CHAPTER 5

Torts

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A. Court Decisions

§5.1. Malicious prosecution. A resident of Westwood brought an action of tort for malicious prosecution against the building inspector and the chief of police of the town, and the defendants' demurrer was sustained. In an opinion in which discussion of procedural problems consumed "time . . . greatly disproportionate to the contribution, if any, to our jurisprudence,"[1] the Supreme Judicial Court reversed and held that the declaration, which alleged that, in a prosecution for violation of a zoning by-law, the defendants procured a conviction of the plaintiff in a district court[2] by perjured testimony and suppression of evidence, stated a cause of action. The case thus constituted an exception to the general rule that conviction by the court in which the complaint is made is conclusive evidence of probable cause and a bar to an action for malicious prosecution even if a Superior Court jury subsequently acquits.[3]

§5.2. Medical malpractice. In *Delaney v. Rosenthall*,[1] a verdict was directed for the defendant physician in a tort action brought by a patient whom he had treated following an industrial accident. On exceptions taken by the plaintiff, the Supreme Judicial Court held that although there was no expert testimony that the defendant was negligent in treating the plaintiff, none was necessary in view of the evidence that the defendant failed to prescribe hospitalization of the plaintiff after it was clear that his thumb was infected, and that he left the treatment of the plaintiff largely to "a girl who had merely graduated from high school and had worked in a hospital as a nurses' aide for about two years. . . ."[2] The case thus joins others of recent years in which the very nature of the doctor's acts was held not to require expert appraisal in order to reach a conclusion of negligence.[3]

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§5.1. [1] Magaletta v. Millard, 346 Mass. 591, 195 N.E.2d 324 (1964).
[2] He was subsequently acquitted after a jury trial in the Superior Court.
[3] Broussard v. Great Atlantic & Pacific Tea Co., 324 Mass. 323, 326, 86 N.E.2d 439, 440 (1949); Dunn v. E. E. Gray Co., 254 Mass. 202, 203-204, 150 N.E. 166 (1926). The case was finally tried in September, 1964, and resulted in a jury verdict for the defendants.

§5.2. [1] 1964 Mass. Adv. Sh. 393, 196 N.E.2d 878.
[2] Id. at 397, 196 N.E.2d at 878.
[3] Lipman v. Lustig, 346 Mass. 182, 190 N.E.2d 675 (1963), 1963 Ann. Surv. Mass. Law §3.2; Fitzgerald v. Leach, 337 Mass. 463, 150 N.E.2d 12 (1958).

§5.3. Libel and slander. In three cases decided during the 1964 SURVEY year, the Supreme Judicial Court reversed an order of the Superior Court sustaining a demurrer to an action of tort for libel.

Mabardi v. Boston Herald-Traveler Corporation[1] involved the so-called Blatnik Committee investigation of fraudulent practices in the payment of damages for land taken by the Commonwealth under the federal highway program. The plaintiff, a Boston attorney, appeared before the committee to testify to his refusal to take part in alleged frauds and criminal activity. The lead story in the defendant's newspaper on the same day was an account of the day's proceedings before the committee under a headline reading "Settlement Upped $2,000 — $400 Kickback Told." Three photographs appeared immediately below the headline, one of them being of the plaintiff and captioned "Mitchell A. Mabardi — Attorney." The other two photographs were identified as being of a state negotiator who had been convicted of increasing a settlement in return for a kickback, and of the president of the National Association of Real Estate Boards, who was due to testify before the committee. No mention of the plaintiff was made in the article, although there was a reference to an unidentified lawyer who had solicited cases of persons whose property had been taken.

In an opinion by Mr. Justice Reardon, the Court held that the context in which the plaintiff's picture appeared encouraged an inference that he was involved in the wrongdoing cited in the headline and discussed in the story. The test is not how a careful and thorough reader would construe the story before him, but whether a "considerable segment of the community" would read it as charging the plaintiff with wrongdoing. The standard is that applied to fraudulent advertising by such agencies as the Federal Trade Commission or the Post Office,[2] and the rule appears to be that if a publication is susceptible of both defamatory and harmless meanings, the jury should decide the sense in which the public understands it.[3]

Twohig v. Boston Herald-Traveler Corporation[4] involved a political writer's comments on a state senate campaign. In 1962 the plaintiff, a former member of the House of Representatives, was engaged in a primary fight with an incumbent senator who was also president of the Senate. Five days before the primary, the defendant's political editor, in discussing the campaign in his column, made the statement: "The Senate president has reversed the anti-union charge Twohig is spreading about him by resurrecting some of Twohig's votes against Labor when he served on Beacon Hill."

The Supreme Judicial Court, dividing 5 to 2, held that the declaration stated a cause of action. Justice Kirk, speaking for the majority, held that the words quoted were capable "of being understood as an

§5.3. [1] 1964 Mass. Adv. Sh. 719, 198 N.E.2d 304.

[2] Rhodes Pharmacal Co. v. Federal Trade Commission, 208 F.2d 382 (7th Cir. 1953); Gottlieb v. Schaffer, 141 F. Supp. 7 (S.D. N.Y. 1956).

[3] 1964 Mass. Adv. Sh. 719, 722, 198 N.E.2d 304, 306, citing Twombly v. Monroe, 136 Mass. 464, 469 (1884).

[4] 346 Mass. 654, 195 N.E.2d 320 (1964).

assertion of fact that the plaintiff, when he was a member of the General Court, had cast votes against labor." Such an interpretation, the majority felt, would "tend to discredit the plaintiff in the minds of workers in general and of members of labor unions in particular who constitute a considerable and respectable class of the community."[5]

The fact that the publication came during a political campaign was held to be an aggravating, rather than an excusing, circumstance.

The *Twohig* case was decided on January 10, 1964, some two months prior to the decision in *New York Times Co. v. Sullivan*,[6] in which the Supreme Court of the United States reversed, on First Amendment grounds, a judgment in favor of the police commissioner of Montgomery, Alabama, in an action for libel against the *New York Times*. Mr. Justice Brennan, speaking for six of the justices,[7] held the Constitution to require "a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[8]

The separate opinions in the case would go even further than the majority, Mr. Justice Goldberg stating the view that "the First and Fourteenth Amendments to the Constitution afford to the citizen and to the press an absolute, unconditional privilege to criticize official conduct despite the harm which may flow from excesses and abuses."[9]

Justice Cutter, speaking for himself and Justice Spalding in dissent in the *Twohig* case,[10] expressed similar views based on the policy of allowing free and full discussion of the public acts of public officials.

> Because of the healthy public skepticism concerning even more extreme statements in such an election period, as part of a customary type of political appeal and comment (see *Aldrich v. Boyle*, 328 Mass. 30, 32), this article should not be regarded as likely to injure the plaintiff's reputation in the community. To treat such an article as not defamatory would be consistent with the public interest in freedom of responsible discussion during an election campaign, a freedom likely to be restricted if such general comment may be regarded as defamatory.[11]

The Cutter-Spalding view appears to be more in accord with the Supreme Court's policy of permiting free, even though irresponsible, discussion of the official acts of public officials, and it may very well prevail should the case be heard again by the Supreme Judicial Court after a trial of the merits.[12]

[5] Id. at 655, 195 N.E.2d at 321.

[6] 376 U.S. 254, 84 Sup. Ct. 710, 11 L. Ed. 2d 686 (1964).

[7] Justices Black and Goldberg concurred in the result in separate opinions in which Mr. Justice Douglas joined.

[8] 376 U.S. at 279-280, 84 Sup. Ct. at 726, 11 L. Ed. 2d at 706.

[9] Id. at 298, 84 Sup. Ct. at 735, 11 L. Ed. 2d at 719.

[10] 346 Mass. 654, 656, 195 N.E.2d 320, 322 (1964).

[11] Id. at 656-657, 195 N.E.2d at 322.

[12] It may be worthwhile to add the following footnote to history. The Senate

In *Anthony v. Barss,*[18] the owner-editor-publisher of a newspaper was a plaintiff in an action for libel against one who had written to all of the plaintiff's advertisers asking whether they had taken time to examine the editorial content of the plaintiff's newspaper and whether they believed "that irritating advertising is the best way to keep customers and contact new ones." The letter contained statements that "Nothing is more irritating than a presentation of the news (item or editorial) compiled without proper regard for facts," and "A lasting relationship between an advertiser and his customer is based on truth, not distortion." Since a jury might conclude that distortion meant an intentional falsification and departure from the facts, the letter was held actionable.

§5.4. Products liability. In an opinion which, according to its author, involved "earnest study not only of the law but also of the culinary traditions of the Commonwealth,"[1] the Court ruled that a fish bone could not, by all that is dear to New Englanders, be considered a foreign substance in a real New England fish chowder. Authorities from Daniel Webster to Fanny Farmer were cited in support of the Court's position in denying recovery to the plaintiff for her "peculiarly New England injury."[2]

In *Harrod v. Edward E. Tower Company,*[3] recovery was denied the operator of a beauty shop whose hands were burned when a mixture containing the defendant's hair-coloring cream got under her rubber gloves as she was rinsing a customer's hair. The evidence, the Court held, left it conjectural whether the plaintiff's injuries were caused by the defendant's product or by the hydrogen peroxide or the homogenized bleach with which she had mixed it.

§5.5. Snow and ice. By statute, a municipality is liable in tort to any person injured as a result of its failure to exercise reasonable care and diligence to remedy or repair any defect in a public way.[1] It is not, however, liable for an injury sustained by reason of snow or ice on a way "if the place at which the injury or damage was sustained was at the time of the accident otherwise reasonably safe and convenient for travelers."[2] In *Fortin v. City of Gardner,*[3] the Court held what should have been self-evident from a reading of Section 17, namely, that a city was not liable to one who was injured when a windrow of snow, which had been left by the side of the street during

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president referred to vacated his seat in early 1964 to become clerk of the Supreme Judicial Court. Twohig tried for the Senate seat at the primary held September 10, 1964, but lost again.

[18] 346 Mass. 401, 193 N.E.2d 329 (1963).

§5.4. [1] Webster v. Blue Ship Tea Room, Inc., 1964 Mass. Adv. Sh. 731, 198 N.E.2d 309.

[2] Id. at 736, 198 N.E.2d at 312.

[3] 346 Mass. 532, 194 N.E.2d 392 (1963).

§5.5. [1] G.L., c. 84, §15.

[2] Id. §17.

[3] 1964 Mass. Adv. Sh. 747, 198 N.E.2d 431.

snow clearance operations, collapsed under him as he was climbing over it.

A different consideration was involved in *Lewis v. Steinberg*,[4] an action against the owner of private property by one walking on the adjoining public sidewalk who slipped and fell on a mound of ice concealed by snow. The fall occurred right under a protruding sign, the end of which was "icy" and which had icicles protruding from it. The plaintiff's proof was ruled deficient for failure to show the origin of the ice on which she fell, since her case required proof of something other than a natural accumulation of either ice or snow.[5]

Recovery was also denied a seaman returning to his ship, tied up at the defendant's wharf, who fell on a patch of ice which he had seen earlier, should have seen[6] on his return, and could have avoided.[7] The case thus may be classified with those holding that a plaintiff is expected to use his faculties for his own protection and guidance.[8]

§5.6. Deceit. In *Barrett Associates v. Aronson*,[1] the Supreme Judicial Court held that one who had been induced to buy stock in a corporation could maintain an action of tort for deceit against those who induced him to buy by falsely representing that they intended to take no salary until the corporation was earning a profit, and that one of them stood to lose $25,000 if the business failed and so had set aside a reserve of $50,000 of his own funds to be used if the corporation needed money.

The decision in *Saxon Theatre Corporation of Boston v. Sage*,[2] decided during the 1964 SURVEY year, indicates that *Barrett* might mark the limits to which the Court will go in holding a representation of a state of mind to be actionable. The plaintiff declared in both contract and tort, seeking to recover, alternatively, for breach of an alleged agreement to construct a motion picture theatre and lease it to the plaintiff, or for false representations made by the defendants "that their intention was to construct a theatre on . . . [a certain] parcel of property, which they intended to lease to the plaintiff, to be operated by the plaintiff under a long-term lease."[3]

Demurrers to all counts were sustained, the Court holding that the contract counts failed because the alleged agreement was too indefinite and lacking in essential details to be enforceable. The indefinite

4 1964 Mass. Adv. Sh. 597, 197 N.E.2d 698.

5 Municipal ordinances or by-laws requiring owners of land to clear snow from their abutting sidewalks have been held to be penal only, and violations of them give rise to no civil liability to an injured person.

6 The jury, in answer to a special question, found that the place was illuminated.

7 Gadowski v. Union Oil Co. of Boston, 326 F.2d 524 (1st Cir. 1964).

8 Benjamin v. O'Connell & Lee Mfg. Co., 334 Mass. 646, 138 N.E.2d 126 (1956); Letieg v. Denholm & McKay Co., 328 Mass. 120, 102 N.E.2d 86 (1951); O'Hanley v. Norwood, 315 Mass. 440, 53 N.E.2d 3 (1944).

§5.6. 1 346 Mass. 150, 190 N.E.2d 867 (1963). See discussion in 1963 Ann. Surv. Mass. Law §3.7.

2 1964 Mass. Adv. Sh. 1009, 200 N.E.2d 241.

3 Id. at 1011, 200 N.E.2d at 243.

nature of the agreement was also fatal to the tort counts, the Court holding that (1) the representation of an intention to build a theatre was no more than an offer to negotiate, (2) the plaintiff could not reasonably rely on a representation of an intention to draw up and execute a mutually acceptable lease when essential terms of it had not been stated or settled, and (3) the representation that the defendants would build a theatre and lease it to the plaintiff was no more than an opinion or prophecy that an acceptable (to both parties) lease would be agreed upon.[4] *Barrett* was distinguished on the ground that the intentions there misrepresented were definite and precise, and the case was classed with *Yerid v. Mason*,[5] as falling "within the ordinary rule that false statements of opinion, of conditions to exist in the future, or of matters promissory in nature are not actionable."[6]

The result appears to be sound. Massachusetts cases have shown a reluctance on the part of the Court to deny a plaintiff relief on the ground that an agreement which he sought to enforce was too vague or indefinite.[7] In view of the liberality in making enforceable agreements out of parties' promises, it seems entirely proper that a party who fails to show an enforceable contract should not be permitted to make the same indefinite statements the basis of an action of tort.

§5.7. Unfair competition. Problems involving competition by the former owner of a business against the purchaser of his former business are as old as *Old Corner Book Store v. Upham*.[1] The 1964 SURVEY year presented two more cases involving the problem. In one the parties inserted a specific covenant against competition in the sales agreement; in the other they did not.

In *Sulmonetti v. Hayes*,[2] the defendant, who was in financial difficulty, sold his oil business to the plaintiff. The sale included the assets, good will, and name, and the plaintiff also undertook to pay off all indebtedness and to employ the defendant on mutually agreeable terms. The defendant agreed not to re-enter the fuel oil business in Worcester County "in any capacity, directly or indirectly," for ten years from the date of the agreement or the termination of his employment by the plaintiff, whichever was later.

Within two years, and while the defendant was still employed by the plaintiff, the defendant's wife organized a new corporation and went into the fuel oil business from their home; his mother terminated the plaintiff's tenancy of the premises from which the defendant had operated his former business; and, using the plaintiff's customer list,

[4] Id. at 1012, 200 N.E.2d at 244-245.

[5] 341 Mass. 527, 170 N.E.2d 718 (1960), 1961 Ann. Surv. Mass. Law §3.4, 1962 Ann. Surv. Mass. Law §3.5.

[6] 1964 Mass. Adv. Sh. 1009, 1013, 200 N.E.2d 241, 245, citing Yerid v. Mason, *supra* note 4.

[7] Shayeb v. Holland, 321 Mass. 429, 73 N.E.2d 731 (1947); Weiner v. Pictorial Paper Package Corp., 303 Mass. 123, 20 N.E.2d 458 (1939).

§5.7. [1] 194 Mass. 101, 80 N.E. 228 (1907).

[2] 1964 Mass. Adv. Sh. 693, 198 N.E.2d 297, also noted in §6.1 *infra*.

the defendant's wife successfully took some two hundred customers from it.

Although the wife had not signed the purchase and sale agreement, the Supreme Judicial Court ruled that the evidence clearly established that she "deliberately and willfully connived with her husband and purposefully acted both with him and independently of him, to appropriate to herself and her husband the good will that the [plaintiff] had purchased from [the defendant]." Her conduct was thus held to amount to a total disregard of the concept of fair dealing underlying the principle restricting the right of a seller of a business to compete with the buyer "in such a way as to deprive the buyer of the good will which he has purchased."[3] An injunction identical to that issued against the husband was ordered against the wife.

Athough no specific covenant against future competition was made in *Cap's Auto Parts, Inc. v. Caproni,*[4] the Court held one to be implied by the nature of the transaction. The plaintiff corporation was the creature of three brothers who operated an automobile parts and allied equipment business. In 1961 one of the brothers, owning 40 percent of the stock, agreed to buy out the two others, paying in part in cash and in part by two notes, payable in ten years and secured by mortgages and pledges of the stock and the plaintiff's real estate. Within eight months the defendant, who had sold his interest in the plaintiff's business, opened a competing business less than one mile from the plaintiff's place of business. In affirming a final decree enjoining the defendant from engaging in the auto parts business, the Supreme Judicial Court held that "the circumstances as found by the trial judge fully justify the finding of an implied covenant under the *Tobin*[5] standard . . ."[6]

The extent to which a state may, either by statute or through application of its common law, prevent "unfair competition" was seriously restricted by the United States Supreme Court's decision in *Sears, Roebuck & Co. v. Stiffel Co.*[7] The case involved a suit in a federal court in Illinois by Stiffel to prevent Sears from infringing its patent for a pole lamp and for unfair competition. The lower courts held that the patent was invalid for lack of invention but allowed recovery under the Illinois laws against unfair competition. The Supreme Court reversed, holding that a state could not invoke its own laws of unfair competition to give a manufacturer patent-like protection of an article not eligible for the protection of a federal patent.

The *Stiffel* case was discussed but held to be inapplicable in *Edgar H. Wood Associates, Inc. v. Skene,*[8] a case involving common law copyright. Unlike statutory copyright, which is a creature of federal

[3] Id. at 698, 198 N.E.2d at 301.
[4] 1964 Mass. Adv. Sh. 471, 196 N.E.2d 874, also noted in §6.1 *infra.*
[5] Tobin v. Cody, 343 Mass. 716, 180 N.E.2d 652 (1962).
[6] 1964 Mass. Adv. Sh. 471, 474, 196 N.E.2d 874, 876.
[7] 376 U.S. 225, 84 Sup. Ct. 784, 11 L. Ed. 2d 661 (1964).
[8] 1964 Mass. Adv. Sh. 647, 197 N.E.2d 886, also noted in §11.6 *infra.*

statutes, common law copyright is a matter of state law. It protects an author's rights to his works only until there has been a publication. In the *Wood* case the issue was whether there had been a publication of an architect's plans so as to disentitle him to relief in equity against a former employee and his new employers who had taken a set of the plans and constructed a building identical to that designed by the plaintiff. On appeal from a final decree dismissing the bill after the sustaining of a demurrer and denial of leave to amend, the Supreme Judicial Court held that neither filing the original plans with the building department nor constructing a building from them constituted a "publication" of them so as to destroy the common law copyright. Relief, in the event that construction was already started, was limited to the fair market value of the plans.[9]

§5.8. Survival of action. At common law an action of tort did not survive the death of the tort-feasor, and no action could be brought or maintained against his estate.[1] To some extent this common law rule has been changed in Massachusetts,[2] and an action of tort for damage to real or personal property survives the death of either the tort-feasor or the injured party. The statute, however, has been held not to apply to malpractice suits against an attorney.[3] This rule was reaffirmed during the 1964 SURVEY year in *Gallagher v. First National Bank of Boston*,[4] the Court holding that no action lay against the executor of an attorney's estate for his negligently failing to deliver a will he had prepared. As a result of his failure to deliver the will, the decedent's property had been distributed as an intestate estate, and the plaintiff, who had been given $500 plus one third of the residue under the will, received no part of the estate. The Court held that the plaintiff's loss of her legacy did not constitute damage to her personal property.[5]

§5.9. Liability of the Commonwealth. *Smith v. Commonwealth*[1] presented the question of whether the Commonwealth could be held liable for damage caused by the bursting of a Metropolitan District Commission water main as the result of negligent construction, operation, or maintenance. A judge of the Superior Court held not and allowed a motion to dismiss. The Supreme Judicial Court affirmed, holding that the provision in General Laws, Chapter 92, relating to the Metropolitan Water District,[2] did not have the effect of making the Commonwealth liable in tort for damages caused by negligent operation of any waterworks. The petitioner relied on a provision in

[9] Id. at 661, 197 N.E.2d at 896.

§5.8. [1] Putnam v. Savage, 244 Mass. 83, 85, 138 N.E. 808, 809 (1923).
[2] G.L., c. 228, §1.
[3] Connors v. Newton National Bank, 336 Mass. 649, 147 N.E.2d 185 (1958); Jenks v. Hoag, 179 Mass. 583, 61 N.E. 221 (1901).
[4] 346 Mass. 587, 195 N.E.2d 68 (1964).
[5] Id. at 591, 195 N.E.2d at 70.

§5.9. [1] 1964 Mass. Adv. Sh. 765, 198 N.E.2d 420.
[2] G.L., c. 92, §§10-32.

Chapter 92, Section 15,[3] as imposing such liability, but the Court rejected this idea, the majority noting that the sole express provision in Sections 10 through 32 of the chapter relating to the right to recover damages was the provision in Section 32 referring to the eminent domain law.

B. Legislation

§5.10. Physicians: Exemption from civil liability. General Laws, Chapter 112, Section 12B,[1] exempting physicians from liability in tort for emergency treatment rendered at the scene of any motor vehicle accident, was amended to include physicians residing in other states and duly registered therein. It formerly applied only to physicians registered in Massachusetts.[2]

Physicians have also been required to report to the Department of Public Welfare any treatment of injuries to children under sixteen which the physician has reasonable cause to believe were inflicted by the parent or person responsible for the care of such child. Such a report shall not constitute slander or libel.[3]

§5.11. Contribution among joint tort-feasors. The 1963 Survey reported the failure of the 1963 legislature to enact proposed legislation which would have introduced the federal-style of third-party practice[1] into Massachusetts.[2] The 1964 session enacted such legislation.[3]

§5.12. Charitable immunity.[1] The legislature rejected the hardy perennial to make charitable corporations operating hospitals, sanatoriums, infirmaries, and convalescent, nursing, or rest homes liable in tort.[2]

§5.13. Other legislative rejections. The legislature also rejected legislation making the Commonwealth and its political subdivisions liable in tort[1] and three bills imposing vicarious liability on parents for damage or injury caused by minor children.[2] It also rejected an act enlarging the duty of a landlord to maintain premises for use by

[3] "The commission shall keep all water works constructed or maintained by it and all bridges built by it across the reservoir upon the Nashua River safe, and shall have charge of, use, maintain and operate the same, and the commonwealth shall be exclusively responsible for all damages caused thereby or by any defect or want of repair therein."

§5.10. [1] Inserted by Acts of 1962, c. 217. See 1962 Ann. Surv. Mass. Law §3.7.
[2] Acts of 1964, c. 59.
[3] Id. c. 534, inserting G.L., c. 119, §§39A-39B.

§5.11. [1] Fed. R. Civ. P. 14.
[2] See 1963 Ann. Surv. Mass. Law § 3.14.
[3] Acts of 1964, c. 696, inserting G.L., c. 231, §4B.

§5.12. [1] See 1954 Ann. Surv. Mass. Law § 4.5.
[2] House Doc. No. 1944.

§5.13. [1] House Doc. No. 2894.
[2] House Doc. Nos. 1946, 2143, Senate Doc. No. 180.

his tenants,[3] as well as a proposed act providing that negligence of the operator of a motor vehicle shall not be imputed to the owner.[4]

[3] House Doc. No. 783.
[4] House Doc. No. 2361.