth amendment due process requirements,⁶ the Court has held, the State must show specific examples of the parent's unfitness, and not merely demonstrate that removal is in the child's best interests.⁷ A court cannot justify a

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¹ *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (parents have "the liberty to direct the upbringing and education of children under their control"). See also *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) ("Without doubt, [the liberty guaranteed by the Fourteenth Amendment] denotes . . . the right . . . to marry, establish a home and bring up children").

² *Griswold v. Connecticut*, 381 U.S. 479, 534-35 (1965) (Goldberg, J., concurring). Justice Goldberg states that:

The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the right[] to . . . raise a family [is] of similar order and magnitude as the fundamental rights specifically protected

The fact that no particular provision of the Constitution explicitly forbids the State from disrupting the traditional relation of the family — a relation as old and as fundamental as our entire civilization — surely does not show that the Government was meant to have the power to do so.

Id. See also *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.") (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

³ BLACK'S LAW DICTIONARY 579 (5th ed. 1983).

⁴ *Developments in the Law- The Constitution and the Family*, 93 HARV. L. REV. 1156, 1317 (1980) (citing *Stanley v. Illinois*, 405 U.S. 645, 652 (1972)). Cf. *Roe v. Wade*, 410 U.S. 113, 150 (1973).

⁵ *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (clear and convincing evidence must be shown to terminate parental rights).

⁶ U.S. CONST. amend. XIV, § 1.

⁷ *Quilloin*, 434 U.S. at 255. ("We have little doubt that the Due Process Clause would be

child's removal from the parent's home unless the court either provides the parents with an opportunity to eliminate the harm, and the parents subsequently fail, or a delay in placement threatens the child with permanent harm.⁸

Massachusetts law usually requires a child's natural or lawful parent's⁹ consent before a court enters an adoption decree.¹⁰ In accordance with Supreme Court standards, however, this consent requirement is not absolute.¹¹ Pursuant to Massachusetts General Laws chapter 210, section 3, if the court finds the parent or lawful guardian unfit and unable to assume parental responsibility, the court will grant the adoption decree without parental consent if the adoption will serve the child's best interests.¹² Massachusetts courts will grant a petition to dispense with consent to adoption where it finds that the parent or parents are guilty of neglect, abandonment, or abuse, or where the adoption would substantially protect the child's welfare.¹³

When examining parental fitness, under Massachusetts General Law chapter 210, section 3, courts must assess the adults' present

offended "[i]f a State were to attempt to force the breakup of a natural family . . . for the sole reason that to do so was thought to be in the children's best interest." (quoting *Smith v. Organization of Foster Families*, 431 U.S. 816, 862-63 (1977) (Stewart, J., concurring)).

⁸ *Developments, supra* note 4, at 1322 (citing *Alsagar v. District Court*, 406 F.Supp. 10, 22 (S.D. Iowa 1977), *aff'd*, 545 F.2d 1137 (8th Cir. 1976)).

⁹ In this section, the term "parent" is used to designate the natural or lawful parent or guardian.

¹⁰ MASS. GEN. L. ch. 210, § 2 (1986) provides in relevant part that "[a] decree of adoption shall not be made . . . without the written consent of . . . the lawful parents . . ." *Id.*

¹¹ *See id.* at § 3.

¹² MASS. GEN. L. ch. 210, § 3 provides in relevant part that the consent of a natural or lawful parent is not required if the "best interests of the child . . . will be served by said [adoption] decree." *Id.* at § 3(b).

In determining whether the "best interests of the child" would be served by granting an adoption without parental consent, section 3 authorizes the court to consider the ability, capacity, fitness and readiness of the child's parents or other [statutorily designated] person . . . to assume parental responsibility and shall also consider the ability, capacity, fitness and readiness of the [person having care and custody] . . . to assume such responsibilities. . . . The court shall . . . also consider the plan proposed by the department or other agency initiating the petition.

Id. at § 3(c).

Furthermore, courts recognize that the child's interest in a stable, permanent homelife is best served by prompt departmental action. *Adoption of Howard*, 24 Mass. App. Ct. 911, 912, 506 N.E.2d 1163, 1164 (1987) (citing *Custody of a Minor*, 389 Mass. 755, 764 (1983); *Custody of Two Minors*, 396 Mass. 610, 611 n.2 (1986)).

¹³ *Cf.* 1 MASS. PRACTICE DIGEST, § 71 (1967 and Supp. 1987) (citing *Purinton v. Jamrock*, 195 Mass. 187, 80 N.E. 802 (1907); *Commonwealth v. Hall*, 322 Mass. 523, 78 N.E.2d 644 (1948); *Adoption of a Minor*, 343 Mass. 292, 178 N.E.2d 264 (1961)).

fitness as a parent.¹⁴ The court may, however, examine the parents' past or ongoing behavior patterns or characteristics in evaluating the child's prognosis within the parents' home.¹⁵ Thus, in assessing present parental fitness, the court may consider past inappropriate behaviors, and is not limited to present parental conduct.¹⁶

The Massachusetts Legislature has created a patient-psychotherapist and a patient-social worker privilege, both of which prohibit a professional from disclosing patient confidences.¹⁷ These privileges, however, are not absolute. Stating that the child's welfare is more important than the therapeutic relationship, the Massachusetts Legislature created an exception providing that these privileges do not extend to information pertaining to parental fitness if sought in the context of child custody proceedings.¹⁸ Thus, in determining whether a petition to dispense with consent to adoption will serve

¹⁴ Petitions of the Dep't of Social Services to Dispense with Consent to Adoption, 20 Mass. App. Ct. 689, 694, 482 N.E.2d 535, 539 (1985). See also *supra* note 12 for the relevant text of MASS. GEN. L. ch. 210, § 3 (1986).

¹⁵ *Id.* at 694-95, 482 N.E.2d at 539.

¹⁶ See, e.g., *id.*

¹⁷ MASS. GEN. L. ch. 112, § 135 (1986); MASS. GEN. L. ch. 233, § 20B (1986).

¹⁸ MASS GEN. L. ch. 233, § 20B provides:

[I]n any court proceeding and in any proceeding preliminary thereto and in legislative and administrative proceedings, a patient shall have the privilege of refusing to disclose, and of preventing a witness from disclosing any communication, wherever made, between said patient and a psychotherapist relative to the diagnosis or treatment of the patient's mental or emotional condition

The privilege granted hereunder shall not apply

(c) In any child custody in which . . . the judge . . . determines that the psychotherapist has evidence bearing significantly on the patient's ability to provide suitable custody, and that it is more important to the welfare of the child that the communication be disclosed than that the relationship between psychotherapist be protected.

Id.

The statute defines "psychotherapist" as:

a person licensed to practice medicine who devotes a substantial portion of his time to the practice of psychiatry or a person who is licensed as a psychologist . . . provided, however, that such person has a doctoral degree in the field of psychology or a registered nurse licensed . . . as a psychiatric nurse mental health clinical specialist

Id.

In relevant part, MASS GEN. L. ch. 112, § 135 (1986) provides that:

No social worker in any licensed category . . . shall disclose any information he may have acquired from a person consulting him in his professional capacity or whom he has served in his professional capacity except:

(d) to initiate a proceeding . . . [to dispense with consent to adoption] and give testimony in connection therewith.

Id.

the child's best interests, the court may examine information pertaining to either the child's or the parents' psychiatric health.¹⁹

During the *Selected Developments* year, the Massachusetts Supreme Judicial Court clarified the patient-psychotherapist privilege, as it relates to proceedings to dispense with consent to adoption.²⁰ In the 1987 decision of *Petitions of the Department of Social Services to Dispense with Consent to Adoption*, the Court held that conversations between a social worker and family members do not constitute privileged communications for the purpose of proceedings to dispense with consent to adoption.²¹ Furthermore, in the 1987 decision of *Adoption of Diane*, the Supreme Judicial Court refused to limit the exception to patient-social worker privilege to communications made solely in connection to child protection hearings.²² Moreover, in both cases the Court affirmed its earlier holdings that a court may consider a parent's ongoing and past patterns of behavior when determining current parental fitness.²³

In *Petitions of the Department of Social Services to Dispense with Consent to Adoption*,²⁴ the Supreme Judicial Court held that only notes written by a psychotherapist about patient communications constituted privileged communications.²⁵ Notes written in the hospital records by medical staff, other than psychotherapists, exceeded the scope of privileged communications even if the notes contained psychiatric observations.²⁶ Refusing to extend the scope of the privilege to include psychiatric information communicated by non-psychiatric doctors and nurses, the Court reversed the trial court's decision that the patient-psychotherapist privilege prevented consideration of all information contained in hospital records.²⁷ The Court held that although the patient-psychotherapist privilege is

¹⁹ *Adoption of Diane*, 400 Mass. 196, 508 N.E.2d 837 (1987); *Petitions of Dep't of Social Services to Dispense with Consent to Adoption*, 399 Mass. 279, 503 N.E.2d 1275 (1987).

²⁰ *Petitions to Dispense with Consent to Adoption*, 399 Mass. 279, 503 N.E.2d 1275.

²¹ *Adoption of Diane*, 400 Mass. at 200, 508 N.E.2d at 837.

²² *Adoption of Diane*, 400 Mass. at 199-200, 508 N.E.2d at 839.

²³ *Id.* at 204, 508 N.E.2d at 841; *Petition to Dispense with Consent*, 399 Mass. at 289, 503 N.E.2d at 1281-82.

²⁴ 399 Mass. 279, 503 N.E.2d 1275.

²⁵ *Petition to Dispense with Consent*, 399 Mass. at 286, 503 N.E.2d at 1280.

²⁶ *Id.* at 287, 503 N.E.2d at 1280-81. The court found that the Middlesex Division of the Probate and Family Court Department had improperly construed the patient-psychotherapist privilege, embodied in MASS. GEN. L. ch. 233, § 20B. See *supra* note 18 for a discussion of MASS. GEN. L. ch. 233, § 20B (1986).

²⁷ *Petition to Dispense with Consent*, 399 Mass. at 288, 503 N.E.2d at 1281.

broad, it does not preclude the admissibility of notations made by non-psychiatric hospital personnel which contain some psychiatric information.²⁸ Thus, the Court held, the trial judge could assess all relevant information contained within the hospital records, except the notations made by psychotherapists concerning privileged communications.²⁹

In *Adoption of Diane*,³⁰ the Massachusetts Supreme Judicial Court clarified the exception to the patient-social worker privilege for proceedings to dispense with consent to adoption pursuant to Massachusetts General Laws chapter 210, section 3.³¹ Diane's mother contended that the exception applies only to client-social worker communications made in connection with either care and protection proceedings or a petition to dispense with consent to adoption, but not to confidences made during the course of an ongoing relationship.³² Thus, she argued, the testimony of the social worker, who had a continuing relationship with the family, was inadmissible.³³

Reasoning that the legislature intended the privileged-communication exception to protect the child's welfare at the expense of confidential, therapeutic relationships, the Court found that a narrow application of the exception, limited only to statements made in the context of a child protection hearing, would undermine the statutory goal.³⁴ The Court reasoned, furthermore, that granting a petition to dispense with consent to adoption is such a "drastic intervention in family life" that a detailed and complete evaluation of the entire family relationship must be available to the judge.³⁵ Because social worker involvement in protective service families is typically ongoing and extensive, the Court stated, their testimony provides the judge with invaluable assistance.³⁶ Thus, the Supreme Judicial Court held that testimony of a social worker who has an

²⁸ *Id.*

²⁹ *Id.* at 280, 503 N.E.2d at 1276.

³⁰ 400 Mass. 196, 508 N.E.2d 837 (1987).

³¹ See *supra* note 12 and accompanying text for a discussion of MASS. GEN. L. ch. 210, § 3 and exception (d).

³² *Adoption of Diane*, 400 Mass. at 197-98, 508 N.E.2d at 837-38. A care and protection proceeding is to determine whether, to protect the child's welfare, he or she should be removed from the parent's custody. MASS. GEN. L. ch. 119, § 24 (1986).

³³ *Id.* at 198, 508 N.E.2d 838.

³⁴ *Id.* at 198-99, 508 N.E.2d at 838-39.

³⁵ *Id.* at 199, 508 N.E.2d at 838.

³⁶ *Id.* at 200, 508 N.E.2d 839.

ongoing relationship with the family did not constitute an inadmissible privileged communication for the purpose of a petition to dispense with consent to adoption.³⁷

In addition, Diane's mother challenged the testimony of three other witnesses regarding conversations with Diane, alleging that the patient-psychotherapist privilege had been breached when three witnesses offered testimony concerning the mother's impact on Diane's emotional health.³⁸ The Court held that the first witness did not fall within the statutory definition of "psychotherapist," and thus her patient communications were not privileged.³⁹ Although the other two witnesses satisfied the statutory definition of "psychotherapist," the Court noted that the statute allows only the patient to assert the privilege.⁴⁰ Because Diane enjoyed the privilege as the patient, her mother lacked standing to allege that the patient-psychotherapist privilege had been breached.⁴¹

In making a determination whether a petition to dispense with consent to adoption would serve the child's best interests, a court must assess the parent's ability to care for and protect the child.⁴² Patterns of inability or unwillingness to follow through on Department of Social Service plans,⁴³ or a history of past abuse, neglect or threats to the child's safety can support a finding of current parental unfitness.⁴⁴ In *Petitions of the Department of Social Services to Dispense with Consent to Adoption*, the Supreme Judicial Court upheld the Department's contention that the weight of the evidence supported a finding of parental unfitness, even absent a consideration of the

³⁷ *Id.* at 199-200, 508 N.E.2d at 839.

³⁸ *Id.* at 200, 508 N.E.2d at 839.

³⁹ *Id.* at 201, 508 N.E.2d at 840. See *supra* note 18 for the statutory definition of "psychotherapist."

⁴⁰ See *supra* note 18 for MASS. GEN. L. ch. 233, § 20B.

⁴¹ *Adoption of Diane*, 400 Mass. at 201, 508 N.E.2d at 840.

⁴² See *supra* note 12 for MASS. GEN. L. ch. 210, § 3.

⁴³ See, e.g., *Petition of the Dep't of Social Services to Dispense with Consent to Adoption*, 397 Mass. 659, 669, 493 N.E.2d 197, 203 (1986) (adequate DSS service plans failed to unify the family because of the "parents' unwillingness, poor motivation, lack of capacity, unavailability, lack of parental personal qualities and their inability to correct deficiencies in the home environment."); *Petition of the Dep't of Social Services to Dispense with Consent to Adoption*, 389 Mass. 793, 802, 452 N.E.2d 497, 503 (1983) (the department failed to reunite the family because the mother was "unable to carry through on any of the [service] plans" or to "maintain a positive relationship with the department's employees.").

⁴⁴ See, e.g., *Custody of Two Minors*, 396 Mass. 610, 621, 487 N.E.2d 1358, 1366 (1986) ("The court is permitted to assess prognostic evidence derived from prior patterns of parental neglect or misconduct in determining future fitness and the likelihood of harm to the child.").

hospital records.⁴⁵ As evidence of parental unfitness, the Court outlined the trial judge's findings of fact,⁴⁶ which demonstrated the mother's lifelong pattern of disturbed behavior, including psychiatric hospitalization,⁴⁷ threats to kill herself and her baby,⁴⁸ abandonment⁴⁹ and lack of cooperation with the Department.⁵⁰ Although the Court found these facts sufficient to support a determination of current parental unfitness,⁵¹ they remanded the case to the trial court, stating that only the judge who sees and hears the witness can make such a finding.⁵²

Similarly, in *Adoption of Diane*, the Supreme Judicial Court found clear and convincing evidence of current parental unfitness, despite the fact that the Department's witnesses had no direct contact with Diane's mother for at least one and one-half years before the trial.⁵³ Stating that Diane's mother contested only the sufficiency of the evidence but not its veracity, the Court described her history of alcoholism and physical and sexual abuse of Diane.⁵⁴ The Court found, furthermore, that Diane's mother exhibited a propensity for violence, evidenced by frequent involvement in fistfights⁵⁵ and hostility towards social workers and hospital staff.⁵⁶ Moreover, the Supreme Judicial Court noted that Diane's mother never followed through on parental skills training or treatment designed to remedy her violent and abusive behavior.⁵⁷ Concluding that Diane's mother showed a severe lack of parenting skills and an unwillingness to change, the Supreme Judicial Court held that the lower court properly based its finding of current parental unfitness on past behavior patterns.⁵⁸

The Supreme Judicial Court's decisions in *Petitions to Dispense with Consent to Adoption* and *Adoption of Diane* were well-reasoned,

⁴⁵ *Petitions to Dispense with Consent*, 399 Mass. at 289 n.18, 503 N.E.2d at 1281 n.18.

⁴⁶ *Id.* at 280-84, 503 N.E.2d at 1276-79.

⁴⁷ *Id.* at 282, 503 N.E.2d 1278.

⁴⁸ *Id.*

⁴⁹ *Id.* at 281, 503 N.E.2d at 1277.

⁵⁰ *Id.* at 284, 503 N.E.2d at 1278.

⁵¹ *Id.* at 285 n.18, 503 N.E.2d at 1281 n.18.

⁵² *Id.* at 290, 503 N.E.2d at 1282.

⁵³ *Adoption of Diane*, 400 Mass. 196, 202, 204, 508 N.E.2d 837, 840, 841 (1987).

⁵⁴ *Id.* at 202-03, 508 N.E.2d at 840-41.

⁵⁵ *Id.* at 204, 508 N.E.2d at 841.

⁵⁶ *Id.*

⁵⁷ *Id.* at 203, 508 N.E.2d at 841.

⁵⁸ *Id.* at 204, 508 N.E.2d at 841.

sound decisions. Termination of parental rights is a drastic step, but nonetheless appropriate when required to safeguard the child's health and safety.⁵⁹ Because the child's sense of security depends on a stable and permanent home life, once the court decides to terminate parental rights, it must free the child for adoption.⁶⁰

The court must decide to remove the child from the home before the parent seriously injures the child. Thus, courts must assess the child's prognosis if returned to the home before determining whether the child's best interests mandate the child's removal.⁶¹ An examination of each parent's current behavior, without reference to past or ongoing behavior patterns or characteristics, provides insufficient evidence to assess the child's future risk.⁶²

Many factors should influence the court's decision. The court must consider the parents' efforts to remedy inappropriate parenting, their attempts to understand and meet their child's needs, and their willingness to cooperate with the Department of Social Services.⁶³ Because social worker involvement in protective service families is typically ongoing and extensive, their testimony provides invaluable assistance to the judge who must weigh all information before taking the drastic step of granting a petition to adopt without parental consent.⁶⁴ Thus, for the purpose of determining whether the child's need for protection outweighs the parents' fundamental right to raise their child, the court must be allowed to consider social worker's testimony.

Petitions to Dispense with Consent to Adoption and *Adoption of Diane* clarified the scope of patient-psychologist and patient-social worker privilege in the context of child protection hearings. Moreover, with these cases the Supreme Judicial Court affirmed its earlier holdings that courts may examine past behavior patterns to determine current parental unfitness. Furthermore, the Court reiterated and emphasized children's rights to protection, stability and permanence. These decisions correctly ensure that courts will have access to all relevant admissible information in determining how to safeguard the best interests of the child.

⁵⁹ See *supra* notes 5-16 and accompanying text for a discussion of parental rights' termination.

⁶⁰ *Adoption of Howard*, 24 Mass. App. Ct. 911, 912, 506 N.E.2d 1163, 1164 (1987).

⁶¹ *Petitions of the Department of Social Services to Dispense with Consent to Adoption*, 397 Mass. 659, 671, 493 N.E.2d 197, 205 (1986) (citing *Custody of Two Minors*, 396 Mass. 610, 621 (1986); *Custody of a Minor* (No. 1), 377 Mass. 876, 883 (1979)).

⁶² Cf. *Adoption of Diane*, 400 Mass. at 204, 508 N.E.2d at 841.

⁶³ *Petitions to Dispense with Consent*, 399 Mass. at 289-90, 503 N.E.2d at 1282.

⁶⁴ *Adoption of Diane*, 400 Mass. at 199, 508 N.E.2d at 838-39.

D. **Paternity: Standing to Sue and Presumptions of Legitimacy*

Massachusetts courts presume that children conceived during a lawful marriage are the offspring of the husband and wife. This presumption of legitimacy holds even if the mother gives birth to a child after a divorce decree becomes final.¹ Because this presumption of legitimacy may preclude interested parties, indeed actual fathers, from asserting claims to a child, courts faced with putative, or alleged, fathers' claims have carefully examined what state interest the presumption of legitimacy protects.² According to the prevailing view here and elsewhere, the state has a compelling interest in promoting family life.³ Courts looking at this issue have reasoned that preventing putative fathers from bringing paternity suits protects the family by preserving the child's stability and the child's status as a legitimate child.⁴ Hence, although the presumption of legitimacy at times prevents an actual father from claiming parenthood, the Supreme Judicial Court has held that preservation of the family outweighs his right.⁵ In other words, Massachusetts courts view the avoidance of family disruption as a reasonable justification for refusing to grant alleged fathers standing to sue for paternity in most instances.

The fact that preservation of the family underlies the presumption of legitimacy has logically led to different results when paternity suits arise in situations where either there is no legitimacy to preserve,⁶ or where there is no 'family unit' to protect from disruption.⁷ The Massachusetts Legislature, for example, grants

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¹ *PBC v. DH*, 396 Mass. 68, 71, 483 N.E.2d 1094, 1096 (1985), *cert. denied*, 106 S. Ct. 1286 (1986) (citing *Commonwealth v. Leary*, 345 Mass. 59, 60, 185 N.E.2d 641 (1962)).

² See *PBC*, 396 Mass. at 73, 483 N.E.2d at 1097; *Sayles v. Sayles*, 323 Mass. 66, 67, 80 N.E.2d 21, 22 (1948).

³ See, e.g., *PBC*, 396 Mass. at 73, 483 N.E.2d at 1097; *A. v. X., Y., and Z.*, 641 P.2d 1222, 1226-27 (Wyo. 1982) *cert. denied sub nom A. v. X.*, 459 U.S. 1021 (and superseded by statute 1983); *Vincent B. v. Joan R.*, 126 Cal. App. 3d 619, 624-27, 179 Cal. Rptr. 9, 12-14 (1981); *Petitioner F. v. Respondent R.*, 430 A.2d 1075, 1078-79 (Del. 1981). *But see R. McG. v. J.W.*, 200 Colo. 345, 351-52, 615 P.2d 666, 671 (Colo. 1980).

⁴ *PBC*, 396 Mass. at 73, 483 N.E.2d at 1097.

⁵ *Id.*

⁶ See generally, J. LOMBARD, FAMILY LAW, 1 MASS. PRACTICE SERIES, § 641 (West 1967 & Supp. 1987).

According to John Lombard, a legitimate child is "one who is born in lawful wedlock, or within a [sic] competent time thereafter." FAMILY LAW, 1 MASS. PRACTICE SERIES § 454 (West 1967 & Supp. 1987). Lombard describes an illegitimate child as "one born of an unmarried woman or of a married woman whose husband is not the father of the child." *Id.*

⁷ *RRK v. SGP*, 400 Mass. 12, 507 N.E.2d 736 (1987).

putative fathers of illegitimate children the right to establish paternity.⁸ Unlike the relative ease with which courts can observe a child's legitimacy or lack thereof, the determination of what constitutes a family poses problems and may be the subject of disagreement.

A party bringing a suit to establish or challenge paternity may overcome the presumption of legitimacy in three ways.⁹ The first two methods of overcoming the presumption depend on a showing that the husband and wife did not have sexual relations during the probable time of conception. If the party challenging legitimacy can demonstrate either the lack of contact or impotence at the probable time of conception, he or she may successfully rebut the presumption that the child was the offspring of the legally married couple.¹⁰ The third method of overcoming the presumption relies on blood tests — blood grouping tests,¹¹ the human leukocyte antigen (HLA) test,¹² or a combination of both — to demonstrate that the child could not be the child of the husband and wife.

Until recently, courts and legislatures viewed paternity testing primarily as a means of conclusively establishing that a particular man did not father the child.¹³ Because of the HLA's improved

⁸ In Massachusetts, this statutory right is embodied in MASS. GEN. LAWS ANN. ch. 209C, § 5 (West 1987), which provides in pertinent part:

Complaints under this chapter [Children Born Out of Wedlock] to establish paternity, support, visitation, or custody of a child may be commenced, . . . by a person presumed to be or alleging himself to be the father . . .

Id.

⁹ Under all three methods of overcoming the presumption of legitimacy, the demonstration that the mother had an adulterous relationship while living with her husband is not enough. J. LOMBARD, FAMILY LAW, 1 MASS. PRACTICE SERIES § 641 (West 1967 & Supp. 1987).

¹⁰ See generally J. LOMBARD, FAMILY LAW, 1 MASS. PRACTICE SERIES §§ 641-44 (West 1967 & Supp. 1987).

¹¹ See generally Lee, *Current Status of Paternity Testing*, 9 FAM. L.Q. 615, 616, 617, 621 (1975); Joint AMA-ABA Guidelines: *Present Status of Serologic Testing in Problems of Disputed Parentage*, 10 FAM. L.Q. 247, 257-59 (1976).

¹² See generally Peterson, *A Few Things You Should Know About Paternity Tests (But Were Afraid to Ask)*, 22 SANTA CLARA L. REV. 667 (1982); Terasaki, *Resolution By HLA Testing of 1000 Paternity Cases Not Excluded By ABO Testing*, 16 J. FAM. L. 543 (1978).

The Supreme Judicial Court recognized the value of HLA test results in *Commonwealth v. Beausoleil* when it held that the exclusionary blood test statute, Massachusetts General Laws chapter 273, section 12A, did not prohibit the admission of inculpatory HLA test results. 397 Mass. 206, 213-14, 490 N.E.2d 788, 793 (1986). The Court reasoned that the statute did not address the HLA test both because the HLA is a tissue test and not a blood test, and because the statute was written before scientists developed the HLA test, and therefore the legislators could not have meant to exclude it. *Id.* at 213-14, 490 N.E.2d at 793. For a discussion of this case's significance and of HLA testing generally, see 1986 ANNUAL SURVEY OF MASSACHUSETTS LAW, § 4.4.

¹³ See, e.g., *Symonds v. Symonds*, 385 Mass. 540, 542, 432 N.E.2d 700, 702 (1982);

technical precision, however, the Supreme Judicial Court has permitted HLA test results to be used in the demonstration of the probability of paternity.¹⁴

As a corollary to the presumption of legitimacy, Massachusetts courts and the legislature have limited the classes of persons who can bring suit to establish paternity.¹⁵ Until 1987, courts limited standing to challenge the presumption of legitimacy to the mother of the child,¹⁶ to the husband of the child's mother,¹⁷ and to men seeking to establish paternity of an illegitimate child.¹⁸ Before 1987, no clear answer existed to determine whether a man claiming that he fathered a child presumed legitimate would ever have the opportunity to establish paternity.¹⁹

During the *Selected Developments* year, in the 1987 decision of *R.R.K. v. S.G.P.*, the Supreme Judicial Court made an exception to the general rule that alleged fathers have no standing to sue to establish paternity for a child conceived while the mother was lawfully wed to another.²⁰ The *RRK* Court held that a putative father of a child conceived while the mother was lawfully wed to another should have standing to sue when the mother and child were not a part of a family unit.²¹ Because the state interest in preserving the family clearly cannot exist in the absence of a family, the *RRK* Court reasoned, the rights of a woman and her child to be left alone and the right of a man to claim his paternity should be treated differently than when an intact family exists.

In the spring of 1984, *RRK* filed a complaint in the Berkshire Probate Court requesting visitation rights to a child he had allegedly

Commonwealth v. D'Avella, 339 Mass. 642, 645, 162 N.E.2d 19, 21 (1959); *Commonwealth v. Stappen*, 336 Mass. 174, 175, 143 N.E.2d 221, 222-23 (1957).

¹⁴ See, *Commonwealth v. Beausoleil*, 397 Mass. 206, 214, 490 N.E.2d 788, 793 (1986).

¹⁵ See, e.g., MASS. GEN. LAWS ANN., ch. 209C, § 5 (1987); *PBC v. DH*, 396 Mass. 68, 483 N.E.2d 1094 (1985).

¹⁶ *Symonds*, 385 Mass. at 544, 432 N.E.2d at 703 (Court examined MASS GEN. L. ch. 273, § 7 in resolving dispute between divorcing parties about who fathered child).

¹⁷ *Id.*

¹⁸ *Normand v. Barkei*, 385 Mass. 851, 853, 434 N.E.2d 631, 633 (1982) (suit by man for visitation rights to two illegitimate children he claimed were his).

The burden of proof to establish paternity of an illegitimate child is by "clear and convincing" evidence. MASS. GEN. LAWS ANN. ch. 209C, § 7 (1987).

¹⁹ See 1985 ANNUAL SURVEY OF MASSACHUSETTS LAW, § 4.5.

²⁰ 400 Mass. 12, 507 N.E.2d 736 (1987).

²¹ *Id.* at 14, 507 N.E.2d at 738.

The *RRK* court also addressed the issue of the admissibility of inconclusive HLA test results. *Id.* The court held that such results could be admissible only if presented in conjunction with evidence showing a sexual alliance between the appropriate parties. *Id.* (citing *Commonwealth v. Beausoleil*, 397 Mass. 206, 220 n.18, 490 N.E.2d 788, 797 n.18 (1986)).

fathered three years earlier.²² The child had been conceived while the mother, SGP, was lawfully married to her former husband.²³ SGP answered by denying RRK's paternity. She affirmatively asserted that because the child was conceived during her marriage to another man, the husband was presumptively the child's father, thus barring RRK's suit.²⁴ In June, the probate judge allowed RRK's motion to order RRK, SGP, and the child to submit to a blood test and to undergo psychological evaluation.²⁵ In January of the following year, the judge ruled that RRK could visit the child once a month and ordered RRK to pay \$25 a month child support.²⁶

During the course of this litigation the Supreme Judicial Court decided another paternity suit, *PBC v. DH*.²⁷ In this paternity suit, the Supreme Judicial Court held that children conceived during a lawful marriage, even if born after a final divorce decree, are presumptively the offspring of the once married couple.²⁸ This holding extended the presumption of legitimacy. Because this holding favored the mother in the Berkshire case, SGP, she filed a motion to dismiss on the basis that RRK lacked standing to sue to establish paternity.²⁹ The trial court dismissed the putative father's complaint, and RRK appealed. The Supreme Judicial Court took the case on its own motion.³⁰

The Supreme Judicial Court evaluated the *RRK* case in light of Massachusetts courts' rationale that both the denial of standing to establish paternity and the presumption of legitimacy further the valid state interest in preserving family stability.³¹ The Court noted the absence of an "intact family" in this particular case and reasoned that the absence of a family unit meant that a putative father could seek to establish paternity.³² To distinguish this case from the *PBC* case, in which the Court extended the presumption of legitimacy,

²² *Id.* at 12, 507 N.E.2d at 737.

²³ *Id.* at 13, 507 N.E.2d at 737. The mother asserted that because the child was conceived during her marriage to another man, the husband was presumptively the child's father, thus barring RRK's suit. *Id.*

²⁴ *Id.*

²⁵ *Id.* On the basis of the test results, the trial judge granted RRK visitation rights during the pendency of the litigation. *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *PBC v. DH*, 396 Mass. 68, 71, 483 N.E.2d 1094, 1096 (1985).

²⁹ *RRK*, 400 Mass. at 13, 507 N.E.2d at 737.

³⁰ *Id.*

³¹ *Id.* at 14, 507 N.E.2d at 738.

³² *Id.*

the Court compared the family relationships each situation involved.³³

In the *PBC* paternity case, although the husband and wife divorced, they subsequently remarried.³⁴ At the time the alleged father instituted paternity proceedings, the husband, wife and child lived together.³⁵ Furthermore, in the earlier case, the husband's name appeared on the child's birth certificate.³⁶

The Court stated that no comparable ties existed between the original family unit in *RRK*. The husband and wife in *RRK* remained separated after their divorce. The ex-husband in *RRK* had neither acknowledged the child by his conduct nor did the birth certificate list his name.³⁷ Additionally, the Court noted that the putative father in the Berkshire case, *RRK*, had frequently visited the child he alleged to be his own.³⁸

The Supreme Judicial Court remanded the case, making mention of the fact that the results of the HLA white blood cell test would not be admissible without additional evidence tending to show a sexual alliance between *RRK* and *SGP* around the time of conception.³⁹ After articulating the presumption of legitimacy, the Court concluded by stating that the proof needed to overcome the presumption must be beyond a reasonable doubt.⁴⁰ The Court did not evaluate the standards of evidence in the lower court proceedings.

In sum, the Court made exception to two rules about paternity. By granting *RRK* the opportunity to be heard at all, the Court made an exception to the rule that putative fathers of legitimate children generally do not have standing to challenge paternity. Second, the Court indicated that the presumption of legitimacy that applies to children conceived during legal marriage did not protect children living with a single mother.⁴¹

In an opinion concurring with the result of the Court, Justice Liacos questioned the wisdom of remanding the case without offer-

³³ *Id.*

³⁴ 396 Mass. 68, 70, 483 N.E.2d 1094, 1096 (1985).

³⁵ *Id.*

³⁶ *RRK*, 400 Mass. at 14, 507 N.E.2d at 738.

³⁷ *Id.* at 14, 507 N.E.2d at 738. The Court also noted that the child called *RRK* "Daddy."

Id.

³⁸ *Id.*

³⁹ *Id.* at 15, 507 N.E.2d at 738.

⁴⁰ *Id.* at 14, 507 N.E.2d at 738.

⁴¹ *Id.* at 15, 507 N.E.2d at 738 (Liacos, J., concurring).

ing more guidance to the trial court.⁴² Justice Liacos stated that the Court's holding in the 1985 *PBC* case should apply to the instant case because RRK had not offered sufficient evidence to overcome the presumption of legitimacy.⁴³ Consistent with this view, Justice Liacos took the position that, even though no family unit existed in RRK, the public policy concerns which motivated the *PBC* Court should nonetheless control. The absence of an intact family unit, according to Justice Liacos, did not warrant dispensing with the presumption that a child conceived during a lawful marriage is legitimate.⁴⁴

Justice Liacos criticized the Court's unquestioning acceptance of the lower court's proceedings. He expressed concern about the decision to compel the parties to submit to psychological evaluation and an HLA test without a sufficiently developed trial record.⁴⁵ According to Justice Liacos, RRK did not produce adequate information to support his motion.⁴⁶ The potentially invasive nature of psychological and tissue testing, according to Justice Liacos, warranted a more detailed motion.⁴⁷

⁴² *Id.* at 18, 507 N.E.2d at 740 (Liacos, J., concurring). Justice Liacos stated that the standard of review was "beyond all reasonable doubt" and that RRK had not offered enough evidence for the trial court to make that determination. *Id.*

⁴³ *Id.* at 18, n.3, 507 N.E.2d at 740, n.3 (Liacos J., concurring) (quoting *Estate of Cornelious*, 35 Cal.3d 461, 465, 198 Cal. Rptr. 543, 674 P.2d 245 (1984) *app. dismd. sub nom Hall v. Taylor*, 466 U.S. 967 (1984)). Justice Liacos pointed out that the presumption of legitimacy, in addition to protecting children and preserving families, served to keep children off welfare, and insured the stability of property transfers. *Id.* (Liacos, J., concurring).

⁴⁴ *Id.* (Liacos, J., concurring).

⁴⁵ *Id.* at 18, 507 N.E.2d at 740. (Liacos, J., concurring).

⁴⁶ *Id.* at 18-19, 507 N.E.2d at 740 (Liacos, J., concurring). The concurrence stated that "it was improper in the extreme for the motion judge to have ordered [the tests] on the basis of what was then before him." *Id.* at 18-19, 507 N.E.2d at 740. Justice Liacos emphasized that the only information that RRK had produced in support of his motion to compel testing consisted of an unsworn and unverified statement. *Id.* at 18-19, 507 N.E.2d at 740.

⁴⁷ The justice referred to MASS. R. Civ. P. 35, which provides in part:

(a) ORDER FOR EXAMINATION. When the mental or physical condition (including the blood group) of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties

Id.

In evaluating the propriety of ordering a blood test, Justice Liacos cited a United States Supreme Court case which held that probable cause for arrest must exist before the state can compel a nonconsenting defendant to undergo alcohol blood testing. *Id.* at 19, 507 N.E.2d at 740 (Liacos, J., concurring) (citing *Schmerber v. California*, 384 U.S. 757, 768, 771 (1966)). The *Schmerber* Court held that the privilege against self-incrimination did not preclude using the results of a blood test to convict a drunk driver because the arresting officer had probable cause to arrest. Justice Liacos did not explicitly demand probable cause for the

At greater length than the Court, Justice Liacos discussed the constitutional implications of granting RRK's request for visitation.⁴⁸ The concurring opinion first emphasized that the presumption of legitimacy in *RRK* made this case different from a 1982 case in which the Court had granted an alleged father visitation rights.⁴⁹ Next, the opinion referred to the fact that other jurisdictions disagree about whether to grant men who challenge the paternity of a child presumed legitimate visitation rights.⁵⁰ In concluding, Justice Liacos pointed out that visitation cases by putative fathers should be resolved on a factual, case-by-case basis.⁵¹

In sum, then, in Justice Liacos's view the inadequacy of the record in this case precluded a reasoned determination of the constitutionality of the putative father's claim.⁵² He repeatedly expressed concern about using such an underdeveloped record to overcome the presumption of legitimacy. Without more facts to deliberate on, Justice Liacos concluded that the *PBC* Court's holding should control and hence would not have inferred on the basis of the record that RRK should have standing to make out a claim for visitation.⁵³

The Supreme Judicial Court has in two ways indicated a willingness to circumscribe the recently expanded presumption of legitimacy. First, the Court made no comment about the motion judge compelling a blood test on the basis of the alleged father's unsworn affidavit.⁵⁴ Second, the Court distinguished the instant case from the *PBC* situation, where the woman had remarried her former spouse, thus limiting its prior holding.⁵⁵ It appears as though the presumption that a child conceived during a lawful marriage is fathered by a woman's husband may not apply if the woman is single at the time the alleged father institutes paternity proceedings.

instant case. He did, however, assert that before compelling a blood test to determine paternity, a judge hearing the motion should require more than an unverified complaint. *Id.* at 19, 507 N.E.2d at 740 (Liacos, J., concurring).

⁴⁸ *Id.* at 20, 507 N.E.2d at 741 (Liacos, J., concurring).

⁴⁹ *Id.* at 20, 507 N.E.2d at 741 (Liacos, J., concurring). The concurrence mentioned *Normand v. Barkei*, 385 Mass. 851, 853, 434 N.E.2d 631, 632 (1982), in which the Supreme Judicial Court held that a man alleging paternity of an illegitimate child had the right to visit that child if he was the father and if it was in the best interests of the child. *Id.*

⁵⁰ *Id.* at 20-21, 507 N.E.2d at 741 (Liacos, J., concurring).

⁵¹ *Id.* at 21, 507 N.E.2d at 741-42 (Liacos, J., concurring).

⁵² *Id.* at 18, 507 N.E.2d at 740 (Liacos, J., concurring).

⁵³ *Id.* at 18, 507 N.E.2d at 740 (Liacos, J., concurring).

⁵⁴ *Id.* at 12-15, 507 N.E.2d at 736-38.

⁵⁵ *Id.* at 14, 507 N.E.2d at 738.

In limiting the *PBC* holding to its facts, it appears that the Court is liberalizing its earlier restrictions concerning when putative fathers have standing to sue to establish paternity.

By avoiding a discussion of the proceedings that resulted in psychological evaluation and blood testing, the Court implicitly accepts the lower judge's decision to grant the alleged father's motion to compel on the basis of his unsworn and unverified affidavit. As the concurrence pointed out, the *RRK* Court may be setting too low a threshold of proof for the man alleging paternity to be consistent with the fourth amendment of the United States Constitution.⁵⁶ Additionally, the requirement that a woman be married for a presumption of legitimacy to apply confuses the parameters of the presumption and loses sight of one of the original goals of the presumption — that is, protecting the child from the stigma of illegitimacy.

By limiting the 1985 case to its facts,⁵⁷ the *RRK* Court established that putative fathers' standing to bring paternity suits may depend upon the marital status of the woman involved.⁵⁸ In examining the relationships before it, the *RRK* Court reasoned that courts may justify denying a man standing to establish paternity only if they seek to protect an existing, traditionally-defined, family unit.⁵⁹ Before *RRK*, a man alleging paternity of a child conceived during the mother's lawful marriage to another would have had little hope of even being heard by a court.⁶⁰ Since *RRK*, when a putative father alleges paternity to a child being mothered by a single woman, he has a greater chance in convincing a court that his claim should be heard.⁶¹

RRK, therefore, shifts the parameters of the presumption of legitimacy. The *RRK* case establishes that under some circumstances

⁵⁶ *Id.* at 19, 507 N.E.2d at 740-41 (Liacos, J., concurring).

When a defendant is being sued under the criminal statute for determining paternity, the judge must grant a motion for a blood test. MASS. GEN. LAWS ANN. ch. 273, § 12A (West 1987).

In an action to establish paternity for an illegitimate child, MASS. GEN. LAWS ANN. ch. 209C, § 17 (West 1987) grants courts the discretion to decide whether to compel blood testing or not.

Statutes do not govern suits brought by putative fathers of children conceived during a lawful marriage.

⁵⁷ See *PBC v. DH*, 396 Mass. 68, 483 N.E.2d 1094 (1985).

⁵⁸ *RRK*, 400 Mass. at 14, 507 N.E.2d at 738.

⁵⁹ *Id.* See also, 1986 ANNUAL SURVEY OF MASSACHUSETTS LAW, § 4.5.

⁶⁰ See *PBC v. DH*, 396 Mass. 68, 483 N.E.2d 1094 (1985).

⁶¹ *RRK*, 400 Mass. at 14, 507 N.E.2d at 738.

a man who was not married to a woman when she conceived a legitimate child will have the right to adjudicate the child's paternity. *RRK* suggests that the permissible circumstances for granting a putative father standing to establish paternity are those in which there is no family unit to protect. After *RRK*, the presumption that a child conceived during a lawful marriage is the husband's may only apply to those situations in which the mother remarries prior to the institution of paternity proceedings.

E. **The Role of Speculation in the Equitable Distribution of Property Upon Divorce*

The financial consequences of divorce are an aspect of domestic relations law that have undergone great changes in recent years.¹ Divorce litigation reflects a decline in the significance of alimony payments and a rise in the importance of final property reallocations between divorced spouses.² Traditional principles, emanating from the Married Women's Separate Property Acts of the late nineteenth and early twentieth centuries, restricted the court's role in property division to discerning which spouse held title to each asset, restoring the spouses to their proper ownership, and dividing jointly held property.³ By 1980, however, most jurisdictions had adopted systems which gave courts broad discretion to consider all the circumstances surrounding the divorce in order to distribute assets according to principles of fairness.⁴

Massachusetts courts have broad discretion to award alimony and to divide assets equitably upon termination of a marriage.⁵ Massachusetts' equitable distribution statute mandates that the trial court consider certain factors when determining alimony awards or property settlements.⁶ Courts may also consider other statutorily

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¹ M. GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* 51 (1981).

² See *id.* at 57. Professor Glendon states that the development of new ways to address the economic aspects of divorce has accelerated because of lawmakers' recognition that the amount of money transferred upon divorce now rivals the amounts passing by will or intestate succession.

³ *Id.* at 62.

⁴ *Id.*

⁵ See MASS. GEN. L. ch. 208, § 34 (1986).

⁶ MASS. GEN. L. ch. 208, § 34 (1986) provides in pertinent part:

In determining the amount of alimony, if any, to be paid, or in fixing the nature and value of the property, if any, to be so assigned, the court, after hearing the witnesses, if any, of each party, shall consider the length of the marriage, the conduct of the parties during the marriage, the age, health, station, occupation,

enumerated factors.⁷ A trial court's findings must indicate that it weighed each of the statutory factors.⁸

In applying equitable distribution principles, courts in Massachusetts and elsewhere have entertained arguments for an expanded category of "property" which courts may divide upon divorce.⁹ Characterizing an asset as property has significant repercussions because, unlike alimony, a property settlement is not subject to modification.¹⁰ Whether professional degrees and pension benefits can be treated as property for purposes of equitable distribution remains a controversial issue in American courts.¹¹ During the *Selected Developments* year, the Massachusetts Supreme Judicial Court decided two significant cases dealing with the equitable division of future income from medical degrees and retirement plans.¹²

In the 1987 decision of *Drapek v. Drapek*, the Court held that neither a professional degree nor the increased earning potential it represents constituted property for purposes of equitable distribution.¹³ Conversely, in the 1987 decision of *Dewan v. Dewan*, the Court maintained that pension benefits constituted property subject to equitable division upon divorce, and that a present assignment of future benefits was the preferred method of allocation.¹⁴ The *Drapek*

amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income.

Id.

⁷ MASS. GEN. L. ch. 208, § 34 (1986) provides in pertinent part that "the court may also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates and the contribution of each of the parties as a homemaker to the family unit." *Id.*

⁸ *Loud v. Loud*, 386 Mass. 473, 474, 436 N.E.2d 164, 165 (1982). In a case decided during the *Recent Developments* year, the Supreme Judicial Court described a two-step analysis for review of judgments pursuant to the equitable distribution statute. In *Bowring v. Reid*, 399 Mass. 265, 503 N.E.2d 966 (1987), the Court asserted that, first, a reviewing court should examine the judge's findings to determine whether all relevant factors were considered. Then, the Court stated, the reviewing court must determine whether the reasons for the judge's conclusions are apparent in his or her findings or rulings. *Id.* at 268, 503 N.E.2d at 968.

⁹ See GLENDON, *supra* note 1, at 67.

¹⁰ See MASS. GEN. L. ch. 208, § 34 (1986).

¹¹ See Note, *The Supporting Spouse's Rights in the Other's Professional Degree Upon Divorce*, 35 U. FLA. L. REV. 130 (1983) [hereinafter Note, *Supporting Spouse's Rights*]; see also Freed & Foster, *Spousal Rights in Retirement and Pension Benefits*, 16 J. FAM. L. 187 (1978) [hereinafter *Retirement and Pension Benefits*].

¹² *Drapek v. Drapek*, 399 Mass. 240, 503 N.E.2d 946 (1987); *Dewan v. Dewan*, 399 Mass. 754, 506 N.E.2d 879 (1987).

¹³ See 399 Mass. at 244, 503 N.E.2d at 947.

¹⁴ See 399 Mass. at 755, 757, 506 N.E.2d at 880, 881.

and *Dewan* decisions manifest the Court's reluctance to permit excessive speculation in determining property settlements.

Drapek illustrates the distribution problems that arise when a marriage breaks down shortly after one spouse completes his or her education and before the couple reaps the monetary benefits of the spouse's degree.¹⁵ In *Drapek*, the parties were married for approximately eight years, during which time the husband earned his medical degree.¹⁶ His wife worked to support the household and also provided most of the homemaking services during the marriage.¹⁷ The couple used its joint funds to pay the husband's tuition.¹⁸ At the time of the divorce, the twenty-eight year-old husband practiced internal medicine as a senior resident.¹⁹ His wife, twenty-seven years old, worked as a service representative for a telephone company.²⁰

At a settlement hearing following the divorce, the probate judge entitled the wife to participate in her husband's earning capacity until she became rehabilitated.²¹ The judge then ordered the husband to pay his wife \$42,024.50, representing the value of her homemaking services plus the amount by which the wife's financial contributions exceeded her husband's.²² The court also awarded the wife 9.35% of her husband's gross income over five years, or \$60,000, whichever figure was greater.²³ The judge refrained from deciding whether the medical degree constituted property, but nonetheless found it amenable to equitable assignment.²⁴

Although recognizing that Massachusetts law accords a trial judge the discretion to assign one spouse's property to the other spouse, the *Drapek* Court held that the present value of future earned income is not subject to equitable distribution.²⁵ The *Drapek* Court asserted that future earnings were too speculative to characterize them as marital assets capable of permanent assignment.²⁶

¹⁵ See generally Note, *Supporting Spouse's Rights*, *supra* note 11.

¹⁶ 399 Mass. at 241, 503 N.E.2d at 947.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 242, 503 N.E.2d at 947.

²² *Id.* The Court noted that the trial judge did not err in assigning a monetary value to the wife's homemaking services based on expert testimony. *Id.* at 247, 503 N.E.2d at 950.

²³ *Id.* at 241, 503 N.E.2d at 947.

²⁴ *Id.* at 241-42, 503 N.E.2d at 947.

²⁵ *Id.* at 244, 503 N.E.2d at 949.

²⁶ See *id.*

The Court noted that, because of illness, death, or market factors, a spouse might never realize potential earnings.²⁷ Because assigning a present value to a medical degree necessitates evaluating the earning potential the degree creates, the *Drapek* Court declined to categorize professional degrees or licenses as marital property subject to division.²⁸ The Court, however, maintained that a trial judge may consider the earning capacities of both parties in determining an alimony award or assigning parties' estates.²⁹ The Court stressed, however, that a medical degree is not to be considered as part of the estate that can be presently divided.³⁰

In holding that a medical degree failed to constitute property in a spouse's estate for purposes of equitable distribution, the *Drapek* Court brought Massachusetts in line with other jurisdictions that have addressed the issue.³¹ New York, in *O'Brien v. O'Brien*, is the only jurisdiction thus far to diverge from the prevailing view.³² In *O'Brien*, the New York Court of Appeals interpreted a state statute to include an interest in a spouse's medical degree as property for purposes of equitable distribution.³³ The *Drapek* Court distinguished *O'Brien* by pointing out that the New York statute explicitly enumerates an interest in a profession as marital property,³⁴ while Massachusetts legislation contains no such mandate.³⁵

In addition to its discussion of *O'Brien*, the *Drapek* Court cited a number of jurisdictions that provide restitution to the supporting spouse in cases where one spouse enables the other to pursue an education.³⁶ The Court, however, did not comment upon whether Massachusetts courts might employ such a remedy in future cases. Instead, the Court reversed the trial court's alimony and property division order, and remanded those issues for further consideration in light of the finding that a medical degree is not subject to equitable division.³⁷

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 246, 503 N.E.2d at 950.

³¹ For an extensive list of cases in which various jurisdictions have considered the question of whether a degree is marital property, see *Archer v. Archer*, 303 Md. 347, 493 A.2d 1074 (1985).

³² 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985).

³³ *Id.* at 580-81, 489 N.E.2d at 713, 498 N.Y.S.2d at 744.

³⁴ See N.Y. DOM. REL. LAW § 236(B)(5)(d)(6) (McKinney's Supp. 1986).

³⁵ *Drapek*, 399 Mass. at 245, 503 N.E.2d at 949.

³⁶ *Id.* at 245, 503 N.E.2d at 949-50.

³⁷ See *id.* at 246, 503 N.E.2d at 950.

Although the *Drapek* decision reflects the Supreme Judicial Court's unwillingness to recognize a professional degree as property, the Court's decision in *Dewan v. Dewan* demonstrates that it will recognize as marital assets certain other interests that courts did not traditionally regard as property.³⁸ In *Dewan*, the Court included pension benefits as part of the husband's estate.³⁹ The Court held that presently assigning a percentage of the present value of the future pension benefits is preferable to using the "if and when" approach.⁴⁰ In the latter approach, a court allocates to the payee spouse a percentage of the pension benefits attributable to the marriage period if and when the paying spouse receives the money.⁴¹

The *Dewan* Court conceded that, in some circumstances, practical difficulties dictate that a court utilize the "if and when" approach.⁴² The Court noted that one such difficulty might involve the degree of speculation necessary in assigning a present value to a pension.⁴³ Another problem which might warrant assignment on an if and when basis arises when an employee spouse lacks sufficient liquid assets to pay the present value award.⁴⁴ The Court, however, found that these factors did not control the situation in *Dewan*.⁴⁵ The Court asserted that present value assignment would henceforth be the favored approach in Massachusetts.⁴⁶

The *Dewan* Court reasoned that the approach provides a clean break between partners and provides the employee with an unencumbered pension plan.⁴⁷ In addition, the *Dewan* Court stated that the present value method would relieve the courts of further supervision and relieve retirement agencies of having to pay benefits to former spouses.⁴⁸ Also, the Court noted, the if and when approach unfairly allows the employee spouse to decide when benefits will commence by control over his or her retirement date.⁴⁹

³⁸ See 399 Mass. 754, 506 N.E.2d 879 (1987).

³⁹ *Id.* at 755, 506 N.E.2d at 880.

⁴⁰ *Id.* at 757, 506 N.E.2d at 881.

⁴¹ *Id.* at 755, 506 N.E.2d at 881.

⁴² *Id.* at 757, 506 N.E.2d at 881.

⁴³ See *id.* at 756, 506 N.E.2d at 881.

⁴⁴ *Id.*

⁴⁵ See *id.*

⁴⁶ *Id.* at 757, 506 N.E.2d at 882.

⁴⁷ *Id.*

⁴⁸ *Id.* at 757-58, 506 N.E.2d at 882.

⁴⁹ See *id.*

Drapek and *Dewan* represent important developments in Massachusetts law because the decisions reflect the degree of speculation the Supreme Judicial Court will permit in the equitable assignment of assets. The *Drapek* Court found that when determining a permanent property settlement, courts would be unwise to characterize potential earnings as property because such income might never materialize. Speculation as to the value of a medical degree, the Court aptly noted, can be dangerous in a property division because the earnings might not be realized, thus granting a windfall to the spouse seeking a property interest in the degree.

The role of speculation is critical to understanding why the *Dewan* Court found a property interest in a divorced spouse's future retirement benefits, while the *Drapek* Court refused to treat future income from a professional degree as property. The Court did not state its rationale for defining pension benefits as property. The Court may simply have believed the determination of future pension benefits to be less speculative than the future earning potential from a medical degree. This is a fair appraisal for the Court to make. While potential earnings from a degree are only an "expectancy," pension benefits are earned during the marriage. Thus, in assigning property interests in pension benefits, courts need only speculate as to the parties' respective contributions to those earnings. Courts would not be faced with speculating as to whether such benefits will ever be earned. In the case of medical degrees as property for equitable distribution, courts would have to speculate as to whether the earnings would accrue, how much would be earned, and the parties' contributions.

Interestingly, the *Dewan* Court's favoring of the "assignment of present value" approach over the "if and when" approach represents a choice of the more speculative alternatives for distributing pension benefits. This indicates that the Court is willing to allow for increased speculation when the dangers of doing so are outweighed by benefits such as a clean break between spouses after divorce. In *Dewan*, the balance favored a present assignment of pension benefits, while in *Drapek*, the high degree of speculation probably outweighed possible benefits of assigning future income as property. The *Drapek* approach is fair, however, for the Court still allows for a high degree of speculation by permitting courts to consider potential earnings as a factor in determining property division and in awarding alimony.

In an area of law where judges have enjoyed broad discretion in fashioning equitable remedies, both *Dewan* and *Drapek* signifi-

cantly limit a trial court's discretion to equitably assign assets upon divorce. *Drapek* mandates that a court cannot include professional degrees in the category of property for purposes of equitable distribution. *Dewan* restricts a trial court's discretion in selecting a method of allocating pension benefits upon divorce. The limiting effects of these decisions indicate that the Supreme Judicial Court may favor setting guidelines for trial judge's to follow in administering the Massachusetts divorce statute.

III. SELECTED DEVELOPMENTS IN TORT LAW

During the *Selected Developments* year, Massachusetts courts addressed a broad array of torts issues ranging from the duty of care in medical malpractice cases to standards of proof in products liability actions. In the medical malpractice field, Massachusetts courts rendered a decision requiring physicians to inform patients not only of the risk of injury, but also of the consequences of such injury on the patient. In addition, the Supreme Judicial Court, addressing the informed consent doctrine, held that physicians must inform patients about the risks of alternative or additional surgical procedures. The Supreme Judicial Court also delivered an opinion facilitating the use of medical expert witnesses by holding that an expert witness need not be a specialist in the field in which the witness is testifying. Finally, the Appeals Court decided a case delineating a physician's standards of care when dealing with a patient whose pregnancy is at risk.

In addition to medical malpractice developments, Massachusetts courts probed other areas of tort law. The Supreme Judicial Court limited the scope of negligent infliction of emotional distress by affirming a lower court's grant of summary judgment dismissing a plaintiff's claim when the plaintiff did not see the body of the accident victim, her son, until at least twenty-four hours after the accident. In the area of immunities, the Supreme Judicial Court refused to apply the fading doctrine of interspousal immunity to claims of fraudulent conveyancing, breach of fiduciary duties, and conversion. The Supreme Judicial Court, in two cases decided during the *Selected Developments* year, also clarified defamation law by laying down clearer guidelines for the use of summary judgment motions and conditional privileges in defamation cases.

Finally, Massachusetts courts have clarified and extended the law in strict/products liability actions. The United States Court of Appeals for the First Circuit clarified the standards of proof for

plaintiffs seeking to demonstrate a design defect in products liability actions by sustaining a plaintiff's cause of action notwithstanding the plaintiff's failure to introduce evidence on the feasibility of safer alternatives. In the area of defective design, the Appeals Court applied causation principles and the Restatement (Second) approach to deny a plaintiff recovery when the design defect failed to create a condition unreasonably dangerous to the user or consumer. In addition to products liability developments, the Supreme Judicial Court examined strict liability issues and affirmed a verdict against a landlord for violating a statute requiring landlords to remove lead paint from the premises, despite the fact that the landlord lacked knowledge of the dangerous condition.

A. **Developments in Medical Malpractice*

In the controversial area of medical malpractice, Massachusetts courts decided four cases dealing with both a physician's duty of care and causation for medical malpractice during the *Selected Developments* year. In the United States Court of Appeals for the First Circuit, *Kissinger v. Lofgren* addressed the scope of a physician's duty to inform a patient regarding the risks of a surgical procedure.¹ The Supreme Judicial Court held in *Martin v. Lowney* that a waived claim to a non-consensual surgical procedure broke the chain of causation for a surgically caused injury.² In *Letch v. Daniels*, the Supreme Judicial Court stated that an expert witness, testifying as to a physician's duty of care, does not have to be in the same field as the defendant.³ Finally, in *Coughlin v. Bixon*, the Massachusetts Appeals Court elucidated some of the standards for an obstetrician in dealing with a high-risk pregnancy.⁴

In *Kissinger v. Lofgren*, the United States Court of Appeals for the First Circuit dealt with a physician's duty to inform a patient.⁵ The patient suffered mild discomfort in his upper left gum since the early 1970s, caused by a benign tumor covering much of his sinus.⁶ The otolaryngologists who diagnosed the tumor recommended a "Caldwell-Luc" operation to remove the tumor, warning

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¹ 836 F.2d 678 (1st Cir. 1988).

² 401 Mass. 1006, 517 N.E.2d 162 (1988).

³ 401 Mass. 65, 514 N.E.2d 674 (1987).

⁴ 23 Mass. App. Ct. 639, 504 N.E.2d 1069 (1987).

⁵ 836 F.2d 678 (1st Cir. 1988).

⁶ *Id.* at 679-80.

that there was a risk of damaging the infraorbital nerve, a nerve in the sinus area.⁷ The admitting physician, one of the two defendants, repeated this warning.⁸ The specialist who performed the operation, the other defendant, only mentioned a risk of temporary numbness.⁹ No one informed the patient that the surgery could result in chronic pain from a nerve injury, nor was he told about an alternative procedure, which had less risk of causing the injury.¹⁰

The patient agreed to the Caldwell-Luc operation, and the specialist, assisted by the admitting physician, performed the operation.¹¹ The next day, the patient complained of numbness and pain in the area of the infraorbital nerve.¹² The patient continued suffering chronic, excruciating pain through the time of trial.¹³

The case was tried in the United States District Court for the District of Massachusetts under Massachusetts tort law.¹⁴ The jury found that the physicians had failed to inform the patient of the risks of the operation, and awarded him \$275,000.¹⁵ The defendants appealed.¹⁶

The informed consent doctrine in Massachusetts, the court explained, required that the patient show, first, that the physician has breached a duty to inform the patient about significant risks, and second, that the breach caused the harm to the patient.¹⁷ The court continued that the duty of care, in turn, has four elements.¹⁸ First, there must be a "sufficiently close" doctor-patient relationship.¹⁹ Second, the physician knows or should reasonably know the information regarding the risk.²⁰ Third, the physician should reasonably recognize that the information is material to the patient's decision to undergo or forego treatment.²¹ Finally, the physician

⁷ *Id.* at 680.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 679.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* (citing *Precourt v. Frederick*, 395 Mass. 689, 481 N.E.2d 1144 (1985) and *Harnish v. Children's Hosp. Medical Center*, 387 Mass. 152, 439 N.E.2d 240 (1982)).

¹⁸ *Id.* (citing *Halley v. Birbiglia*, 390 Mass. 540, 458 N.E.2d 710 (1983)).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

must fail to disclose this material information, thereby breaching the duty to inform the patient.²²

The crux of this case, the court noted, was the third component of the above duty of care analysis focusing on whether the information was material.²³ Under Massachusetts law, the court explained, information is "material" when "a physician reasonably should recognize it as necessary for his [or her] patient to make an informed decision whether to forego treatment."²⁴ "Material" risks, however, according to the court, do not include risks inherent in any operation, and of which every patient should know, such as infections, or those which are possible but only remotely probable.²⁵

In this case, the court held that the evidence was such that the risk of injury was substantial and known to the physicians, thus requiring a warning to the patient.²⁶ An injury to the infraorbital nerve, the court noted, could have effects ranging from numbness to severe pain.²⁷ There was evidence in the record that the risk of severe pain was not remote.²⁸ Finally, the court held that the evidence did not show chronic pain to be an obvious consequence of a nerve injury.²⁹ Therefore, the court concluded, information that severe and chronic pain could result from a nerve injury was material, and thus, the physician had a duty to inform the patient of this particular risk.³⁰

The court also held that the breach of the duty caused the harm to the patient.³¹ In general, the court noted, a physician's breaching of the duty to inform a patient is actionable only if the patient, knowing the risk, would not have consented to the treatment, and the undisclosed risk materializes.³² Here, although the evidence was in dispute, the court held that there was sufficient

²² *Id.*

²³ *Id.* at 681. The court found that the jury had sufficient evidence to find a doctor-patient relationship for both the admitting physician and the surgeon. *Id.* at 680. In addition, expert testimony showed that chronic pain was a consequence of the nerve injury, about which the defendants knew or reasonably should have known. *Id.* at 680-81.

²⁴ *Id.* at 681 (citing *Harnish*, 387 Mass. at 156, 439 N.E.2d at 243).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 682.

³⁰ *Id.* The court found that the patient was not informed of the material information, and therefore, the fourth prong of the duty of care test was fulfilled. *Id.*

³¹ *Id.* at 682-83.

³² *Id.*

evidence that the injury was caused by damage to the infraorbital nerve.³³

The court also noted that the patient's testimony that he would not have consented to the operation had he known the risk of serious, chronic pain resulting from a nerve injury alone was not sufficient.³⁴ The evidence, the court reasoned, showed that the patient had suffered mild pain for eight years, and was being treated for pain.³⁵ Therefore, the court concluded, there was enough evidence for the jury to find that the patient would not have consented had he been informed properly of the risks from the operation.³⁶ Thus, the court concluded, the physician's failure to inform the patient of the risks of the operation caused the harm to the patient.

In sum, in *Kissinger v. Lofgren*, the First Circuit decided that to fulfill his or her duty to inform a patient about risks from an operation, a physician must provide patients with more information than merely telling them that a nerve injury may possibly occur. The physician must also be sure to tell the patient what consequences a nerve injury may have. In addition, although the patient's testimony that he or she would not have consented had he or she been fully informed of the risks is insufficient evidence for the jury to conclude that the patient would not have consented, the jury may look to the other evidence to support the patient's testimony in reaching its conclusion.

In addition to fully informing a patient about the nature of the risks in a surgical procedure, physicians must also advise a patient about the alternative surgical procedures. In *Martin v. Lowney*, the Supreme Judicial Court reiterated that a physician has a duty to inform a patient about the risks of treatment and about alternatives to that procedure.³⁷ In *Martin*, the patient claimed that her doctors, an osteopath and a surgeon, failed to inform her about the risks of, and options for, removing an intrauterine device and having a tubal ligation performed.³⁸ Her physicians told her that the operation would leave no more than a one-inch scar.³⁹

During the surgical procedure, the physicians performed an appendectomy, to which the patient claims she would not have

³³ *Id.* at 683.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ 401 Mass. 1006, 517 N.E.2d 162 (1988).

³⁸ *Id.* at 1006, 517 N.E.2d at 163.

³⁹ *Id.* at 1006-07, 517 N.E.2d at 163.

consented.⁴⁰ The operation required a six-inch incision.⁴¹ In addition, the patient apparently suffered a wound abscess when bacterioides fragilis from the appendectomy were released into the normally sterile abdominal cavity.⁴²

At trial, the patient waived her claims concerning the non-consensual appendectomy.⁴³ The issue before the jury, then, was whether the doctor-defendants acted negligently in failing to inform the patient properly about the risks of the particular procedure.⁴⁴ The jury found for the defendant-surgeon, but could not reach a verdict as to the defendant-osteopath.⁴⁵ The trial court, upon the defendant-osteopath's motion, granted a directed verdict for that defendant.⁴⁶

The Supreme Judicial Court affirmed the trial court decision.⁴⁷ The Court looked to its decision in *Harnish v. Children's Hospital Medical Center*, in which it set out the standard for a physician's duty to inform a patient.⁴⁸ The Court, however, held that even if the defendant-osteopath had failed to inform the patient of the risks of the procedure, the patient did not prove that the injury was caused by the physician's alleged breach of that duty.⁴⁹ The Court held that the injury was caused by the appendectomy.⁵⁰ Since the patient had waived her claim relating to the non-consensual appendectomy, the Court found no causal relationship between the negligence of the doctor, if any, and the injury.⁵¹

In sum, the Supreme Judicial Court restated its standard for a physician's duty to inform a patient. In this case, the patient lost her case because she could not prove a causal connection between the physician's alleged breach and her injury. It is unclear, however, how the Court would have ruled if the patient had not waived her claim relating to the appendectomy.

⁴⁰ *Id.* at 1007, 517 N.E.2d at 163.

⁴¹ *Id.*

⁴² *Id.* at 1007, 517 N.E.2d at 164. The text of the opinion is opaque as to the extent of the patient's injuries.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Harnish v. Children's Hosp. Medical Center*, 387 Mass. 152, 439 N.E.2d 240 (1982). See notes 10-15 and accompanying text for a fuller exposition of the standard found in *Harnish*.

⁴⁹ 401 Mass. at 1008, 517 N.E.2d at 164.

⁵⁰ *Id.* at 1007-08, 517 N.E.2d at 164.

⁵¹ *Id.* at 1008, 517 N.E.2d at 164.

In *Letch v. Daniels*, the Supreme Judicial Court held that a medical expert does not have to be a specialist or practitioner in the same field as the defendant.⁵² In *Letch* a minor, in an action brought by her mother, claimed that a pedodontist performing orthodontia, by his negligent treatment, caused root resorption in several teeth.⁵³ At trial, the patient attempted to elicit opinion testimony from an expert witness, an orthodontist, as to the doctor's standard of care for the plaintiff's treatment.⁵⁴ The judge refused to hear this testimony from the expert because the witness was not a pedodontist.⁵⁵ As a result, the patient was unable to enter evidence as to the doctor's standard of care, and the trial court entered a directed verdict for the doctor.⁵⁶

The Supreme Judicial Court held that the trial court erred in refusing to hear the expert witness's testimony. The Court explained that a medical expert does not have to be a specialist in the area in question, nor does the witness have to practice in the same field as the defendant to testify as to the defendant's standard of care.⁵⁷ To so testify, the Court indicated, the witness instead must have sufficient "education, training, experience and familiarity with the testimony's subject matter."⁵⁸

In sum, *Letch v. Daniels* facilitates the use of expert witnesses in medical malpractice cases. By allowing an expert to testify as to a physician's standard of care without practicing in the same specialty, the Court has increased the flexibility of the use of expert witnesses. Parties need not find an expert in the identical field with the defendant. Thus, the Court's holding in *Letch* allows a greater number of witnesses to qualify as experts when testifying as to a physician's standard of care.

In *Coughlin v. Bixon*, the Appeals Court clarified the duty of care owed by an obstetrician to a patient whose pregnancy is at risk.⁵⁹ The patient-mother [hereinafter "the mother"] was substantially overweight, smoked two packs of cigarettes per day, and would

⁵² 401 Mass. 65, 68, 514 N.E.2d 675, 677 (1987).

⁵³ *Id.* at 65-66, 514 N.E.2d at 675.

⁵⁴ *Id.*

⁵⁵ *Id.* at 66, 67-68 & nn. 2-3, 514 N.E.2d at 675, 676-77 & nn. 2-3.

⁵⁶ *Id.* at 66, 514 N.E.2d at 675-76.

⁵⁷ *Id.* at 68, 514 N.E.2d at 676.

⁵⁸ *Id.*, 514 N.E.2d at 676 (quoting *Gill v. North Shore Radiological Assocs.*, 10 Mass. App. Ct. 885, 886, 408 N.E.2d 248, 250 (1980)).

⁵⁹ 23 Mass. App. Ct. 639, 504 N.E.2d 1969 (1987). The patients whose pregnancy is at risk are, naturally, the mother and the child.

be older than thirty-five years old at the expected date of delivery.⁶⁰ The plaintiff's experts testified that these factors put the pregnancy at risk from the outset.⁶¹ Furthermore, during the pregnancy, the mother did not gain weight appropriately, and, in the last two months of her very short pregnancy,⁶² she suffered cramps and episodes of vaginal bleeding and passing of fluid.⁶³ Three days before her premature delivery, the mother experienced a "gush of fluid."⁶⁴ The passing of fluid, and especially the "gush," indicated that fetal membranes were rupturing.⁶⁵ The initial risk was increased by the uterine bleeding and the rupturing fetal membranes.⁶⁶

The day of the delivery, the mother visited the physician and described the incident of the gushing fluid to him.⁶⁷ The physician prescribed bed rest.⁶⁸ That night, the mother went into labor, and was admitted to Malden Hospital.⁶⁹ She demanded that the physician transfer her to a hospital with a better-equipped neonatal unit, but the physician failed to act on her request.⁷⁰ When the patient-child [hereinafter "the child"] was delivered, there was no pediatrician in the delivery room or immediately available.⁷¹ The physicians present were unable to treat the child.⁷² Treatment, though inadequate, could not commence until the child was admitted to the hospital nursery.⁷³ The next day, the child was transferred to Children's Hospital Medical Center, but it was too late; the child died eleven days later following surgery to try to correct heart abnormalities.⁷⁴

The plaintiff instituted the action before a medical malpractice tribunal which dismissed the complaint following the plaintiff's of-

⁶⁰ *Id.* at 640, 504 N.E.2d at 1070.

⁶¹ *Id.*

⁶² The patient was expected to deliver on March 30, 1982, but delivered on January 25, 1982. *Id.* at 640-41, 504 N.E.2d at 1070.

⁶³ *Id.* at 640, 504 N.E.2d at 1070.

⁶⁴ *Id.*

⁶⁵ *Id.* at 641, 504 N.E.2d at 1070.

⁶⁶ *Id.*

⁶⁷ *Id.* at 640, 504 N.E.2d at 1070.

⁶⁸ *Id.*

⁶⁹ *Id.* at 641, 504 N.E.2d at 1070.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* The physicians could not start an intravenous or administer bicarbonate, and the delivery room was not equipped to administer oxygen to the child. *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

fer of proof.⁷⁵ The Massachusetts Appeals Court vacated the dismissal, holding that the offer of proof showed that a doctor-patient relationship existed, the physician failed to conform to good medical practice, and the physician's negligence probably contributed to the child's death.⁷⁶ The court set out eight respects in which the physician failed to conform to acceptable standards.⁷⁷ First, the physician failed to monitor the mother's uterine contractions.⁷⁸ Second, the physician failed to administer tocolytics.⁷⁹ Third, the physician failed to assess the seriousness of the ruptured membranes by doing a sonograph.⁸⁰ Fourth, the physician failed to hospitalize the mother after the "gush of fluid" showed that the fetal membranes were ruptured.⁸¹ Fifth, the physician failed to administer antibiotics in response to the fetal membrane rupture.⁸² Sixth, the physician failed to have a pediatrician in the delivery room, or close at hand.⁸³ Seventh, the physician failed to administer cortisone to treat the child's respiratory distress.⁸⁴ Finally, the physician failed to transfer the mother to a hospital with a neonatal unit better equipped to handle a high-risk pregnancy.⁸⁵ Thus, by laying out these standards, the Appeals Court enumerated some of the elements in a physician's duty of care to a patient whose pregnancy is at risk.

The four medical malpractice cases decided in Massachusetts during the Survey year are a mixed bag. In two, *Kissinger v. Lofgren* and *Letch v. Daniels*, the courts took a common-sense approach to the problems before them. In *Kissinger*, the First Circuit held that not only must a surgeon warn that a certain operation may result in nerve damage, he or she must also warn the patient what the results of such nerve damage may be. In *Letch*, the Supreme Judicial Court, reversing an incorrect evidentiary ruling by the trial judge, held that a medical expert witness did not have to practice in the

⁷⁵ *Id.* at 639-40, 504 N.E.2d at 1069-70.

⁷⁶ *Id.* at 640, 504 N.E.2d at 1069.

⁷⁷ *Id.* at 641, 504 N.E.2d at 1070.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 641-42, 504 N.E.2d at 1070.

⁸⁴ *Id.* at 642, 504 N.E.2d at 1070.

⁸⁵ *Id.* In addition, the court held that a patient's offer of proof before a medical malpractice tribunal did not necessarily have to include the words "to a reasonable medical certainty" in expert testimony to make proof of causation legally sufficient. *Id.* at 644-45, 504 N.E.2d at 1072.

exact same field as the defendant in a malpractice case in order to testify as to the defendant's standard of care. While the federal case may be stretching the standard a bit, in holding that chronic pain is not an obvious result of nerve damage, the Supreme Judicial Court's ruling regarding expert witnesses makes perfect sense. The reasoning behind the rule of evidence regarding expert witnesses is that the witness have sufficient background knowledge on which to base his or her expert opinion. The Court's ruling in *Letch* only restates that common-sense rule.

In *Coughlin v. Bixon*, the Appeals Court responded to an obviously egregious incident of malpractice by an obstetrician. In vacating the decision of the medical malpractice tribunal,⁸⁶ the Appeals Court, in an opinion written by the only woman on the court, found eight aspects in which the doctor had not conformed to good medical practice.⁸⁷ The facts of the case were such that the court was almost forced to decide as it did.⁸⁸

Martin v. Lowney, however, is a disgraceful throwback to legal formalism. The Supreme Judicial Court disposes of the issue before it by resorting to a questionable waiver. In the facts as related by the Court, there is no indication of what injury, if any, the patient suffered. The size and extent of her injuries may only be surmised from the mentioning that the operation as performed required a six-inch incision, and that the wound abscessed.

Martin appears flawed, or at least questionable, in three respects. First, the Court does not show that it considered the patient's alleged waiver of her claim regarding the appendectomy. Second, the Court did not look to whether the extension of the operation, and the resulting lengthened incision and wound abscess, was a "material" risk, or whether the patient was informed of this risk. Finally, the Court did not deal correctly with the causation question before it.

The *Martin* Court dealt summarily with the patient's waiver of her appendectomy claim. The Court, in its opinion, gave no thought as to what exactly the patient thought she was waiving. While she may have truly been waiving any and all claims with any relation to the non-consensual appendectomy, such a waiver, one would hope,

⁸⁶ The egregiousness of the doctor's malpractice, coupled with the tribunal's treatment of the case, would seem to cast doubt on the efficacy and neutrality of the tribunal.

⁸⁷ In addition, the court got rid of a bit of legal formalism, holding that the magic words "to a reasonable medical certainty" did not have to be invoked by an expert witness to show causation in a medical malpractice case. 23 Mass. App. Ct. at 643-45, 504 N.E.2d at 1072.

⁸⁸ One wonders what the effect of the doctor's suggesting bed rest to the mother when she visited the doctor was on the court's decision in this case.

would have to be relatively explicit. It very well may be that the patient thought she was waiving only a battery claim for the non-consensual appendectomy, a claim which would be worth less in damages, and would be largely duplicative of the failure to inform claim. To have dealt with such a complicated issue so summarily, and to have made the issue decisive of the case, is mistaken.

Second, under the Court's own criteria, the information that the operation may be extended while the patient is under anaesthesia could very well be material information which the doctor has a duty to disclose to the patient. The surgeon presumably felt compelled by what he believed constituted good medical practice to extend the requested operation, removing the intrauterine device and performing a tubal ligation to include removing the patient's appendix. The risk that such a procedure may have to be extended may well be a known risk. The Court did not address whether such a risk was either so well known by patients to not require a warning, or whether it was so remote as to not be material. The patient, however, indicated that, had she known that she could have her appendix removed, she would not have consented to the operation. What the root of this lack of consent would have been is not clear, but if it had to do with the amount of scarring, this risk may have been material to this patient.

If the risk, defined here as the risk that the surgery be extended and the incision be lengthened, was a material one, then the patient should have received an appropriate warning. The risk of a wound abscess from an infection is, according to the Court, an obvious one, about which the patient need not be warned. Presumably, the risk that there may be scarring from an incision may well be obvious as well. However, the information as to the length of the necessary incision may well have been material to the patient, as it could have directed her as to whether she wanted the operation at all, or wanted to be sure that the surgeon did not extend the operation.

Finally, the Court was cavalier in its treatment of the causation question. The Court claimed that the injury was caused by the appendectomy, and the appendectomy claim was waived, so the patient had no case. The Court, by this syllogism, ignored or glossed over many of the metaphysical questions of causation raised by the facts of the case. Through the technicality of a waiver, and without dealing with the circumstances of that waiver, the Court did the patient an injustice.

In conclusion, duty and causation in medical malpractice tort law continues to thrive. In three of the cases during the *Selected Developments* year, the courts have expanded these elements to pro-

tect injured plaintiffs. In *Kissinger v. Lofgren*,⁸⁹ the First Circuit clarified the law of informed consent to include the risk of pain from a nerve injury as material information which must be disclosed. In *Letch v. Daniels*,⁹⁰ the Supreme Judicial Court facilitated the use of medical expert witnesses by not requiring a medical expert to be in the exact same practice field as the defendant. In *Coughlin v. Bixon*,⁹¹ the Appeals Court listed a number of the elements present in a physician's duty of care to a patient whose pregnancy is at risk. In these three cases, the courts did justice to the individual injured plaintiffs. In *Martin v. Lowney*,⁹² however, the Supreme Judicial Court did an injustice to a woman through its summary treatment of her case. By failing to realize that there was a real person with real injuries suffering real pain, the Court failed to come to a decision that can stand up to critical observation. Perhaps the Court will atone for this lapse of judgment in the years to come.

B. **Recent Limitations on Negligent Infliction of Emotional Distress Claims*

In 1978 the Supreme Judicial Court effected a change in Massachusetts negligent infliction of emotional distress law. In the case of *Dziokonski v. Babineau*, the Court expressly overruled the longstanding "impact" rule which had denied plaintiffs recovery for physical injury resulting solely from negligently inflicted psychological distress.¹ In a potentially far reaching decision, the Supreme Judicial Court not only recognized a cause of action for the negligent infliction of emotional distress absent a physical "impact," but also extended recovery for physical injuries which resulted from the plaintiff's concern over harm to a third party.² Although initially this ruling indicated a new receptiveness to recovery under the

⁸⁹ 836 F.2d 678 (1st Cir. 1988).

⁹⁰ 401 Mass. 65, 514 N.E.2d 675 (1987).

⁹¹ 23 Mass. App. Ct. 639, 504 N.E.2d 1069 (1987).

⁹² 401 Mass. 1006, 517 N.E.2d 162 (1988).

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¹ *Dziokonski v. Babineau*, 375 Mass. 555, 556, 380 N.E.2d 1295, 1296 (1978). In moving away from the impact rule regarding negligent infliction of emotional distress the Supreme Judicial Court overruled its decision in *Spade v. Lynn & Boston R.R.*, 168 Mass. 285, 47 N.E. 88 (1897). *Dziokonski*, 375 Mass. at 556, 380 N.E.2d at 1296. Although the impact formula had been modified by the Court over the years, the *Spade* decision had been the controlling case in the area since the 19th Century. *Id.* at 558, 47 N.E.2d at 1297.

² *Dziokonski*, 375 Mass. at 562, 380 N.E.2d at 1299.

doctrine of negligent infliction of emotional distress, the Court has in more recent years taken great effort to limit its scope.

In *Dziokonski* the estates of a husband and wife brought claims for negligent infliction of emotional distress alleging that the plaintiffs died from shock caused by an auto accident involving their daughter and the defendant.³ The facts alleged stated that Mrs. Dziokonski arrived shortly after the accident and witnessed her injured daughter lying at the scene.⁴ As a result of the trauma caused by this sight, Mrs. Dziokonski died in the ambulance while accompanying her daughter to the hospital.⁵ Mr. Dziokonski, who apparently never reached the accident scene nor witnessed the death of his wife, was so physically and emotionally overcome by this chain of events that he died.⁶

In ruling that both plaintiffs stated a cause of action,⁷ the Supreme Judicial Court rejected such traditional theories as "impact" and "zone of danger."⁸ In their place the Court determined that a test which evaluated whether the plaintiffs' injuries were a reasonably foreseeable result of the defendant's negligence effected the proper analysis.⁹ The threshold requirement in this analysis involves a showing that a substantial physical injury occurred as a result of the defendant's negligence.¹⁰ Once this is established, the question of recovery becomes dependent on a balancing of several factors.¹¹ These factors include the manner, time and place where the plaintiff became aware of the injury to the third party as well as the type of relationship which existed between the two parties.¹² The Court noted that generally such questions require resolution by the factfinder, but indicated that in some cases the facts may preclude liability as a matter of law.¹³

³ *Id.* at 556-57, 380 N.E.2d at 1296.

⁴ *Id.* at 557, 380 N.E.2d at 1296.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 569, 380 N.E.2d at 1303. While the Court did state that both complaints could withstand a motion to dismiss for failure to state a claim, it noted that while the claim of Mr. Dziokonski was far more indefinite, it could not be found insufficient as a matter of law. *Id.*

⁸ *Id.* at 556, 563, 380 N.E.2d at 1296, 1300. According to the zone of danger approach, a plaintiff is denied recovery for negligent infliction of emotional distress arising out of concern for a third party unless the defendant's actions posed an unreasonable risk of bodily harm to the plaintiff. *Id.* at 563, 380 N.E.2d at 1300.

⁹ *Id.* at 567, 380 N.E.2d at 1302.

¹⁰ *Id.* at 568, 380 N.E.2d at 1302.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

Applying these considerations to the case before it, the Supreme Judicial Court concluded that a parent who incurs physical injuries, induced by the emotional trauma over an injury to their child caused by the defendant's negligence, states a cause of action.¹⁴ This rule applies whether the parent witnesses the injury or comes upon the scene shortly thereafter.¹⁵ Thus, the plaintiffs in this case stated a cause of action sufficient to withstand a motion to dismiss and the judge properly submitted the question of liability to the trier of fact.¹⁶

Two years later the Supreme Judicial Court in *Ferriter v. Daniel O'Connell's Sons, Inc.* extended the scope of the *Dziokonski* decision when it allowed a cause of action for negligent infliction of emotional distress for a plaintiff who was not present at the scene of the accident but first viewed the injured loved one in the hospital shortly thereafter.¹⁷ In *Ferriter*, the plaintiffs were the wife and two children of a man injured while in the defendant's employ.¹⁸ As a result of the accident, the husband required hospitalization and suffered paralysis from the neck down.¹⁹ The plaintiffs did not witness the accident, but instead first came upon their injured loved one in the hospital.²⁰

In overturning the lower court's grant of summary judgment for the defendant, the Supreme Judicial Court found that the facts before it fell within the scope of the principles set forth in their *Dziokonski* decision.²¹ Provided that the plaintiffs could demonstrate the existence of a physical injury resulting from the defendant's negligence, the Court ruled that they had stated a cause of action upon which relief could be granted.²² Although the facts did not allege the time lapse between the accident and the arrival of the plaintiffs at the hospital, the Court concluded that a jury could find a short time lapse sufficient for the defendant to incur liability under the *Dziokonski* theory of reasonable foreseeability.²³ The Court reasoned that no logical reason exists to justify granting recovery

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 569, 380 N.E.2d at 1303.

¹⁷ *Ferriter v. Daniel O'Connell's Sons, Inc.*, 381 Mass. 507, 518-19, 413 N.E.2d 690, 697 (1980).

¹⁸ *Id.* at 508, 413 N.E.2d at 691.

¹⁹ *Id.* at 509, 413 N.E.2d at 691.

²⁰ *Id.*

²¹ *Id.* at 518-19, 413 N.E.2d at 697.

²² *Id.*

²³ *Id.*

to a plaintiff who rushes to the scene of the accident and witnesses an injured loved one, while denying it to a plaintiff who learns of the accident and instead rushes to the hospital.²⁴ As long as the plaintiffs' injuries follow closely in time to the accident, they are both equally foreseeable in terms of the proximity limits found in *Dziokonski*.²⁵

The willingness of the Supreme Judicial Court to expand the *Dziokonski* doctrine proved short-lived. The 1982 case of *Miles v. Edward O. Taber, M.D., Inc.* involved a claim for the negligent infliction of emotional distress brought by a plaintiff who witnessed the defendant's negligence in the birth of her child which resulted in the death of the infant two months later.²⁶ Although the jury rendered a verdict in her favor, the trial judge entered a judgment notwithstanding the verdict.²⁷ In affirming the lower court, the Supreme Judicial Court held that the plaintiff failed to produce sufficient evidence of emotional distress at the time of the negligent act to support her claim.²⁸ Despite a psychiatrist's testimony attributing the plaintiff's deteriorating mental and physical condition to her witnessing the defendant's negligence, the Court found that the manifestation of this injury did not occur until two months later and thus did not follow "closely on the heels" of the negligent act as required by *Dziokonski* and *Ferriter*.²⁹

The Supreme Judicial Court again refused to expand the scope of recovery for the negligent infliction of emotional distress in the

²⁴ *Id.* at 518, 413 N.E.2d at 697.

²⁵ *Id.* at 518-19, 413 N.E.2d at 697.

²⁶ 387 Mass. 783, 784-85, 443 N.E.2d 1302, 1303-04 (1982). The doctor's alleged negligence began when he discharged the plaintiff from a hospital stay informing her she was only seven months pregnant. *Id.* at 784, 443 N.E.2d at 1303. One week later she was readmitted to the hospital and gave birth to a full-term baby, despite the defendant's repeated contention that she was only in her seventh month. *Id.*

The Court elaborated on the facts of the defendant's alleged negligence during the birth of the child. The plaintiff saw her child soon after birth:

His body was a gray-blue color. [The plaintiff] watched Dr. Tabor hand [the child] to a nurse and instruct her to "snap" the baby's feet and to give it oxygen. The mother saw Dr. Tabor listen to the baby's heartbeat with a stethoscope and then walk away. He said to [the plaintiff], "It doesn't look good, I can't hear a heartbeat." Dr. Tabor then stayed on the opposite side of the delivery room from the baby for about ten minutes.

Id. at 784-85, 443 N.E.2d at 1303.

Expert testimony was offered indicating that the defendant's procedures were not in accordance with proper medical standards. *Id.* at 785, 443 N.E.2d at 1303. After undergoing extensive treatment, the baby died two months later. *Id.*

²⁷ *Id.* at 787-88, 443 N.E.2d at 1305.

²⁸ *Id.* at 788, 443 N.E.2d at 1305.

²⁹ *Id.* at 788-89, 443 N.E.2d at 1305-06.

1983 decision of *Cohen v. McDonnell Douglas Corp.*³⁰ In *Cohen*, a mother learned of the death of one of her sons in an airplane accident through a telephone call from her other son seven hours after the accident occurred.³¹ This news so shocked her that she died two days later of a heart attack.³² Her estate brought a suit alleging that the woman's emotional distress and subsequent death directly resulted from the defendant's negligence.³³ The Court found that, because the plaintiff failed to discover her son's death until seven hours after it occurred, her injuries did not result from an actual sensory impression of her son's injuries.³⁴ Applying the *Dziokonski* principles, the Court precluded liability as a matter of law.³⁵

During the *Selected Developments* year, the Supreme Judicial Court again narrowed the possible scope of liability for the negligent infliction of emotional distress. In the 1987 case of *Stockdale v. Bird & Son, Inc.* the plaintiff brought an action against her son's employer for emotional distress that resulted from her son's death in a work-related industrial accident.³⁶ The plaintiff first became aware of her son's death when the police called her four hours after the accident occurred.³⁷ Following the telephone call, the first physical manifestations of her emotional distress began to appear.³⁸ The following day, approximately twenty-four hours later, the plaintiff viewed the body of her son at a funeral home and became physically ill at the sight.³⁹ Thereafter, the plaintiff suffered from a variety of mental and physical ailments for some time.⁴⁰

³⁰ 389 Mass. 327, 450 N.E.2d 581 (1983).

³¹ *Id.* at 329-30, 450 N.E.2d at 583.

³² *Id.* at 330, 450 N.E.2d at 583.

³³ *Id.* at 328, 450 N.E.2d at 582.

³⁴ *Id.* at 341-43, 450 N.E.2d at 589-90.

³⁵ *Id.* The Court stated:

We are aware of no case where a court has imposed liability where the plaintiff was located a substantial distance from the scene of the accident and did not observe either the scene of the accident or the injuries inflicted on the victim . . . [T]he injury to Nellie Cohen did not result from a sensory perception of the injuries caused to her son or the injury producing event. Thus, the emotional distress which she suffered is more akin to the anguish that any person feels after being informed of death or injury to a loved one than it is to the distress, which we have deemed compensable, that involves firsthand observation of a defendant's negligence or the consequence thereof.

Id. at 342-43, 450 N.E.2d at 589-90.

³⁶ 399 Mass. 249, 249-50, 503 N.E.2d 951, 952 (1987).

³⁷ *Id.* at 251, 503 N.E.2d at 953.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

The Supreme Judicial Court affirmed the defendant's motion for summary judgment on the issue of liability for negligent infliction of emotional distress.⁴¹ The Court found that, because the plaintiff learned of her son's death several hours after the accident and never actually observed the injuries until twenty-four hours later, the employer's negligence did not proximately cause the plaintiff's injuries.⁴² The Court stated that the case before it resembled its decisions in *Miles* and *Cohen* rather than those in *Dziokonski* and *Ferriter*, and on that basis affirmed the trial court's grant of summary judgment for the defendant.⁴³

Aside from an initial extension in the *Ferriter* case, the Supreme Judicial Court has limited the standard for recovery for negligent infliction of emotional distress. As first set out in *Dziokonski*, the Court determined that the analysis for determining recovery under this theory consists of a reasonable foreseeability standard.⁴⁴ Thus, the imposition of liability would depend on weighing the particular facts of an individual case to determine if the harm complained of was a reasonably foreseeable consequence of the defendant's negligence.⁴⁵ This analysis, the Court noted, would bring the definition of the scope of duty in this area of the law more in line with general tort principles.⁴⁶

The subsequent history of the standard enunciated in *Dziokonski* paints a picture of a Court struggling to define the precise limits of this newly accepted doctrine. Initially the Supreme Judicial Court moved to expand these limits. In *Ferriter* the Court extended the scope of negligent infliction of emotional distress to plaintiffs who never witness the defendant's negligence but come upon their injured family member in the hospital.⁴⁷ The Court included such an injury within the scope of reasonable foreseeability as set out in *Dziokonski*.⁴⁸

⁴¹ *Id.* at 251, 503 N.E.2d at 952-53.

⁴² *Id.* at 252, 503 N.E.2d at 953-54.

⁴³ *Id.*

⁴⁴ *Dziokonski v. Babineau*, 375 Mass. 555, 567, 380 N.E.2d 1295, 1301-02 (1978).

⁴⁵ *Id.* at 568, 380 N.E.2d at 1302. Once a substantial injury is shown and the question of causation is answered, the Court indicated that the weighing process is to involve factors "such as where, when, and how the injury, to the third person entered into the consciousness of the claimant, and what degree there was of familial or other relationship between the claimant and the third person." *Id.*

⁴⁶ *Id.* at 567, 380 N.E.2d at 1301-02.

⁴⁷ *Ferriter v. Daniel O'Connell's Sons, Inc.*, 381 Mass. 507, 518, 413 N.E.2d 690, 697 (1980).

⁴⁸ *Id.* at 518-19, 413 N.E.2d at 697.

In more recent years, however, the Court has refrained from expanding recovery under this theory. In *Miles* the Court ruled that because the plaintiff's emotional distress did not manifest itself for two months after the defendant's negligence, there existed insufficient evidence on which to claim negligent infliction of emotional distress.⁴⁹ Similarly, in *Cohen* the Court denied recovery to a woman who learned of the death of her son in an airplane crash seven hours after the fact and neither witnessed the accident nor observed her son's injuries.⁵⁰ In both of these cases the Court ruled that the manner and timing of the plaintiffs' awareness of the negligence and the subsequent manifestation of emotional distress precluded recovery as a matter of law. While the rulings in these two cases did not amount to unexpected interpretations of the reasonable foreseeability standard, they nonetheless failed to clearly establish the outer bounds of recovery under this theory.

Finally, in *Stockdale*, the Court limited the time span allowed between the occasion of the negligence and the plaintiff's first sight of the victim. In both *Dziokonski* and *Ferriter* the Court stated that the latter must follow closely on the heels of the former, but the outer limits of that criteria remained undefined. In *Stockdale* the Court determined that as a matter of law a twenty-four hour time span exceeded a reasonable time limit, thus denying plaintiff's recovery.⁵¹ Although sufficient to dispose of the case before it, the Supreme Judicial Court's decision in *Stockdale* failed to clearly delineate the outermost parameters of the appropriate time interval between the two events sufficient to allow injured plaintiffs a recovery.

After the Court's recent decision in *Stockdale*, the scope of recovery for negligent infliction of emotional distress appears limited to instances where the plaintiff comes upon the victim during the accident or *immediately* thereafter. Although the *Dziokonski* Court's announcement of the reasonable foreseeability standard at first reflected a broad scope of possible recovery under this theory, subsequent cases demonstrate a curtailment of *Dziokonski*'s broad holding. While certainly less restrictive than either the "impact" or "zone of danger" theories of recovery, the reasonable foreseeability stan-

⁴⁹ *Miles v. Edward O. Tabor, M.D., Inc.*, 387 Mass. 783, 788-89, 443 N.E.2d 1302, 1305 (1982).

⁵⁰ *Cohen v. McDonnell Douglas Corp.*, 389 Mass. 327, 342-43, 450 N.E.2d 581, 589-90 (1983).

⁵¹ *Stockdale v. Bird & Son, Inc.*, 399 Mass. 249, 252, 503 N.E.2d 951, 953-54 (1987).

dard is not as broad as its name implies. Rather than focusing on the foreseeability of the plaintiff's distress, this standard instead emphasizes the proximity in time between the negligence and the distress. Such an interpretation will sometimes work to deny recovery for an arguably foreseeable emotionally distressed plaintiff on the basis that the plaintiff was not "fortunate" enough to have learned of the accident within the prescribed time limit. The most difficult question remaining for the plaintiffs who seek to recover under this theory is what exactly is the prescribed time limit. This is a question which has not been answered with any clarity by the Supreme Judicial Court.

C. **Interspousal Immunity and Conversion*

Massachusetts courts have greatly eroded the doctrine of interspousal immunity. Spouses now may bring actions against each other based on contract¹ and may maintain negligence actions against each other.² Additionally, spouses may bring actions in courts with equitable jurisdiction to secure separate property, prevent fraud and coercion, enforce trusts, and establish other conflicting property rights.³ Massachusetts, thus, has limited the scope of the interspousal immunity doctrine to preclude a spouse from maintaining actions for intentional torts against his or her spouse.⁴

During the *Selected Developments* year, the Massachusetts Supreme Judicial Court, in *Garrity v. Garrity*, held that interspousal immunity did not constitute a viable defense to a lawsuit containing claims of fraudulent conveyancing of property, violation of fiduciary duties, and conversion.⁵ The Court declared that courts may "enforce trusts and . . . resolve other conflicting property claims including those between husband and wife."⁶ Although a decision not to bar the lawsuit was proper in this case, the Court's summary

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¹ See MASS. GEN. LAWS ANN. ch. 209, §§ 2, 6 (West 1984).

² See *Lewis v. Lewis*, 370 Mass. 619, 351 N.E.2d 526 (1976) (abolishing interspousal immunity in actions for negligence).

³ See *Gahm v. Gahm*, 243 Mass. 374, 376, 137 N.E. 876, 876 (1923).

⁴ See *Thompson v. Thompson*, 218 U.S. 611 (1910). See also J. NOLAN, TORT LAW, 37 MASS. PRACTICE SERIES § 121, at 189 (1979) ("The Court has not changed the traditional immunity as to intentional torts. The spouses are not permitted to maintain actions for personal torts against each other such as assault and battery, false imprisonment, malicious prosecution, defamation and the like.")

⁵ 399 Mass. 367, 371-72, 504 N.E.2d 617, 620 (1987).

⁶ *Id.* at 372, 504 N.E.2d at 620.

treatment of the law of interspousal immunity and its failure to distinguish between the conversion claim and the other claims reflect a potential misunderstanding of the law. A close review of the case law reveals that the interspousal immunity doctrine, absent sufficient equitable considerations, may apply to the intentional conversion of a spouse's personal property.

In *Garrity*, the plaintiff wife and the defendant husband were the sole stockholders, directors and officers of a closely held corporation.⁷ The wife's complaint alleged that the husband failed to pay her for her services to the corporation as an attorney; used corporate assets and the wife's personal money to purchase rare stamps, postcards, and artifacts; and refused to repay personal loans to the wife.⁸ For relief, the wife sought a conveyance of property from her husband to her, an accounting of the business ventures, and dissolution of the dead-locked corporation.⁹ The plaintiff based her complaint on contract grounds, as well as intentional and negligent tort grounds, including fraud.¹⁰ The defendant asserted the interspousal immunity defense against all but the contract claims and attempted to dismiss the action for lack of subject matter jurisdiction¹¹ and for failure to state a claim on which relief can be granted.¹² The motion judge dismissed the action based on the interspousal immunity defense.¹³

Upon review, the Massachusetts Supreme Judicial Court dismissed the claims for negligent and intentional infliction of emotional distress before reaching the interspousal immunity issue¹⁴ because the complaint failed to allege physical harm and outrageous conduct.¹⁵ The Court held the doctrine inapplicable to claims of fraudulent conveyancing of property, violation of fiduciary duties

⁷ *Id.* at 370, 504 N.E.2d at 619.

⁸ *Id.* at 370-71, 504 N.E.2d at 619.

⁹ *Id.* at 368 n.1, 504 N.E.2d at 618 n.1.

¹⁰ The plaintiff based her complaint on "fraud and deceit, undue influence, conversion, breach of contract, breach of fiduciary duties, negligence, gross negligence, bad faith, conspiracy, intentional and negligent infliction of severe emotional distress, interference with advantageous relationships, unfair competition, interference with prospective advantage and investment opportunities and fraudulent conveyance." *Id.*

¹¹ MASS. R. CIV. P. 12(b)(1); *Garrity*, 399 Mass. at 368, 504 N.E.2d at 619.

¹² MASS. R. CIV. P. 12(b)(6); *Garrity*, 399 Mass. at 368, 504 N.E.2d at 619.

¹³ *Garrity*, 399 Mass. at 368, 504 N.E.2d at 619.

¹⁴ *Id.* at 369, 504 N.E.2d at 619. The Court, however, did mention that the only claims in the complaint to which the doctrine of interspousal immunity applied were based on negligent and intentional infliction of emotional distress. *Id.*

¹⁵ *Id.* at 369-70, 504 N.E.2d at 619.

relating to a trust, and conversion of personal property.¹⁶ Referring to each of the claims, including that of conversion, the Court held the interspousal immunity doctrine inapplicable because "[c]ourts may hear and decide complaints to enforce trusts and to resolve other conflicting property claims including those between husband and wife."¹⁷

Although the Court properly held the doctrine inapplicable to claims involving fraud, the Court erred in including the conversion claim in its holding. The law clearly allows spouses to maintain suits against one another based on contractual claims and actions concerning fraud and the enforcement of trusts.¹⁸ The Court, however, should have accorded separate treatment to the conversion claim. Little direct support exists in the case law, absent sufficient equitable considerations,¹⁹ such as the existence of fraud, for holding the defense of interspousal immunity inapplicable to the intentional tort of conversion. Interspousal immunity should not apply to the conversion claim in this case, however, because it arose out of circumstances that were equitable in nature, in essence, the fraudulent dealings of the husband. Although the Court achieved this *result*, its analysis lacked precision and should have set out the foregoing explanation.

First, the case law reveals that interspousal immunity still applies to the intentional tort of conversion. Neither the Massachusetts legislature nor the Massachusetts judiciary has yet altered the traditional grant of interspousal immunity that the 1910 United States Supreme Court case of *Thompson v. Thompson* maintained for intentional torts.²⁰ The *Thompson* opinion clearly demonstrates that conversion of a spouse's personal property comes within the immunity's protection. The *Thompson* Court, although reviewing an assault and battery claim,²¹ declared that the immunity extends to claims con-

¹⁶ *Id.* at 371-72, 504 N.E.2d at 620. The Court affirmed the motion judge's dismissal of the complaint on the ground that the complaint failed to set forth "a short and plain statement of the claim showing that the pleader is entitled to relief." *Id.* The Court permitted the plaintiff to file an amended complaint. *Id.*

¹⁷ *Id.* at 372, 504 N.E.2d at 620.

¹⁸ See *supra* notes 1 and 3.

¹⁹ See *infra* notes 33-36 and accompanying text.

²⁰ 218 U.S. 611, 617, 619 (1910). See J. NOLAN, DOMESTIC RELATIONS, MASS. PRACTICE SERIES § 121, at 189 (1979) ("The Court has not changed the traditional immunity as to intentional torts. The spouses are not permitted to maintain actions for personal torts against each other such as assault and battery, false imprisonment, malicious prosecution, defamation and the like.").

²¹ *Thompson*, 218 U.S. at 614.

cerning injuries to personal property, as well as to injuries to the person: it applies to "complaints for assault, slander and libel, and alleged injuries to *property* of the one or the other" ²² The Court reasoned that if the law sanctioned interspousal intentional tort claims, then litigants would burden the courts with frivolous domestic disputes. ²³ The Court maintained that spouses could not bring such suits against one another "as though they were strangers." ²⁴

Although the Supreme Judicial Court in the 1976 case of *Lewis v. Lewis* swept away the traditional arguments in favor of the immunity — disruption of familial peace and harmony and the fear of insurance fraud — the Court limited its holding to claims arising out of motor vehicle accidents, and did not alter the application of the doctrine to intentional torts. ²⁵ The Court so limited its holding because "[c]onduct, tortious between two strangers, may not be tortious between spouses because of the mutual concessions implied in the marital relationship." ²⁶ Although in the 1980 case of *Brown v. Brown* the Court extended *Lewis* to cover negligence suits for personal injuries not arising out of motor vehicle accidents, ²⁷ the Court has not yet lifted the immunity as to intentional torts.

The *Garrity* Court stated that spouses may sue one another to enforce trusts and to settle "other conflicting property claims." ²⁸ It follows that the Court understood the conversion claim to fall within the scope of such property claims. A reading of *Baxt v. Baxt* ²⁹ and *Lombard v. Morse*, ³⁰ the cases upon which the Court relies, reveals that early courts did not lift the immunity for the sake of property interests alone, but, rather, allowed suits between spouses when circumstances raised substantial equitable considerations.

In *Baxt*, the Supreme Judicial Court permitted the plaintiff to sue her husband to enforce a trust containing the plaintiff's employment earnings. ³¹ Although this case supports the *Garrity* Court's holding concerning the claim alleging fiduciary duty violations re-

²² *Id.* at 618. (emphasis added).

²³ *Id.*

²⁴ *Id.*

²⁵ *Lewis v. Lewis*, 370 Mass. 619, 630, 351 N.E.2d 526, 532 (1976).

²⁶ *Id.*

²⁷ 381 Mass. 231, 232-33, 409 N.E.2d 717, 718-19 (1980).

²⁸ 399 Mass. 367, 372, 504 N.E.2d at 620 (1987).

²⁹ 320 Mass. 762, 70 N.E.2d 799 (1946).

³⁰ 155 Mass. 136, 29 N.E. 205 (1891).

³¹ 320 Mass. at 762, 70 N.E.2d at 800.

lating to a trust, it does not support the removal of immunity as to claims for conversion of property. In dicta, the *Baxt* Court noted that the immunity did not apply to the establishment of "other conflicting rights concerning property."³² That conversion necessarily falls within such conflicting rights, however, is not evident.

The *Baxt* Court cited to the 1923 case of *Gahm v. Gahm*³³ for support for its proposition. The Supreme Judicial Court in *Gahm* held that spouses may acquire jurisdiction in equity "to secure [the wife] separate property, to prevent fraud, to relieve from coercion, to enforce trusts and establish other conflicting rights concerning property."³⁴ The Court stressed the importance attached to the absence of equitable considerations and held that the immunity applied.³⁵ Similarly, discussion of equitable considerations permeated the Supreme Judicial Court's decision in the *Lombard* case. In *Lombard*, however, sufficient equitable considerations existed — fraud — that prompted the Court to lift the immunity. In that case, the plaintiff husband sued to recover property that he had conveyed to his wife through his wife's alleged fraud before marriage.³⁶ Thus, to assume that *any* conflicting property interest, absent equitable considerations, necessarily falls outside the immunity is to take a judicial step beyond the holdings of *Gahm*, *Baxt* and *Lombard*.

Whether interspousal immunity should bar claims for conversion of personal property remains a question that the courts must answer by determining the extent to which the courts ought to apply the policy considerations discussed in *Lewis*³⁷ to the intentional tort of conversion. The *Garrity* Court failed to address this issue properly. Although immunity should not shield the conversion claim in the present case because of the surrounding "equitable considerations," the Court's analysis does not reflect this reasoning. Consequently, the holding in *Garrity* leaves the door open for zealous attorneys to argue against application of the interspousal immunity doctrine to conversion claims that lack sufficient equitable considerations. The doctrine should become further limited as a result of careful judicial scrutiny, rather than by the *Garrity* Court's cursory treatment of the issue.

³² *Id.*

³³ 243 Mass. 374, 376, 137 N.E. at 876 (1923).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Lombard v. Lombard*, 155 Mass. 136, 140, 29 N.E. 205, 205 (1981).

³⁷ See *supra* notes 25 and 26 and accompanying text.

D. *Current Trends In Defamation Law

The United States Supreme Court made clear in the landmark case of *New York Times Co. v. Sullivan* its intention to protect the media from the chilling effect of defamation suits where the media makes a good faith attempt to cover events and persons of public interest.¹ In *New York Times*, the Court held that the Constitution required the public officer plaintiff to establish by "convincing clarity" that the defendant newspaper acted with "actual malice."² The application of this standard to the media, although somewhat effective in limiting the number of suits brought, did not allay judicial concerns about the effect of defamation suits upon editorial policy.³ In order to further the policy of protecting the media's constitutional right to report newsworthy events, courts have attempted to clarify the use of summary judgment and conditional privileges in defamation cases involving the media.⁴

During the *Selected Developments* year, the Massachusetts Supreme Judicial Court in *King v. The Globe Newspaper Co.* and *Jones v. Taibbi*, helped define the roles of both summary judgment and conditional privileges in media defamation cases.⁵ In *King*, the Court did not grant the defendant publication's motion for summary judgment.⁶ The Court found that the political plaintiff met the burden of proving that a jury could find clear and convincing evidence of defendant's malice.⁷ The *King* Court, however, used a test that generally promotes the use of summary judgment in defamation cases. In *Jones*, the Supreme Judicial Court held that the "fair report" privilege protected media coverage of an arrest, but would not similarly protect the publication of unofficial statements of police or others which directly or indirectly relate to a criminal investigation.⁸ The *Jones* decision thus defined some limitations on

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¹ *New York Times Co. v. Sullivan*, 376 U.S. 254, 277-79 (1968); Louis, *Summary Judgment and the Actual Malice Controversy in Constitutional Defamation Cases*, 57 S. CAL. L. REV. 707 (1984) [hereinafter *Actual Malice*].

² *New York Times*, 376 U.S. at 285-86.

³ *Actual Malice*, *supra* note 1, at 708.

⁴ See *infra* notes 11-53 and accompanying text for a discussion of the defamation cases in which the Massachusetts Supreme Judicial Court clarified the use of summary judgment and conditional privileges.

⁵ *King v. The Globe Newspaper Co.*, 400 Mass. 705, 512 N.E.2d 241 (1987); *Jones v. Taibbi*, 400 Mass. 786, 512 N.E.2d 260 (1987).

⁶ *King*, 400 Mass. at 722, 512 N.E.2d at 251.

⁷ *Id.*

⁸ *Jones*, 400 Mass. at 794-98, 512 N.E.2d at 266-67.

privileges granted to the news media's coverage of newsworthy events.⁹ *King* and *Jones* help to define the important relationship between news coverage, which promotes open robust discussion, and the need to protect the rights of individuals. Helping to clarify the boundaries to this delicate relationship may deter future suits. This is crucial because the very threat of a defamation suit may have a chilling effect on the media due to high litigation costs.¹⁰

1. Summary Judgment in Defamation Actions: *King v. Boston Globe Newspaper Co.*

The United States Supreme Court's decision, in *Celotex Corp. v. Catrett*, will help protect the media from defamation suits.¹¹ In *Celotex*, the Supreme Court decided that a defendant moving for summary judgment need not produce evidence which negates the plaintiff's claim.¹² The defendant merely must indicate in his or her motion that the plaintiff failed to establish an element essential to the plaintiff's case.¹³ This test removes a significant burden from the defendant and thus increases the likelihood that a court will grant summary judgment.¹⁴ Consequently, this test will aid motions for summary judgment by media defendants.

Although not binding on the Massachusetts Supreme Judicial Court, *Celotex* did influence the Massachusetts high court. In *King*, former governor Edward King argued that *The Boston Globe* defamed him by the publication of a series of cartoons and articles.¹⁵ The lower court granted *The Globe's* motion for summary judgment on all claims.¹⁶ The court found all but one of the written pieces constitutionally protected expressions of opinion.¹⁷ Although the court held that one article was a statement of fact and not a protected opinion, the court held that the statement failed to rise to the level of defamation.¹⁸

⁹ *Id.*

¹⁰ *Actual Malice*, 57 S. CAL. L. REV. at 708.

¹¹ 477 U.S. 317 (1986).

¹² *Id.* at 322-23.

¹³ *Id.*

¹⁴ See generally *Actual Malice*, *supra* note 1, at 714-18.

¹⁵ *King v. The Globe Newspaper Co.*, 400 Mass. 705, 706-07, 512 N.E.2d 241, 242-43 (1987).

¹⁶ *Id.* at 707, 512 N.E.2d at 243. The motion for summary judgment was originally denied by a judge in the Superior Court. Two years later, the court granted the judgment noted within the text. *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

The *King* Court noted that the lower court improperly granted summary judgment regarding the fact statement because there was a genuine issue of fact as to whether the article's author acted with actual malice.¹⁹ In making this determination, the *King* Court applied a summary judgment test which placed a large burden on the plaintiff (the party opposing the motion), while also giving notice that it might reduce the defendant's burden of producing evidence for its motion.²⁰

The Massachusetts Rules of Civil Procedure govern summary judgment procedures and mandate that a court grant summary judgment only where no issue of material fact exists.²¹ The Supreme Judicial Court requires that the plaintiff in opposing a motion of summary judgment meet the substantive evidentiary standard of proof applicable at trial.²² Thus, the *King* Court required King to produce material from which a jury could infer the existence of clear and convincing evidence of actual malice.²³ The Court found, however, that King satisfied this heavy burden of proof and therefore denied summary judgment, remanding the case to the superior court.²⁴

The Supreme Judicial Court went further in protecting the news media by intimating that it might adopt the *Celotex* standard, which would ease the proof required to obtain summary judgment.²⁵ Under current law, Massachusetts courts require a defendant moving for summary judgment to produce evidence to show that no genuine issue exists as to any material fact.²⁶ A defendant

¹⁹ *Id.* at 718-22, 512 N.E.2d at 249-51. The lower court did not reach this issue because they decided that the statement was not susceptible to a defamatory meaning. *Id.*

²⁰ *Id.* at 719, 512 N.E.2d at 249.

²¹ Mass. R. Civ. P. § 56(c) states in pertinent part: "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact. . . ."

²² See, e.g., *King*, 400 Mass. at 719, 512 N.E.2d at 249; *Godbout v. Cousens*, 396 Mass. 254, 258-59, 485 N.E.2d 940, 943 (1985). See also *New York Times Co. v. Sullivan*, 376 U.S. 254, 277-79 (1968). The Supreme Court required plaintiff to prove at trial, with convincing clarity, that the media acted with actual malice. *Id.*

²³ *King*, 400 Mass. at 719-22, 512 N.E.2d at 249-51.

²⁴ *Id.* at 722, 512 N.E.2d at 251.

²⁵ *Id.* at 719, 512 N.E.2d at 249. See also *Jones v. Taibbi*, 400 Mass. 786, 805 n.3, 512 N.E.2d 260, 272 n.3 (1987) (Abrams, J., concurring). In referring to the new rule, Justice Abrams noted: "I believe that in ruling on the defendant's motion for summary judgment, the judge should . . . place on the plaintiff a somewhat greater burden because the plaintiff has the burden of proof on the issue of fault and opposes the motion. *Id.*"

²⁶ *Nat'l Ass'n of Gov't Employees, Inc. v. Central Broadcasting Corp.*, 379 Mass. 220, 231, 396 N.E.2d 996, 1003 (1979) (Court noted that "the defendant was required to establish that on the evidence brought forward" there was no genuine issue as to a material fact.)

may not simply move for summary judgment, but must produce evidence, usually in the form of affidavits, negating the plaintiff's claim and indicating that no genuine issue exists as to a material fact.²⁷

The *King* Court, in deciding whether the *Boston Globe* met their burden of proving the articles were written without malice, discussed both the Massachusetts test and the recent Supreme Court test.²⁸ Under the *Celotex* test, *The Boston Globe* need only state that the plaintiff did not prove malice.²⁹ The Court concluded, however, that even if it required *The Globe* to meet this lighter burden, the material before the judge in this case demonstrated that a jury could conclude that clear and convincing evidence of actual malice existed.³⁰ Although the *King* Court discussed the *Celotex* test, the Court did not adopt it.³¹ The Court's discussion, and its comments in recent cases indicate that it may soon adopt this test.³²

Thus, although it denied summary judgment, the burden the Supreme Judicial Court required of both parties in *King* procedurally favors the use of summary judgment for media coverage of public events or figures. If the court adopts the *Celotex* standard, summary judgment will become even easier for a defendant such as the *Boston Globe*. The *King* case is therefore in keeping with the general trend of protecting the media from the chilling effects of defamation suits.³³

2. Fair Report Privilege: *Jones v. Taibbi*

In *Jones v. Taibbi*, the Supreme Judicial Court defined the use of the "fair report" privilege afforded the media in their coverage of public events.³⁴ The fair report privilege is a product of the common law and originally protected the publishing of "reports of judicial, legislature, or other official proceedings."³⁵ Currently, the Restatement (Second) of Torts defines the rule to include the re-

²⁷ *Id.* at 231, 396 N.E.2d at 1003.

²⁸ *King v. The Globe Newspaper Co.*, 400 Mass. 705, 719, 512 N.E.2d 241, 249 (1987).

²⁹ *Id.*

³⁰ *Id.* at 719-22, 512 N.E.2d at 249-51.

³¹ *Id.* at 719, 512 N.E.2d at 249. The Court noted that "even applying" the *Celotex Corp.* standard, the defendant did not meet the summary judgment burden. *Id.* The Court went no further in adopting the *Celotex* test than the "even applying" language. *Id.*

³² See *supra* note 25.

³³ *Actual Malice*, *supra* note 1, at 709-10.

³⁴ *Jones v. Taibbi*, 400 Mass. 786, 512 N.E.2d 260 (1987).

³⁵ *Id.* at 794, 512 N.E.2d at 266.

porting of official actions or proceedings or of meetings open to the public.³⁶ The Court in *Jones* used the Restatement's formulation of the privilege to support its holding.³⁷

In *Jones*, the defendant news station reported on a police investigation which culminated in the arrest of the plaintiff, who was later released uncharged.³⁸ Among other claims, the plaintiff alleged that the defendant inaccurately stated that the police had charged him with murder.³⁹ The plaintiff also argued that the defendant's use of statements made by witnesses and by police reporting witnesses' statements were defamatory.⁴⁰ The defendant argued that the reporting of all these statements fell within the fair report privilege and therefore, the court should grant its motion for summary judgment.⁴¹

The Supreme Judicial Court adopted the Restatement view in holding that the fair report privilege encompassed the defendant's erroneous report of the arrest.⁴² The Court held that a substantially accurate report of an official arrest receives protection.⁴³ Although the police had charged the plaintiff, as the defendant had stated, the Court held that the overall report of the plaintiff's arrest was "not substantially inaccurate."⁴⁴ Utilizing a test under which a report of an official arrest is privileged if it is not "substantially inaccurate" gives much discretion to the media's coverage of such events.

The *Jones* Court further defined the fair report privilege by holding that unofficial statements made by police fall outside the scope of the privilege.⁴⁵ The Court held that statements which the defendants received from the police and republished are only privileged if the police statements are considered official.⁴⁶ The Court did not, however, define what type of statements are "official," and held that it lacked sufficient evidence to decide if these particular statements were official.⁴⁷ Justice Abrams, in her concurring opinion, noted that the developing law suggested that statements made

³⁶ RESTATEMENT (SECOND) OF TORTS § 611 (1977).

³⁷ *Jones*, 400 Mass. at 794-97, 512 N.E.2d at 266-67.

³⁸ *Id.* at 787-88, 512 N.E.2d at 262.

³⁹ *Id.* at 792-93, 512 N.E.2d at 265.

⁴⁰ *Id.*

⁴¹ *Id.* at 794-95, 512 N.E.2d at 266-67.

⁴² *Id.* at 795-96, 512 N.E.2d at 266-67.

⁴³ *Id.*

⁴⁴ *Id.* at 795, 512 N.E.2d at 266.

⁴⁵ *Jones*, 400 Mass. at 796, 512 N.E.2d at 267.

⁴⁶ *Id.* at 796-97, 512 N.E.2d at 267.

⁴⁷ *Id.* at 802, 512 N.E.2d at 270.

by officials at a press conference which relate to an investigation leading to a subsequent arrest constitute official statements.⁴⁸ Thus, the Court noted that the statements presented in *Jones* might receive protection if made at a press conference.⁴⁹ Finally, the Court decided that the defendant's publication of the witnesses' own views clearly exceeded the privilege because such witnesses are unofficial sources.⁵⁰

The *Jones* Court's ruling that unofficial police reports fall outside the scope of the fair report privilege helped to clarify the scope of the protections afforded to the media's coverage of news events. The issue as to what constitutes an official statement must still be resolved. If the Court adopts Justice Abrams' view concerning statements made at press conferences, the Court will need to define the parameters of the term "press conference." Additionally, the Court stretched the Restatement's definition of the fair and accurate reporting requirement to a less demanding standard of "not substantially inaccurate."⁵¹ This change may significantly ease the burden faced by the media in their coverage of public events.

Ensuring the robust discussion of events necessitates the need to protect the media's coverage of events. The news media has faced more suits and have had to pay more damages in this decade than in the past.⁵² Because of this increase in litigation, courts must make clear the burdens of proof required of each party in a summary judgment hearing. During this *Selected Developments* year, the Supreme Judicial Court addressed the important issue of summary judgment and conditional privileges in defamation litigation.⁵³

The Supreme Judicial Court's holding in *King*, including the intimation that the court may apply the *Celotex* standard, greatly adds to the protection afforded the media's coverage of public events. The court's holding in *Jones* helped to define when the media falls within the "fair report" privilege. The court, however, must further clarify the parameters of this privilege. Thus, although

⁴⁸ *Id.* at 803-04, 512 N.E.2d at 271 (Abrams, J., concurring). Justice Abrams noted that "the developing law appears to be that statements made at a press conference by law enforcement officials relating to an arrest and the investigations forming the basis of the arrest should be considered official statements and therefore should fall within the fair report privilege." *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 797, 802, 512 N.E.2d at 267, 270.

⁵¹ *Id.* at 795, 512 N.E.2d at 266.

⁵² N.Y. Times, March 11, 1988, at L-11, *The Law, The Verdict is Libel, and the Trend is Up*.

⁵³ *Jones v. Taibbi*, 400 Mass 786, 512 N.E.2d 260 (1987); *King v. Boston Newspaper Co.*, 400 Mass. 705, 512 N.E.2d 241 (1987).

these cases shed some light on this important area there are many questions left unanswered. The trend towards a liberal use of summary judgment as well as the use of conditional privileges to protect the media will likely continue.

E. **Recent Developments in Strict Liability and Products Liability Actions*

In the Commonwealth of Massachusetts, actions commenced under the rubric of strict/products liability usually originate via a statutory cause of action.¹ Unlike many jurisdictions that follow the strict tort liability approach of the Restatement (Second) of Torts, Section 402A,² Massachusetts follows the breach of implied warranty of merchantability approach in products liability actions.³ Al-

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¹ See, e.g., MASS. GEN. LAWS ANN. ch. 106, § 2-314 (West 1958) (goods sold by a merchant carry an implied warranty of merchantability if the seller is a merchant with respect to goods of that kind); MASS. GEN. LAWS ANN. ch. 106, § 2-318 (West Supp. 1988) (legislature abolished requirement of privity in breach of warranty action); MASS. GEN. LAWS ANN. ch. 106, § 2-318 (West Supp. 1988) (suppliers of goods cannot limit the operation of 2-318 by contract); MASS. GEN. LAWS ANN. ch. 106, § 2-316A (West Supp. 1988) (merchants may not disclaim the implied warranty of merchantability). See also MASS. GEN. LAWS ANN. ch. 111, § 199 (West Supp. 1988) (imposes liability on a landlord for failure to remove lead-based paint chips from a premises accessible to children under six years of age).

² See SHAPIRO, THE LAW OF PRODUCTS LIABILITY ¶ 7.02[2] (1987). Restatement (Second) Section 402A, demonstrating the strict tort liability theory in products liability actions, reads in pertinent part:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
 (a) the seller is engaged in the business of selling such a product, and
 (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his [her] product, and
 (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1965).

Many jurisdictions follow the strict tort liability approach of the Restatement. See, e.g., *Morningstar v. Black & Decker Mfg. Co.*, 162 W. Va. 857, 253 S.E.2d 666 (1979) (court adopted Restatement (Second) § 402A approach); *Temple v. Wean United Inc.*, 50 Ohio St.2d 317, 364 N.E.2d 267 (1977) (adopted Restatement (Second) § 402A); *Phipps v. General Motors Corp.*, 278 Md. 337, 363 A.2d 955 (1976) (adopted Restatement (Second) § 402A); *Zaleskie v. Joyce*, 333 A.2d 110 (Vt. 1975) (adopted Restatement (Second) § 402A); *Heavner v. Uniroyal, Inc.*, 63 N.J. 130, 305 A.2d 412 (1973) (follows strict tort liability approach); *Codling v. Paglia*, 32 N.Y.2d 330, 345 N.Y.S.2d 461, 298 N.E.2d 622 (1973) (follows the strict tort liability approach).

³ See *Back v. Wickes*, 375 Mass. 633, 639, 378 N.E.2d 964, 968 (1978).

though this theory of recovery differs superficially from the approach utilized in other jurisdictions, the Massachusetts approach is "nearly congruent" in most respects with jurisdictions following the more modern strict tort liability approach embodied by Section 402A.⁴

During the *Selected Developments* year of 1987, decisions in the Commonwealth of Massachusetts have clarified and extended the law in strict/products liability actions.⁵ In a products liability case, the Court of Appeals for the First Circuit upheld a jury's verdict allowing an injured plaintiff to recover notwithstanding the plaintiff's failure to produce evidence on two of the five factors essential to a jury's determination of a design defect.⁶ In an action alleging a breach of the implied warranty of merchantability, the Massachusetts Appeals Court held that the plaintiff must demonstrate that the defect created a condition unreasonably dangerous to the user or consumer in order to surmount the proximate cause hurdle.⁷ If the defect only indirectly triggered the injury, the plaintiff will probably be denied recovery.⁸ Finally, the Supreme Judicial Court imposed strict liability on a landlord who failed to comply with the statutory command to remove lead-based paint from premises in which the paint was accessible to children under six years of age, notwithstanding the landlord's ignorance of the dangerous condition.⁹

⁴ *Id.* at 640, 378 N.E.2d at 969.

⁵ See *Marchant v. Dayton Tire & Rubber Co.*, 836 F.2d 695 (1st Cir. 1988); *Barry v. Stop & Shop Cos.*, 24 Mass. App. Ct. 224, 507 N.E.2d 1062 (1987); *Bencosme v. Kokoras*, 400 Mass. 40, 507 N.E.2d 748 (1987).

In addition to these cases addressing substantive issues, the Supreme Judicial Court delivered a decision affecting procedural issues associated with an action based on the breach of the implied warranty of merchantability. In *Goulet v. Whitin Machine Works, Inc.*, 399 Mass. 547, 506 N.E.2d 95 (1987), the Court held that the plaintiffs' claim alleging negligent design on behalf of the manufacturer was broad enough to encompass the less rigorous breach of implied warranty of merchantability claim. *Id.* at 550-51, 506 N.E.2d at 98. The Court noted that the trial judge erred in denying the plaintiffs' leave to amend their complaint to add the breach of warranty count because the allegation of negligent design framed in the pleadings implicitly alleged a breach of implied warranty of merchantability and, therefore, the addition of the warranty claim to the complaint would be only a mere formality. *Id.* at 551, 506 N.E.2d at 98. Given the liberal policy towards allowing plaintiffs' leave to amend their complaints, the Court held that the motion judge improperly denied the plaintiffs' request to amend their complaint to encompass the breach of implied warranty of merchantability claims. *Id.* at 551-52, 506 N.E.2d at 98-99.

⁶ See *Marchant v. Dayton Tire & Rubber Co.*, 836 F.2d 695, 699-700 (1st Cir. 1988).

⁷ *Barry v. Stop & Shop Cos.*, 24 Mass. App. Ct. 224, 507 N.E.2d 1062 (1987).

⁸ See *id.* at 226-28, 507 N.E.2d at 1063-64.

⁹ *Bencosme v. Kokoras*, 400 Mass. 40, 507 N.E.2d 748, 749 (1987).

1. Plaintiff's Burden of Proof in a Products Liability Action:

Marchant v. Dayton Tire & Rubber Co.

In the 1988 case of *Marchant v. Dayton Tire & Rubber Co.*,¹⁰ argued during the *Selected Developments* year, the Court of Appeals for the First Circuit addressed the issue of the plaintiff's burden of proof in maintaining a successful products liability action.¹¹ The court applied Massachusetts law and held that the plaintiff's failure to introduce evidence on the feasibility and costs of an alternative design did not bar the plaintiff's right to recover for his injuries.¹² The circuit court clarified an earlier Supreme Judicial Court decision delineating the types of evidence that plaintiffs may submit in proving a design defect.¹³ The court interpreted the earlier decision as demonstrating the types of evidence that plaintiffs *may* submit in actions based on design defects, rather than conditioning the plaintiff's recovery on producing enough evidence to satisfy each "requirement."¹⁴

The *Marchant* plaintiff, an employee of J & P Trucking Company, had been seriously injured when a tire he was replacing exploded while he was inflating it.¹⁵ Commencing a breach of warranty products liability action against the tire manufacturer, the plaintiff claimed that an alleged design defect in the "bead" of the tire triggered the explosion.¹⁶ In challenging the design of the bead, the plaintiff introduced evidence of an alternative design used by Michelin, a French manufacturer, that would have enhanced the tire's strength.¹⁷ Although the plaintiff failed to demonstrate the existence of the Michelin design in 1973, the year of the "faulty" tire's manufacture, the plaintiff did demonstrate the simplicity of the alternative design, suggesting that it had been mechanically feasible prior to its actual development.¹⁸ As an alternative, the plaintiff alleged that the manufacturer failed to properly warn of the maximum air pressure that the tire could withstand before exploding.¹⁹

¹⁰ 836 F.2d 695, 699-700 (1st Cir. 1988).

¹¹ See *id.* at 698-700.

¹² *Id.* at 699-700.

¹³ *Id.*

¹⁴ See *id.*

¹⁵ *Id.* at 697.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 698.

After hearing all of the evidence, the jury delivered a favorable verdict for the plaintiff. The district court, however, granted the defendant's motion for a judgment notwithstanding the verdict because the plaintiff failed to introduce evidence as to the costs and consequences of an alternative design.²⁰ In so ruling, the court applied the earlier Supreme Judicial Court decision in *Back v. Wickes*.²¹ The *Back* decision clarified the essential factors that a jury must consider in reaching a verdict in a products liability action based on design defect.²² According to the *Back* Court, a jury must consider the following five factors: (1) the gravity of the danger posed by the challenged design; (2) the likelihood that such danger would occur; (3) the mechanical feasibility of a safer alternative design; (4) the financial cost of an improved design; (5) the adverse consequences to the product and to the consumer that would result from an alternative design.²³ The district court stated that it granted the judgment notwithstanding the verdict because the plaintiff failed to produce evidence on the last two factors, which comprise the cost/benefit analysis of the jury's decision.²⁴ The district court interpreted *Back v. Wickes* to require a plaintiff to satisfy all five components before a jury could properly find for the plaintiff.²⁵

The Court of Appeals for the First Circuit rejected the district court's grant of judgment notwithstanding the verdict and ordered reinstatement of the jury verdict for the plaintiff.²⁶ In rejecting the action of the district court, the circuit court held that the district court improperly applied the *Back v. Wickes* factors.²⁷ The circuit

²⁰ *Id.* at 698, 699.

²¹ *Id.* at 698-99 (citing *Back v. Wickes*, 375 Mass. 633, 642, 378 N.E.2d 964, 970 (1978)).

²² *Back*, 375 Mass. at 642-43, 378 N.E.2d at 970.

²³ *Id.* at 642, 378 N.E.2d at 970. The Supreme Judicial Court, in *Back*, held that :

In deciding this issue, the jury must weigh competing factors much as they would in determining the fault of the defendant in a negligence case. The inquiry focuses on product characteristics rather than on the defendant's conduct, but the nature of the decision is essentially the same In evaluating the adequacy of a product's design, the jury should consider, among other factors, "the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design."

Id. (citing *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 431, 143 Cal. Rptr. 225, 237, 573 P.2d 443, 455 (1978)).

²⁴ *Marchant*, 836 F.2d at 699.

²⁵ *See id.*

²⁶ *Id.* at 700.

²⁷ *Id.* at 699-700.

court noted that the issue in *Back* involved introducing evidence of trade practices at the time of manufacture of the allegedly defective product in order to demonstrate the existence of a design defect in light of safer alternatives.²⁸ The circuit court, however, held that the plaintiff's failure to address the last two factors delineated in *Back* did not severely undermine the plaintiff's case.²⁹ Instead, these factors, according to the circuit court, demonstrated the types of evidence that injured plaintiffs may introduce in order to prove that a product suffers from a design defect.³⁰ Thus, the circuit court held that the district court improperly interpreted *Back* in requiring the plaintiff to produce evidence on all five factors.³¹

In addition, the circuit court held that the district court's decision conflicted with earlier decisions recognizing the right of a jury to determine the reasonableness of a design based on its own lay understanding.³² In *Smith v. Ariens*³³ and *doCanto v. Ametek, Inc.*,³⁴ the Supreme Judicial Court held that a plaintiff need not always introduce expert testimony in order to prove a design defect.³⁵ In some cases, according to the Court, a jury can properly determine the reasonableness of the design using only its lay knowledge and understanding.³⁶ Thus, given the disposition of the Supreme Judicial Court in these cases, the circuit court held that the plaintiff's failure to introduce evidence as to the feasibility and efficiency of safer alternatives did not undermine the plaintiff's case and invalidate the favorable jury verdict.³⁷

In addressing the issue of the failure of the manufacturer to provide a proper warning, the circuit court held that the plaintiff provided sufficient evidence to support the jury verdict that the manufacturer failed to supply warnings that would adequately guard against foreseeable dangers associated with the use of the product.³⁸ In so ruling, the circuit court again rejected the district court's reasoning that the plaintiff's failure to introduce evidence

²⁸ *Id.*

²⁹ *Id.* at 700.

³⁰ *Id.* at 699-700.

³¹ *See id.*

³² *Id.* at 700.

³³ 375 Mass. 620, 377 N.E.2d 954 (1978).

³⁴ 367 Mass. 776, 328 N.E.2d 873 (1975).

³⁵ *Smith*, 375 Mass. at 625, 377 N.E.2d at 957; *doCanto*, 367 Mass. at 782-83, 328 N.E.2d at 877.

³⁶ *Id.*

³⁷ *See Marchant*, 836 F.2d at 700.

³⁸ *Id.* at 701-02.

focusing on the "trade-offs," or cost/benefit analysis for providing more specific warnings, invalidated the jury's verdict in favor of the plaintiff.³⁹ The circuit court recognized that a lay jury could reasonably determine the adequacy of the warnings despite the lack of evidence as to the costs and benefits of providing more effective warnings to the foreseeable consumer.⁴⁰ As a result, the circuit court held that the evidence introduced at trial supported the jury verdict in favor of the plaintiff on the count based on a failure to warn, and therefore, the court reinstated that verdict imposing liability on the manufacturer.⁴¹

Marchant v. Dayton Tire & Rubber Co. clarifies the state of products liability law in the Commonwealth of Massachusetts. Although earlier cases such as *Back v. Wickes* described the essential considerations in the jurors' deliberation on claims of design defects,⁴² the *Marchant* case demonstrates that these elements do not impose evidentiary requirements on plaintiffs.⁴³ Instead, the *Marchant* court recognized that the deliberation process is more complex and involves a balancing of the five factors in order to resolve the issues as to the design defect.⁴⁴ *Marchant* further suggests that, in balancing these factors, a jury may rely on its own lay knowledge in order to determine if a product had been defectively designed.⁴⁵ Thus, a strong case presented by a plaintiff ought not be denied recovery simply because the plaintiff has failed to introduce evidence reflecting the feasibility of alternative designs.

Although the *Marchant* case does not introduce new elements into the practice of products liability law, it clarifies the scope of the plaintiff's burden in proving a design defect.⁴⁶ *Marchant* reconciles the decisions in *Back v. Wickes* and *Smith v. Ariens* by recognizing the importance of the five factors supporting a design defect, but also noting that a jury, in certain circumstances, can rely on its own lay knowledge to determine if a product has been defectively designed.⁴⁷ *Marchant*, therefore, prevents defendants from applying the *Back* decision so as to preclude a plaintiff's recovery by claiming

³⁹ *Id.* at 701.

⁴⁰ *Id.*

⁴¹ *Id.* at 701-02.

⁴² 375 Mass. 633, 642, 378 N.E.2d 964, 970 (1978).

⁴³ See *Marchant*, at 699-700.

⁴⁴ See *id.*

⁴⁵ See *id.* at 700.

⁴⁶ See *id.* at 699-700.

⁴⁷ See *id.* at 700.

that the five factors presented in *Back* create evidentiary "hurdles" that a plaintiff must clear in order to obtain a favorable jury verdict in a breach of the implied warranty of merchantability action.

2. Unreasonably Dangerous Defects: *Barry v. Stop & Shop Cos.*

Plaintiffs seeking to impose strict liability on retailers or manufacturers for injuries sustained in the course of using a particular product can proceed on at least one of two possible grounds.⁴⁸ One means of establishing liability focuses on a failure to warn a foreseeable consumer of a dangerous condition associated with the use of the product.⁴⁹ The second ground, addressed in a recent Massachusetts Appeals Court decision, involves demonstrating that the manufacturer designed the product defectively, and as a result, the defect created an unreasonably dangerous condition for the consumer.⁵⁰

In the 1987 decision of *Barry v. Stop and Shop Cos.*, the Massachusetts Appeals Court addressed the issue of unreasonably dangerous defects leading to injuries to consumers.⁵¹ The Appeals Court affirmed the trial court's grant of judgment notwithstanding the verdict.⁵² The lower court's ruling denied recovery to a plaintiff who failed to demonstrate that a product's design defect created an unreasonably dangerous condition for the user or consumer when the injuries resulted from the plaintiff's unreasonable actions in attempting to remedy the defect.⁵³ The Appeals Court applied causation principles in holding that the plaintiff's unreasonable response to the design defect proximately caused her injuries.⁵⁴ Thus, the Appeals Court hinged a plaintiff's recovery in a products liability action on proving successfully that the challenged design defect created an unreasonably dangerous condition for the user or consumer.⁵⁵

In *Barry*, the plaintiff sustained injuries as a result of attempting to adjust the curved metal piece on the underside of a lawnmower,

⁴⁸ See *Marchant v. Dayton Tire & Rubber Co.*, 836 F.2d 695, 698 (1st Cir. 1988).

⁴⁹ *Id.*

⁵⁰ See *Barry v. Stop & Shop Cos.*, 24 Mass. App. Ct. 224, 226-27, 507 N.E.2d 1062, 1063-64 (1987).

⁵¹ *Id.*

⁵² *Id.* at 226-27, 230, 507 N.E.2d at 1063-64, 1066.

⁵³ *Id.*

⁵⁴ *Id.* at 228-30, 507 N.E.2d at 1064-66.

⁵⁵ See *id.* at 226-27, 507 N.E.2d 1063-64.

known as the "baffle."⁵⁶ The first few times she attempted to adjust the loose baffle, the plaintiff turned off the lawnmower.⁵⁷ During her last attempt, however, the plaintiff failed to turn off the lawnmower when she reached down to fix the baffle and, as a result, severely injured her hand in the blades of the lawnmower.⁵⁸

In her suit against the retailer, Stop & Shop Companies, and the manufacturer, Wheeling Manufacturing Company, the plaintiff alleged a breach of an implied warranty of merchantability for her injuries arising from the dangerous condition created by the defective baffle.⁵⁹ The plaintiff claimed that an alternative design would have held the baffle in place, precluding the need for her to repeatedly adjust the baffle in the course of using the lawnmower.⁶⁰ Thus, the plaintiff claimed that the defective baffle proximately caused her injuries because, absent the defect, the plaintiff had no reason to reach under the lawnmower.⁶¹

The Appeals Court ruled that the defect in the attachment of the baffle did not create an unreasonably dangerous condition to the user or consumer.⁶² While the baffle may have been defectively attached to the deck of the mower, the court maintained, the plaintiff sustained her injuries not as a direct result of the faulty baffle attachment, but instead, as an indirect result of reaching down to adjust the baffle during the lawnmower's operation.⁶³ The lawnmower itself contained warnings advising users not to place their hands anywhere near the blade.⁶⁴ As a result, the *Barry* court observed that the plaintiff acted unreasonably in confronting a moving blade in light of the warnings,⁶⁵ and therefore, the defect in the attachment of the baffle did not amount to sufficient proximate cause of the plaintiff's injuries to warrant imposing liability on the retailer.⁶⁶

Barry demonstrates that a product can have a defective design, yet still not result in the imposition of liability on the retailer or manufacturer. The key to determining liability when dealing with

⁵⁶ *Id.* at 225, 507 N.E.2d at 1063.

⁵⁷ *Id.*

⁵⁸ *Id.* at 225-26, 507 N.E.2d at 1063.

⁵⁹ *Id.* at 224, 507 N.E.2d at 1062-63.

⁶⁰ *Id.* at 226-27, 507 N.E.2d at 1064.

⁶¹ *Id.* at 229 n.11, 507 N.E.2d at 1065 n.11.

⁶² *Id.* at 227, 507 N.E.2d at 1064.

⁶³ *Id.* at 227, 230, 507 N.E.2d at 1064, 1065-66.

⁶⁴ *Id.* at 227 n.8, 507 N.E.2d at 1064 n.8.

⁶⁵ *Id.* at 230, 507 N.E.2d at 1065-66.

⁶⁶ *Id.* at 229-30, 507 N.E.2d at 1065-66.

design defects lies in the condition created by the defect.⁶⁷ If the design defect creates a condition unreasonably dangerous to the user or consumer, then liability will be imposed. If however, the defect, as in *Barry*, only remotely or indirectly results in injury to the plaintiff, then liability will not be imposed on the retailer or manufacturer. Although the defect may have been the *sine qua non*, or cause in fact of the injury, *Barry* indicates that the plaintiff must prove that the defect, in and of itself, created the dangerous condition to the user or consumer, and not merely that the defect triggered a chain of events culminating in injury to the plaintiff.⁶⁸

Barry recognizes a distinction between reasonable design defects and design defects creating an unreasonably dangerous condition for the user or consumer. By requiring a plaintiff not only to demonstrate the existence of a design defect, but also to prove that the defect itself proximately caused the injuries, the *Barry* court may be allowing the contributory negligence defense to resurface in an inconspicuous fashion. Although contributory negligence fails to bar a plaintiff's recovery in strict liability actions,⁶⁹ theories of causation focusing on the "reasonableness" of design defects provide a viable defense to retailers and manufacturers. Thus, *Barry* presents another example of a court sidestepping the bar to the contributory negligence defense by precluding recovery for plaintiffs acting unreasonably in response to a known product defect.

⁶⁷ See *id.* at 226, 507 N.E.2d at 1063.

⁶⁸ See *id.* at 227, 507 N.E.2d at 1064.

⁶⁹ See *Allen v. Chance Mfg. Co.*, 398 Mass. 32, 494 N.E.2d 1324 (1986) (Supreme Judicial Court applied the assumption of the risk defense by recognizing an "unreasonable use" of a dangerously defective product by a plaintiff who is aware of the defect as a valid defense to a personal injury claim based on an alleged breach of implied warranty of merchantability action); see also *Correia v. Firestone Tire & Rubber Co.*, 388 Mass. 342, 446 N.E.2d 1033 (1983) (Supreme Judicial Court held that contributory negligence is not an available defense in breach of warranty actions based on strict liability).

See also RESTATEMENT (SECOND) OF TORTS § 402A comment n (1965). Comment n to the Restatements (Second) of Torts reads in pertinent part:

n. *Contributory negligence.* Since the liability with which this Section deals is not based upon negligence of the seller, but is strict liability, the rule applied to strict liability cases . . . applies. Contributory negligence of the plaintiff is not a defense when such negligence consists merely of a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.

Id.

3. Strict Liability Developments in Landlord-Tenant Law:

Bencosme v. Kokoras

In addition to developments in products liability, the Massachusetts judiciary has also applied strict liability theories to the evolving relationship between landlords and tenants. In the 1987 decision of *Bencosme v. Kokoras*,⁷⁰ the Supreme Judicial Court interpreted Massachusetts General Laws chapter 111, section 199, to impose strict liability on landlords who fail to remove paint, plaster and other materials accessible to children under six years of age in accordance with section 197.⁷¹ In so ruling, the Court rejected the requirement that the landlord know of the dangerous condition, thus holding landlords strictly liable for injuries caused by those conditions.⁷²

The plaintiffs, two small children under six years of age, had ingested the lead paint chips that the landlord failed to remove from their apartment building in violation of section 197.⁷³ The trial court interpreted section 199 to impose strict liability on the

⁷⁰ 400 Mass. 40, 507 N.E.2d 748 (1987).

⁷¹ *Id.* at 41, 507 N.E.2d at 749. The *Bencosme* Court based its decision on Massachusetts General Laws chapter 111, section 199, which reads in pertinent part:

The owner of any residential property shall be liable for all damages caused by his failure to perform the duties required of him pursuant to subsection (a) of section one hundred and ninety-six or section one hundred and ninety-seven.

The owner of any residential property who is notified of a dangerous level of lead in paint, plaster or other material present upon his premises pursuant to section one hundred and ninety-four, and who does not satisfactorily correct or remove said dangerous conditions shall in addition to the provisions of the preceding paragraph be subject to punitive damages, which shall be treble[triple] the actual damages found.

MASS. GEN. LAWS ANN. ch. 111, § 199 (West 1983), amended by MASS. GEN. LAWS ANN. ch. 111, § 199 (West Supp. 1988). The amended version of section 199 now reads as follows:

[T]he owner of any residential premises shall be liable for all damages caused by his failure to comply with the provisions of subsection (c) of section one hundred and ninety-four A, subsection (a) of section one hundred and ninety-six, or section one hundred and ninety-seven. The owner of any residential premises who is notified of a dangerous level of lead in paint, plaster, soil or other material present upon his premises pursuant to section one hundred and ninety-four, and who does not satisfactorily correct or remove said dangerous conditions shall in addition to the provisions of the preceding paragraph be subject to punitive damages, which shall be treble the actual damages found. *The remedy provided by this section is not exclusive and supplements any existing statutory or common law cause of action. No bank, lending institution, mortgage company or mortgagee, except where such mortgage[e] takes actual possession pursuant to applicable law, shall be liable in any action brought under this section.*

MASS. GEN. LAWS ANN. ch. 111, § 199 (West Supp. 1988) (emphasis added).

⁷² *Bencosme*, 400 Mass. at 43-44, 507 N.E.2d at 750.

⁷³ *Id.* at 42, 507 N.E.2d at 750.

landlord.⁷⁴ Therefore, the court allowed the plaintiffs to recover for their injuries despite the landlord's absence of fault or knowledge of the dangerous condition.⁷⁵

On appeal, the Supreme Judicial Court affirmed the lower court's decision and held that the statute imposes strict liability on landlords for failure to abate the dangerous conditions in areas accessible to children under six years of age.⁷⁶ In so ruling, the Court noted that section 199 imposes greater liability in the form of punitive damages on landlords who have knowledge of the dangerous conditions but fail to abate them.⁷⁷ Because section 199 provided greater compensation in the case of a landlord who knew of the danger, the Court reasoned that the legislature intended to impose strict liability on the landlords for failure to remove lead paint even if those landlords failed to realize that a dangerous condition existed.⁷⁸

Bencosme provides a clear example of judicial interpretation of ambiguous provisions contained in legislative enactments. The Supreme Judicial Court focused on the provisions imposing punitive damages on landlords when they knew of a dangerous condition in order to support its ruling that the general provisions of section 199 impose strict liability on landlords rather than a standard akin to negligence.⁷⁹ Such a determination fits within the scheme of the continually evolving landlord-tenant relationship in which courts have, in more recent years, recognized the gross inequality in the "bargaining" relationship between the landlord and the tenants.⁸⁰ The *Bencosme* case "encourages" landlords to remedy dangerous conditions as soon as practicable by removing the requirement of knowledge, thus eliminating a possible loophole for absentee land-

⁷⁴ See *id.* at 41, 507 N.E.2d at 749-50.

⁷⁵ *Id.*

⁷⁶ *Id.* at 43, 507 N.E.2d at 750.

⁷⁷ *Id.* at 43-44, 507 N.E.2d at 750.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ See *Javins v. First National Realty Co.*, 428 F.2d 1071 (D.C. Cir. 1970) (court rejected common law property principles viewing the landlord-tenant relationship as one based on an interest in land, in holding that the landlord-tenant relationship revolves around a contract that carries an implied warranty of habitability that the premises be fit for dwelling purposes). See also *Berman & Sons, Inc. v. Jefferson*, 379 Mass. 196, 396 N.E.2d 981 (1979) (Supreme Judicial Court held that landlords do not have a reasonable time to repair a defect rendering the premises uninhabitable before the tenant may abate the rent); *Boston Housing Authority v. Hemingway*, 363 Mass. 184, 293 N.E.2d 831 (1973) (Supreme Judicial Court adopted the view set out in the *Javins* case in holding that a lease agreement carries an implied warranty of habitability).

lords who are quite unfamiliar with the condition of the premises that they lease.

IV. SELECTED DEVELOPMENTS IN TAXATION

During the *Selected Developments* year, the Supreme Judicial Court and the Appellate Tax Board addressed a number of controversial tax issues dealing with issues ranging from the tax consequences of liquidations of corporate subsidiaries and the deduction of gambling losses, to matters relating to the taxation of foreign corporations. In addressing the tax consequences of liquidations of corporate subsidiaries, the Supreme Judicial Court granted favorable treatment to corporations with corporate subsidiaries by treating dividends received after liquidations of those subsidiaries as non-taxable dividends. In matters relating to gambling, the Appellate Tax Board adopted a "facts and circumstances" analysis to deny a taxpayer-gambler the right to deduct gambling losses where his activities failed to rise to the level of a trade or business.

In addition to these tax issues, the Court and the Board decided a number of cases which have significant consequences on foreign corporations doing business in the Commonwealth of Massachusetts. The Appellate Tax Board granted favorable treatment to affiliated corporations by allowing these corporations to combine their incomes and losses before apportioning the total net income to the states in which the corporations conduct business. The Massachusetts Legislature, realizing that the Board's decision diminished significant revenues for the Commonwealth, amended chapter 63, section 32B, which in effect reversed the Board's decision by requiring affiliated corporations to apportion their incomes to the states before combining these incomes to produce a total net income.

In other cases, the Supreme Judicial Court treated "hybrid" corporations, which are corporations with both utility and non-utility characteristics, as utility corporations for tax purposes, thereby denying these corporations the benefit of deductions available to non-utility, business corporations. The Appellate Tax Board, focusing on the statutory framework for apportioning income, issued a decision prohibiting foreign corporations from relying on the Commissioner of Revenue's past practices in determining whether a statutory alternative for apportioning income is available to these foreign corporations. Instead, the corporations must satisfy the burden of demonstrating that the statutory framework does not

reasonably approximate the corporation's net income allocable to Massachusetts for each tax year before receiving the benefit of an alternative statutory method of apportionment. Finally, in tax matters relating to domestic international sales corporations (DISCs), the Appellate Tax Board broadly interpreted Massachusetts General Laws chapter 63, section 38G, to require a corporation to include the income of its wholly-owned DISC when the tax years of both the parent and the subsidiary end concurrently, notwithstanding the statutory language requiring inclusion only when the DISC's tax year ends immediately after the parent corporation's tax year.

A. **Distributions from Liquidation of Corporate Subsidiaries:*
Commissioner of Revenue v. Northeast Petroleum Corp.

The Supreme Judicial Court in the 1984 decision of *Commissioner of Revenue v. Shafner*¹ held that distributions following liquidation of a *corporate trust* should be treated as dividends, and therefore excluded from taxable income under Massachusetts General Laws chapter 62, section 2(a)(2)(D).² During the *Selected Developments* year, the Supreme Judicial Court in the 1987 decision of *Commissioner of Revenue v. Northeast Petroleum Corporation*,³ applied its earlier *Shafner* decision in finding that a distribution following liquidation of a fifty-percent owned *corporate subsidiary* should also be treated as a dividend, and exempt from taxable income under Massachusetts General Laws chapter 63, section 38(a)(1).⁴

In *Northeast Petroleum*, Northeast Petroleum, a Massachusetts corporation, entered into a joint venture with Ingram Corporation, a foreign corporation, to build a petroleum refinery in Louisiana.⁵ Northeast and Ingram formed a separate corporation, Energy, each taking a fifty percent interest.⁶ Energy, in turn, formed a wholly-owned subsidiary, ECOL, Ltd, a Louisiana corporation, which sought to purchase a refinery site and construct a refinery.⁷ ECOL's only asset consisted of its stock, which Energy subsequently sold to

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¹ 392 Mass. 256, 465 N.E.2d 788 (1984).

² *Id.* at 260, 465 N.E.2d at 791; see MASS. GEN. L. ch. 62, § 2(a)(2)(D) (1986).

³ 401 Mass. 44, 514 N.E.2d 359 (1987).

⁴ *Id.* at 49, 514 N.E.2d at 362.

⁵ *Id.* at 45, 514 N.E.2d at 359.

⁶ *Id.*

⁷ *Id.*

an unrelated corporation.⁸ Energy itself was then liquidated, and Northeastern realized a capital gain of \$44,658,048.⁹ Because Energy adopted a plan of complete liquidation under section 337 of the Internal Revenue Code,¹⁰ Energy was not taxed on this gain.¹¹ Instead, tax fell on the stockholders of Energy's corporate parents, Northeast and Ingram, based on the distribution amount as recognizable gain.¹²

Northeast, in its corporate excise return for the year ending June 30, 1977, failed to include the \$44,658,048 liquidation distribution income, causing the Commissioner of Internal Revenue to assess against Northeastern an additional tax based on this amount.¹³ After the Commissioner denied application for abatement, Northeast paid the assessed tax and appealed to the Appellate Tax Board.¹⁴ The Board affirmed the Commissioner's assessment. On appeal, the Supreme Judicial Court remanded the case for reconsideration in light of the Court's holding in *Commissioner of Revenue v. Shafner*.¹⁵

Shafner involved distributions upon liquidation of a corporate trust.¹⁶ Under Massachusetts General Laws chapter 62, section 8(c), dividends on shares of any corporate trust are exempt from taxation.¹⁷ The issue in *Shafner*, then, focused on whether a distribution upon liquidation of corporate trust would constitute a non-taxable dividend. Noting that Massachusetts General Laws chapter 62, section 1(e) defines dividend as "any item of federal gross income which is a dividend under section three hundred sixteen [316] of the [Internal Revenue] Code or which is treated as a dividend under any other provision of the Code,"¹⁸ the Supreme Judicial Court found that the distributions constituted dividends under section 316 of the Code, and therefore were dividends for the purposes of the statute.¹⁹ Adopting the reasoning of *Shafner* on remand, the Board

⁸ *Id.*

⁹ *Id.*

¹⁰ I.R.C. § 337 (1982).

¹¹ 401 Mass. at 45, 514 N.E.2d at 359-60.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* (citing *Commissioner v. Shafner*, 392 Mass. 256, 465 N.E.2d 788 (1984)). See *infra* notes 16-19 and accompanying text for a discussion of *Shafner*.

¹⁶ 392 Mass. at 259, 465 N.E.2d at 790.

¹⁷ See MASS. GEN. L. ch. 62, § 8(a) (1988).

¹⁸ See *id.* § 1(c) (1988).

¹⁹ *Shafner*, 392 Mass. at 259-61, 465 N.E.2d at 790-92.

in *Northeast* ruled in *Northeast's* favor, holding that the distribution on liquidation of Energy constituted a dividend.²⁰ The Commissioner appealed.²¹

In affirming the Board's decision, the Supreme Judicial Court first noted that in Massachusetts a business corporation computing its net income subtracts from its Massachusetts gross income all the deductions (but not the credits) allowable under the Internal Revenue Code.²² It noted also that, under Massachusetts General Laws chapter 63, section 38(a)(1), dividends in Massachusetts are deducted when calculating taxable income.²³ Whether *Northeast* would have to include the liquidation distribution in its Massachusetts income tax return therefore turned on the proper categorization of the distribution. The Court agreed with the Board that the Massachusetts Legislature's adoption of the Code's definition of gross income for the purpose of Massachusetts General Laws chapter 63, section 30, supported adopting the Code's definition of dividend under section 316,²⁴ which would include the liquidation distribution in question as a dividend.²⁵

The Court also noted that no "intrinsic difference" existed between the present case and *Commissioner of Revenue v. Shafner*.²⁶ The Supreme Judicial Court in *Northeast* thus concluded that because the legislature nowhere indicates that dividends should receive treatment separate from that of the Code for the purpose of Massachusetts General Laws chapter 63, they therefore will not receive separate treatment.²⁷ The Supreme Judicial Court in *Northeast* therefore makes clear that distributions upon liquidation of a corporate subsidiary will be treated like distributions upon liquidation of a corporate trust, and thereby accords favorable treatment to liquidations of corporate subsidiaries by recognizing subsequent distributions as non-taxable dividends.

²⁰ *Northeast*, 401 Mass. at 45, 514 N.E.2d at 360.

²¹ *Id.*

²² *Id.* at 46, 514 N.E.2d at 360.

²³ *Id.*

²⁴ I.R.C. § 316 (1976). Section 316 of the Internal Revenue Code defines dividend as "any distribution of property made by a corporation to its shareholders." *Id.* Under I.R.C. § 316, then, distributions upon liquidation of Energy would be a dividend.

²⁵ *Northeast*, 401 Mass. at 47, 514 N.E.2d at 360.

²⁶ *Id.* at 47, 514 N.E.2d at 361 (citing *Commissioner v. Shafner*, 392 Mass. 356, 465 N.E.2d 788 (1984)).

²⁷ *Id.* at 49, 514 N.E.2d at 362.

B. **Gambling Loss Deductions and the United States Supreme Court's Commissioner v. Groetzinger Definition of "Trade or Business":*
Cerpovicz v. Commissioner

During the *Selected Developments* year, the Appellate Tax Board adopted a narrow interpretation of "trade or business" for the purposes of gambling loss deductions. In the 1987 decision of *Cerpovicz v. Commissioner*,¹ the Appellate Tax Board held that in order to deduct gambling losses in Massachusetts, a taxpayer must engage in the trade or business of gambling.² Employing a "facts and circumstances" analysis in accordance with the United States Supreme Court's recent decision in *Commissioner v. Groetzinger*,³ the Board held that a taxpayer who listed his occupation as "teacher" but who also gambled five hours a day on jai alai games during nine months of the year failed to engage in the trade or business of gambling under Massachusetts General Laws chapter 62, section 2(d). Therefore, the Court concluded that the taxpayer could not deduct his losses from such activity.⁴

Taxpayer Cerpovicz, a teacher for the city of Chicopee, noted on his tax return for 1978, in addition to his \$17,517.00 salary as teacher, \$1,527.00 in net profit from a business or profession under Schedule C.⁵ Cerpovicz listed "systematic wagering" as the main occupation under this section.⁶ Cerpovicz reported \$71,612 as his total income from wagering, but deducted \$70,083, the cost of purchasing tickets, to arrive at his net profit figure of \$1,527.⁷ A federal audit, which showed the \$70,612 as gambling winnings, led to an audit by Massachusetts tax authorities.⁸ This audit resulted in a notice of assessment of \$5,653.23, calculated by applying a tax rate to the entire \$70,612 winnings but barring any deductions for ticket purchases.⁹ Following denial of a request for an abatement, Cerpovicz appealed to the Appellate Tax Board.¹⁰

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¹ [2 Mass.] St. Tax Rep. (CCH) ¶ 201-426, at 10,404 (App. Tax Bd. 1987).

² *Id.* at 10,406.

³ 107 S. Ct. 980 (1987).

⁴ *Cerpovicz*, [2 Mass.] St. Tax Rep., at 10,408-09.

⁵ *Id.* at 10,404.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 10,404-05.

⁹ *Id.* at 10,405.

¹⁰ *Id.*

Cerpovicz testified before the Board that from May until December of 1978, he and his wife made the two-hour drive to Connecticut every day after teaching and gambled on every jai alai game from seven to midnight.¹¹ He sought to deduct from these activities the cost of purchasing tickets, excluding the cost of gas, tolls, and occasional overnight stays from the deductions.¹² In deciding the case, the Board had to determine whether a taxpayer in Massachusetts must engage in a trade or business to deduct gambling losses and, if so, whether Cerpovicz engaged in the trade or business of gambling.¹³

Addressing the question of whether a taxpayer must be in the trade or business of gambling to deduct gambling losses, the Board noted that in calculating Massachusetts adjusted gross income, a taxpayer may, under Massachusetts General Laws, chapter 62, section 2(d), take all "the deductions allowable under sections sixty-two [62] . . . of the (Internal Revenue) Code."¹⁴ The Board further noted that Section 62 of the Internal Revenue Code defines adjusted gross income as gross income minus sixteen specific deductions, including general trade or business deductions (but excluding specific deductions for gambling losses).¹⁵ A taxpayer in Massachusetts, therefore, must engage in the trade or business of gambling to deduct gambling losses.¹⁶

In turning to the trade or business question, the Board first observed that historically the circuit courts have been split regarding the appropriate standard for determining whether a taxpayer engages in a trade or business.¹⁷ After discussing the split in the circuits, however, the Board acknowledged that the Supreme Court

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* Gambling losses are not listed under section 62 of the Internal Revenue Code. See I.R.C. § 62 (1982). Section 165(d) does provide specifically that wagering losses are deductible. I.R.C. § 165(d) (1982). This section, however, would not be applicable in Massachusetts because it does not come under the deductions specifically listed in section 62. See I.R.C. § 62 (1982).

¹⁶ *Cerpovicz*, [2 Mass.] St. Tax Rep., at 10,406.

¹⁷ *Id.* Lower federal courts have used two different tests. One test, the "goods or services" test, requires that a taxpayer hold him or herself out to others as engaged in the selling of goods or services, a test under which gamblers will not achieve trade or business status. See, e.g., *Estate of Cull v. Commissioner*, 746 F.2d 1148 (6th Cir. 1984). Another test, the "facts and circumstances" test, looks to whether the taxpayer engages in an activity with continuity and regularity and with good faith intent to make a profit. See, e.g., *Ditunno v. Commissioner*, 80 T.C. 362 (1983). Under this test, gamblers have received trade or business status. See *Id.*

in *Commissioner v. Groetzinger*¹⁸ had resolved the lower court split by declaring that a "facts and circumstances" analysis is appropriate in trade or business cases.¹⁹ Turning to the facts and circumstances of *Cerpovicz* case, the Board held that although *Cerpovicz*' gambling activity was more than "a mere hobby," it nevertheless failed to rise to the level of trade or business.²⁰ The Board said that to allow trade or business status for *Cerpovicz*' activity would require "stretch[ing] [the trade or business] concept to unprecedented limits."²¹

Cerpovicz makes clear that Massachusetts will follow the Supreme Court's decision in *Commissioner v. Groetzinger*, which, in resolving the long standing dispute in the circuit courts over a proper standard for determining trade or business status, adopted a "facts and circumstances" analysis. Although a "facts and circumstances" type test often provides limited guidance, resulting in a tendency toward increased litigation, the situation with Massachusetts taxpayers confronting the trade or business issue may be different. The many federal court cases which had previously applied the "facts and circumstances" test in the trade or business context provides a large body of case law to which Massachusetts taxpayers can already turn for guidance.

C. **Calculating Net Income for Affiliate Corporations: United States Shoe Corp. v. Commissioner of Revenue*

During the *Selected Developments* year, in deciding the 1987 case of *United States Shoe Corporation v. Commissioner of Revenue*,¹ along with two companion cases,² the Massachusetts Appellate Tax Board ("the Board") held that affiliated corporations subject to the taxing authority of Massachusetts and filing a consolidated federal tax return may elect to combine their net incomes (and losses) prior to apportioning that part of the group's total taxable net income upon

¹⁸ 107 S. Ct. 980 (1987).

¹⁹ *Cerpovicz*, [2 Mass.] St. Tax Rep., at 10,408.

²⁰ *Id.*

²¹ *Id.*

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¹ [2 Mass.] St. Tax Rep. (CCH) ¶ 201-409, at 10,361 (App. Tax Bd. 1987).

² *CDE, Inc. v. Commissioner of Revenue*, [2 Mass.] St. Tax Rep. (CCH) ¶ 201-407, at 10,358 (App. Tax Bd. 1987); *General Electric Company v. Commissioner of Revenue*, [2 Mass.] St. Tax Rep. (CCH) ¶ 201-408, at 10,360 (App. Tax Bd. 1987). The facts of all three of these cases are for all practical purposes identical. And the issue in each is the same as well: should combination of income precede apportionment?

which the Massachusetts corporate excise tax is assessed.³ The issue arose in each of the three companion cases over how to interpret the phrase "combined net income" found in chapter 63, section 32B of the Massachusetts General Laws.⁴ Since the *United States Shoe* decision, the Massachusetts Legislature has amended the language of chapter 63, section 32B. The definition of "combined net income" now comports with the Commissioner's proposed definition of that phrase as argued before the Board in the *United States Shoe* case. The amendment now requires the corporations to apportion their incomes taxable in Massachusetts before combining these incomes to arrive at net income.⁵

In *United States Shoe*, the Board referred to the legislative history of section 32B and interpreted "combined net income" to allow corporations to combine their net incomes prior to apportionment. In so ruling, the Board initially noted the discriminatory effect that the Commissioner's interpretation would have on groups of independently incorporated business entities. In addition, the Board acknowledged the Commissioner's failure to adequately promulgate its interpretation of the statute contemporaneously with its enactment. Finally, the Board observed that the Supreme Judicial Court similarly interpreted the statute in another context.⁶ Thus, the Board held that the combination of income necessarily precedes apportionment.⁷

In *United States Shoe*, U.S. Shoe and its wholly owned and separately incorporated subsidiary, U.S. Specialty Retailing, were Ohio corporations that did part of their business in Massachusetts.⁸ These corporations filed a consolidated federal tax return for the fiscal

³ *U.S. Shoe*, [2 Mass.] St. Tax Rep., at 10,363; *CDE*, [2 Mass.] St. Tax Rep., at 10,359; *General Electric*, [2 Mass.] St. Tax Rep., at 10,361.

⁴ *CDE*, [2 Mass.] St. Tax Rep., at 10,363; *General Electric*, [2 Mass.] St. Tax Rep., at 10,361. *U.S. Shoe*, [2 Mass.] St. Tax Rep., at 10,362. The controversy is over the order in which income is combined and apportioned. At stake is whether a group of corporations which file a consolidated Massachusetts tax return is able to offset the profits of some corporations with revenue losses sustained by others of the affiliated group. If the consolidated group of corporations is able to offset profits with losses by combining its income prior to apportionment, it will have a smaller net income to tax and consequently a smaller tax liability. The Commissioner argued that apportionment should precede combination. In other words, the Commissioner argued that a consolidated group of corporations should not be allowed to take advantage of losses in arriving at the group's taxable net income. *U.S. Shoe*, [2 Mass.] St. Tax Rep., at 10,362; *CDE*, [2 Mass.] St. Tax Rep., at 10,359; *General Electric*, [2 Mass.] St. Tax Rep., at 10,361.

⁵ 1988 Mass. Adv. Legis. Serv. 225, 228-29 (Law. Co-op.).

⁶ *U.S. Shoe*, [2 Mass.] St. Tax Rep., at 10,365 (citing *Walter Kidde & Co., Inc. v. Commissioner of Revenue*, 389 Mass. 577, 451 N.E.2d 420 (1983)).

⁷ *Id.* at 10,363.

⁸ *Id.* at 10,361-62.

year ending July 31, 1976 (the fiscal year).⁹ For the same year, however, they filed separate Massachusetts corporate excise returns. The sum of the state excise tax liability contained in the separate returns totaled \$144,891 for the fiscal year.¹⁰

The two corporations later elected under Massachusetts General Laws chapter 63, section 32B to amend their separate tax returns by filing a consolidated state return based on their combined net income.¹¹ By first combining the net income of the corporations and then apportioning that part of the total to business taxable in Massachusetts, the corporations calculated their new tax liability for the fiscal year at \$126,474.¹² Accordingly, they petitioned the Commissioner for an abatement of the difference between the earlier calculation of liability, which was \$19,128 higher than the liability calculated on the combined net income of the corporations, plus interest.¹³

The Commissioner denied the request for abatement. In doing so, he contended that the determination of combined net income taxable in Massachusetts is properly arrived at by requiring each of the corporations to separately determine and apportion that portion of net income taxable in Massachusetts.¹⁴ Having arrived at separate determinations of tax liability, continued the Commissioner, the two corporations could then combine those figures to arrive at their combined net income.¹⁵

The Board reasoned that Massachusetts General Laws chapter 63, section 32B is properly evaluated in conjunction with Massachusetts' three-step scheme of corporate taxation.¹⁶ In the first step of that scheme, corporations determine their net income.¹⁷ Second, they determine their taxable net income.¹⁸ Finally, they geographically apportion taxable net income to Massachusetts.¹⁹

⁹ *Id.* at 10,362.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 10,363.

¹⁷ *Id.* (citing MASS. GEN. L. CH. 63, § 30(5)(B) (1973)).

¹⁸ *Id.* (citing MASS. GEN. L. CH. 63, § 38(A) (1973)). This is accomplished by deducting dividends and disregarding long-term capital gains and losses. *Id.*

¹⁹ *Id.* (citing MASS. GEN. L. CH. 63, §§ 38(B)-38(I) (1973)). Corporations with income that is taxable in Massachusetts and in other states must apportion their taxable income for taxation by Massachusetts through a formula based on property, wages, and income generated or paid by the corporation in Massachusetts relative to the corporation's total property, wages and income. *Id.*

Reading section 32B in conjunction with this three-step taxing scheme, the Board concluded that combination of net income necessarily precedes apportionment.²⁰ The Board reasoned that allowing business entities composed of separately incorporated subsidiaries to combine their profits and losses before apportioning the resulting sum prevents discrimination against such entities attempting to compete with large multistate corporations which are subdivided into separate departments rather than into separate corporations.²¹ The large multistate corporation, subdivided into departments, may take advantage of losses in some departments when reporting its taxable net income.²²

The Board concluded that its interpretation of section 32B comported with the legislative history of not only that section but with its counterpart in the federal tax code as well.²³ Underlying this history and the Board's reasoning, is the idea that substance should control over form.²⁴ A group of separately incorporated business entities operated as a single business unit and owned by the same shareholders should be treated as a single business unit despite the legal form — separate corporations — which is merely a legal fiction.²⁵ The Board recognized that the same reasoning underlies permitting certain groups of separately incorporated business entities to file a consolidated federal tax return.²⁶ The Board further noted that such reasoning has been adopted in Massachusetts since the enactment of the first corporate excise statute in 1919 which contained the phrase "combined net income."²⁷

The manner in which the Board dismissed the Commissioner's contention that its interpretation of section 32B should be given

²⁰ *Id.* The Board argued that it had already adopted the principle of combination of income prior to apportionment in interpreting section 32B in a previous case involving an investment tax credit. *Id.* at 10,365 (citing *Walter Kidde & Co., Inc. v. Commissioner of Revenue*, No. 99-262 (App. Tax Bd. July 30, 1982), *aff'd*, 385 Mass. 577 (1983)).

The Board also surveyed the law of the several states on this issue and concluded that its interpretation was in accord with the twenty-eight states that either permit or require affiliated corporations to file consolidated returns. Only four of these states require apportionment prior to combination. In each of these four cases, post-apportionment combination of income is required by explicit statutory language. *Id.* at 10,366.

²¹ *Id.* at 10,364.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

"great weight" deserves mention.²⁸ The Commissioner argued that its interpretation of section 32B was contemporaneous with a 1959 amendment to the Massachusetts tax statute.²⁹ The Board concluded that the phrase "combined net income" appeared in the original tax statute in 1919 and has been preserved in all subsequent amendments to the statute. As a matter of statutory construction, ruled the Board, a phrase in a statute which remains intact through successive amendments retains its original meaning and content.³⁰ The Board concluded that a contemporaneous interpretation of "combined net income" would have to have been promulgated in 1919 to have any weight in a current interpretation of the statute.³¹

The Board also found that the Commissioner's sole promulgation of its interpretation was by a 1979 letter ruling.³² The Commissioner promulgated this ruling after the fiscal year in question in *United States Shoe*. In fact, the promulgation appeared even after U.S. Shoe requested an abatement.³³ There was no mention of the Commissioner's interpretation of section 32B on the required form that U.S. Shoe used to calculate and report its combined net income.³⁴ The Board ruled that the retroactive application of new tax rules on a selective basis can be unfair.³⁵

In rendering the *United States Shoe* decision, the Board arrived at a fair interpretation of the statute. The real significance of the case, however, is that the Board's decision diminished the potential tax revenues for the state more than had the Commissioner's arguments prevailed. Consequently, in 1988 the legislature amended the language of Massachusetts General Laws chapter 63, section 32B and essentially codified the Commissioner's interpretation of "combined net income" as he argued that phrase should be interpreted in the U.S. Shoe decision.³⁶ The end result of the legislature's

²⁸ *Id.* at 10,366.

²⁹ *Id.* For the text of the present version of section 32B, see *infra* note 36.

³⁰ *Id.* at 10,364-65.

³¹ *Id.* at 10,362, 10,366.

³² *Id.* at 10,362, 10,366. Letter Ruling 1979-42.

³³ *Id.* at 10,363.

³⁴ *Id.* Form 355B, the Foreign Business or Manufacturing Corporation Excise Return.

³⁵ *Id.* at 10,366.

³⁶ 1988 Mass. Adv. Legis. Serv. 225, 228-29 (Law. Co-op.). On July 26, 1988 the Governor approved Chapter 202 of the Massachusetts Session Laws. Section 15 of Chapter 202 states in relevant part that MASS. GEN. L. CH. 63, § 32B is amended by adding the following language:

The combined net income shall be determined as follows: (a) the taxable net income of each such corporation [members of a consolidated group] apportioned to this commonwealth pursuant to the provisions of section thirty-eight

action is that a group of corporations which file a consolidated Massachusetts tax return are not able to offset the profits of some corporations with revenue losses sustained by others of the affiliated group.

D. *Taxation of Foreign Corporations

During the *Selected Developments* year, the Massachusetts Supreme Judicial Court held, in the 1987 decision of *Tenneco v. Commissioner*,¹ that a corporation which manifests both utility and non-utility characteristics would be treated for tax purposes as a utility corporation if it fell within the statutory definition of a utility corporation.² This has important consequences for such "hybrid corporations" given the tax differences between utility and business corporations. For example, utility corporations are taxed at a 6.50% rate;³ business corporations at an 8.33% rate.⁴ Although its tax rates may be higher, a business corporation benefits from a federal tax provision which permits such entities to deduct dividends received from any corporation in which the business owned at least 15% of the voting stock.⁵ In contrast, utility corporations can only deduct dividends distributed from certain other utility corporations.⁶ After *Tenneco*, utility corporations can no longer take advantage of tax provisions applicable to business corporations.

In *Tenneco*, the taxpayer incorporated in Delaware in 1943 and received a certificate of foreign corporation registration to conduct business in Massachusetts in 1954.⁷ Although originally established to construct an interstate natural gas pipeline, Tenneco expanded to become an international conglomerate with varied activities.⁸ From its certification in 1954, until 1979, Tenneco filed its Massa-

shall first be separately determined; and (b) the taxable net income of each such corporation, as so determined, shall then be added together and shall constitute their combined net income taxable under this chapter.

Id.

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¹ 401 Mass. 380, [2 Mass.] St. Tax Rep. (CCH) ¶ 201-462, at 10,503 (1987).

² See *id.* at 384-86, [2 Mass.] St. Tax Rep., at 10,505-06.

³ MASS. GEN. L. ch.63, § 52A(2) (1987).

⁴ *Id.* § 39(3)(a)(2).

⁵ *Tenneco*, 401 Mass. at 383, [2 Mass.] St. Tax Rep., at 10,505.

⁶ *Id.*

⁷ *Id.* at 381, [2 Mass.] St. Tax Rep., at 10,504.

⁸ *Id.* at 382, [2 Mass.] St. Tax Rep., at 10,504. Tenneco expanded into such areas as oil and gas operations, automotive parts, insurance, agriculture and land management, and shipbuilding. *Id.* at 382, [2 Mass.] St. Tax Rep., at 10,504-05.

chusetts tax returns as a utility corporation using a public service corporation franchise tax return provided for in Massachusetts General Laws chapter 63 section 52A.⁹

Because it filed as a utility corporation and not as a business corporation, Tenneco benefitted from several preferential tax treatment devices afforded to utility corporations. First, Tenneco allocated its net income solely on the basis of its property holdings, as compared to the three factors considered in apportioning a business corporation's net income (income, property and employment).¹⁰ Second, filing as a utility corporation allowed Tenneco to use the lower tax rate of 6.50%, as compared to 8.33% for business corporations.¹¹

In addition to calculating its taxes as a utility corporation, Tenneco also took advantage of a tax provision favoring business corporations. Specifically, Tenneco deducted dividends it received from all of its subsidiaries; had it consistently acted as a utility corporation, Tenneco could only deduct dividends received from other utility corporations.¹² After reviewing its returns, the Commissioner disallowed Tenneco's deductions for nonutility dividends for the years 1977-1979, included those dividends as taxable income, and assessed additional taxes to Tenneco totalling \$1,998,624.¹³

Tenneco applied to the Commissioner for a tax abatement and the Commissioner denied the application.¹⁴ Subsequently, Tenneco appealed to the Appellate Tax Board.¹⁵ In affirming the Commissioner's refusal to abate Tenneco's taxes, the Board concluded that despite the numerous activities of its divisions, Tenneco still qualified as a utility corporation and would be taxed as such, and not as a business corporation.¹⁶ Tenneco appealed the Board's decision.

The Massachusetts Supreme Judicial Court upheld the Tax Board's ruling. In dispensing with Tenneco's claim that because of its diverse activities the state should treat Tenneco as a business or

⁹ *Id.* at 382, [2 Mass.] St. Tax Rep., at 10,505.

¹⁰ *See id.* at 382-83, [2 Mass.] St. Tax Rep., at 10,505.

¹¹ *See id.*

¹² *Id.*

¹³ *Id.* at 381, [2 Mass.] St. Tax Rep., at 10,504.

¹⁴ *Id.* at 381-82, [2 Mass.] St. Tax Rep., at 10,504. Tenneco urged the Commissioner to grant a tax abatement, arguing that because of its varied business interests, only Tenneco's pipeline division should be taxed under Massachusetts General Laws chapter 63's section 52A, and that chapter 63's sections 30-42B should apply to its nonpipeline divisions. *Id.*

¹⁵ *Id.* at 382, [2 Mass.] St. Tax Rep., at 10,504.

¹⁶ *Id.*

hybrid corporation, the Court concentrated on the applicable Massachusetts tax provisions.¹⁷ The Court concluded from its reading of Massachusetts General Law chapter 63 section 52A, that Tenneco clearly fell within the definition of "utility corporations," regardless of the business it transacted outside of Massachusetts.¹⁸ Moreover, the Court held that nothing in the statute compelled a determination that a foreign utility, operating with both utility and nonutility components had to be taxed in Massachusetts as a hybrid or business corporation.¹⁹

In its appeal to the Supreme Judicial Court, Tenneco also alleged several constitutional violations. First, Tenneco argued that the Commissioner's inclusion in net income of dividends paid to Tenneco by nonutility subsidiaries operating outside of Massachusetts violated its due process right because no reasonable connection existed between Tenneco's in-state activities and the value of its interstate business interests.²⁰ Tenneco next claimed a federal due process violation based on the one-factor income apportionment test appearing in section 52A.²¹ Tenneco argued that the formula did not justly apportion its income with respect to its Massachusetts activities.²² Tenneco also pursued an equal protection claim, contending that the Massachusetts taxing structure discriminated against utility corporations.²³ Tenneco's final objection concerned the policy against double taxation. Tenneco alleged that the state violated this policy when it included the dividends in Tenneco's net income even though the subsidiaries that distributed those dividends paid corporate taxes in Massachusetts.²⁴

The Supreme Judicial Court addressed and rejected each point raised by Tenneco. The Court first considered Tenneco's due process claims. Not only did the Court conclude that Tenneco failed to show an absence of a nexus between the value of its in-state activities and the nonutility subsidiaries' dividend distributions, but sufficient evidence existed to prove that interrelatedness and therefore, the

¹⁷ See *id.* at 384-86, [2 Mass.] St. Tax Rep., at 10,505-06.

¹⁸ *Id.* at 386, [2 Mass.] St. Tax Rep., at 10,506. "Utility corporation," as defined in chapter 63, section 52A, includes "every domestic or foreign pipeline corporation engaged in the transportation or sale of natural gas within the commonwealth . . ." MASS. GEN. L. ch. 63, § 52A(1)(a)(viii) (1987).

¹⁹ *Tenneco*, 401 Mass. at 384-86, [2 Mass.] St. Tax Rep., at 10,506.

²⁰ *Id.* at 386, [2 Mass.] St. Tax Rep., at 10,506.

²¹ *Id.* at 387, [2 Mass.] St. Tax Rep., at 10,507.

²² *Id.*

²³ See *id.* at 388, [2 Mass.] St. Tax Rep., at 10,507.

²⁴ *Id.*

dividend income's inclusion did not violate due process.²⁵ The Court dispensed with Tenneco's other due process claim based on the one-factor apportionment formula. Relying on the 1978 United States Supreme Court ruling in *Moorman Mfg. v. Bair*, the Court upheld single-factor apportionment formulas, even where income which originates outside of Massachusetts is taxed as a result.²⁶

In addition to rejecting Tenneco's due process claims, the Court found no merit in Tenneco's equal protection or double taxation arguments. Although Tenneco could not use an alternative apportionment formula as authorized under Massachusetts General Law chapter 63, section 42, the Court found no discrimination against utility corporations because it could obtain relief under chapter 62C section 37's abatement procedure where section 52A's application yielded a disproportionate net income allocation.²⁷ Finally, the Court reasoned that no double taxation occurred because the state designed the excise tax to tax Tenneco for conducting business in Massachusetts and not to tax the individual elements comprising taxable net income.²⁸

Thus, the Supreme Judicial Court rejected Tenneco's claims that the Commissioner should treat it as a business or hybrid corporation and further rejected Tenneco's constitutionally based allegations.²⁹ Because Tenneco fell within section 52A's definition of "utility corporation," the Court held that the Tax Board correctly classified it as such.³⁰ Accordingly, the Court agreed that the Commissioner properly imposed additional taxes on Tenneco by denying the deductions Tenneco claimed from its nonutility subsidiaries and including these dividends as taxable income.³¹

²⁵ *Id.* at 387, [2 Mass.] St. Tax Rep., at 10,507. The Court considered the following information in reaching its decision: the degree of integration of Tenneco's oil and gas facilities; and its nonpipeline subdivisions, as well as three subsidiaries, that generated revenues within Massachusetts. *Id.*

²⁶ *Id.* at 388, [2 Mass.] St. Tax Rep., at 10,507 (citing *Moorman Mfg. Co. v. Blair*, 437 U.S. 267, 273 (1978)). In *Moorman*, Justice Stevens, writing for the Court, stated that the Supreme Court has continually recognized that a single-factor formula was "presumptively valid." 437 U.S. at 273.

²⁷ *Tenneco*, 401 Mass. at 388, [2 Mass.] St. Tax Rep., at 10,507. Section 37 provides: "Any person aggrieved by the assessment of a tax, other than a tax assessed under chapters sixty-five or sixty-five A, may apply in writing to the commissioner, . . . for an abatement thereof . . ." MASS. GEN. L. ch. 62C, § 37 (1987).

²⁸ *Tenneco*, 401 Mass. at 389, [2 Mass.] St. Tax Rep., at 10,508 (quoting *Commissioner v. Massachusetts Mut. Life Ins. Co.*, 384 Mass. 607, 618 (1981)).

²⁹ See *Tenneco*, 401 Mass. at 384-89, [2 Mass.] St. Tax Rep., at 10,505-08.

³⁰ *Id.* at 386, 389, [2 Mass.] St. Tax Rep., at 10,506, 10,508.

³¹ *Id.* at 389, [2 Mass.] St. Tax Rep., at 10,508.

Tenneco is significant because of its impact on Massachusetts' tax scheme and on foreign utility corporations. By rejecting *Tenneco's* due process and equal protection claims, the Supreme Judicial Court reinforced the constitutionality of Massachusetts' taxing utility and business corporations separately by rendering it less impervious to attack. *Tenneco* also has important ramifications for foreign utility corporations. Corporations falling within section 52A's definition of "utility corporations" will be treated and taxed as such, regardless of whether the corporation has nonutility subsidiaries or extensively diverse operations.

Notwithstanding the added taxes incurred as a result, *Tenneco* suggests that utility corporations may no longer benefit from preferential tax treatment reserved solely for business corporations. This is an important principle because utilities corporations are still treated differently than business corporations³² even though Massachusetts tax law has changed significantly since the dispute arose.³³ Not benefitting from tax provisions aimed at a certain type of corporation could result in a marked difference in taxes owed.

In another case decided during the *Selected Developments* year, the Appellate Tax Board issued a ruling that significantly impacts future applications of Massachusetts General Laws chapter 63, section 38, which determines the apportionment of a corporation's taxable net income in Massachusetts. Under section 38's formula, property, payroll and sales all play key roles in the determination of taxable net income.³⁴ A corporation, however, may apply under section 42 to the Revenue Commissioner for a different allocation method.³⁵ If the Commissioner holds that section 38 does not reasonably approximate the corporation's net income arising from business conducted in Massachusetts, the Commissioner may adopt an alternative method.³⁶

³² Tax rates provide the clearest illustration. Massachusetts assesses an 8.33% tax rate on a business corporation's net income. See MASS. GEN. L. ch. 63, § 32 (1987). In contrast, Massachusetts imposes a 6.50% tax rate on a utility corporation's net income. See *id.* § 52A.

³³ At the time *Tenneco* filed the disputed returns, the applicable tax law provided that a gas, electric, pipeline, water, or aqueduct corporation's net income allocable to Massachusetts consisted of that percentage of net income that the costs of its plant, property and equipment constituted. MASS. GEN. LAWS ANN. ch. 63, § 52A(3) (Law. Co-op. 1971 & Supp. 1978). Presently, the formula to determine a utility corporation's taxable Massachusetts income includes sums representing sales, property and payroll. MASS. GEN. L. ch. 63, § 52A(3) (1987).

³⁴ See MASS. GEN. L. ch. 63, § 38 (1987).

³⁵ *Id.* § 42.

³⁶ *Id.*

In the 1987 case of *Engelhard Minerals and Chemical Corp. v. Commissioner of Revenue*,³⁷ the Appellate Tax Board held that the Commissioner may lawfully reject an alternative plan that the Revenue Department had accepted for the past fifteen years.³⁸ The Board reasoned that prior acceptances did not compel the Commissioner to find that a section 42 alternative apportionment method must be used each year.³⁹ Accordingly, unless the taxpayer demonstrated that section 38's application resulted in a grossly unfair apportionment, the Board concluded that the Commissioner need not continue to accept an alternative plan, despite a long history of doing so.⁴⁰

In *Engelhard*, Engelhard incorporated in Delaware, qualified to do business in Massachusetts and sought to have its Massachusetts taxable income derived from a method different than the allocation and apportionment procedure prescribed in section 38.⁴¹ Engelhard determined its net income taxable in Massachusetts by excluding from its calculations the final status of one of its acquired Massachusetts corporations, D.E. Makepeace Company.⁴² Engelhard's corporate predecessor used this alternative plan since 1958 and Engelhard since 1967.⁴³ The Commissioner of Revenue (and his or her predecessor, the Commissioner of Corporations and Taxation) approved Engelhard's accounting method until 1977.⁴⁴

The Commissioner, on February 18, 1977, sent Engelhard Notices of Intention to Assess added corporation excises for the years 1972-1974.⁴⁵ Intradepartmental documents, however, revealed that

³⁷ *Engelhard Minerals & Chem. Corp. v. Commissioner*, [2 Mass.] St. Tax Rep. (CCH) ¶ 201-428, at 10,430 (App. Tax Bd. 1987).

³⁸ See *id.* at 10,435-36.

³⁹ *Id.* at 10,436.

⁴⁰ *Id.* at 10,436-37.

⁴¹ *Id.* at 10,430.

⁴² See *id.* at 10,432. In 1953, Engelhard's predecessor, Engelhard Industries, Inc. acquired D.E. Makepeace Company by merger. *Id.* at 10,431. Since 1958 and after the 1967 merger of Engelhard Industries, Inc. with Minerals and Chemical Corporation, the alternative method was the following: Engelhard determined the income, sales, property and salaries for Engelhard and separately for Makepeace; then Engelhard apportioned the income of each within and outside of Massachusetts. *Id.* at 10,432. According to Engelhard, "the Massachusetts operations were treated as if [Makepeace] were still a separate corporation, with its own income allocation factors for property, payroll and sales . . ." *Id.* (quoting memorandum pp. 3-4).

⁴³ *Id.*

⁴⁴ See *Engelhard*, [2 Mass.] St. Tax Rep., at 10,432.

⁴⁵ *Id.* at 10,430.

the Commissioner approved the accounting method for 1972 and so the Commissioner assessed additional taxes for 1973 and 1974 using the apportionment and allocation procedures found in Massachusetts General Laws chapter 63, section 38.⁴⁶ The Notices of Intention to Assess reflected two primary reasons for the Commissioner's rejection of Engelhard's alternative method. First, Engelhard's financial records did not include Makepeace as a separate subdivision and Makepeace's finances simply were not mentioned.⁴⁷ Second, the structure of Engelhard revealed that management viewed the corporation as one entity and not as separate subdivisions.⁴⁸ Accordingly, the Commissioner concluded that only section 38 appropriately determined Engelhard's Massachusetts taxable income.⁴⁹

Engelhard filed for a tax abatement on November 4, 1977, which the Revenue Commissioner subsequently denied on September 2, 1980.⁵⁰ Engelhard appealed to the Appellate Tax Board, arguing that the statutorily prescribed apportionment method did not adequately approximate net income and that the Commissioner's past acceptance provided the basis for Engelhard's reliance on continued approval.⁵¹ In ruling that Engelhard did not demonstrate sufficient justification for tax abatement, the Appellate Tax Board held that the Revenue Commissioner's determination of the applicability of section 38 each year and that prior practices of accepting alternative methods did not compel similar acceptance in future tax years.⁵²

The Appellate Tax Board based its conclusion that Engelhard did not deserve abatement on three grounds. First, the Board stated

⁴⁶ *Id.* at 10,433.

⁴⁷ See *id.* Rider A to the Notices of Intention to Assess stated:

the separation of the D.E. Makepeace Co., which is part of the Engelhard Industries Division, is difficult to achieve since the performance, standing, and the financial position of [Makepeace] are not mentioned anywhere (i.e., financial reports, federal purposes, annual reports, etc.). The only divisional analysis is the three divisions mentioned above [Minerals & Chemicals Division, Engelhard Industries Division, Engelhard Industries Division and Philipp Brothers Division].

Id. (quoting Rider A to Notices of Intention to Assess).

⁴⁸ *Id.* (quoting Rider A to Notices of Intention to Assess).

⁴⁹ *Id.* (quoting Rider A to Notices of Intention to Assess).

⁵⁰ *Id.* at 10,430.

⁵¹ *Id.* at 10,433. In addition, Engelhard argued that the Commissioner's "retroactive revocation of approval" constituted improper and arbitrary action on the Commissioner's part. *Id.* (citing Appellant's Proposed Conclusions of Law).

⁵² *Id.* at 10,436, 10,437.

that section 42 did not require the Revenue Commissioner to adopt an alternative plan from that announced in section 38 unless in the Commissioner's opinion, the prescribed apportionment calculation did not reasonably reflect the corporation's net income.⁵³ The Board found that despite continued acceptance of the alternative plan, the Commissioner never expressly found that the section 38 method did not reasonably approximate net income.⁵⁴ Second, in response to Engelhard's claim that it relied on the Commissioner's past actions, the Board reasoned that the statute did not compel the Commissioner to reach the same decision each year as to section 38's applicability.⁵⁵ Finally, because that statute required a company to apply and file for an alternative apportionment annually, the Board concluded that the Commissioner's determination as to necessity of an alternative method was an annual decision.⁵⁶

Thus, after *Engelhard Minerals and Chemicals Corp. v. Commissioner of Revenue*, a foreign corporation qualified to do business in Massachusetts may no longer rely on the Commissioner's past practices with respect to receipt of tax returns, especially if in past years the corporation filed and the Commissioner accepted an alternative method of apportionment of net income. The foreign corporation has the burden of demonstrating that the statutorily prescribed method in Massachusetts General Laws chapter 63, section 38, does not reasonably approximate its net income in Massachusetts. The corporation must sustain this burden each year because, as *Engelhard* evidences, the Revenue Commissioner annually determines the appropriateness of section 38 and is not compelled to reach the same judgment year after year.

Another recent development in Massachusetts tax law that occurred in 1987 involved domestic international sales corporations (DISC).⁵⁷ The DISC provision, Massachusetts General Laws chapter

⁵³ *Id.* at 10,435.

⁵⁴ *Id.*

⁵⁵ *Id.* at 10,436.

⁵⁶ *Id.* The Board stated: "The Commissioner's responsibility under the statutes is to determine whether a taxpayer is fairly entitled to the special treatment applied for in the tax years at issue; he cannot be precluded from changing a practice followed in earlier years if he later determines that it was mistaken . . ." *Id.* (citing *John S. Lane & Son, Inc. v. Commissioner*, 396 Mass. 137, 140 (1985)).

⁵⁷ MASS. GEN. L. ch. 63, § 30(15) (1987) defines a DISC as a corporation which meets the amended Federal Internal Revenue Code's section 992(a)(1) definition. Section 992(a)(1) defines a DISC as a corporation incorporated under any state's law and which meets five requirements: 95% or more of its gross receipts must consist of qualified export receipts; the corporation's adjusted basis of its qualified export assets must at the end of the taxable year,

63, section 38G, generally provides that a corporation subject to Massachusetts taxes must include in its income, the income of a wholly-owned DISC⁵⁸ for the DISC's taxable year that ends immediately following the corporation's taxable year.⁵⁹ A taxpayer, in *White Consolidated Industries Inc. v. Commissioner of Revenue*,⁶⁰ challenged section 38's language as inapplicable where the DISC's taxable year ended concurrently with the corporation's. The Appellate Tax Board, in interpreting the statute, rejected the taxpayer's argument and held that the provision covers such circumstances.⁶¹

In *White*, the taxpayer, White Consolidated Industries, Inc., was a business corporation organized in Delaware in 1926 and which had a principal office in Massachusetts.⁶² White, in 1972 and under Ohio law, organized a wholly-owned subsidiary, WCI International Sales Corp. (WCI) that qualified, under the Internal Revenue Code, as a domestic international sales corporation (DISC).⁶³ Although WCI owned no property, had no employees, and had not bought or sold any property, White and its subsidiaries paid WCI commission income from their sales of tangible property.⁶⁴

White reported in its 1973 foreign manufacturing corporation excise return, as WCI's income, the money that White paid to WCI but not those commissions paid by White's subsidiaries.⁶⁵ The Revenue Commissioner, on March 14, 1977, assessed an additional tax of \$46,732.60 including in White's net income those commissions omitted from WCI's that White's subsidiaries paid to WCI.⁶⁶ White

equal or exceed 95% of the sum of the adjusted basis of all the corporation's assets at the taxable year's end; the corporation cannot have more than one class of stock and the par or stated value of its outstanding stock equals at a minimum, \$2500 each day of the taxable year; the corporation has elected to be treated as a DISC and the election is effective for the taxable year; and the corporation is not a member of any controlled group of which FSC is a member. 26 U.S.C. § 992(a)(1) (1982 & Supp. 1986).

⁵⁸ A wholly-owned DISC is a "DISC all of whose outstanding shares, except directors' qualifying shares, are owned by a single corporation, either directly or indirectly through other corporations all of whose shares are owned directly or indirectly by such corporation." MASS. GEN. LAWS ANN. ch. 63, § 30(15) (Law. Co-op. Supp. 1978). The same definition appears unchanged in MASS. GEN. L. ch. 63, § 30(15) (1987).

⁵⁹ MASS. GEN. L. ch. 63, § 38G (1987).

⁶⁰ [2 Mass.] St. Tax Rep. (CCH) ¶ 201-444, at 10,453 (App. Tax Bd. 1987).

⁶¹ *Id.* at 10,455.

⁶² *Id.* at 10,453.

⁶³ *Id.*

⁶⁴ *Id.* In 1973, WCI received commissions totaling \$4,334,031, broken down as follows: \$43,777 from White; \$1,081,332 from a wholly-owned subsidiary of White organized in Massachusetts; and the remainder from other wholly-owned subsidiaries of White who were not organized or doing business in Massachusetts. *Id.* at 10,454.

⁶⁵ *Id.*

⁶⁶ *Id.* at 10,453.

applied for and received a tax abatement, but , because it was minimal, White appealed to the Appellate Tax Board.⁶⁷

White raised two issues on appeal, the first of which concerned a statutory reading of the Massachusetts DISC tax provision. That provision, section 38G of Massachusetts General Laws chapter 63, provided that a foreign or domestic business corporation must include in its income, any wholly-owned DISC's income for the DISC's taxable year which ends immediately after the corporation's taxable year.⁶⁸ White argued this language precluded the state from requiring White to include WCI's income for its taxable year ending on the same date.⁶⁹

The Board rejected the reading of section 38G that suggested the exclusion of WCI's income for its taxable year that ended concurrently with and not immediately after White's taxable year.⁷⁰ A literal reading of the statute would render it inoperable, and this, the Board concluded, was not what the legislature intended.⁷¹ Accordingly, the Board ruled that section 38G applied not only to income of DISCs whose taxable year ended one day after a parent corporation's taxable year, but also to the income of those DISCs whose tax year ended simultaneously with that of the parent corporation's.⁷²

White's second argument centered not on the statute's language, but instead, on potential constitutional violations. White contended that including in WCI's income those funds paid by White's subsidiaries who were neither organized nor doing business in Massachusetts contravened principles found in the United States and Massachusetts Constitutions.⁷³ Specifically, White claimed that no connection existed between Massachusetts and White's activities, a nexus the Massachusetts and federal courts have required before a

⁶⁷ *Id.* The Commissioner abated the tax in the amount of \$3,904.40 but refused to reduce it any further. *Id.*

⁶⁸ The applicable 1973 tax provision read in pertinent part:

A domestic or foreign corporation subject to tax under this chapter shall . . . include in the report of its income all the income of any wholly-owned DISC, whether such DISC is organized under the laws of the commonwealth or the laws of any other state, for the taxable year of such wholly-owned DISC which ends immediately after the taxable year of such corporation . . .

MASS. GEN. LAWS ANN. ch. 63, § 38G (Law. Co-op. Supp. 1978). Section 38G remains unchanged in the current Massachusetts tax code. MASS. GEN. L. ch. 63, § 38G (Supp. 1987).

⁶⁹ *White*, [2 Mass.] St. Tax Rep., at 10,454.

⁷⁰ *Id.* at 10,455.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 10,456.

state may include in a foreign corporation's income, income derived from out-of-state activities.⁷⁴ Because no nexus existed, White claimed a due process violation occurred.⁷⁵

In addressing the constitutional question, the Appellate Tax Board noted that Massachusetts courts consider the nexus requirement satisfied when the activities carried on in and outside of Massachusetts were part of a "unitary business."⁷⁶ Contrary to White's contention that for a unitary business to be established, a necessary relationship must exist between the taxing state and the DISC's income before that state may tax that income,⁷⁷ the Board held the proper governing standard to be whether the taxpayer demonstrated by "clear and cogent evidence" that the state taxed extraterritorial values.⁷⁸ Applying this standard, the Board held that WCI was part of a unitary business with White.⁷⁹ The Board based this determination on White's apparent failure to show otherwise. Although White claimed that its Massachusetts and foreign subsidiaries were not part of a unitary business, the Board reasoned that the record could not support such a finding.⁸⁰ Additionally, the Board noted that White never alleged that its subsidiaries did not engage in the same business as did White.⁸¹ Accordingly, the Board concluded that White and its subsidiaries constituted a unitary business and that White failed to demonstrate the absence of a nexus between White's in-state and out-of-state activities.⁸² In the Board's opinion then, section 38G did not violate the Massachusetts Constitutional requirement that excises be reasonable.⁸³

⁷⁴ *Id.* (citing *Becton, Dickinson & Co. v. Department of Revenue*, 383 Mass. 786 (1981); *W.R. Grace & Co. v. Commissioner*, 378 Mass. 577 (1979); *Weyerhaeuser Co. v. Commissioner*, 1987 Mass. Adv. Sh. 308 (App. Tax Bd. 1987)).

⁷⁵ *See id.*

⁷⁶ *Id.* (citing *Becton, Dickinson & Co. v. Department of Revenue*, 383 Mass. 786 (1981); *W.R. Grace & Co. v. Commissioner*, 378 Mass. 577 (1979); *Weyerhaeuser Co. v. Commissioner*, 1987 Mass. Adv. Sh. 308 (App. Tax Bd. 1987)). The Board noted that the Massachusetts decisions were consistent with United States Supreme Court decisions. *Id.* at 10,457.

⁷⁷ *See id.* at 10,458.

⁷⁸ *Id.* at 10,458-59 (quoting *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 175 (1983)).

⁷⁹ *Id.* at 10,459.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *See id.* The Massachusetts Constitution provides in pertinent part: "full power and authority are hereby given and granted to the said general court, . . . to impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and

Thus, in *White*, the Appellate Tax Board affirmed the Revenue Commissioner's assessment of an excise upon a taxpayer who failed to include in its income the commissions that its out-of-state subsidiaries paid to its wholly-owned DISC.⁸⁴ The Board ruled that section 38G governed, even though WCI's taxable year ended simultaneously with White's taxable year.⁸⁵ Furthermore, because White failed to show an absence of a nexus between White's in-state and out-of-state activities, the Board concluded that a unitary business existed and hence, no due process violation occurred by the Commissioner's imposing a tax.⁸⁶

The *White* decision is important for two reasons. First, White upholds the principle that Massachusetts may tax a foreign corporation's income that is derived from out-of-state activities. *White* adds another link to a chain of Massachusetts cases that hold that the state may assess a tax in such circumstances when the taxpayer constitutes a unitary business. A due process violation may occur but *White* makes clear that the taxpayer bears the burden of demonstrating by "clear and cogent evidence" the absence of a unitary business.

More importantly, *White's* significance lies in the Appellate Tax Board's statutory interpretation of section 38G. That provision provides relatively clear guidance on the inclusion of a DISC's income in a foreign or domestic business corporation's net income. Under section 38G, such inclusion must occur for the DISC's taxable year which ends immediately after the parent corporation's taxable year. The Board rejected a literal interpretation that would have rendered the provision inoperable where the DISC's taxable year ended simultaneously with the parent corporation's. Instead, based on what it perceived to be the legislature's intent, the Board declared section 38G applicable even where the DISC and its parent corporation had concurrent taxable years. Unless declared erroneous by the Massachusetts Supreme Judicial Court, the Appellate Tax Board's novel interpretation of section 38G will result in the inclusion of more DISC income, and hence more taxable income for the parent corporation, because a DISC's taxable year no longer must end immediately after the parent corporation's taxable year.

persons resident, . . . within the said Commonwealth . . ." MASS. CONST. art. IV, pt. 2, cl. 1, § 1.

⁸⁴ See *White*, [2 Mass.] St. Tax Rep., at 10,453, 10,455.

⁸⁵ *Id.* at 10,455.

⁸⁶ See *id.* at 10,459.

V. SELECTED DEVELOPMENTS IN CORPORATE LAW

The selected developments surveyed indicate an interesting dichotomy in the treatment of corporate management by the legislature and the judiciary. In general, the legislature has enacted several measures that tend to favor corporate management of Massachusetts corporations. In particular, the legislature has amended the Massachusetts corporate statute to allow corporations to eliminate or limit the liability of their directors for breaching their duty of care to the corporation and to allow corporations to issue "blank stock."

The judiciary has been less accommodating. In *Hyde Park Holdings, Inc. v. Connolly*, the First Circuit Court of Appeals enjoined the enforcement of the Massachusetts anti-takeover statute. In *Commonwealth v. L.A.L. Corp.*, the Massachusetts Supreme Judicial Court sustained a lower court ruling that a closely held corporation was criminally liable for the actions of its employees under the same standards as a large publicly held corporation. Finally, in *Bodio v. Ellis*, the Supreme Judicial Court further developed the fiduciary duties that the directors of a closely held corporation owe to each other. Although one should not overemphasize the point, the contrast between the treatment of corporate management by the different branches of government is striking.

A. **Limitation or Elimination of Director Liability for Breach of the Fiduciary Duty of Care: The Amended Section 13(b)(1 1/2)*

Commentators often divide the fiduciary duties that members of a corporation's board of directors owe to the shareholders into two categories: the duty of care¹ and the duty of loyalty.² For many years, courts have limited director liability for breaching the duty of care through the business judgment rule.³ In recent years, how-

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¹ The duty of care requires that directors exercise diligence in managing a corporation and discharge their duties after informing themselves of all material information that they can obtain through reasonable efforts. *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985).

² The duty of loyalty requires that directors make all business decisions in the good faith belief that the decision is in the best interests of the corporation. *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984). Duty of loyalty questions arise often in certain contexts such as when a director has interests in a transaction different from the interests of the corporation, when the director usurps a corporate opportunity or when a director directly competes with a corporation. HENN & ALEXANDER, *LAWS OF CORPORATIONS* § 235 (3d ed. 1983).

³ If in the course of managing a corporation the directors arrive at a decision for which they have a reasonable basis and they arrive at that decision through a good faith examination

ever, courts have held directors liable for large damage awards for breaching their duty of care.⁴ These damage awards have contributed to the skyrocketing cost of obtaining liability insurance for corporate directors. The increasing chance that courts will hold directors liable for huge damage awards in breach of duty cases and the difficulty of obtaining reasonably priced liability insurance have combined to discourage qualified people from accepting positions as outside directors on a corporation's board. In response to this reluctance to join corporate boards, several states, led by Delaware, have amended their corporate statutes to allow a corporation to eliminate, or at least limit, the liability of its directors for breaching the fiduciary duty of care.⁵

On December 24, 1986, the Massachusetts Legislature joined with these jurisdictions in amending its corporate statute.⁶ In amending the Massachusetts corporate statute, the legislature adopted the Delaware statute virtually verbatim.⁷ Several aspects of this amendment merit explanation.

The amendment does not by itself alter the fiduciary duty of care that Massachusetts law requires of corporate directors. Rather, it simply allows corporations to amend their articles of organization to limit director liability.⁸ Thus, the shareholders of a corporation must approve any limits upon the liability of its directors for breaching the duty of care.⁹

of the best interests of the corporation, courts will not penalize the directors for any losses that result from that decision. *Id.* § 242.

⁴ E.g., *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985).

⁵ DEL. CODE ANN. tit. 8, § 102(b)(7) (Supp. 1986). One article asserts that Indiana, Michigan, Minnesota, New Jersey, Ohio, Pennsylvania, and Virginia have all enacted similar provisions to the Delaware amendment. Balotti & Gentile, *Elimination or Limitation of Director Liability for Delaware Corporations*, 12 DEL. J. CORP. L. 5, 10 n.22 (1987).

⁶ MASS. GEN. L. ch. 156B, § 13(b)(1 1/2) (Supp. 1988).

⁷ Section 13(b)(1 1/2) reads:

(1 1/2) a provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director notwithstanding any provision of law imposing such liability; provided, however, that such provision shall not eliminate or limit the liability of a director (i) for any breach of the director's duty of loyalty to the corporation or its stockholders, (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (iii) under section sixty-one or sixty-two, or (iv) for any transaction from which the director derived an improper benefit;

Id.

⁸ Section 13(b) contains permissible provisions for the articles of incorporation, not mandatory terms. MASS. GEN. L. ch. 156B, § 13(b) (Supp. 1988).

⁹ *Id.* §§ 70-71 (1970 & Supp. 1988).

Section 13(b)(1 1/2) also applies only to directors acting in their capacity as directors.¹⁰ Thus, while a corporation may limit its directors' liability, it may not limit the liability of its officers for breaching their fiduciary duties. Neither may a corporation limit the liability of inside directors for actions they take in their roles as corporate officers rather than corporate directors.

Additionally, section 13(b)(1 1/2) only applies to shareholder derivative suits arising after a corporation amends its articles of incorporation.¹¹ Thus, directors will continue to be subject to liability for any transgressions against third parties outside of the corporation. Furthermore, a corporation may not adopt an amendment authorized under section 13(b)(1 1/2) to shield liability from pending litigation.

Under section 13(b)(1 1/2), a corporation may only limit the liability of its directors for monetary damages.¹² Thus, shareholders may still bring actions for equitable relief from a director's breach of the duty of care. Such actions may include preventing an unfavorable action with an injunction or rescinding a transaction tainted by a director's breach of the duty of care.¹³

The most important limitation on amendments authorized by section 13(b)(1 1/2) lies in its restriction to actions based on the duty of care. A corporation may not limit the liability of its directors for breaches of the duty of loyalty to the corporation, for intentional misconduct or violations of the law, for distributing assets when those distributions would render the corporation insolvent, or for any transactions from which a director derived an improper benefit.¹⁴ By limiting or eliminating directors' liability for breaching the duty of care but not the other duties, amendments under section 13(b)(1 1/2) place tremendous significance on the distinction between the duty of care and these other duties, especially the duty of loyalty.

The distinction between the duty of care and the duty of loyalty may often appear blurry.¹⁵ Amendments under section 13(b)(1 1/2) may eliminate director liability on one side of this blurry line but not on the other. This uncertainty may well generate a great deal of litigation. Nonetheless, in adopting section 13(b)(1 1/2), Massa-

¹⁰ *Id.* § 13(b)(1 1/2) (Supp. 1988).

¹¹ *Id.*

¹² *Id.*

¹³ Balotti & Gentile, *supra* note 5, at 15-16.

¹⁴ MASS. GEN. L. ch. 156B, § 13(b)(1 1/2) (Supp. 1987).

¹⁵ See, e.g., *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985).

chusetts joins with a number of other jurisdictions.¹⁶ As long as Massachusetts courts move in unison with these other jurisdictions in clarifying the distinction between the duty of care and the duty of loyalty, the threat of this potential litigation may be limited.

B. **Allowing Corporations to Issue Blank Stock: Section 26*

On July 21, 1987, the Massachusetts Legislature amended the Massachusetts corporate statute to allow a corporation to grant its directors authority to determine the rights, preferences, powers and privileges of any class or series of stock before that corporation issues any stock in that class or series.¹ This amendment allows the corporation to issue "blank stock" in order to better compete in the securities market.² This amendment brings the Massachusetts corporate statute into line with the Delaware statute and allows Massachusetts-based corporations the flexibility to compete with their Delaware counterparts.

Under the amended section 26, a Massachusetts corporation may authorize its board of directors to determine the preferences, voting powers, qualifications and privileges of any stock series or class which the corporation has not previously issued.³ Such a series or class of stock is "blank stock."⁴ The device of blank stock allows a corporation to tailor its securities issues to the current conditions in the securities market.⁵ A corporation may adjust the dividend percentage of a stock series to reflect the most recent developments in the market.⁶ Without the device of blank stock, a corporation must engage in the expensive and time-consuming process of seeking shareholder approval to amend the articles of incorporation to

¹⁶ See *supra* note 5 and accompanying text.

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¹ MASS. GEN. L. ch. 156B, § 26 (1988 Supp.). The amended section 26 provides, in part:

Section 26. If the articles of organization so provide, the directors may determine, in whole or in part, the preferences, voting powers, qualifications, and special . . . rights or privileges of (1) any class of stock before the issuance of any shares of that class or (2) one or more series within a class before the issuance of any shares in that series.

² A corporation has blank stock when the directors may determine the rights and preferences of the stock at a later date. W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 5284.1 (permanent ed. 1986).

³ MASS. GEN. L. ch. 156B, § 26 (Supp. 1988).

⁴ W. FLETCHER, *supra* note 2, § 5284.1.

⁵ *Id.*

⁶ *Id.*

authorize the specific rights and preferences of each new class or series of stock.⁷

The amended section 26 provides that to authorize the issuance of a new series or class of stock, the corporation must file a certificate with the state secretary.⁸ That certificate must state the full text of the directors' decision determining the rights and preferences of the stock.⁹ That certificate constitutes, in effect, an amendment of the articles of organization.¹⁰

By allowing Massachusetts corporations to use the device of blank stock, the amended version of section 26 allows them to better compete with their Delaware counterparts. Modern securities markets can fluctuate a great deal in a short period of time.¹¹ Seeking shareholder authorization to adjust the percentage of dividends of a stock series can be a cumbersome process.¹² Through the device of blank stock, a corporation may decide what preferences are appropriate for a stock series given the current market conditions.¹³ Thus, corporations based in states that allow blank stock have more flexibility to react to a changing market than corporations located in states that do not allow blank stock. By amending section 26 in this manner, the legislature has, therefore, given Massachusetts-based corporations a useful device for adjusting to a fluctuating securities market.

Moreover, allowing corporations to issue blank stock may prove useful to corporations subject to hostile takeovers.¹⁴ Under the amended version of section 26, a Massachusetts corporation may issue "poison pill" preferred stock. "Poison pill" shares are preferred shares of stock issued *pro rata* to the holders of common stock.¹⁵ "Poison pill" shares have special redemption privileges.¹⁶ Typically, holders of "poison pill" shares have the right to redeem these shares for cash if another company gains control over the

⁷ *Id.*

⁸ MASS. GEN. L. ch. 156B, § 26 (Supp. 1988).

⁹ *Id.*

¹⁰ *Id.*

¹¹ W. FLETCHER, *supra* note 2, § 5284.1.

¹² *Id.*

¹³ *Id.*

¹⁴ See Note, *Protecting Shareholders Against Partial and Two-Tiered Takeovers: The "Poison Pill" Preferred*, 97 HARV. L. REV. 1964 (1984).

¹⁵ *Id.* at 1964.

¹⁶ *Id.* at 1964-65.

target corporation.¹⁷ Furthermore, the price paid by the target corporation for these redeemed shares generally equals the highest price offered during the previous year.¹⁸ Thus, when a target corporation issues blank stock, the takeover "shark" faces the prospect of the target company's shareholders liquidating their holdings and depleting the newly acquired company's assets.

*C. *First Circuit Court of Appeals Enjoins Enforcement of the
Massachusetts Takeover Statute: Hyde Park Holdings, Inc. v.
Connolly*

The United States Supreme Court has twice determined the constitutionality of state anti-takeover statutes.¹ First, in *Edgar v. MITE Corp.*,² in 1982, the Court invalidated an Illinois statute on commerce clause grounds while a plurality also found that the federally enacted Williams Act preempted the statute.³ The Illinois statute empowered the Illinois Secretary of State to delay indefinitely tender offers while preventing some offers altogether even where the target corporation was not incorporated in that state.⁴ In 1987, the Supreme Court, in *CTS Corp. v. Dynamics Corp. of America*, held that an Indiana statute which allowed disinterested shareholders to decide whether voting rights would be attached to shares purchased by a bidder in a control transaction was constitutional.⁵

In 1988, the First Circuit Court of Appeals, in *Hyde Park Holdings, Inc. v. Connolly*, affirmed a lower court's grant of an injunction enjoining enforcement of certain provisions of a Massachusetts takeover statute.⁶ In this case, Hyde Park⁷ sought to enjoin enforcement of section 3 of the Massachusetts Takeover Bid Regulation Act⁸ on the grounds that its provisions, which prohibited further takeover bids (for a 1-year period) by any bidder exceeding the 5% stock

¹⁷ *Id.*

¹⁸ *Id.* at 1965.

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¹ See *CTS Corp. v. Dynamics Corp. of Am.*, 107 S. Ct. 1637 (1987); *Edgar v. MITE Corp.*, 457 U.S. 624 (1982).

² 457 U.S. 624.

³ See *id.* at 634, 646.

⁴ See *id.* at 627.

⁵ See *CTS*, 107 S. Ct. at 1652.

⁶ 839 F.2d 837, 854 (1st Cir. 1988).

⁷ Hyde Park consists of Hyde Park Partners, L.P. and Hyde Park Holdings, Inc. *Id.* at 840.

⁸ MASS. GEN. L. ch. 110C, § 3 (1986).

ownership level in its target without announcing its intent to acquire control of such corporation, were unconstitutional.⁹ Hyde Park asserted that section 3 violated both the commerce clause and the supremacy clause of the United States Constitution.¹⁰

The relevant facts in *Hyde Park* are straightforward. On December 9, 1987, Hyde Park Holdings, Inc. made purchases of High Voltage Engineering Corporation's shares that resulted in ownership in excess of the 5% level.¹¹ The company failed, however, to announce its intent to gain control of the corporation until December 21, 1987.¹² The court in *Hyde Park* noted that the bidder did not deny that it was in fact seeking control of the target.¹³ As a result of the bidder's failure to announce, section 3 of the statute would have prohibited any further purchases of High Voltage shares until December 9, 1988.¹⁴

Subsequent to an analysis of several procedural questions and an examination of the proper standard of review, the court considered Hyde Park's likelihood of success on the merits of its commerce clause challenge.¹⁵ Utilizing the two-part test enumerated by the Supreme Court in *CTS*, the *Hyde Park* court concluded that the statute neither discriminated against interstate tender offers nor subjected Massachusetts corporations to inconsistent regulations.¹⁶ The court did warn, however, that application of the statute to a corporation having its principal place of business in Massachusetts but being incorporated elsewhere would probably be unconstitutional under the commerce clause due to the aforementioned potentially inconsistent regulation by more than one state.¹⁷ In addition, although the court stated that a balancing test which weighs a statute's burdens on interstate commerce against its purported local benefits¹⁸ may not be appropriate in all commerce clause cases, it applied the test in this instance because of the statute's "direct regulation of interstate transactions."¹⁹ Regarding the disclosure provision, the court was unwilling to accept as certain the state's

⁹ See *Hyde Park*, 839 F.2d at 840.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ See *id.*

¹⁵ See *id.* at 840-43.

¹⁶ *Id.* at 844.

¹⁷ *Id.*

¹⁸ This balancing test was enumerated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

¹⁹ *Hyde Park*, 839 F.2d at 844-45.

contentions that this provision would increase shareholders' chances to obtain premiums for their shares and that the statute would aid Massachusetts corporations on the whole.²⁰ The court noted that nonresident shareholders do not represent legitimate local interests, that less takeovers may not benefit corporate shareholders, and that "mere protection of local economic interests is generally an impermissible purpose under the Commerce Clause."²¹ The court concluded, therefore, that due to the above-mentioned legitimate and conflicting arguments, Hyde Park had not demonstrated sufficiently the necessary likelihood of success on the merits regarding its commerce clause challenge to this provision.²²

The court did acknowledge, however, the likelihood of the penalty provision's violating the commerce clause and likened the provision to that in *MITE* in that it represented a direct prohibition on the actual transfer of shares.²³ Moreover, the court of appeals rejected the argument that because the provision would deter violation of the constitutional disclosure provision, it should be held constitutional.²⁴ Courts may consider whether the particular penalty in question is as unoffensive to interstate commerce as other alternatives would be, the court added.²⁵ In fact, the court noted that this penalty provision could serve to undermine the underlying purpose of the statute (i.e. investor protection) by denying them opportunities to maximize their profits by selling their shares to the tender offeror for one year.²⁶ Because the court could cite only one benefit created by the provision — its deterrent effect on disclosure violations — it concluded that the penalty provision was sufficiently likely to violate the commerce clause to warrant an injunction.²⁷

Under a preemption analysis,²⁸ the court initially pointed out that Congress had not stated that the Williams Act, the federal statute regulating takeovers, was meant to preempt all state legis-

²⁰ *Id.* at 845-47.

²¹ *Id.* at 845-46.

²² *Id.* at 847.

²³ *Id.* at 847-48.

²⁴ *Id.*

²⁵ *See id.*

²⁶ *See id.* at 848.

²⁷ *See id.*

²⁸ The court noted that it had earlier held, in *Agency Rent-A-Car v. Connolly*, 686 F.2d 1029 (1st Cir. 1982), that the penalty provision did not violate the Supremacy Clause. *Hyde Park*, 839 F.2d at 848. The court added, however, that its decision therein was based on the stipulation by both parties that the disclosure provision did not conflict with federal legislation — a stipulation not present in this case. *Id.*

lation in this area.²⁹ The court did note, however, that section 3 must be examined to determine whether it would prevent the objectives of the Williams Act from being achieved.³⁰ The main goal of the Williams Act, the court asserted, is to protect investors.³¹ Because the disclosure provision would potentially reduce the number of tender offers for shares of Massachusetts corporations without offering any protection to shareholders additional to that already provided by the Williams Act and due to the Williams Act's explicit enumeration of the proper extent and timing of disclosure in takeover bids, the court concluded that the disclosure provision would likely be preempted.³² As a result, the court held that the penalty provision, intended to deter violations of the disclosure provision, was also likely violative of the supremacy clause.³³

The court's decision in *Hyde Park* reaffirms the judiciary's intolerance for provisions potentially allowing for the outright prevention of sales of stock. That, of course, represented a significant distinction between the two statutes examined by the Supreme Court in *MITE* and *CTS*. Whereas the Illinois statute invalidated in *MITE* empowered a state official to prevent outright a tender offer where he or she found its terms to be inequitable,³⁴ the Indiana statute upheld in *CTS* involved only the voting rights to be attached to shares subsequent to a control purchase.³⁵

Regarding preemption, courts have varied in their willingness to accept state legislation which regulates along similar lines as the Williams Act. In *Hyde Park*, the court of appeals expressed little tolerance for the statute's disclosure requirement which called for an announcement of intent to control the target corporation prior to the federally imposed regulation. The court concluded that Congress had struck a balance between the timing and extent of disclosure and the potential adverse effects on the number of takeover bids³⁶ and that the disclosure requirement of section 3 frustrated that balance.³⁷

²⁹ *Id.* at 849.

³⁰ *See id.*

³¹ *Id.*

³² *See id.* at 850-53.

³³ *Id.* at 853.

³⁴ *See Edgar v. MITE Corp.*, 457 U.S. 624, 639 (1982).

³⁵ *See CTS Corp. v. Dynamics Corp. of Am.*, 107 S. Ct. 1637, 1641 (1987).

³⁶ *See Hyde Park*, 839 F.2d at 853.

³⁷ *Id.*

D. **Criminal Liability for Close Corporations: Commonwealth v. L.A.L. Corp.*

In 1987, the Massachusetts Supreme Judicial Court decided in *Commonwealth v. L.A.L. Corp.* that courts could hold a closely held corporation criminally liable for acts committed by its agents.¹ In deciding the *L.A.L.* case, the Supreme Judicial Court relied heavily on its previous ruling in *Commonwealth v. Beneficial Finance Company* which held several non-closely held, or "endocratic," corporations criminally liable for the acts of their employees.² By refusing to create an exception from the rule of the *Beneficial Finance* case, the Court reinforced that decision and avoided making a difficult distinction between endocratic³ and closely held corporations.

In *Beneficial Finance*, the Supreme Judicial Court sustained the convictions of three finance corporations as well as several individuals for various crimes associated with a scheme to bribe members of the Small Loans Regulatory Board.⁴ The defendant corporations, in *Beneficial*, argued that they should not incur criminal liability for the actions of their agents unless the corporation's officers, directors or other high managerial agents authorized these actions before they occurred, ratified them after they occurred, or tolerated them as they occurred.⁵ The Supreme Judicial Court rejected these contentions and stated that courts could hold a corporation criminally liable for the actions of its agent if the corporation placed the agent in a position where that agent had enough authority and responsibility to act for the corporation in the particular project that gave rise to the criminal act.⁶ In reaching this conclusion, the Court expressed considerable concern over the ability of large endocratic corporations to escape liability for their actions.⁷ The *L.A.L.* Corporation seized upon these statements of concern to argue that the

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¹ 400 Mass. 737, 511 N.E.2d 599 (1987). Closely held corporations are corporations in which a small closely-knit group of shareholders own the vast majority of the stock. HENN & ALEXANDER, LAWS OF CORPORATIONS § 257 (3d ed. 1983). Most, though not all, closely held corporations are small businesses. *Id.*

² 360 Mass. 188, 275 N.E.2d 33 (1971).

³ Endocratic corporations are large, publicly held corporations whose stock is scattered in small groups among thousands of stockholders. *Id.* at n.58, 275 N.E.2d at 84 n.58.

⁴ *Id.* at 200-01, 373, 275 N.E.2d at 42-43, 136.

⁵ *Id.* at 254, 275 N.E.2d at 71.

⁶ *Id.* at 280, 275 N.E.2d at 86.

⁷ *Id.* at 276-79, 275 N.E.2d at 83-85.

rule of the *Beneficial Finance* case should not apply to closely held corporations.

L.A.L.'s affidavit stated that the L.A.L. Corporation was a small closely held corporation that operated an establishment known as The Ranch House.⁸ Only two people owned stock in the L.A.L. Corporation.⁹ The L.A.L. Corporation was duly licensed to serve alcoholic beverages at The Ranch House.¹⁰ On several occasions, minors purchased alcoholic drinks at The Ranch House, but the bartender failed to ask any of these minors for proper age identification.¹¹ Thus, each sale violated Massachusetts General Laws chapter 138, section 34.¹² L.A.L.'s affidavit stated that the corporation's manager, officers and directors played no role in the actions which triggered this controversy.¹³ The affidavit also stated that the company maintained a firm policy of prohibiting its employees from selling drinks to minors.¹⁴

At trial, the L.A.L. Corporation moved to dismiss the complaint, arguing that the *Beneficial Finance* standard should not apply to closely held corporations.¹⁵ Rather, L.A.L. contended that a closely held corporation should only incur criminal liability for the actions of its agents if the corporation's officers, directors or other high managerial agents approved of the actions.¹⁶ L.A.L. pointed to the concern expressed by the Supreme Judicial Court in *Beneficial Finance* over controlling large endocratic corporations.¹⁷

The Supreme Judicial Court rejected L.A.L.'s position.¹⁸ In its opinion, the Court stated that the distinction between large endocratic corporations and closely held corporations makes "no difference" in holding a corporation criminally liable for the actions of its employees.¹⁹ In so holding, the Court added that nothing in the *Beneficial* opinion suggested that it should distinguish between

⁸ 400 Mass. at 738-39, 511 N.E.2d at 600-01.

⁹ *Id.* at 739, 511 N.E.2d at 601.

¹⁰ *Id.* at 739, 511 N.E.2d at 600-01.

¹¹ *Id.* at 739, 511 N.E.2d at 601.

¹² MASS. GEN. L. ch. 138, § 34 (1986). This provision reads as follows: "Whoever makes a sale or delivery of any alcoholic beverages or alcohol to any person under twenty-one years of age . . . shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than six months, or both." *Id.*

¹³ 400 Mass. at 739, 511 N.E.2d at 601.

¹⁴ *Id.*

¹⁵ *Id.* at 740, 511 N.E.2d at 601.

¹⁶ *Id.* at 741, 511 N.E.2d at 601.

¹⁷ *Id.* at 740, 511 N.E.2d at 601.

¹⁸ *Id.*

¹⁹ *Id.*

closely held and endocratic corporations.²⁰ The Court added that the defense advanced no sound reason for making such a distinction in this context.²¹ Turning to the facts of the case, the Court held that the trial court could reasonably find that the bartenders were engaged in authorized conduct on behalf of the corporation when they served drinks to the minors.²² The Court, therefore, concluded that the trial court improperly granted the defendant's motion to dismiss and remanded the case for further proceedings.²³

In ruling against the defendants in *Commonwealth v. L.A.L. Corp.*, the Supreme Judicial Court affirmed a strong public policy in favor of holding corporations accountable for their actions, and avoided making a distinction between closely held and endocratic corporations in an inappropriate context. Corporations, unlike natural persons, can only act through their agents. To allow a corporation to benefit from these acts when they produce profits but not incur liability when they act in a criminal fashion would allow a corporation to exert tacit pressure on its employees to violate laws that reduce profits. In this case, when the bartenders sold the drinks to the minors, the L.A.L. Corporation received the profits from these sales as well as from any other sales that went undetected. L.A.L. should not be able to hide behind a cloak labelled "legal fiction" to avoid liability for these sales. Furthermore, allowing a closely held corporation to escape liability for these actions would defeat the underlying social policies behind the provisions of the criminal law.

The decision of the Supreme Judicial Court in the *L.A.L.* case also avoids making a potentially troublesome distinction. While the distinction between closely held and endocratic corporations seems relatively clear when one compares a Fortune 500 company to a prototypical "Mom and Pop" store, the distinction can blur as the size of the business moves away from these two extremes. This is not to say that making legal distinctions between endocratic and closely held corporations is generally unwise. Indeed, in a number of contexts the needs and operations of these two types of corporations differ greatly.²⁴ Such a distinction, however, could cloud the

²⁰ *Id.* at 743-44, 511 N.E.2d at 603.

²¹ *Id.* at 744, 511 N.E.2d at 603.

²² *Id.*

²³ *Id.*

²⁴ Closely held corporations generally have no publicly held voting shares of stock. HENN & ALEXANDER, *supra* note 1, § 257. Closely held corporations are generally concerned with reducing the burden of formal procedures, avoiding deadlocks amongst the shareholders,

issue of criminal liability in cases such as *Commonwealth v. L.A.L. Corp.* and undermine the public policies embodied in the field of criminal law.

E. **Fiduciary Duties Among Shareholders of Close Corporations: Bodio v. Ellis*

In 1975, the Massachusetts Supreme Judicial Court, in *Donahue v. Rodd Electrotype Co.*, established that a close corporation's shareholders owe to one another duties of loyalty.¹ This decision represented an extension of the fiduciary duties concept more commonly considered in connection with a corporation's officers and directors, and their responsibilities to the corporation.² These fiduciary duties owed by a close corporation's shareholders to one another have been further defined in Massachusetts cases following *Donahue*.³ Specifically, in 1987, in *Bodio v. Ellis*,⁴ the Massachusetts Supreme Judicial Court held that where shareholders of a close corporation clearly indicate their intent to maintain equal control between two of the corporation's three shareholders and that equality is later disturbed by some shareholders to the detriment of another, courts may find a breach of fiduciary duty among shareholders and order that the transaction disturbing the envisioned equality be undone.⁵

Bodio involved the shareholders of Bright Insurance Agency, a close corporation incorporated in Massachusetts.⁶ The company had originally authorized 1000 shares and issued 450 shares in 1952.⁷ Karl Bright was the majority shareholder of the corporation with 300 shares, while minority shareholders, Henry Bodio and Elsie Apicella, had 105 shares and 45 shares respectively.⁸ In 1965, Ap-

providing an active role in the management of the company for stockholders, and generally keeping many of the attributes of a partnership. *Id.*

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¹ 367 Mass. 578, 597, 328 N.E.2d 505, 517 (1975).

² See R. CLARK, CORPORATE LAW 141 (1986).

³ See, e.g., *Wilkes v. Springside Nursing Home, Inc.*, 370 Mass. 842, 353 N.E.2d 657 (1976) (a minority shareholder's being "frozen out" of a close corporation by majority shareholders absent a legitimate business purpose constituted a breach of the fiduciary duties owed among a close corporation's shareholders); *Hallahan v. Haltom Corp.*, 7 Mass. App. Ct. 68, 385 N.E.2d 1033 (1979) (where shareholders of a close corporation purposely create equal control among them, transactions that disturb that equality may be subject to invalidation by the courts).

⁴ 401 Mass. 1, 513 N.E.2d 684 (1987).

⁵ See *id.* at 10, 513 N.E.2d at 689.

⁶ *Id.* at 2, 513 N.E.2d at 685.

⁷ *Id.* at 4, 513 N.E.2d at 686.

⁸ *Id.*

icella sold her shares to Peter Ellis, who, by acquiring 60 shares from Bright in 1968, became an equal minority shareholder along with Bodio.⁹ By 1982, Bodio and Ellis had become vice-president and president of the corporation respectively.¹⁰

In 1972, however, Bright had transferred two shares to Gordon Shaw, an attorney, so as to make Shaw a mediator in deadlock votes between Ellis and Bodio.¹¹ In 1973, the three shareholders executed several agreements, the most significant of which provided that Ellis and Bodio would each be entitled to one-half of Bright's shares on the date of Bright's death.¹² Shaw, however, transferred his two shares to Ellis in 1974, at the direction of Bright, thereby upsetting the originally intended equality between Ellis and Bodio.¹³ Both Ellis and Bodio purchased 119 shares of Bright's 238 upon Bright's death in 1981.¹⁴

This case, therefore, focused on whether the decision by Bright to direct Shaw's two shares to Ellis violated Bright's fiduciary duty to Bodio.¹⁵ The Court examined all agreements among the parties¹⁶ and concluded that the shareholders had intended to maintain equality between Ellis and Bodio.¹⁷ The Court noted that Bright's initial two-share transfer to Shaw did not upset the equality established between Bodio and Ellis.¹⁸ Although the Court conceded that Bright apparently changed his mind by directing Shaw to transfer the two shares to Ellis, thereby giving him eventual majority shareholder status, it concluded that Bright's decision violated his duty of "utmost loyalty, trust and confidence."¹⁹ As a result of the breach,

⁹ *Id.*

¹⁰ *See id.* at 4-5, 513 N.E.2d at 686.

¹¹ *Id.* at 6, 513 N.E.2d at 687.

¹² *Id.* at 5, 513 N.E.2d at 686-87.

¹³ *See id.* at 6, 513 N.E.2d at 687.

¹⁴ *Id.*

¹⁵ *See id.* at 9, 513 N.E.2d at 688. The Court initially rejected defendants' argument that Bodio had "de facto" retired and thereby subjected his shares to repurchase pursuant to an earlier agreement among the parties. *See id.* at 6-7, 513 N.E.2d at 687.

¹⁶ Other agreements provided for Ellis' rights upon Bodio's retirement and vice versa, as well as their salaries, responsibilities and rights as directors. *Id.* at 5, 513 N.E.2d at 686.

¹⁷ *See id.* at 8-9, 513 N.E.2d at 688.

¹⁸ *Id.* at 9, 513 N.E.2d at 688.

¹⁹ *Id.* at 9, 513 N.E.2d at 688-89 (citing *Donahue v. Rodd Electrotpe Co.*, 367 Mass. 578, 594-97, 328 N.E.2d 505 (1975)). The Court also cited *Hallahan v. Haltom Corp.* wherein the Massachusetts Appeals Court found a breach of fiduciary duties among shareholders where four shareholders were intended to have equal control of the corporation and that equality was disrupted by a shareholder's acquiring by proxy the right to vote the shares of a fifth party not intended to be a participant in the corporation's affairs. *Id.* at 9, 513 N.E.2d at 689 (referring to *Hallahan*, 7 Mass. App. Ct. 68, 69-71, 385 N.E.2d 1033 (1979)).

the Court ordered that the corporation re-acquire two of Ellis' shares.²⁰

The Massachusetts Supreme Judicial Court, in *Bodio*, further clarified the duty of loyalty owed among shareholders of closely held corporations. The Court established that even where shareholders do not possess equal power initially, subsequent agreements among the shareholders to create and to maintain such a balance cannot be rendered ineffective by transfers that would disrupt that equality, as such would constitute breaches of the fiduciary duties owed among shareholders of close corporations. The Court also demonstrated its willingness to resort to equitable remedies where such equality is indeed disrupted.

VI. SELECTED DEVELOPMENTS IN PROPERTY AND ZONING LAW

Several noteworthy developments in property law occurred during the *Selected Developments* year. Section A first will consider the effect of the recently enacted statutory provision Massachusetts General Laws chapter 40A, section 6, on the exemption of non-conforming uses from local zoning by-laws. Next, Section B examines the requirements for exempting a non-profit educational corporation from local zoning regulations. Section C addresses recent Massachusetts Appeals Court decisions that interpret what constitutes a subdivision within the meaning of Massachusetts General Laws chapter 41, section 81P and relatedly, whether a plan may be exempt from the local planning board subdivision approval process. Section D discusses recent decisional law concerning adverse possession of an easement. Finally, Section E concludes with a general review of Massachusetts law regarding a real estate broker's right to a commission, and a particular critique of a 1987 First Circuit decision that interprets Massachusetts law concerning the broker's fee issue.

A. **Discontinuance or Abandonment of Nonconforming Uses*: Bartlett v. Board of Appeals of Lakeville

Under Massachusetts General Laws chapter 40A, section 6, a "zoning ordinance or by-law may define and regulate nonconforming uses and structures abandoned or not used for a period of two

²⁰ *Bodio*, 401 Mass. at 10, 513 N.E.2d at 689.

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years or longer.”¹ The exemption of nonconforming uses from zoning ordinances and by-laws has existed since the legislature first granted authority to cities and towns outside of Boston to adopt such ordinances and by-laws.² Cities and towns, however, may regulate non-use of nonconforming structures so as to terminate the nonconforming use.³ Many city and town ordinances and by-laws which extinguished nonconforming uses usually required a period of “discontinuing” use before they could extinguish the nonconforming use.⁴

The Supreme Judicial Court, in the 1954 decision of *Pioneer Insulation & Modernizing Corp. v. Lynn*, held that the term “discontinued” was the equivalent of “abandoned.”⁵ The Court stated that to determine whether an owner discontinued a nonconforming use, a court should examine two concurring factors: first, the intent to abandon, and second, any voluntary conduct, whether affirmative or negative, that implies an abandonment.⁶ The Court noted, however, that non-occupancy of the premises or suspension of the business due to causes beyond the owner’s control did not alone constitute a discontinuance.⁷ According to the Court, the lapse of time during which the premises were unoccupied or the business suspended was not controlling, although such a period of non-use would constitute evidence of an intent to discontinue the nonconforming use.⁸

During the *Selected Developments* year, the Massachusetts Appeals Court, in *Bartlett v. Board of Appeals of Lakeville*, equated the words “discontinued for a period of two years or longer,” appearing in the relevant portion of a town’s zoning by-law, with the language “not used for a period of two years or more,” as used in section 6.⁹ The court also held that the owners of a building are precluded from re-establishing a nonconforming use that the operation of the by-laws had extinguished absent any by-law provision which would

¹ MASS. GEN. L. ch. 40A § 6, (1975).

² *Bartlett v. Board of Appeals of Lakeville*, 23 Mass. App. Ct. 664, 666-67, 505 N.E.2d 193, 195 (1987). See *Inspector of Buildings of Burlington v. Murphy*, 320 Mass. 207, 209, 68 N.E.2d 918 (1946).

³ *Bartlett*, 23 Mass. App. Ct. at 667, 505 N.E.2d at 195.

⁴ *Id.*

⁵ 331 Mass. 560, 565, 120 N.E.2d 913 (1954).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Bartlett*, 23 Mass. App. Ct. at 670, 505 N.E.2d at 197. See MASS. GEN. L. ch. 40A, § 6 (1975).

allow them to do so.¹⁰ In *Bartlett*, the court held that the Lakeville Board of Appeals (the "Board") correctly equated the language of the town by-law extinguishing a nonconforming use with the recently enacted cognate provisions of Massachusetts General Laws chapter 40A, section 6 (the "Statute").¹¹ A city or town, the court stated, may not adopt a new or amended zoning ordinance or by-law which conflicts with general enabling legislation.¹² A city or town may, however, adopt either or both criteria set forth in the statute to extinguish nonconforming uses.¹³ In other words, a city or town may extinguish a nonconforming use by using the abandonment standard, or by using the two year time period of non-use, as stated in the statute.¹⁴

In *Bartlett*, a town building inspector refused to issue a permit for the renovation of a three-unit dwelling in the residential zoning district of the town.¹⁵ The building had been exempt since 1959 from a by-law that did not permit three-family dwelling units in the residential zone in which the building was located.¹⁶ The previous owner had lived in one of the units, but had not rented out the other two for a period of ten years, during which time she was in declining health for several years.¹⁷ Because of her declining health she failed to rent the premises or to alter or eliminate the apartments.¹⁸

In 1984, the plaintiff, as present owner of the property, applied for a building permit for use in connection with the renovation of all three dwelling units.¹⁹ The building inspector refused the permit on the grounds that the zoning by-laws prohibited three-family units unless protected by the nonconforming use provisions of the by-law.²⁰ The plaintiff appealed to the Board, which upheld the action of the building inspector.²¹ The Board equated the words "discontinued for a period of two years or longer" in the town by-law with

¹⁰ *Bartlett*, 23 Mass. App. Ct. at 672, 505 N.E.2d at 198.

¹¹ *Id.* at 670, 505 N.E.2d at 197.

¹² *Id.* (citing *Planning Bd. of Reading v. Board of Appeals of Reading*, 333 Mass. 657, 660, 132 N.E.2d 386, 388-89 (1956)).

¹³ *Bartlett*, 23 Mass. App. Ct. at 688-89, 505 N.E.2d at 196.

¹⁴ *Id.* See MASS. GEN. L. ch 40A, § 6 (1975).

¹⁵ *Bartlett*, 23 Mass. App. Ct. at 666, 505 N.E.2d at 194.

¹⁶ *Id.* at 665, 505 N.E.2d at 194.

¹⁷ *Id.* at 665-66, 505 N.E.2d at 194.

¹⁸ *Id.*

¹⁹ *Id.* at 666, 505 N.E.2d at 194.

²⁰ *Id.*

²¹ *Id.* at 666, 505 N.E.2d at 194-95.

the words "not used for a period of two years or more" in the statute, and sustained the building inspector's decision, prompting the plaintiff to appeal the decision to the Superior Court.²² The Superior Court sustained the Board's decision on appeal.²³

The Appeals Court held that the Board correctly equated the language of the by-law with the language of the statute.²⁴ In choosing the language of the by-law, the court held, the town meeting selected the objective criteria of "not used for two years or more" for terminating a nonconforming use.²⁵ The court refused to apply the traditional voluntary or intentional action requirement, a part of the abandonment criterion, to the second "discontinued" use criterion.²⁶ The legislature, the court held, had established an objective standard with the second criterion that was both easily understood and easily applied.²⁷ The legislature could not have intended to merely repeat the abandonment test in the second criterion.²⁸ It would have been a tautology, the court stated, if the legislature had meant to extinguish a nonconforming use that had been "abandoned or abandoned for a period of two years or more."²⁹

Bartlett is significant because it provides guidance in framing a by-law or ordinance used to terminate nonconforming uses. Although a city or town cannot adopt a new or amended zoning ordinance or by-law which conflicts with general enabling legislation, a city or town can select either or both criteria for extinguishing a nonconforming use. Either the traditional "abandonment" standard can be used, which requires intent plus voluntary action or inaction and is not dependent on a time period, or the two year provision which terminates a nonconforming use according to the time period, regardless of intent. In doing so, the court has made it relatively easy to extinguish a nonconforming use. The court upheld the policy that cities and towns should have the ability to terminate such nonconforming uses.

This interpretation of the statute and the by-law is especially hard on indigent property owners. In *Bartlett*, the previous owner, whose protection was extinguished, was in declining health and

²² *Id.*

²³ *Id.* at 666, 505 N.E.2d at 195.

²⁴ *Id.* at 670, 505 N.E.2d at 197.

²⁵ *Id.*

²⁶ *Id.* at 669, 505 N.E.2d at 196.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

unable to rent the units for at least part of the ten-year period of non-use. The court did not address the issue of whether the protection would have been extinguished had the previous owner been incapacitated for the entire period of non-use. If the protection would have been extinguished despite the owner's incapacity to exercise the nonconforming use, then indigent or disabled property owners would be unfairly deprived of the protection. Buyers seeking the protected property would have an enormous advantage over an owner whose nonconforming use would be terminated even if they are unable, rather than unwilling, to maintain it. After *Bartlett*, towns and cities may now choose the "abandonment" standard or the two year time period or both in order to extinguish a nonconforming use. Although voluntary action is not required for the two-year standard as it is for the abandonment standard, the Appeals Court has not yet decided whether physical inability to maintain the nonconforming use will affect the running of the statutory period. Thus, until the courts incorporate a physical incapacity exception to the two-year period for extinguishing a nonconforming use, towns may easily destroy nonconforming uses by adopting the less restrictive two-year standard, thereby depriving indigent property owners their nonconforming uses.

B. **Zoning: Zoning Exemptions for Nonprofit Educational Corporations*

Massachusetts prohibits municipalities from enforcing zoning restrictions which exclude educational and religious organizations, and significantly restricts the ability of municipalities to regulate educational and religious uses of property.¹ The Massachusetts zoning exemption for educational and religious organizations accords with the majority view that such organizations are important to society generally and therefore municipalities may not exclude them from residential districts.² In 1950, the Massachusetts Legislature enacted legislation to preclude municipalities from exercising preferences as to the type of educational and religious uses of property they would tolerate.³ The legislature amended this enactment in

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¹ See MASS. GEN. LAWS ANN. ch. 40A, § 3 (West 1979).

² See 2 A. RATHKOPF & D. RATHKOPF, *THE LAW OF ZONING AND PLANNING* § 20.01(2)(a) (1986).

³ *Bible Speaks v. Board of Appeals of Lenox*, 8 Mass. App. Ct. 19, 27 n.10, 33, 391 N.E.2d 279, 283 n.10, 286 (1979). See *Newbury Junior College v. Town of Brookline*, 19 Mass. App. Ct. 197, 205, 472 N.E.2d 1373, 1379, *rev. denied*, 394 Mass. 1102, 475 N.E.2d 401 (1985). The statute as amended in 1956, provided "that no ordinance or by-law which

1975 to require that the property be leased or owned by a "nonprofit educational corporation" in addition to requiring that the property be used for "educational purposes."⁴

Massachusetts courts broadly define education as the process of developing human abilities and preparing individuals for "activity and usefulness in life."⁵ The courts likewise broadly define "educational purpose" within the context of the Massachusetts General Laws chapter 40A, section 3.⁶ They focus on the particular use of the structure or the land at issue and require that the proposed use of that land be primarily educational.⁷ In contrast to the definition of "educational purpose," Massachusetts courts have not required that a corporation's general activities be primarily educational to qualify as a "nonprofit educational corporation."⁸

prohibits or limits the use of land for any church or other religious purpose or for any educational purpose whether public, religious, sectarian or denominational shall be valid." *City of Worcester v. New England Inst. and New England School of Accounting*, 335 Mass. 486, 488, 140 N.E.2d 470, 472 (1957).

⁴ See *Gardner-Athol Area Mental Health Ass'n v. Zoning Bd. of Appeals of Gardner*, 401 Mass. 12, 15 n.5, 513 N.E.2d 1272, 1275 n.5 (1987). No zoning ordinance or by-law shall "prohibit, regulate or restrict the use of land or structures . . . for educational purposes on land owned or leased . . . by a nonprofit educational corporation." MASS. GEN. LAWS ANN. ch. 40A, § 3 (West 1979) (emphasis added). The statute permits "reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements." *Id.*

⁵ Commissioner of Code Inspection of Worcester v. Worcester Dynamy, Inc., 11 Mass. App. Ct. 97, 99, 413 N.E.2d 1151, 1153 (1980) (quoting *Mt. Hermon Boys' School v. Gill*, 145 Mass. 139, 146, 13 N.E. 354, 357 (1887)); *Fitchburg Housing Auth. v. Board of Zoning Appeals of Fitchburg*, 380 Mass. 869, 875, 406 N.E.2d 1006, 1009 (1980) (quoting *Mt. Hermon Boys' School v. Gill*, 145 Mass. 139, 146, 13 N.E. 354, 357 (1887)). See also *Harbor Schools v. Board of Appeals of Haverhill*, 5 Mass. App. Ct. 600, 604-05, 366 N.E.2d 764, 767-68 (1977) (education includes rehabilitation of emotionally disturbed children); *New England Inst.*, 335 Mass. at 493, 140 N.E.2d at 474 (education includes vocational training).

⁶ See *Worcester County Christian Communications, Inc. v. Board of Appeals of Spencer*, 22 Mass. App. Ct. 83, 89, 491 N.E.2d 634, 638-39 (1986) (radio station's intended use not for educational purposes, although radio programming might be for an educational purpose under other circumstances). See *Newbury*, 19 Mass. App. Ct. at 199, 472 N.E.2d at 1379-80 (dormitories as "use for an educational purpose"); *Radcliffe College v. City of Cambridge*, 350 Mass. 613, 618, 215 N.E.2d 892, 895 (1966) (automobile parking facilities for students and faculty as "use for an educational purpose").

⁷ *Whitinsville Retirement Soc'y, Inc. v. Town of Northbridge*, 394 Mass. 757, 760, 477 N.E.2d 407, 409 (1985); *Fitchburg*, 380 Mass. at 874, 406 N.E.2d at 1009.

⁸ See *Gardner-Athol*, 401 Mass. at 15-16, 513 N.E.2d at 1275. See also *Christian Communications*, 22 Mass. App. Ct. at 87, 491 N.E.2d at 637 (although its land use was not educational, radio station's articles of organization stated its purposes were charitable, scientific and educational); *Whitinsville*, 394 Mass. at 758, 477 N.E.2d at 408 (nonprofit corporation's land use for nursing home not educational); *Newbury*, 19 Mass. App. Ct. at 206-07, 472 N.E.2d at 1379 (junior college's land use educational); *Dynamy*, 11 Mass. App. Ct. at 98, 413 N.E.2d at 1152 (nonprofit corporation organized exclusively for educational purposes); *Bible Speaks v. Board of Appeals of Lenox*, 8 Mass. App. Ct. 19, 21, 391 N.E.2d 279, 280 (1979) (nonprofit religious and educational corporation).

During the *Selected Developments* year, in the 1987 decision of *Gardner-Athol Area Mental Health Ass'n v. Zoning Bd. of Appeals of Gardner*, the Supreme Judicial Court of Massachusetts explicitly ruled that the phrase "nonprofit educational corporation" did not require that education be the primary activity of a nonprofit corporation for the corporation to be exempt from zoning requirements.⁹ *Gardner-Athol* establishes that the general corporate purposes set forth in the articles of organization determine whether or not a nonprofit corporation is educational.¹⁰ Consequently, following *Gardner-Athol*, a nonprofit corporation's use of land is exempt from zoning requirements if the use will be primarily educational and education is within its corporate purposes as set forth in the corporation's articles of organization.¹¹

The nonprofit corporation in *Gardner-Athol* operated programs for the mentally ill and mentally retarded.¹² Its articles of organization stated that the corporation's purposes included cooperating with governmental agencies to "promote a program of mental health education; providing means and facilities to aid in the prevention, care and treatment of mental health disorders;" and facilitating rehabilitation of the mentally handicapped.¹³ In carrying out its corporate purposes, the Gardner-Athol Area Mental Health Association (GAAMHA) leased a single family dwelling to use as a residential care facility for four adults with mental disabilities.¹⁴ The

Prior to 1975, the statute provided that "no ordinance or by-law which prohibits or limits the use of land . . . for any educational purpose which is . . . public shall be valid." *City of Chicopee v. Jakubowski*, 348 Mass. 230, 232, 202 N.E.2d 913, 915 (1964). Massachusetts courts interpreted "public" to mean non-commercial or nonprofit activity. See, e.g., *Harbor Schools*, 5 Mass. App. Ct. at 607-08, 366 N.E.2d at 769 (nonprofit school operated for charitable purposes exempt from zoning requirements); *Chicopee*, 348 Mass. at 232, 202 N.E.2d at 915 (teaching ceramics for slight profit not "public"); *Kurz v. Board of Appeals of N. Reading*, 341 Mass. 110, 113, 167 N.E.2d 627, 629 (dancing school operated as a commercial enterprise for profit not "public").

⁹ 401 Mass. at 15, 513 N.E.2d at 1275. See MASS. GEN. LAWS ANN. ch. 40A, § 3 (West 1979).

¹⁰ 401 Mass. at 15-16, 513 N.E.2d at 1275. See also MASS. ANN. LAWS ch. 180, §§ 2-4 (Law. Co-op. 1987).

¹¹ See 401 Mass. at 15-16, 513 N.E.2d at 1275. See MASS. GEN. LAWS ANN. ch. 40A, § 3 (West 1979).

¹² 401 Mass. at 14, 513 N.E.2d at 1274. The corporation was organized under Massachusetts General Laws, chapter 180. *Id.* It also provided vocational training and alcohol dependence programs. *Id.*

¹³ *Id.*

¹⁴ *Id.*

facility's program would teach the residents daily living and vocational skills to prepare them to live more independently.¹⁵

Shortly before the execution of the lease, a resident of the neighborhood where the dwelling was located questioned the proposed use of the building.¹⁶ The building inspector notified this resident that Massachusetts law exempted the proposed use from zoning regulations.¹⁷ Numerous area residents appealed to the Zoning Board of Appeals of Gardner ("the Board").¹⁸ The Board reversed the inspector's ruling without stating its reasons.¹⁹ GAAMHA appealed to a Massachusetts district court which upheld the Board's decision, stating that because education played a subordinate role in GAAMHA's activities, GAAMHA failed to qualify as a nonprofit educational corporation.²⁰ The Supreme Judicial Court granted a request for direct appellate review.²¹

The Court vacated the judgment of the district court and affirmed the determination of the building inspector.²² The Court established that persons charged with enforcement should refer to the articles of organization filed with the state in order to determine whether or not a nonprofit corporation is educational.²³ As long as a corporation's articles permit the proposed educational activities, the Court refused to impose a requirement that the corporation's overall activities be primarily educational.²⁴

The Court held that the primary purpose or activity of a corporation need not be educational for the corporation to be a "nonprofit educational corporation."²⁵ The proper test, the Court stated, is whether the nonprofit corporation's articles of organization permit it to engage in any educational activities.²⁶ If the articles of organization so provide, the Court continued, then as long as the

¹⁵ *Id.*

¹⁶ *Id.* at 14, 513 N.E.2d at 1274-75.

¹⁷ *Id.* at 14, 513 N.E.2d at 1275. See MASS. GEN. LAWS ANN. ch. 40A, § 3 (West 1979).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 14-15, 513 N.E.2d at 1275.

²¹ *Id.* at 15, 513 N.E.2d at 1275.

²² *Id.* at 16, 513 N.E.2d at 1276.

²³ *Id.* at 15-16, 513 N.E.2d at 1275.

²⁴ *Id.* While the Court held that GAAMHA's use of the property would be educational, it did not address whether or not its use would be primarily educational. *Id.* at 13, 513 N.E.2d at 1274 (citing *Fitchburg*, 380 Mass. 869, 406 N.E.2d 1006).

²⁵ *Id.* at 15, 513 N.E.2d at 1275.

²⁶ *Id.* at 15-16, 513 N.E.2d at 1275.

corporation's use of the land in question is predominantly educational, the corporation is exempt from local zoning ordinances.²⁷

The Court noted that this construction does not deprive the word "educational" of meaning.²⁸ In contrast, the Court stated that to interpret "nonprofit educational corporation" as "nonprofit primarily-educational corporation" would be to add words to the statute and give it a meaning it does not otherwise have.²⁹ The Court further noted Massachusetts' policy of continuing deinstitutionalization of mental health patients.³⁰ Consistent with this policy, GAAMHA's general activities and proposed use of the particular property at issue could not have been regulated by zoning provisions prior to 1975 and the legislative history surrounding the 1975 amendment did not indicate any attempt to change this effect.³¹ Thus, because GAAMHA's articles of organization established it as a nonprofit corporation permitted to engage in educational and rehabilitative activities, the Court held that GAAMHA qualified as a nonprofit educational corporation within the meaning of the statute.³²

Justice Lynch, joined by Justice Nolan, dissented and argued that to qualify as an educational corporation a nonprofit corporation's purposes should be primarily educational to come within the statute's protection.³³ The dissent asserted that, because the Court requires the use of property to be primarily for an "educational purpose" to qualify for a zoning exemption, the Court also should require that the overall activities of a nonprofit corporation be primarily educational to qualify for a zoning exemption.³⁴ The dissent reasoned that GAAMHA was primarily a social service organization and, therefore, GAAMHA's use of the particular property at issue, regardless of whether the use was an educational purpose, should be subject to zoning regulations.³⁵

²⁷ *Id.* at 15, 513 N.E.2d at 1275.

²⁸ *Id.* at 16, 513 N.E.2d at 1275-76.

²⁹ *Id.* at 16, 513 N.E.2d at 1276.

³⁰ *Id.* at 15 n.5, 513 N.E.2d at 1275 n.5 (citing *Fitchburg*, 380 Mass. 869, 406 N.E.2d 1006).

³¹ *Id.*

³² *Id.* at 13, 15, 513 N.E.2d at 1274, 1275. The Court stated that "[r]ehabilitation surely falls within the meaning of education." *Id.* at 15, 513 N.E.2d at 1275 (citing *Harbor Schools*, 5 Mass. App. Ct. at 604-05, 366 N.E.2d at 768).

³³ *Id.* at 18, 513 N.E.2d at 1276-77 (Lynch, J., dissenting).

³⁴ *Id.* at 18, 513 N.E.2d at 1277 (Lynch, J., dissenting). Justice Lynch additionally argued that the Court's interpretation rendered the word "educational" superfluous in the phrase "nonprofit educational corporation." *Id.* at 17, 513 N.E.2d at 1276 (Lynch, J., dissenting).

³⁵ *Id.* at 18-19, 513 N.E.2d at 1277 (Lynch, J., dissenting).

Gardner-Athol presents a two-step analysis for determining whether a nonprofit corporation qualifies for exemption from zoning regulations on educational grounds.³⁶ In order to qualify, the articles of organization for a nonprofit corporation must permit it to engage in educational activities.³⁷ Additionally, the particular use of the property at issue must be primarily educational.³⁸ Thus, *Gardner-Athol* establishes that while property must be used primarily for an educational purpose, a nonprofit corporation does not have to engage primarily in educational activities to qualify for exemption from zoning regulations.

The *Gardner-Athol* Court, on the facts presented, properly interpreted the statutory phrase "nonprofit educational corporation." While the Court previously had concluded that the phrase "educational purpose" appearing earlier in the same statute requires that the specific use of the property be primarily educational,³⁹ requiring that a corporation's general activities be primarily educational adds words to the statute and changes the statute's meaning.⁴⁰ The Court resolved the tension between adding words to the statute and interpreting the word "educational" consistently by reference to Massachusetts' policy favoring deinstitutionalization of mental health patients.⁴¹ Because of this policy, the Court correctly reasoned that the legislature probably did not intend that only a nonprofit corporation primarily engaging in educational activities would be exempt from local zoning regulations.⁴² In this context, therefore, the Court correctly held that a nonprofit corporation's overall activities need not be primarily educational for the corporation to qualify for zoning exemptions.

In summary, *Gardner-Athol* continues the broad exemption from local zoning regulation for educational activities. Municipalities wanting to apply zoning regulations to nonprofit corporations which claim a zoning exemption on educational grounds must show either that the corporation's articles of organization do not contain an educational purpose or that the proposed use of the particular property at issue would not be primarily educational. Nonprofit

³⁶ See *id.* at 15, 513 N.E.2d at 1275.

³⁷ See *id.* at 15-16, 513 N.E.2d at 1275.

³⁸ See *supra* note 7 and accompanying text.

³⁹ See *Gardner-Athol*, 401 Mass. at 18, 513 N.E.2d at 1277 (Lynch, J., dissenting). See *supra* note 7 and accompanying text.

⁴⁰ See *Gardner-Athol*, 401 Mass. at 16, 513 N.E.2d at 1275-76.

⁴¹ See *id.* at 15 n.5, 513 N.E.2d at 1275 n.5.

⁴² *Id.*

corporations seeking exemption should therefore ensure that their articles of organization express an educational purpose and that the particular proposed use would be primarily educational. Additionally, Massachusetts courts will be permissive in allowing zoning exemptions in the contexts of rehabilitating deinstitutionalized mental health patients and rehabilitating emotionally disturbed children.⁴³ Thus, *Gardner-Athol* reaffirms the Court's view that courts should construe zoning exemptions for educational activities broadly.

C. **Interpretations of the Subdivision Control Law*

Although the precise definition varies from state to state, a subdivision is generally defined as the division of a parcel of land into two or more lots.¹ Every state has passed enabling legislation authorizing local governments to regulate subdivisions.² Ordinarily, such enabling legislation authorizes the local legislative body to adopt detailed subdivision regulations and to appoint a planning board that may grant or deny subdivision applications according to those regulations.³ A municipality's authority to regulate the subdivision of land is an important tool in planning for community growth and development.⁴ Regulating such matters as the construction of streets and the provision of adequate water, sewage, and other services to the proposed subdivision, such subdivision controls ensure the efficient development of the municipality.⁵

The "subdivision control law," chapter 41, sections 81K to 81GG of the Massachusetts General Laws,⁶ confers to Massachusetts municipalities the power to control the subdivision of property.⁷ Under section 81O, a person may not subdivide his or her land without submitting a plan of the proposed subdivision to the local planning board for approval.⁸ Section 81L of chapter 41 defines a subdivision as "the division of land into two or more lots."⁹ Section

⁴³ See *id.* See *supra* note 7 and accompanying text.

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¹ 4 A. RATHKOPF & D. RATHKOPF, *THE LAW OF ZONING AND PLANNING*, § 64.03, at 64-19 (1986) [hereinafter RATHKOPF].

² *Id.* § 64.04, at 64-41-64-43; 82 AM. JUR. 2D, *Zoning and Planning* § 163 (1976).

³ RATHKOPF, *supra* note 1, § 64.04, at 64-41-64-42.

⁴ *Id.* § 64.01, at 64-7.

⁵ 82 AM. JUR. 2D, *Zoning and Planning*, § 163 (1976).

⁶ MASS. GEN. L. ch. 41, § 81K (1979).

⁷ *Id.* § 81O.

⁸ *Id.*

⁹ *Id.* § 81L. Section 81L provides in part:

'Subdivision' shall mean the division of a tract of land into two or more lots and shall include resubdivision, and, when appropriate to the context, shall relate

81L also provides, however, that in two instances, the division of a parcel of land into two or more lots does *not* constitute a subdivision within the meaning of the subdivision control law.¹⁰ The first exception under section 81L, hereinafter referred to as the "frontage" exception, provides that the division of property into two or more lots does not constitute a subdivision if each newly created lot fronts (a) on a public way, (b) on a way shown on a development plan approved under the subdivision control law, or (c) on a way existing at the time the subdivision control law became effective in the municipality where the land lies which the planning board has deemed adequate for traffic needs and the installation of municipal services.¹¹

Additionally, section 81L provides a second exception to the definition of a subdivision, hereinafter referred to as the "two or more buildings" exception. Under this provision, the division of land containing two or more buildings at the time the subdivision control law went into effect in the municipality does not constitute a subdivision within the meaning of that law as long as each newly created lot contains at least one of those buildings.¹²

to the process of subdivision or the land or territory divided; provided, however, that the division of a tract of land into two or more lots shall not be deemed to constitute a subdivision within the meaning of the subdivision control law if, at the time when it is made, every lot within the tract so divided has frontage on (a) a public way or a way which the clerk of the city or town certifies is maintained and used as a public way, or (b) a way shown on a plan theretofore approved and endorsed in accordance with the subdivision control law, or (c) a way in existence when the subdivision control law became effective in the city or town in which the land lies, having, in the opinion of the planning board, sufficient width, suitable grades and adequate construction to provide for the needs of vehicular traffic in relation to the proposed use of the land abutting thereon or served thereby, and for the installation of municipal services to serve such land and the buildings erected or to be erected thereon. Such frontage shall be of at least such distance as is then required by zoning or other ordinance or by-law, if any, of said city or town for erection of a building on such lot, and if no distance is so required, such frontage shall be of at least twenty feet. Conveyances or other instruments adding to, taking away from, or changing the size and shape of, lots in such a manner as not to leave any lot so affected without the frontage above set forth, or the division of a tract of land on which two or more buildings were standing when the subdivision control law went into effect in the city or town in which the land lies into separate lots on each of which one of such buildings remains standing, shall not constitute a subdivision.

Id.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

These exceptions to the definition of a subdivision under section 81L have a significant impact on zoning law because under chapter 41, section 81P, only those things defined as a subdivision are subject to the approval process of the local planning board.¹³ Where a plan for the division of property does not constitute a subdivision as defined by the subdivision control law, a local planning board must endorse the plan "approval not required."¹⁴ Thus, if a landowner can show that his or her plan for dividing the property satisfies either exception to the definition of a subdivision under the subdivision control law, the landowner can avoid the requirement of obtaining planning board approval before beginning development.

During the *Selected Developments* year, the Massachusetts Appeals Court rendered three decisions interpreting the exceptions to the definition of a subdivision outlined in chapter 41, section 81L of the Massachusetts General Laws. In *Hutchinson v. Planning Board of Hingham*, the Appeals Court interpreted the section 81L "frontage" exception for the division of land into lots fronting on a public way to include a requirement that the public way provide practical access to each lot.¹⁵ In *Fox v. Planning Board of Milton*, the court held that despite the existence of a publicly owned greenbelt lying between private property and a public way, that private property nonetheless "fronts" on a public way for the purposes of part (a) of the "frontage" exception contained in section 81L.¹⁶ In *Citgo Petroleum Corporation v. Planning Board of Braintree*, the court held that the "two or more buildings" exception need not be read together with the "frontage" exception, but rather constitutes a separate and

¹³ MASS. GEN. L. ch. 41, § 81P (Supp. 1988). Section 81P provides:

Any person wishing to cause to be recorded a plan of land situated in a city or town in which the subdivision control law is in effect, who believes that his plan does not require approval under the subdivision control law, may submit his plan to the planning board of such city or town in the manner prescribed in section eighty-one T, and, if the board finds that the plan does not require such approval, it shall forthwith, without a public hearing, endorse thereon or cause to be endorsed thereon by a person authorized by it the words "approval under the subdivision control law not required" or words of similar import with appropriate name or names signed thereto, and such endorsement shall be conclusive on all persons. Such endorsement shall not be withheld unless such plan shows a subdivision

Id.

¹⁴ *Id.*

¹⁵ 23 Mass. App. Ct. 416, 502 N.E.2d 572 (1987).

¹⁶ 24 Mass. App. Ct. 572, 511 N.E.2d 30 (1987).

distinct exception to the definition of subdivision under section 81L.¹⁷

In *Hutchinson v. Planning Board of Hingham*, the plaintiff landowner submitted a plan to the Hingham Planning Board proposing to divide a parcel of land into five lots, each abutting Lazell Street, a public way.¹⁸ The plaintiff argued that her plan did not constitute a subdivision under the subdivision control law in that it provided for the division of lots fronting on a public way, thus falling within part (a) of the "frontage" exception to the definition of subdivision under section 81L.¹⁹ As a result, the plaintiff argued, the Board was required to endorse her plan "approval not required" under section 81P.²⁰ The Board refused to exempt the plaintiff's plan from the subdivision approval process, arguing that Lazell Street failed to provide for the additional traffic needs related to the proposed lots and that the frontage for each of the five lots did not provide adequate access to a public way as required by the subdivision control law.²¹

The Appeals Court affirmed the judgment of the superior court annulling the decision of the Hingham Planning Board.²² Citing the Massachusetts Supreme Judicial Court's holding in *Gifford v. Planning Board of Nantucket*,²³ the court noted that in interpreting the exceptions to the definition of a subdivision in section 81L, courts may look to the purposes of the subdivision control law as expressed in chapter 41, section 81M.²⁴ Because section 81M provides that the purpose of the subdivision control law is to ensure efficient vehicular access to each lot in a subdivision, the court held that even where each lot has frontage on a public way, thus technically satisfying the "frontage" exception to section 81L, if there is no *practical access* to the lots from the public way, the "frontage" exception does not apply.²⁵ The court noted that in *Hrenchuk v. Planning Board of Walpole*,²⁶ it had refused to apply the "frontage" exception because, although every lot fronted on a public way, the public way was a limited access highway which in reality provided

¹⁷ 24 Mass. App. Ct. 425, 509 N.E.2d 284 (1987).

¹⁸ 23 Mass. App. Ct. at 416-17, 502 N.E.2d at 573.

¹⁹ See *id.* at 417, 502 N.E.2d at 573.

²⁰ *Id.* at 417, 502 N.E.2d at 573.

²¹ *Id.*

²² *Id.* at 416, 502 N.E.2d at 573.

²³ 376 Mass. 801, 383 N.E.2d 1123 (1978).

²⁴ *Hutchinson*, 23 Mass. App. Ct. at 419, 502 N.E.2d at 574.

²⁵ *Id.*

²⁶ 8 Mass. App. Ct. 949, 397 N.E.2d 1292 (1979).

no access to the lots.²⁷ Similarly, the *Hutchinson* court noted that in *Perry v. Planning Board of Nantucket*,²⁸ it had refused to apply the 81L exclusion, notwithstanding technical compliance with the "frontage" exception, where the public way on which each lot fronted was listed as a public street on town records, but did not actually exist.²⁹

Where the public way provides the quality of access public streets normally provide, however, the court stated that a planning board does not enjoy the same discretion it normally has when reviewing a plan for development under the usual subdivision process.³⁰ The court observed that a planning board may not refuse to recognize a section 81L exclusion notwithstanding the fact that vehicular access could be better provided for.³¹ Where the proposed lots front on a public way, and that public way is "of sufficient width and suitable to accommodate motor vehicle traffic and to provide access for fire-fighting equipment and other emergency vehicles,"³² the court held that the practical access requirement embodied in section 81M is satisfied and a planning board must endorse the plan "approval not required" under section 81P.³³

Turning to the facts of the case before it, the court noted the findings of the trial court that Lazell Street was a paved public way of the same width as other streets in the area and could provide adequate access to each lot for the owners as well as emergency vehicles.³⁴ Given these findings, the *Hutchinson* court held that Lazell Street provided practical access to each proposed lot, and thus the plaintiff's plan fell within part (a) of the "frontage" exception contained in section 81L.³⁵ Accordingly, the court ruled that the section 81P exemption from the usual subdivision approval process applied to the plaintiff.³⁶

Thus, in *Hutchinson v. Planning Board of Hingham*, the Appeals Court held that although a plan of development may provide that each proposed lot will front on a public way, therefore technically

²⁷ *Hutchinson*, 23 Mass. App. Ct. at 419-20, 502 N.E.2d at 574.

²⁸ 15 Mass. App. Ct. 144, 444 N.E.2d 389 (1983).

²⁹ *Hutchinson*, 23 Mass. App. Ct. at 420, 502 N.E.2d at 574-75.

³⁰ 23 Mass. App. Ct. at 420, 502 N.E.2d at 575.

³¹ *Id.*

³² *Id.* at 420-21, 502 N.E.2d at 575 (quoting *North Landers Corp. v. Planning Bd. of Falmouth*, 382 Mass. 432, 441, 416 N.E.2d 934, 940 (1981)).

³³ *Id.*

³⁴ *Id.* at 421, 502 N.E.2d at 575.

³⁵ *See id.*

³⁶ *See id.*

satisfying part (a) of the "frontage" exception of section 81L, that exception will not apply unless the public way provides practical access to each lot. Under the court's decision, this practical access requirement does not mean that, in reviewing the access afforded by the public way, a planning board may exercise the same kind of discretion utilized in reviewing subdivision applications, denying approval whenever they feel that access could be better provided for. The practical access required to be provided by the public way need not be the best possible. Instead, as long as the public way provides no less access than that of the usual public street, the "frontage" exception applies.

As noted above, the "frontage" exception to the definition of a subdivision under chapter 41, section 81L of the Massachusetts General Laws requires that each lot created by the division of land have "frontage" on a suitable way as defined by either part (a), (b), or (c) of the exception.³⁷ In *Fox v. Planning Board of Milton*, the Appeals Court held that, despite the existence of an intervening greenbelt between private property and a public way, the private property nonetheless "fronts" on a public way for the purposes of part (a) of the "frontage" exception contained in section 81L.³⁸

In *Fox*, the plaintiff landowner submitted a plan for the division of property to the Milton Planning Board for an endorsement "approval not required" under chapter 41, section 81P.³⁹ The plaintiff's plan proposed the division of a parcel of land into four lots, each lot fronting on land taken by the Metropolitan Park Commission in 1904 to build the Neponsit Valley Parkway, a public way.⁴⁰ An intervening greenbelt approximately 175 feet wide, however, separated the lots from the actual parkway.⁴¹ The plaintiff proposed to build a T-shaped driveway across the greenbelt connecting the four lots to the parkway.⁴² The Board denied the section 81P endorsement claiming that the proposed plan failed to satisfy the "frontage" exception of section 81L and thus constituted a subdivision.⁴³

The Board argued that the "frontage on . . . a public way" required by part (a) of the "frontage" exception must provide ser-

³⁷ See *supra* note 9 for a discussion of the frontage exception.

³⁸ 24 Mass. App. Ct. 572, 511 N.E.2d 30 (1987).

³⁹ *Id.* at 572, 511 N.E.2d at 31.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 572-73, 511 N.E.2d at 31.

⁴³ See *id.* at 573, 511 N.E.2d at 31.

viceable access from the lot to the public way.⁴⁴ Because the intervening greenbelt separated the plaintiff's proposed lots from the public way, the Board contended that his land did not "front" on a public way.⁴⁵ Accordingly, the "frontage" exception did not apply and thus the plaintiff's plan failed to bypass the usual subdivision approval process.⁴⁶

Rejecting the Board's argument, the Appeals Court held that owners of land abutting public parkways have a common law right of access to those parkways, and that an intervening greenbelt, irrespective of its size, may not impair such right of access.⁴⁷ A greenbelt, the court reasoned, is analogous to a sidewalk lying between public property and a public way.⁴⁸ Certainly, the court maintained, the existence of a sidewalk between a lot and a public way does not mean that the lot does not front on the public way.⁴⁹ Accordingly, the court held that even where a substantial greenbelt exists between a lot and a public parkway, the lot "fronts" on a public way for purposes of the "frontage" exception contained in section 81L.⁵⁰

Reviewing the facts of *Fox*, the court held that under these principles, despite the existence of the greenbelt between the proposed lots and the Neponsit Valley Parkway, each lot enjoyed a guaranteed right of access to the parkway.⁵¹ Accordingly, the court found that each lot fronted on a public way within the meaning of section 81L.⁵² Because the plaintiff's plan for the division of his property thus satisfied part (a) of the "frontage" exception to the definition of a subdivision under section 81L, the court held that the plaintiff was entitled to an 81P endorsement.⁵³

⁴⁴ *Id.* at 573, 511 N.E.2d at 31.

⁴⁵ *Id.* at 573, 511 N.E.2d at 32.

⁴⁶ *Id.*

⁴⁷ *Id.* at 573-74, 511 N.E.2d at 32.

⁴⁸ *Id.* at 574, 511 N.E.2d at 32.

⁴⁹ *See id.*

⁵⁰ *See id.* The Appeals Court also held that the fact that the proposed driveway connecting the four lots to the paved part of the parkway was a common driveway was irrelevant to determining whether or not the plan constituted a subdivision and thus whether the "frontage" exception applied. *Id.* at 574, 511 N.E.2d at 32. The court maintained that as long as all the new lots fronted on a public way, and the access implied by that frontage is not illusory in fact, the fact that the developer proposed a common driveway was of no concern to the planning board since the Subdivision Control Law was concerned only with access to each lot, not each house on those lots. *Id.* at 574-75, 511 N.E.2d at 32-33.

⁵¹ *Id.* at 575, 511 N.E.2d at 33.

⁵² *See id.*

⁵³ *See id.*

Thus, in *Fox v. Planning Board of Milton*, the Appeals Court held that despite the existence of a publicly owned greenbelt lying between private property and a public way, the private property nonetheless "fronts" on a public way for the purposes of part (a) of the "frontage" exception contained in section 81L. Given the court's analogy between greenbelts and other publicly owned parcels of land such as sidewalks or treebelts, it seems that this holding may find application beyond those instances where a greenbelt separates private property from a public way. Instead, the court is likely to consider any type of public land, irrespective of size, lying between private property and a public way an extension of that public way. As long as the private property fronts on that intervening public land, it will probably be deemed to front on the public way for the purposes of section 81L.

In *Citgo Petroleum Corporation v. Planning Board of Braintree*, the Appeals Court for the first time interpreted the "two or more buildings" exception contained in chapter 41, section 81L of the Massachusetts General Laws, which excludes from the definition of a subdivision the division of land containing two or more buildings standing at the time the subdivision control law went into effect in the municipality if each newly created lot contains at least one of those buildings.⁵⁴ Citgo Petroleum owned a sixty-eight acre parcel in Braintree containing several buildings which had been constructed before the effective date of the subdivision control law.⁵⁵ Seeking to convey a portion of the tract to another corporation, Citgo Petroleum submitted a plan to the Hingham Planning Board for endorsement under chapter 41, section 81P arguing that approval was not required because the plan did not constitute a subdivision.⁵⁶ In support of its position, Citgo Petroleum argued that under the proposed plan for division of the tract, each new lot would contain a building existing at the time the subdivision control law went into effect, thus satisfying the "two or more buildings" exception to the definition of subdivision contained in section 81L.⁵⁷ The Board refused to endorse the plan, however, and Citgo Petroleum subsequently appealed to the Land Court.⁵⁸ The Land Court

⁵⁴ 24 Mass. App. Cl. 425, 425, 509 N.E.2d 284, 284-85 (1987).

⁵⁵ *Id.* at 426, 509 N.E.2d at 285.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

granted Citgo Petroleum's motion for summary judgment, from which the planning board appealed.⁵⁹

Ruling against the Board, the Appeals Court held that Citgo Petroleum's plan fell within the "two or more buildings" exception of section 81L.⁶⁰ The court ruled that this exception was separate and distinct from "the more commonly used" "frontage" exception of section 81L.⁶¹ Under the "two or more buildings" exception, the court held, each lot need not have frontage on a suitable public way as defined by part (a), (b) or (c) of the "frontage" exception of section 81L.⁶² If the frontage exception required a developer to submit plans dividing a parcel into lots each containing a building existing at the time the subdivision control law went into effect, the court reasoned, there would be no purpose for including the "two or more buildings" exception in the statute.⁶³

Under this interpretation of the section 81L exclusions, the court stated, the only inquiry necessary would be a determination of whether the "frontage" exception applied to the proposed division of property.⁶⁴ If this exception applied, the court reasoned, the plan would be entitled to a section 81P endorsement;⁶⁵ otherwise, the plan would be subject to the usual subdivision approval process, and thus, there would be no reason to consider whether the plan satisfied the "two or more buildings" exception.⁶⁶ Unwilling to accept that the legislature would include a provision in section 81L as mere "surplusage," the court held the "two or more buildings" exception separate and distinct from the "frontage" exception.⁶⁷ In doing so the court held that it may receive a section 81P endorsement exempting it from the subdivision approval process without also satisfying section 81L's "frontage" exception.⁶⁸

In so ruling, the court rejected the Board's argument that by interpreting the "two or more buildings" provision and the "frontage" provision as distinct exceptions, the court would allow a property owner to use any detached building on his property, such as a shed or garage, as a basis for the unrestricted division of property

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* See *supra* note 9.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ See *id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

and thus undercut the purposes of the subdivision control law.⁶⁹ First, the court responded, the "two or more buildings" exception had not been included in the original versions of the subdivision control law but appeared in a later revision of the statute.⁷⁰ Accordingly, the court reasoned, the exception was not the result of legislative oversight, and thus, must be consistent with the general purposes of the subdivision control law.⁷¹ Second, the court maintained, the fact that a developer could divide a parcel under this exception did not necessarily suggest that developers could readily obtain approval for the newly created lots under the local zoning ordinance.⁷² Third, the court noted that in the case before it, each lot contained a building of substantial size.⁷³ Where the building standing on a newly created lot resembled "a chicken house or woodshed," the court noted, the "two or more buildings" exception might not apply.⁷⁴ Finally, the court stated that the "two or more buildings" exception applied only to buildings existing at the time the subdivision control law went into effect.⁷⁵ Accordingly, the court reasoned that its decision would not encourage persons to construct new, detached buildings on their property as a means of bypassing the usual subdivision approval process because the process applied to new structures with equal force.⁷⁶

Thus, in *Citgo Petroleum Corporation v. Planning Board of Braintree*, the Appeals Court held the "two or more buildings" exception to the definition of subdivision in section 81L separate and distinct from the "frontage" exception. As long as a landowner's plan for the division of his or her property provides that each newly created lot will contain a building which existed at the time of the adoption of the subdivision control law, that plan satisfies the above exemption from the usual subdivision approval process. To obtain a section 81P endorsement under this exception, the landowner need not show that each lot will front on a suitable way as required by the "frontage" exception of section 81L. Additionally, the court provides an interesting observation that where the building on a newly created lot is "insubstantial," such as a woodshed, the "two or more

⁶⁹ *Id.* at 426-27, 509 N.E.2d at 285.

⁷⁰ *Id.* at 427, 509 N.E.2d at 285.

⁷¹ *See id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

buildings" exception might not apply. This statement of course leaves open the question of what constitutes a "substantial" as opposed to an "insubstantial" building. Nonetheless, where a planning board can show that a building on the proposed lot is "insubstantial," the plan for the division of the property may be subject to the usual subdivision approval process.

In *Hutchinson, Fox, and Citgo Petroleum*, the Appeals Court interpreted the "frontage" and "two or more buildings" exceptions to the definition of subdivision contained in chapter 41, section 81L of the Massachusetts General Laws. These section 81L exceptions are of considerable importance to both private property owners and local planning boards. Where private property owners can show their plan for the division of their property satisfies the requirements of either of these exceptions, that plan is exempted from the usual subdivision approval process. These cases reflect a liberal approach to the exemptions from the subdivision approval process. By clarifying the circumstances under which these section 81L exceptions are satisfied, and according a broad interpretation to these exceptions, the Appeals Court has reduced the likelihood that further litigation over these issues will arise.

D. **The Creation and Extinguishment of Easements Through Adverse Possession*

An easement is a privilege, without profit, which the owner of one parcel of land may have over the land of another.¹ An easement may be both created² and extinguished through adverse possession.³ A person may create an easement through adverse possession, often referred to as a prescriptive easement, by uninterrupted, open,

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¹ M. PARK & D. PARK, REAL ESTATE LAW, 28 MASS. PRACTICE SERIES § 271 (2d ed. 1981) sets forth that:

An easement . . . [is] a liberty, privilege, or advantage without profit, which the owner of one parcel of land may have in the lands of another; or, as conversely stated, it is a service which one estate owes to another, or a right or privilege in one man's estate for the advantage or convenience of the owner of another estate.

Id.

² MASS. GEN. LAWS ANN. ch. 187, § 2 (West 1977) provides:

No person shall acquire by adverse use or enjoyment a right or privilege of way or other easement from, in, upon or over the land of another, unless such use or enjoyment is continued uninterruptedly for twenty years.

Id.

³ M. PARK & D. PARK, *supra* note 1, § 283.

notorious and adverse use of another's land for at least twenty years.⁴ A person may extinguish an easement through adverse possession when that person owns the servient tenement⁵ and uses the easement for at least twenty years in a manner which is inconsistent with the existence of the easement, and thus adverse.⁶ To extinguish the easement, the owner of the servient tenement must use the easement openly and notoriously and this use must be capable of giving rise to a cause of action in favor of the owner of the easement.⁷ Where the owner of the servient tenement renders impossible the use of only a portion of the easement, the easement is only extinguished as to that limited portion.⁸

During the *Selected Developments* year, two cases confronted the issue of adverse possession of an easement.⁹ In *Shapiro v. Burton*, the Massachusetts Appeals Court examined the issue of extinguishment of an easement through adverse possession by the owner of the servient tenement.¹⁰ In *Brooks, Gill and Co., Inc. v. Landmark Properties, 217 Ltd. Partnership*, the Massachusetts Appeals Court addressed the issue of creation of an easement through adverse possession.¹¹

In *Shapiro*, two neighboring couples, the Shapiros and the Magraths, brought companion cases to confirm and register title to their separate parcels of land in Marblehead, Massachusetts.¹² The plaintiffs claimed title in part by grant and in part by adverse possession.¹³ The defendant, Marilyn Burton, was granted an easement over plaintiffs' land, by deed, including an easement over two twenty-five-foot wide paper streets,¹⁴ Neptune Street and Ocean

⁴ *Id.* § 275 (1981); see *supra* note 2 and accompanying text.

⁵ *M. PARK & D. PARK*, *supra* note 1, § 271. A servient tenement is the estate upon which an easement is imposed. *Id.* A dominant tenement is the estate that enjoys the easement. *Id.*

⁶ See *Lemieux v. Rex Leather Finishing Corp.*, 7 Mass. App. Ct. 417, 421-22, 388 N.E.2d 1195, 1199 (1979); *Shaw v. Solari*, 8 Mass. App. Ct. 151, 156-57, 392 N.E.2d 853, 857 (1979); *M. PARK & D. PARK*, *supra* note 1, § 283.

⁷ *Rundell, Easements and Licenses*, in 2 *AMERICAN LAW OF PROPERTY* § 8.102 (A. James Casner 1952).

⁸ *Pappas v. Maxwell*, 337 Mass. 552, 557, 150 N.E.2d 521, 525 (1958).

⁹ See *Shapiro v. Burton*, 23 Mass. App. Ct. 327, 502 N.E.2d 545 (1987); *Brooks, Gill and Co., Inc. v. Landmark Properties, 217 Ltd. Partnership*, 23 Mass. App. Ct. 528, 503 N.E.2d 983 (1987).

¹⁰ 23 Mass. App. Ct. 327, 502 N.E.2d 545 (1987).

¹¹ 23 Mass. App. Ct. 528, 503 N.E.2d 983 (1987).

¹² 23 Mass. App. Ct. at 328, 502 N.E.2d at 546.

¹³ *Id.*

¹⁴ *Id.* The term "paper street" indicates a street shown on a recorded plan, but never actually built. *Id.* at 328 n.3, 502 N.E.2d at 546 n.3.

Spray Avenue.¹⁵ The defendant was also granted a right of access easement to Rockaway Beach.¹⁶

The dispute centered on two portions of the defendant's easement over Neptune Street and on the right of access easement to Rockaway Beach.¹⁷ Neptune Street, as shown on a 1877 plan, was to be a twenty-five-foot wide street extending perpendicularly from Atlantic Avenue on the north to Ocean Spray Avenue on the south.¹⁸ The deed granted the defendant an easement over the full length and breadth of Neptune Street.¹⁹ In reality, Neptune Street, as built, ended in a cul de sac before reaching Ocean Spray Avenue.²⁰ There was, however, a three-foot wide footpath which connected Neptune Street to Ocean Spray Avenue.²¹

The plaintiffs, the Shapiros and the Magraths, each claimed to have respectively extinguished, through adverse possession, a ten-foot strip of the defendant's easement alongside the three-foot wide footpath.²² Therefore, the plaintiffs contended that the defendant's easement over this portion of Neptune Street had been reduced from twenty-five feet to five feet.²³ The Appeals Court noted that the Shapiros lived just west of the footpath, and the Magraths lived just east of the footpath.²⁴ Furthermore, the Appeals Court stated that the plaintiffs had respectively maintained hedges and other plantings over the two ten-foot strips of land, one on each side of the footpath, which had been subject to the defendant's twenty-five-foot wide easement.²⁵ The court additionally noted that the prior owner of the Shapiros' parcel had "vociferously" opposed the use

¹⁵ *Id.* at 328 n.3, 502 N.E.2d at 546 n.3. The deed which granted easements to the defendant's predecessors provided:

... the right to use Neptune Street for all the purposes of a way and also a right of access to Rockaway Beach over Neptune Street, Ocean Spray Avenue and the land between the northerly bound of Ocean Spray Avenue [the bound closest to the plaintiffs' houses] and the Atlantic Ocean.

Id. at 332, 502 N.E.2d at 548.

¹⁶ *Id.* at 328, 502 N.E.2d at 546.

¹⁷ *See id.* at 329-31, 502 N.E.2d at 546-48.

¹⁸ *Id.* at 329, 502 N.E.2d at 546.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 329, 502 N.E.2d at 547.

²³ *Id.* Although the footpath is only three feet wide, and not five feet wide, neither the Shapiros nor the Magraths claimed extinguishment of more than a ten-foot wide strip. *Id.* at 329 n.6, 502 N.E.2d at 547 n.6.

²⁴ *Id.* at 328-29, 502 N.E.2d at 546.

²⁵ *Id.* at 329, 502 N.E.2d at 547.

of the land by the easement holders.²⁶ The Appeals Court held, affirming the Land Court, that the actions of the plaintiffs' predecessors interfered and were inconsistent with the easements over the two ten-foot strips for the requisite twenty years.²⁷ Therefore, the Appeals Court held that the adverse possession of the plaintiffs' predecessors extinguished these portions of the defendant's easement, namely the two ten-foot strips of land.²⁸

The second portion of the defendant's easement that was in dispute was a small area called the "jog."²⁹ The Shapiros' predecessor had treated the "jog" as his own since 1947 by mowing the area and later by using it for a fence and for shrubs.³⁰ The Appeals Court affirmed the Land Court's holding that this portion of the defendant's easement had also been extinguished through adverse possession.³¹

The third issue in dispute in *Shapiro* was whether the defendant, based on her right of access easement to Rockaway Beach, could use the Shapiros' staircase in order to be able to reach the beach.³² The Appeals Court reversed the portion of the Land Court's holding which set forth that the defendant had no right to use the existing staircase.³³ The Appeals Court remanded this issue of the defendant's means of access to the Land Court for further proceedings consistent with its opinion.³⁴ The Appeals Court reaffirmed the Land Court's finding that the defendant had a right of access easement to the whole of Ocean Spray Avenue and to the land between the avenue and the ocean, and thus where the existing staircase is located.³⁵ The Appeals Court, however, disagreed with the Land Court's conclusion that the defendant's rights were limited to rebuilding a staircase at the end of the footpath where one had originally existed.³⁶ The Appeals Court stated that the Shapiros'

²⁶ *Id.* at 329-30, 502 N.E.2d at 547.

²⁷ *Id.* at 330, 502 N.E.2d at 547. A servient tenement owner may extinguish an easement in the servient tenement by adverse use which is capable of being made wrongful by the owner of the easement. *Rundell*, *supra* note 7, § 8.102.

²⁸ *Id.* at 330, 502 N.E.2d at 547. Where acts of the servient tenement owner render the use of only a portion of the easement impossible, the easement is extinguished only as to that part. *Pappas v. Maxwell*, 337 Mass. 552, 557, 150 N.E.2d 521, 525 (1958).

²⁹ *Shapiro*, 23 Mass. App. Ct. at 331, 502 N.E.2d at 547-48.

³⁰ *Id.* at 331, 502 N.E.2d at 548.

³¹ *Id.*

³² *Id.*

³³ *Id.* at 336, 502 N.E.2d at 550.

³⁴ *Id.*

³⁵ *Id.* at 332, 336, 502 N.E.2d at 548, 550.

³⁶ *Id.* at 334, 502 N.E.2d at 549. The Land Court stated that:

rights to the land over which the existing staircase is located were no greater than the defendant's rights because both held easements in common over this land.³⁷

Furthermore, the Appeals Court noted that building a new staircase across from the footpath would be expensive and could damage the bank due to the current state of the erosion of the cliff.³⁸ Moreover, the Appeals Court stated, the plaintiffs' repairs to the bank may have made rebuilding a new staircase more expensive than it otherwise would have been.³⁹ The Appeals Court found an insufficient factual basis to justify finding that the defendant's exclusive access to the beach should be at the location of the old staircase at the end of the footpath.⁴⁰ In addition, the Appeals Court emphasized that the Shapiros and their predecessors permitted several other owners of back parcels to use their staircase to reach Rockaway Beach.⁴¹ For these reasons, the Appeals Court stated that the Land Court had an insufficient factual basis to hold that the defendant only had the right to build a new staircase at the location of the previously existing one.⁴²

The Appeals Court remanded to the Land Court the question of the defendant's means of access to the beach in light of its reasoning in this opinion.⁴³ The Appeals Court specified that the Land Court should resolve this question by balancing the interests of the plaintiffs and the defendant as holders of an easement in common over the land where the existing staircase is located.⁴⁴ The Appeals Court stated that the plaintiffs' and the defendant's uses

[A] set of stairs is obviously necessary for the defendant[] to enjoy the access to the beach previously available to [her], and ruled that the defendant would not be foreclosed from rebuilding the stairs and assuming responsibility for them in the area opposite the 5 foot walkway

Id. at 333, 502 N.E.2d at 549.

³⁷ *Id.* at 332, 333-34, 502 N.E.2d at 548, 549.

³⁸ *Id.* at 334, 502 N.E.2d at 549. The northernmost portion of Ocean Spray Avenue was on a bluff overlooking the Atlantic Ocean, and the bank itself comprised a major part of the avenue. *Id.* at 329, 502 N.E.2d at 546. The bluff was subject to erosion and was supported by a sea wall which was maintained by the plaintiffs and their predecessors. *Id.*

³⁹ *Id.* at 335, 502 N.E.2d at 550. The Appeals Court stated that "[t]he owner of property burdened by an easement whose use of that property impairs the rights of the holder of the easement may be . . . required to take measures at his expense to accommodate the easement holder's right of use." *Id.* (quoting *Texon, Inc. v. Holyoke Mach. Co.*, 8 Mass. App. Ct. 363, 366, 394 N.E.2d 976, 978 (1979)).

⁴⁰ *Id.* at 334, 502 N.E.2d at 549.

⁴¹ *Id.* at 332, 334, 502 N.E.2d at 548, 549.

⁴² *Id.* at 334, 502 N.E.2d at 549.

⁴³ *Id.* at 336, 502 N.E.2d at 550.

⁴⁴ *Id.* at 334, 502 N.E.2d at 549.

of the land are to be governed by equitable principals, specifically what is reasonable in the exercise of their respective rights.⁴⁵ The Appeals Court noted the need to examine the cost of maintaining the existing staircase, the need to protect against liability, and the need to equitably apportion the costs.⁴⁶ Should the parties choose, the Appeals Court stated that they may introduce evidence relating to the expense, the feasibility and the risks involved in the construction of a new set of stairs across from the footpath.⁴⁷

In *Brooks, Gill and Co., Inc. v. Landmark Properties, 217 Ltd. Partnership*, the Massachusetts Appeals Court addressed the issue of the creation of an easement through adverse possession.⁴⁸ In *Brooks*, the Appeals Court affirmed the Land Court's holding that the plaintiff had acquired an easement, through adverse possession, in a fire escape.⁴⁹ The plaintiff had occupied a three-story building since 1962, and for more than twenty years a third-story door led to a common fire escape attached to both the plaintiff's and the defendant's buildings.⁵⁰ The plaintiff's employees used the fire escape sporadically to reach the roof in order to remove debris and to make repairs.⁵¹ Both the plaintiff and the defendant periodically repaired the fire escape to maintain it in good working condition.⁵² Prior to July 1983, the plaintiff decided to rent the third story of its building.⁵³ To rent the third story, however, the continued existence of the fire escape was necessary in order to satisfy the egress requirements of the state building code.⁵⁴ On June 1, 1983, Landmark acquired title to the adjacent parcel, including the building to which the common fire escape was attached.⁵⁵ In July, 1983, Landmark destroyed the fire escape in the course of rehabilitating the building.⁵⁶ The plaintiff then brought this action for declaratory relief and damages.⁵⁷

The Appeals Court affirmed the Land Court's holding that the plaintiff had acquired a prescriptive easement in the fire escape

⁴⁵ *Id.*

⁴⁶ *Id.* at 335, 502 N.E.2d at 550.

⁴⁷ *Id.*

⁴⁸ 23 Mass. App. Ct. 528, 503 N.E.2d 983 (1987).

⁴⁹ *Id.* at 530, 503 N.E.2d at 985.

⁵⁰ *Id.* at 529, 503 N.E.2d at 984.

⁵¹ *Id.*

⁵² *Id.* at 529-30, 503 N.E.2d at 984.

⁵³ *Id.* at 530, 503 N.E.2d at 984.

⁵⁴ *Id.*

⁵⁵ *Id.* at 530, 503 N.E.2d at 984-85.

⁵⁶ *Id.* at 530, 503 N.E.2d at 985.

⁵⁷ *Id.*

based on its open, notorious, uninterrupted and adverse use of the common fire escape for at least twenty years.⁵⁸ The Appeals Court rejected the defendant's contention that there was insufficient evidence of plaintiff's continuous use of the fire escape to establish the acquisition of the easement through adverse possession.⁵⁹ The Appeals Court stated that the plaintiff had "used" the fire escape as a method of satisfying the state building code requirements and that this "use" was sufficient.⁶⁰ The Appeals Court then stated that the defendant's removal of the fire escape over which the plaintiff had a prescriptive easement was wrongful.⁶¹

The Appeals Court then observed that if the defendant had destroyed the entire building, this may have terminated the plaintiff's easement.⁶² The court noted, however, that this was not the case here where the defendant only destroyed the fire escape.⁶³ Moreover, the court stated that the fire escape would not have hindered the defendant's use of its building.⁶⁴ The Appeals Court affirmed the Land Court's order requiring the defendant to replace the fire escape or, in the alternative, pay the plaintiff the amount necessary to install an interior stairway which would meet the applicable building code requirements.⁶⁵

In both cases, *Shapiro* and *Brooks*, the Appeals Court confronted the issue of adverse possession of an easement. The law of adverse possession of easements is well established.⁶⁶ The court in *Shapiro* applied the traditional rule of law that a servient tenement owner may extinguish an easement by adversely possessing it for the requisite twenty years.⁶⁷ In *Brooks*, the court reaffirmed that a person may create an easement over the land of another by adverse pos-

⁵⁸ *Id.* In so ruling, the *Brooks* court noted that:

The rule in Massachusetts is that wherever there has been the use of an easement for twenty years unexplained, it will be presumed to be under claim of right and adverse, and will be sufficient to establish title by prescription

Id. at 530-31, 503 N.E.2d at 985 (quoting *Truc v. Field*, 269 Mass. 524, 528-29, 169 N.E. 428, 430 (1930)).

⁵⁹ *Brooks*, 23 Mass. App. Ct. at 531, 503 N.E.2d at 985.

⁶⁰ *Id.*

⁶¹ *Id.* at 532, 503 N.E.2d at 985.

⁶² *Id.* at 532, 503 N.E.2d at 986.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ See, e.g., *Rundell*, *supra* note 7, § 8.102; *M. PARK & D. PARK*, *supra* note 1, §§ 275, 283.

⁶⁷ *Shapiro v. Burton*, 23 Mass. App. Ct. 327, 330, 502 N.E.2d 545, 547 (1987).

session for twenty years, in this case an easement in a common fire escape.⁶⁸

Although the Appeals Court in *Shapiro*, following traditional property law, allowed the servient tenement owner to extinguish an easement through adverse possession, it also reaffirmed the rights of easement owners.⁶⁹ The court reversed the Land Court's holding which had confined the easement holder's rights to merely being able to build a new staircase and did not permit her to use the existing staircase.⁷⁰ The Appeals Court remanded to the Land Court for further findings the question of the easement holder's means of access to the beach with instructions that this question be determined based on equitable principles and by taking into consideration both parties' needs.⁷¹

The Appeals Court correctly decided this case and its analysis follows the traditional property law concerns for the protection of the rights of easement holders. The Appeals Court emphasized the following three issues in its decision to overturn the Land Court's holding which had precluded the defendant from using the plaintiffs' staircase. First, the plaintiffs and the defendant were holders of an easement in common in the land over which the existing staircase stood and therefore, the plaintiffs' rights were no greater than the defendant's rights.⁷² Second, the defendant's right of access easement to Rockaway Beach would be useless without a means by which to exercise this right, i.e., a staircase.⁷³ Third, the plaintiffs' efforts in fortifying the bank may have rendered the construction of a new staircase both more difficult and more expensive.⁷⁴ Given the substantial cost of building a new staircase, the court correctly reasoned that refusing the defendant access to the plaintiffs' staircase would, in effect, deprive the defendant from beach access and that would be inconsistent with her easement.⁷⁵ Based on these three

⁶⁸ *Brooks*, 23 Mass. App. Ct. at 530-31, 503 N.E.2d at 985 (quoting *Truc v. Field*, 269 Mass. 524, 528-29, 169 N.E. 428, 430 (1930)).

⁶⁹ See *Shapiro*, 23 Mass. App. Ct. at 336, 502 N.E.2d at 550.

⁷⁰ *Id.*

⁷¹ *Id.* at 334, 336, 502 N.E.2d at 549, 550.

⁷² *Id.* at 332, 333-34, 502 N.E.2d at 548, 549.

⁷³ *Id.* at 333, 502 N.E.2d at 549. The Appeals Court noted that forcing the defendant to build a new staircase across from the footpath would be expensive and could damage the bank. *Id.* at 334, 502 N.E.2d at 549. The Appeals Court stated that this solution would, because of its cost, deprive the defendant of beach access and was therefore inconsistent with the defendant's right of access easement. *Id.*

⁷⁴ *Id.* at 335, 502 N.E.2d at 550.

⁷⁵ See *id.* at 334, 502 N.E.2d at 549.

considerations, the Appeals Court reasonably concluded that, depending on the Land Court's further findings, the plaintiffs and the defendant either share the staircase and the costs in maintaining it, or that the plaintiffs must contribute to the construction of a new set of stairs.⁷⁶

The Appeals Court in *Shapiro* correctly reaffirmed the Land Court's decision concerning the other two easement questions by holding that two portions of the defendant's easement had been extinguished by adverse possession.⁷⁷ The court set forth the current status of the law when it stated that an easement is extinguished by prescription through the use, by the servient tenement owner, of his or her land in such a manner so inconsistent with the easement that the easement is extinguished after a lapse of twenty years.⁷⁸ Therefore, the adverse use of portions of the defendant's easement by the plaintiffs and their predecessors for over twenty years extinguished those portions of the defendant's easement.⁷⁹

In *Brooks*, the Appeals Court applied traditional property law in holding that the plaintiff had acquired, through twenty years of adverse possession, an easement in a common fire escape.⁸⁰ Therefore, the court correctly reaffirmed the Land Court's holding that the owner of the servient tenement had acted wrongfully in removing the fire escape where its continued existence would not have impaired the defendant's use of its building.⁸¹ The Appeals Court then affirmed the Land Court's order that the defendant either replace the fire escape or, in the alternative, pay the plaintiff a sufficient sum to cover the costs of installing an interior stairway which would meet the state building code egress requirements.⁸² The Appeals Court's reasoning throughout *Brooks* reaffirmed the current status of the rights of easement holders in Massachusetts.⁸³

Easement holders, whether by grant in *Shapiro* or by prescription in *Brooks*, have substantial rights in the servient tenement which the Massachusetts courts continue to recognize and protect. Thus, the Appeals Court in *Shapiro* reversed the Land Court's holding

⁷⁶ *Id.* at 335, 502 N.E.2d at 550.

⁷⁷ *Id.* at 330, 502 N.E.2d at 547.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Brooks*, 23 Mass. App. Ct. at 532, 503 N.E.2d at 985.

⁸¹ *Id.* at 532; 503 N.E.2d at 986.

⁸² *Id.*

⁸³ See *id.* at 530-31, 503 N.E.2d at 985. See *supra* note 58 for a discussion of adverse possession of easements.

which had precluded the owner of a right of access easement from exercising her rights without considerable expense.⁸⁴ Traditional property law, however, also recognizes the ability of a servient tenement owner to extinguish an easement through adverse possession for a period of not less than twenty years. Thus, the Appeals Court, applying the traditional law of easements, recognized in *Shapiro* that easements may be extinguished, either in part or in their entirety, through adverse possession by the owner of the servient tenement.⁸⁵ In *Brooks*, the Appeals Court upheld the easement holder's rights against those of the owner of the servient tenement by holding that the latter had acted wrongfully in destroying the fire escape to which the plaintiff had acquired a prescriptive easement.⁸⁶ By reiterating and reaffirming the traditional rules of property law in Massachusetts surrounding the creation and extinguishment of easements, the Appeals Court has clarified the rights and obligations of both easement holders and of owners of servient tenements.

E. *Brokers' Fees

Whether the broker¹ or seller should bear the risk of forfeiture in real estate transactions remains a central yet surprisingly unclear issue under Massachusetts law. The majority of states traditionally hold that a real estate broker earns a commission when the broker procures a purchaser ready, able, and willing to buy the property on the seller's terms, regardless of whether the broker and seller actually consummate the sale.² In 1975, the Massachusetts Supreme Judicial Court expressly rejected the majority rule.³ In *Tristram's Landing, Inc. v. Wait*, the Court joined a growing number of states adopting the minority view that, absent a contract to the contrary, a broker does not earn a commission unless the sale is completed, except where the seller's wrongful act or interference prevented the consummation of the sale.⁴

⁸⁴ *Shapiro v. Burton*, 23 Mass. App. Ct. 327, 334, 336, 502 N.E.2d 545, 549, 550 (1987).

⁸⁵ *Id.* at 330, 502 N.E.2d at 547; see *Rundell*, *supra* note 7, § 8.102.

⁸⁶ *Brooks*, 23 Mass. App. Ct. at 532, 503 N.E.2d at 985.

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¹ A real estate broker is an agent who, for a commission or fee, is employed by a principal to negotiate the sale, purchase, lease or exchange of real property to a third party. R. POWELL, 7 POWELL ON REAL PROPERTY, ch. 84C, ¶ 938.13[1][a] (rev. ed. 1987) [hereinafter POWELL].

² POWELL, *supra* note 1, at ¶ 938.17[1].

³ See *Tristram's Landing v. Wait*, 367 Mass. 622, 629, 327 N.E.2d 727, 731 (1975).

⁴ *Id.* A number of jurisdictions have adopted or expressly approved the minority rule, which was first enunciated in *Ellsworth Dobbs, Inc. v. Johnson*, 50 N.J. 528, 551-52, 236

Despite the generally complete treatment of broker's fees in the *Tristam* decision, the Court failed to define explicitly the intended scope of its holding.⁵ In subsequent broker's fees cases, Massachusetts courts have grappled with whether the *Tristam* rule applies only to those situations where a sale is not consummated because the buyer defaults, or whether *Tristam* equally applies where the seller's behavior, short of the prohibited "wrongful act[s] or interference," prevents the successful completion of the real estate transaction.⁶ Although the courts have not clearly decided the issue, Massachusetts courts have suggested that *Tristam* applies to all real estate transactions, even if the seller causes the failure of the sale.⁷ Thus, the courts have intimated, a broker earns a commission only if the buyer and seller enter into a valid contract to sell the property and the parties consummate the sale.⁸ If the seller's wrongful acts or interference prevent the successful completion of the transaction, the courts apply the *Tristam* exception to permit the broker to recover a commission if the broker had produced a ready, able, and willing buyer and the parties had entered into a valid purchase and sale agreement.⁹

During the *Selected Developments* year, however, the First Circuit Court of Appeals concluded that a review of Massachusetts law compels the opposite conclusion.¹⁰ In the 1987 decision of *Bennett v. McCabe*, the court ruled that, under Massachusetts law, a broker earns his commission where the broker produces a ready, able, and willing purchaser for the seller's property, even if the sale is not completed because of an unknown defect in the seller's title, regardless of the seller's good faith.¹¹ The court held that *Tristam*

A.2d 843, 855-56 (1967). See, e.g., *Potter v. Ridge Realty Corp.*, 28 Conn. Supp. 304, 311, 259 A.2d 758, 761 (1969); *Mullenger v. Clause*, 178 N.W.2d 420, 429 (Iowa 1970); *Winkelman v. Allen*, 214 Kan. 22, 38, 519 P.2d 1377, 1390 (1974); *Dworak v. Michals*, 211 Neb. 716, 720-21, 320 N.W.2d 485, 488 (1982); *Goetz v. Anderson*, 274 N.W.2d 175, 179, (N.D. 1978); *Setser v. Commonwealth, Inc.*, 256 Or. 11, 19-23, 470 P.2d 142, 145-47 (1970); *Staab v. Messier*, 128 Vt. 380, 383, 264 A.2d 790, 792 (1970). Colorado has adopted the minority rule by statute. See COLO. REV. STAT. § 12-61-201 (1985).

⁵ See *Tristam*, 367 Mass. at 630, 327 N.E.2d at 731.

⁶ See *infra* notes 21-47 and accompanying text for a review of the Massachusetts cases interpreting *Tristam*.

⁷ See *infra* notes 21-47 and accompanying text for a review of the Massachusetts cases interpreting *Tristam*.

⁸ See *infra* notes 21-47 and accompanying text for a review of the Massachusetts cases interpreting *Tristam*.

⁹ See *infra* notes 21-47 and accompanying text for a review of the Massachusetts cases interpreting *Tristam*.

¹⁰ *Bennett v. McCabe*, 808 F.2d 178, 183-84 (1st Cir. 1987).

¹¹ *Id.* at 184.

applies only to situations where the buyer's unwillingness or inability prevents the consummation of the sale.¹² A review of *Tristam* and its progeny reveals that the *Bennett* decision significantly departs from Massachusetts law.¹³

In *Tristam*, the Supreme Judicial Court ruled that a broker does not earn a commission unless three conditions are met: (a) the broker must produce a buyer ready, willing, and able to buy on the terms fixed by the seller; (b) the buyer must enter into a binding contract with the seller to sell the property; and (c) the buyer must complete the transaction by closing the title in accordance with the provisions of the contract.¹⁴ The Court stated that where the parties do not consummate the contract because of the buyer's financial inability to perform or because of "any other default [by the buyer],"¹⁵ the broker is not entitled to a commission from the seller.¹⁶ The Court noted in contrast that the broker may receive a commission where the failure to complete the contract results from the seller's "wrongful act or interference."¹⁷ The Court recognized that the broker and seller could easily circumvent the rule by contractually providing otherwise, but warned that courts should scrutinize such agreements carefully to insure that they are not unfairly made, unconscionable, or against public policy.¹⁸ The *Tristam* rule, the Court emphasized, protects inexperienced property sellers who are unfamiliar with their legal rights and who typically expect that the broker's fee will be paid from the proceeds of the sale.¹⁹ The Court stressed that the rule properly places the burden of the sale's forfeiture on the broker.²⁰

Two of the earliest Massachusetts Appeals Court decisions interpreting *Tristam* seemed to suggest that the *Tristam* rule applies

¹² *Id.*

¹³ See *infra* notes 21-47 and accompanying text for a review of the Massachusetts cases interpreting *Tristam*.

¹⁴ *Tristam's Landing v. Wait*, 367 Mass. 622, 629, 327 N.E.2d 727, 731 (1975) (quoting *Ellsworth Dobbs, Inc. v. Johnson*, 50 N.J. 528, 551, 236 A.2d 843, 855 (1967)).

¹⁵ *Id.* (quoting *Ellsworth Dobbs*, 50 N.J. at 551, 236 A.2d at 855).

¹⁶ *Id.* (quoting *Ellsworth Dobbs*, 50 N.J. at 551, 236 A.2d at 855).

¹⁷ *Id.* (quoting *Ellsworth Dobbs*, 50 N.J. at 551, 236 A.2d at 855).

¹⁸ *Id.* at 630, 327 N.E.2d at 731-32. In 1987, the Massachusetts Appeals Court, relying on this warning, ruled that any contract provision altering the *Tristam* rule must explicitly negate the conditions set forth in *Tristam* so as to give sufficient notice to a seller that the broker is entitled to a commission even if the sale is not consummated. *Currier v. Kosinski*, 24 Mass. App. Ct. 106, 107-08, 506 N.E.2d 895, 896-97 (1987).

¹⁹ *Tristam*, 367 Mass. at 630, 327 N.E.2d at 731.

²⁰ *Id.*

to situations where the seller defaults.²¹ Both cases, however, applied the *Tristam* exception to allow a broker to recover a commission where the seller's wrongful conduct prevented the consummation of the sale.²² In 1979, the Appeals Court ruled in *Lipis v. Landano* that a broker is entitled to a commission where the sellers refuse to sign a purchase and sale agreement containing terms upon which the parties orally agreed.²³ Citing *Tristam*, the court found that the defendant sellers owed the broker a commission because their desire to enter into a better deal with another buyer and deprive the plaintiff of his earned commission solely motivated their refusal to perform.²⁴ Thus, the sellers' wrongful act triggered the *Tristam* exception and permitted the broker to recover a commission even though the sale was not completed.²⁵

In the same year, the Massachusetts Appeals Court similarly held in *Kinchla v. Welsh* that the *Tristam* rule permits a broker's commission only if the sale is consummated, unless the seller's wrongful act or interference prevents the transaction's successful completion.²⁶ The court found that a seller need not act in bad faith to "wrongfully act or interfere" within the meaning of the *Tristam* rule.²⁷ Thus, the seller's backing out of an agreed deal because of pressure to do so by others, the court concluded, constituted a sufficiently wrongful act to justify holding the seller liable for the broker's commission.²⁸

In 1984, the Supreme Judicial Court in *Lewis v. Emerson* seemed to agree with the Appeals Court that the *Tristam* rule applies to any case in which a broker seeks to recover a commission, regardless of whether the buyer or the seller prevented the consummation of the sale.²⁹ In *Lewis*, the Court expressly applied the *Tristam* rule to hold sellers liable for a broker's commission where the sellers defaulted on their agreement to convey property.³⁰ Justice Nolan paraphrased the *Tristam* rule to require that, absent an agreement to the contrary,

²¹ See *Lipis v. Landano*, 7 Mass. App. Ct. 894, 895, 387 N.E.2d 203, 204 (1979); *Kinchla v. Welsh*, 8 Mass. App. Ct. 367, 371-72, 394 N.E.2d 978, 981 (1979).

²² *Lipis*, 7 Mass. App. Ct. at 894-95, 387 N.E.2d at 204; *Kinchla*, 8 Mass. App. Ct. at 371, 394 N.E.2d at 981.

²³ *Lipis*, 7 Mass. App. Ct. at 894, 387 N.E.2d at 204.

²⁴ *Id.*

²⁵ *Id.* at 894-95, 387 N.E.2d at 204.

²⁶ *Kinchla*, 8 Mass. App. Ct. at 371-72, 394 N.E.2d at 981.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Lewis v. Emerson*, 391 Mass. 517, 524-25, 462 N.E.2d 295, 300 (1984).

³⁰ *Id.* at 525, 462 N.E.2d at 300.

the parties must meet the three conditions set forth in *Tristam* "unless closing is prevented by the wrongful conduct of the seller."³¹

The Court accepted the trial judge's findings that the first two requirements were met: the broker had produced a ready, able, and willing buyer and the parties had entered into a valid purchase and sale agreement.³² Because the sellers failed to appear at the scheduled closing date, the Court concluded, the sellers wrongfully prevented the consummation of the sale.³³ The Court thus held the sellers liable for the broker's commission because the broker had satisfied the *Tristam* requirements and only the sellers' default had caused the sale to fall through.³⁴

One month later, in *Capezzuto v. John Hancock Mut. Life Ins. Co., Inc.* ("*Capezzuto I*"), the Massachusetts Appeals Court, without reference to *Lewis*, interpreted *Tristam* as applying exclusively to situations where the buyer's unwillingness, inability, or unreadiness prevents the consummation of the sale.³⁵ The court, however, acknowledged that a literal interpretation of *Tristam* mandates the conclusion that a broker is entitled to a commission only if the parties meet the three requirements outlined in the decision.³⁶ Judge Armstrong justified this narrow interpretation of *Tristam* on the ground that the purpose of the *Tristam* rule was to protect a seller from a buyer's default.³⁷ The *Tristam* rule, the court stated, does not deprive a broker of a commission where he or she produces a customer ready, able, and willing to buy on the seller's precise terms, but the seller "has a change of heart or otherwise defeats the transaction."³⁸ The court thus reversed the lower court's entry of summary judgment in favor of the seller.³⁹

On the defendant's appeal, the Supreme Judicial Court in *Capezzuto II* reversed the Appeals Court's decision.⁴⁰ Citing *Lewis*, the Court held that where the seller is responsible for the failure to

³¹ *Id.* at 524, 462 N.E.2d at 300.

³² *Id.* at 525, 462 N.E.2d at 300.

³³ *Id.*

³⁴ *Id.*

³⁵ *Capezzuto v. John Hancock Mut. Life Ins. Co.*, 18 Mass. App. Ct. 46, 48-49, 462 N.E.2d 1131, 1133 (1984) [hereinafter *Capezzuto I*], *rev'd*, 394 Mass. 399, 403-04, 476 N.E.2d 188, 190-91 (1985).

³⁶ *Id.* at 47, 462 N.E.2d at 1132.

³⁷ *Id.* at 48, 462 N.E.2d at 1133.

³⁸ *Id.* at 48-49, 462 N.E.2d at 1133.

³⁹ *Id.* at 49, 462 N.E.2d at 1134.

⁴⁰ *Capezzuto v. John Hancock Mut. Life Ins. Co.*, 394 Mass. 399, 403-05, 476 N.E.2d 188, 190-91 (1985) [hereinafter *Capezzuto II*].

complete the transaction, the seller nevertheless owes no commission unless the first two requirements set forth in *Tristam* are satisfied and the seller engaged in bad faith dealing or other misconduct.⁴¹ Thus, the Court found, the seller did not owe the broker a commission where the broker had procured a buyer ready, able, and willing to purchase commercial property from the seller on the seller's terms, but the parties had not entered into a binding purchase and sale agreement.⁴²

Chief Justice Hennessey justified the Court's broad interpretation of the *Tristam* rule on the "same considerations" that motivated the Supreme Judicial Court's holding in *Tristam*.⁴³ The Court stated that applying the rule to cases where the seller prevents the consummation of the sale protects the seller's expectations that payment of the broker's commission will come from the proceeds of the sale, that he or she is not bound until signing a purchase and sale agreement, and that, even where engaging one or more brokers, the seller expects to pay only one commission because only one broker ultimately will succeed in procuring the final buyer.⁴⁴ The Court concluded that the broker properly bears the burden of safeguarding his or her own expectations by specifying the desired terms in a contract with the seller.⁴⁵ Finally, the Court noted that, under *Tristam*, the broker may receive a commission where the seller engaged in bad faith dealing or "other misconduct" which prevents the parties from entering into a binding purchase and sale agreement.⁴⁶ Because there was no inference that the seller acted in bad faith, the Court concluded that the seller did not owe the broker a commission.⁴⁷

Despite the Supreme Judicial Court's explicit rejection in *Capezzuto II* of a narrow reading of *Tristam*, the First Circuit, interpreting Massachusetts law, held in *Bennett v. McCabe* that *Tristam*

⁴¹ *Id.* at 402, 476 N.E.2d at 190.

⁴² *Id.* at 404-05, 476 N.E.2d at 191. In 1985, the Supreme Judicial Court followed *Capezzuto II* in *Hunneman & Co., Inc. v. LoPresti*, 394 Mass. 406, 409-10, 476 N.E.2d 191, 193 (1985) ("As we recognized in *Capezzuto [II]*, . . . until a binding purchase and sale agreement is signed, a seller is ordinarily privileged to sell to whomever it chooses."). See also, *Currier v. Kosinski*, 24 Mass. App. Ct. 106, 108, 506 N.E.2d 895, 897 (1987) (broker not entitled to commission where parties did not enter into binding purchase and sale agreement, thus not satisfying the second condition set forth in *Tristam*).

⁴³ *Capezzuto II*, 394 Mass. at 403, 476 N.E.2d at 190.

⁴⁴ *Id.*

⁴⁵ *Id.* at 404, 476 N.E.2d at 190-91.

⁴⁶ *Id.* at 404, 476 N.E.2d at 191.

⁴⁷ *Id.*

applies exclusively to situations where the broker's customer defaults.⁴⁸ The court therefore ruled that a broker may receive a commission where an unknown defect in the sellers' title prevented the consummation of the sale.⁴⁹ The fact that the sellers acted in good faith and lacked knowledge of the defect in the title at the time they entered the purchase and sale agreement, the court stated, did not relieve the sellers of their duty to pay the broker a commission.⁵⁰

In so ruling, the court rejected the sellers' argument and the lower court's finding that the sellers did not owe the broker a commission because the failure to complete the contract was not the result of sellers' conduct that amounted to "wrongful act[s] or interference."⁵¹ Thus, the court held, the broker did not earn a commission under the *Tristam* exception.⁵² Adopting the Massachusetts Appeals Court's analysis of *Tristam* in *Capezzuto I*, the First Circuit agreed that the purpose of the *Tristam* rule was not to deprive the broker of a commission where he or she produces a customer ready, willing, and able to buy on the seller's terms but the seller "has a change of heart or otherwise defeats the transaction."⁵³ Therefore, the court concluded, *Tristam* simply does not apply where a sale is not consummated because of the seller's conduct, even if the seller did not act "wrongfully."⁵⁴

In light of the contrary holding in *Lewis* that *Tristam* applies equally to situations where the seller or buyer defaults, the First Circuit considered certifying the issue to the Massachusetts Supreme Judicial Court.⁵⁵ The court concluded, however, that certification was unnecessary because *Lewis* was distinguishable as an "unintentionally . . . deceptive" interpretation of *Tristam*.⁵⁶ The court held that *Lewis* was not persuasive because the decision addressed numerous issues, the broker's fee question was not the primary issue in the case, and the seller's affirmative wrongful conduct made the case "easy" because *Tristam*'s "wrongful act or interference" language directly governed the outcome.⁵⁷ Finally, the

⁴⁸ *Bennett v. McCabe*, 808 F.2d 178, 181-82 (1st Cir. 1987).

⁴⁹ *Id.*

⁵⁰ *Id.* at 183.

⁵¹ *Id.* at 180.

⁵² *Id.*

⁵³ *Id.* at 182 (emphasis in original).

⁵⁴ *Id.* at 183-84.

⁵⁵ *Id.* at 182.

⁵⁶ *Id.*

⁵⁷ *Id.*

court concluded that the fact that the Supreme Judicial Court quoted the *Tristram* rule verbatim in the 1985 *Capezzuto II* opinion indicated that it rejected its previous "unintentionally . . . deceptive" paraphrased "reformulation" of *Tristram* in the *Lewis* decision.⁵⁸

The First Circuit buttressed its narrow reading of *Tristram* with several policy considerations.⁵⁹ First, the court stated, requiring the broker to show that the seller wrongfully acted or interfered would result in a rule of very difficult application.⁶⁰ The First Circuit decided that the Massachusetts Supreme Judicial Court would prefer a bright line rule entitling the broker to a commission whenever the seller defaults on a binding purchase and sale agreement because such a rule is easier to understand and apply.⁶¹ Second, the court found that the Supreme Judicial Court, at least in the commercial real estate context, would place the burden of avoiding even innocent defaults on the seller instead of the broker because the seller is in a superior position to ascertain the validity of the title, especially when represented by competent counsel.⁶² Finally, the First Circuit noted that most other states permit a broker to recover a commission where the transaction fails as a result of a defect in the seller's title.⁶³

The First Circuit's analysis and interpretation of Massachusetts law governing broker's fees in *Bennett* is seriously flawed and ultimately unsupportable. In interpreting *Tristram* and its progeny, the First Circuit ignored the line of Massachusetts cases which strongly indicates that the *Tristram* rule applies to all situations where a broker claims the right to a commission, regardless of whether the buyer's or the seller's conduct prevents the completion of the sale.⁶⁴ For example, in *Capezzuto II*, the Supreme Judicial Court clearly established that *Tristram* applies to situations where a seller defaults.⁶⁵ The

⁵⁸ *Id.*

⁵⁹ *Id.* at 183.

⁶⁰ *Id.* The court cited *Kinchla v. Welsh* as evidencing the need to reject a rule which required courts to make distinctions regarding seller's degree of culpability in favor of a bright line test. *Bennett*, 808 F.2d at 183 (citing *Kinchla v. Welsh*, 8 Mass. App. Ct. 367, 371, 394 N.E.2d 978, 981 (1979) (broker need not show seller's bad faith to recover commission)). See *supra* notes 21, 22, 26-28 and accompanying text for a discussion of the *Kinchla* opinion.

⁶¹ *Bennett*, 808 F.2d at 184.

⁶² *Id.* at 183.

⁶³ *Id.*

⁶⁴ See *supra* notes 21-47 and accompanying text for a review of the cases interpreting *Tristram*.

⁶⁵ *Capezzuto v. John Hancock Mut. Life Ins. Co.*, [*Capezzuto II*], 394 Mass. 399, 402, 476 N.E.2d 188, 190-91 (1985).

Court held that a broker is entitled to a commission only if the first two conditions set forth in *Tristam* are satisfied and the seller's bad faith dealing or "other misconduct" prevents the consummation of the sale.⁶⁶ The *Bennett* court simply ignored the *Capezzuto II* opinion, instead relying on the narrow interpretation of the *Tristam* rule which the Massachusetts Appeals Court advanced in *Capezzuto I*, despite the fact that subsequently in *Capezzuto II* the Supreme Judicial Court rejected the appellate court's reasoning and holding.⁶⁷

Moreover, the First Circuit provided untenable grounds for distinguishing *Lewis*, the second Supreme Judicial Court decision that applied *Tristam* to a situation where the seller's conduct caused the failure of the sale.⁶⁸ The fact that the *Lewis* Court decided several issues other than the broker's fee issue⁶⁹ bears no relevance to the weight the First Circuit should afford the Court's holding. Similarly, whether the Supreme Judicial Court paraphrased the rule in a 1984 opinion and quoted the *Tristam* rule verbatim in a 1985 decision⁷⁰ cannot serve as a repudiation of the *Lewis* holding. This sequence simply is inconclusive and ultimately meaningless. The fact that the First Circuit even proffered this as an argument suggests the tenuous basis for its interpretation of *Tristam*.

Finally, the fact that *Lewis* was an "easy" case because the seller displayed clearly wrongful conduct and thus fell squarely within the language of the *Tristam* exception⁷¹ provides an insufficient ground on which to conclude that *Lewis* is not controlling authority. This interpretation of *Lewis* actually supports the view that the *Tristam* rule applies to the earning of broker's fees generally, and that a broker may recover a commission only if the seller's misconduct triggers the *Tristam* exception. Ultimately, therefore, the *Bennett*

⁶⁶ *Id.* at 402, 476 N.E.2d at 189-90.

⁶⁷ *Bennett*, 808 F.2d at 181. The First Circuit relegated its discussion of *Capezzuto II* to a footnote, stating that the Supreme Judicial Court "did not quarrel with the lower court's interpretation" of *Tristam*. *Id.* at 181 n.3. The court considered this fact and the Supreme Judicial Court's holding in *Capezzuto II* that the broker earns no commission where the seller is responsible for an incomplete transaction unless the seller has signed a valid purchase and sale agreement to be consistent with its interpretation of *Tristam*. *Id.* Apparently, the *Bennett* court failed to appreciate that the *Capezzuto II* decision indicates that, to recover a commission, the broker and seller must satisfy at least the first two conditions set forth in *Tristam*, and therefore that *Tristam* applies whether the buyer or the seller's conduct prevents the consummation of the sale. *Id.* See *supra* notes 21-47 and accompanying text for a review of the Massachusetts courts' interpretation of *Tristam*.

⁶⁸ *Bennett*, 808 F.2d at 182.

⁶⁹ See *id.*

⁷⁰ *Id.*

⁷¹ *Id.*

court's characterization of *Lewis* as "unintentionally . . . deceptive"⁷² is unsupportable and perhaps only indicative of the fact that the First Circuit disagrees with the minority rule which Massachusetts adopted in *Tristram* and applied in *Lewis*.

The First Circuit offered equally unconvincing policy considerations in support of its narrow interpretation of *Lewis*. Simply because the *Tristram* rule may be more difficult to apply than a bright line test⁷³ does not justify the Court's alteration of Massachusetts law as announced by the state's highest court. In light of the court's consistent application of the *Tristram* rule in *Kinchla*, *Lewis*, and *Capezzuto II*, the First Circuit articulates no convincing rationale for its finding that the Supreme Judicial Court would adopt a bright line test.⁷⁴

Similarly, no basis exists for the First Circuit's conclusion that the Supreme Judicial Court, at least in the commercial context, would place the burden of even innocent defaults on the seller rather than the broker.⁷⁵ *Lewis* expressly applied *Tristram* to a situation where sellers defaulted on a sale of commercial property.⁷⁶ Moreover, the policy rationales underlying the *Tristram* Court's adoption of the minority rule compel the contrary conclusion. The *Tristram* Court predicated its rule on the need to protect the inexperienced seller who lacks familiarity with the law and typically expects to pay the broker's commission from the proceeds of the completed sale.⁷⁷ The Supreme Judicial Court permits brokers and sellers to enter into agreements varying the *Tristram* rule, provided that such contracts are made fairly.⁷⁸ Absent such an agreement, however, *Tristram* makes clear that the broker properly bears the risk of forfeiture.⁷⁹ Finally, because *Tristram* admittedly is a minority rule, the fact that most other states permit a broker to recover a commission where the transaction fails as a result of a defect in the seller's title⁸⁰ is inconsequential.

The First Circuit's holding in *Bennett*, narrowly confining *Tristram* to cases where the buyer's inability or unwillingness to perform

⁷² *Id.*

⁷³ See *id.* at 183.

⁷⁴ See *supra* notes 21-47 and accompanying text for a discussion of the *Lipis*, *Kinchla*, *Lewis*, and *Capezzuto* decisions.

⁷⁵ See *Bennett*, 808 F.2d at 183.

⁷⁶ *Lewis v. Emerson*, 391 Mass. 517, 524-25, 462 N.E.2d 295, 300 (1984).

⁷⁷ See *Tristram's Landing v. Wait*, 367 Mass. 622, 628, 327 N.E.2d 727, 731 (1975).

⁷⁸ See *id.* at 630, 327 N.E.2d at 732.

⁷⁹ See *id.* at 629, 327 N.E.2d at 731.

⁸⁰ *Bennett v. McCabe*, 808 F.2d 178, 183 (1st Cir. 1987).

thwarts the consummation of the sale, is unconvincing. The Massachusetts cases interpreting *Tristram*, particularly *Lewis* and *Capezuto II*, suggest that a broker earns a commission only if he or she satisfies the *Tristram* conditions. Where the broker fulfills the first two requirements by procuring a customer ready, able, and willing to purchase the seller's property on the seller's terms and the parties enter into a valid purchase and sale agreement, Massachusetts courts consistently have held the seller liable for the broker's commission only if the seller's wrongful act or interference prevents the accomplishment of the third requirement — the final closing. Despite its flaws, however, *Bennett* remains significant in that it highlights the need for a clarification of *Tristram's* scope. To protect the expectations of the broker and seller involved in real estate transactions, the Massachusetts courts should attempt to define clearly the intended application of this eighteen year old, but still somewhat unclear, rule.