CHAPTER 11

Torts

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§ 11.1. Tort Claims Act — Recovery Limitation — Constitutionality — Multiple Claims — Wrongful Death. The Massachusetts Tort Claims Act limits damages for injuries caused by public employers to $100,000.[1] During this *Survey* year, in *Hallett v. Wrentham*[2] the Supreme Judicial Court held that this limitation does not apply to each beneficiary's separate claims under the wrongful death statute but rather to the total amount that the executor or administrator of the decedent may recover.[3] Previously, in *Irwin v. Ware*,[4] the Court held that the $100,000 limitation applied to cap the recovery by each individual plaintiff rather than to place a ceiling on the total amount that multiple plaintiffs involved in a single tortious occurrence could recover.

In *Hallett*, the plaintiff's decedent was killed when his automobile collided with a sanding truck driven by defendant's employee.[5] Decedent's widow and administratrix filed a wrongful death action, designating herself and the deceased's three children as separate plaintiffs. The superior court entered judgment in the amount of $100,000 for the decedent's wife for loss of future income and consortium, and $50,000 each for his three children for loss of parental society.[6] The town appealed, arguing that the wrongful death statute allowed no separate recovery for additional claimants, and that the children's claims should have been joined with those of the wife for the purpose of applying the $100,000 limitation on damage awards against the government.[7] Relying upon *Ferriter v. Daniel O'Connell's Sons, Inc.*,[8] the plaintiff argued that the childrens' claims were not brought under the wrongful death statute and, therefore, were independent of the action brought by the wife as admin-

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[1] G.L. c. 258, § 2.

[2] 398 Mass. 550, 499 N.E.2d 1198 (1986).

[3] *Id.* at 556, 499 N.E.2d at 1193.

[4] 392 Mass. 745, 467 N.E.2d 1292 (1984).

[5] *Hallett*, 398 Mass. at 551, 499 N.E.2d at 1190.

[6] *Id.* at 551–52, 499 N.E.2d at 1190.

[7] *Id.* at 552–53, 499 N.E.2d at 1191.

[8] 381 Mass. 507, 413 N.E.2d 690 (1980).

istratrix. Instead, plaintiff argued, the childrens' claims were brought under the common law and, therefore, recovery under each claim was subject to its own $100,000 "cap." Although it recognized that an action for wrongful death exists under the common law of Massachusetts,[9] the Supreme Judicial Court rejected the plaintiff's argument, maintaining that the wrongful death statute "specifies the procedure and recovery" in such an action.[10] The Court reasoned that the statute, by its very language, "provides for a single action brought by a decedent's executor or administrator . . . [who] presents all claims by the designated beneficiaries for damages flowing from the wrongful death."[11] The children, therefore, could not maintain separate causes of action. Accordingly, the Court ordered the entry of judgment in the amount of $100,000 for the decedent's wife as administratrix, "in satisfaction of all claims."[12]

The Court distinguished its ruling in *Irwin v. Ware*,[13] which construed the $100,000 limitation on liability to apply on a "per plaintiff" basis.[14] Four persons were injured or killed in *Irwin* in a single accident. The *Irwin* plaintiffs were a wife and son who brought suit to recover for their own personal injuries, with the wife suing as well to recover for the wrongful deaths of her husband and daughter.[15] The *Irwin* Court refused to apply the recovery limitation on a "per incident" theory under which the aggregate recovery of all plaintiffs could not have exceeded $100,000.[16] Likewise, the *Irwin* Court rejected the "per claim" approach which would have allowed each plaintiff to recover up to $100,000 on each separate claim.[17] Instead, the Court ruled that "damages are limited under the statute to $100,000 for each plaintiff, even for a plaintiff who has more than one claim."[18]

In *Irwin*, the Court addressed the issue of recovery for the wrongful death of two individuals and for the personal injuries of two others arising from the same tortious incident. It was the existence of these four separate victims that raised the potential recovery in *Irwin* to $400,000.[19]

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[9] *Hallett*, 398 Mass. at 554, 499 N.E.2d at 1192 (quoting Gaudette v. Webb, 362 Mass. 60, 71, 284 N.E.2d 222, 229 (1972)).

[10] *Hallett*, 398 Mass. at 555, 499 N.E.2d at 1192.

[11] *Id.*

[12] *Id.* at 560, 499 N.E.2d at 1195.

[13] 392 Mass. 745, 467 N.E.2d 1292 (1984). For a discussion of the case see Donovan, *Torts*, 1984 ANN. SURV. MASS. LAW, § 14.4, at 476.

[14] *Irwin*, 392 Mass. at 774, 467 N.E.2d at 1311.

[15] *Id.* at 771 n.13, 467 N.E.2d at 1309 n.13.

[16] *Id.* at 766–70, 467 N.E.2d at 1306–08.

[17] *Id.* at 771–72, 467 N.E.2d at 1308–09.

[18] *Id.* at 774, 467 N.E.2d at 1311.

[19] In fact, the actual recovery was less than $400,000 because the jury award for the injury to one of the children was less than the maximum amount.

Hallett, on the other hand, was an action for the recovery of the death of one individual. The primary issue in *Hallett*, therefore, was whether the decedent's children could bring separate suits to recover for loss of parental affection occasioned by that wrongful death. *Irwin* confronted no such question, but, rather, sought to determine the proper limitation on liability where multiple parties were injured in a single accident. Accordingly, the Supreme Judicial Court in *Hallett* dismissed *Irwin* as inapplicable. "The issue we confront here," the Court concluded, "was not raised or argued in *Irwin*."[20]

Finally, the *Hallett* Court considered and rejected the plaintiff's further contention that the statutory limitation on recoveries denied citizens the equal protection of the laws. "Where there is not infringement of fundamental rights or any suspect class," the Court articulated, "a statutory discrimination will be upheld if it is 'rationally related to a legitimate State purpose.'"[21] The plaintiff argued for a strict scrutiny standard of review. In order for the $100,000 limitation to pass constitutional muster, the plaintiff argued, the Court would have to find the liability cap served a compelling state interest.[22] The recovery limitation, the plaintiff claimed, violated "a fundamental right to recover full damages established by Article 11 of the Declaration of Rights" under the Massachusetts Constitution, which declares, in pertinent part, that "[e]very subject of the Commonwealth ought to . . . hav[e] recourse to the laws, for all injuries or wrongs which he may receive [and] . . . ought to obtain right and justice freely, and . . . completely, and without any denial."[23] The Court disagreed, however, stating that "[t]he article is clearly directed toward the preservation of procedural rights"[24] and does not create a fundamental right to recover unlimited damages.[25]

Applying the less stringent rational basis standard of constitutionality, the Supreme Judicial Court concluded that the $100,000 limitation on recovery was constitutional.[26] The Tort Claims Act, it noted, "ensures that a meaningful recovery will be available to victims of public employee negligence, while simultaneously limiting a public employer's exposure to excessive liability . . . . Protecting public funds from unlimited liability is a legitimate legislative purpose, and the $100,000 limitation on govern-

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[20] *Hallett*, 398 Mass. at 556, 499 N.E.2d at 1193.

[21] *Id.* at 557, 499 N.E.2d at 1193 (quoting Paro v. Longwood Hospital, 373 Mass. 645, 649, 369 N.E.2d 985, 988 (1977)).

[22] *Id.*

[23] MASS. CONST., Pt. I, Art. 11.

[24] *Hallett*, 398 Mass. at 557, 499 N.E.2d at 1193 (quoting Pinnick v. Cleary, 360 Mass. 1, 11–12, 271 N.E.2d 592, 600 (1971)).

[25] *Id.* at 557, 499 N.E.2d at 1194.

[26] *Id.* at 558, 499 N.E.2d at 1194.

mental liability is reasonably calculated to further that purpose."[27] The recovery limitation, therefore, did not deny plaintiffs the equal protection of the laws.

§ 11.2. Tort Claims Act — Sole Cause Rule — Comparative Negligence Statute. In *Tomassello v. Commonwealth*,[1] the Supreme Judicial Court concluded that the sole cause rule remains unaffected by the enactment of the Tort Claims Act. That rule imposes state liability for personal injuries caused by defects in state highways only if the defect was the sole cause of the injuries.

In enacting the Tort Claims Act, the Legislature provided that the Act should "not be construed to supersede or repeal" other enumerated statutes.[2] Included among these other statutes was chapter 81, section 18, which provides that the Commonwealth shall be liable for personal injuries caused by defects in state highways "in the manner and subject to the limitations, conditions and restrictions specified in chapter 84, sections 15, 18, and 19." Under these provisions of chapter 84 — which relate to defects in public ways other than state highways — it is "well-settled" law[3] that liability exists only if the defect is the sole cause of the injuries. Recovery is not allowed, therefore, where the plaintiff is contributorily negligent or where another person's conduct contributes to the accident.[4] Because the Legislature treated the state and its political subdivisions alike in enacting the Tort Claims Act, the Supreme Judicial Court could find "no apparent reason" for distinguishing the state from its counties or municipalities and, therefore, held the sole cause rule equally applicable to claims against any of these public employers.[5]

Tomasello, involved the claims of four individuals, two adults and two minors. At the time of the accident the two adults were operating mopeds carrying the minors as passengers.[6] Each moped overturned when it hit a pothole, injuring the drivers and passengers as well as damaging the vehicles.[7] At trial, the jury found the Commonwealth negligently caused the injuries and property damage, but also attributed to each adult plaintiff 49% of the negligence causing the accident. The Commonwealth argued that this finding precluded recovery because of the sole cause

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[27] *Id.* (quoting *Irwin*, 392 Mass. at 772, 467 N.E.2d at 1309).

§ 11.2 [1] 398 Mass. 284, 496 N.E.2d 638 (1986).

[2] Acts of 1978, c. 512, § 18.

[3] 398 Mass. at 286, 496 N.E.2d at 639.

[4] *See, e.g.*, Scholl v. New England Power Serv. Co., 340 Mass. 267, 271, 163 N.E.2d 279, 283 (1960); Carroll v. Lowell, 321 Mass. 98, 100, 71 N.E.2d 763, 764 (1947); Hayes v. Hyde Park, 153 Mass. 514, 515–16, 27 N.E. 522 (1891).

[5] *Tomasello*, 398 Mass. at 286, 496 N.E.2d at 639.

[6] *Id.*

[7] *Id.*

rule. Relying upon the comparative negligence statute,[8] the plaintiffs argued that the Commonwealth could no longer escape liability for a defect in a state highway if the Commonwealth's negligence exceeded the plaintiff's. The trial court denied the Commonwealth's motion for judgment notwithstanding the verdicts on the personal injury counts but allowed it as to the property damage counts. On appeal, the Supreme Judicial Court concluded the motion should have been allowed in its entirety.

The Court first decided that the comparative negligence statute did not replace the sole cause rule, reasoning that the sole cause rule is "based not on principles of contributory fault but rather on causation."[9] Thus, the sole cause rule makes the comparative negligence statute irrelevant because there is nothing for which the governmental entity is liable in the first place. In other words, because there is no liability on the part of the government, there is nothing to which principles of comparative negligence can be applied. The comparative negligence statute is inapplicable because it does not create any liability; its only purpose is to preserve a plaintiff's right to recover where a liability otherwise exists.

The Court further upheld the judgment for the Commonwealth on the property damage claims notwithstanding the verdict for the plaintiffs because liability under chapter 81, section 18, is limited to "injuries sustained by persons." "The Legislature [had] made a conscious choice to omit from section 18 . . . a right to recover for property damage."[10] "Whether in logic and fairness this distinction should be preserved," the Court concluded, is a matter for the Legislature.[11]

§ 11.3. Tort Claims Act — Public Nuisance. During the 1985 *Survey* year, the Appeals Court held the Metropolitan District Commission liable under the Tort Claims Act for injury to personal property damaged as a result of a private nuisance maintained by the MDC.[1] For the second year in a row, another nuisance case brought against the MDC under the Tort Claims Act has come before an appellate court for resolution. This time, in *Connerty v. Metropolitan District Commission*,[2] the Supreme Judicial Court held that the MDC could not be held liable to private parties on a public nuisance theory.

According to the *Connerty* Court, the distinction between public and

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[8] G.L. c. 231, § 85.

[9] *Tomasello*, 398 Mass. at 286, 496 N.E.2d at 640.

[10] *Id.*

[11] *Id.*

§ 11.3 [1] H. Sacks & Sons, Inc. v. Metropolitan District Commission, 20 Mass. App. Ct. 45, 477 N.E.2d 1067 (1985).

[2] 398 Mass. 140, 495 N.E.2d 840 (1986).

private nuisances was critical. The Court first noted that the liability of public bodies for maintaining private nuisances predated the Tort Claims Act.[3] However, the Court could find no authority in which "recovery in public nuisance [had] been allowed against any public entity."[4] The Court was not disposed to recognize such liability here because the public nuisance alleged — dumping untreated sewerage into Boston Harbor and Quincy Bay — was intentional. Instead, the Court ruled that the Tort Claims Act is not applicable to any intentional torts.[5]

In pressing his claim, the plaintiff relied upon the language of chapter 258, section 10(c) which provides that "[p]ublic employers shall be liable . . . in the same manner and to the same extent as a private individual under the circumstances . . . ."[6] The Court held, however, the the statute was inapplicable because its provisions refuse to waive immunity over intentional torts, some of which were specifically enumerated. The Court concluded that it was not significant that the tort of nuisance was not among the list of intentional torts mentioned in section 10(c). The Court reasoned that the statute's use of the word "including" indicated that the list was not intended to be all-inclusive.[7]

The action also was found defective under the Tort Claims Act for another reason. The plaintiff, a licensed master clam digger, was suing for injury to his business.[8] However, "[t]he license held by the plaintiff possessed none of the attributes of a property right."[9] Consequently, the Tort Claims Act was held inapplicable because, by its terms, the act "applies only to 'injury or loss of property or personal injury or death.'"[10] The case is further analyzed in § 11.8, *infra*.

§ 11.4. Tort Claims Act — Presentment — Third Party Complaints — Mental Incompetency. *McGrath v. Stanley*[1] involved two appeals raising the same issue. In both, the Supreme Judicial Court held that defendants, as third-party plaintiffs, had the right to seek contribution from a public entity although the underlying causes of action which might have been brought by the original claimants against the public entity were barred because of their failure to comply with the presentment requirements of

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[3] *See, e.g.*, Morash & Sons v. Metropolitan Dist. Comm'n, 363 Mass. 612, 616, 296 N.E.2d 461, 463 (1973).

[4] *Connerty*, 398 Mass. at 150, 495 N.E.2d at 846.

[5] G.L. c. 258, § 10(c) (1984).

[6] *Id.* at § 2.

[7] *Connerty*, 398 Mass. at 149 n.8, 495 N.E.2d at 845 n.8.

[8] *Id.* at 141, 495 N.E.2d at 841.

[9] *Id.* at 145, 495 N.E.2d at 843.

[10] *Id.* at 149, 495 N.E.2d at 846 (quoting G.L. c. 258, § 2 (1984)).

§ 11.4 [1] 397 Mass. 775, 493 N.E.2d 832 (1986).

the Tort Claims Act.[2] In *McGrath*, the Court reversed the superior court's action in granting summary judgment for the municipality, apparently on the ground that a public entity is not liable for contribution if presentment was not made in compliance with the statute.[3]

The Tort Claims Act provides that a civil action shall not be brought "unless the claimant shall have first presented the claim in writing to the executive officer of [the] public employer within two years after the date upon which the cause of action arose."[4] However, the statute further provides that its provisions "shall not apply to such claims as may be asserted by third-party complaint, cross-claim or counterclaim."[5] On appeal, the town argued that this latter provision operated only to exempt third-party plaintiffs from a requirement of giving an *additional* notice of a claim to a governmental entity.[6] The Supreme Judicial Court rejected this interpretation because it "controverts [the] plain meaning" of the statutory language.[7] Instead, the Court ruled that third-party claims, cross-claims and counterclaims are not subject to the presentment requirements of the Tort Claims Act. The Court next determined that the third-party claims were not lost under the contribution statute[8] because of the dismissal of the original plaintiff's actions against the town for failure to make presentment.[9]

In another case, *Heck v. Commonwealth*,[10] the Supreme Judicial Court suggested that it was "unlikely" that it would hold that a plaintiff's mental incompetency would "toll" the two year presentment period.[11] The Court did suggest, but did not decide, however, that "incompetency may prolong the period during which presentment can be made."[12] The Court intimated that the discovery rule, which operates to postpone the commencement of the statute of limitations until the time a plaintiff discovers or reasonably should have discovered that he or she has been harmed by a defendant's conduct, might similarly operate to delay the commencement of the presentment period. The two forms of postponement

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[2] G.L. c. 258, § 4.

[3] *McGrath*, 397 Mass. at 776, 493 N.E.2d at 832.

[4] G.L. c. 258, § 4.

[5] *Id.*

[6] *McGrath*, 397 Mass. at 779–80, 493 N.E.2d at 835.

[7] *Id.*

[8] G.L. c. 231B.

[9] This aspect of the opinion is analyzed *infra* at § 11.10.

[10] 397 Mass. 336, 491 N.E.2d 613 (1986).

[11] The Court relied upon Fearon v. Commonwealth, 394 Mass. 50, 474 N.E.2d 162 (1985) (failure of executor to make presentment held not to toll statute), and George v. Saugus, 394 Mass. 40, 474 N.E.2d 169 (1985) (minority of plaintiff held not to toll statute). *See*, DONOVAN, TORTS, 1985 ANN. SURV. MASS. LAW, § 10.5.

[12] *Heck*, 397 Mass. at 340, 491 N.E.2d at 615.

are distinct. Tolling prevents the statute of limitations from running on a tort that has already occurred. In contrast, under the discovery rule no tort exists until the time of the discovery of the harm. Hence, the discovery rule would operate to determine when the tort arises, but would not "toll" the presentment period.

§ 11.5. Negligence — Social Host's Liability for Alcohol Related Torts. In *McGuiggan v. New England Tel. & Tel. Co.*,[1] the Supreme Judicial Court announced that in an appropriate case it will hold a social host liable to a person injured by the negligent operation of a motor vehicle by an intoxicated person whom the social host has supplied with alcoholic beverages. The crucial consideration will be the condition of the guest at the time the social host served the drink.[2] This newly recognized liability will exist only where the social host knows or should know that the guest is drunk and nevertheless gives or permits him or her to take an alcoholic drink.[3] The Court will also factor into its determination of ordinary prudence whether the host knew or reasonably should have known that the intoxicated guest "might presently operate a motor vehicle."[4]

The Court's announcement is a departure from the traditional common law view that it is the drinker's voluntary consumption alone that is the proximate cause of the third party's injury.[5] In recent years, this traditional view has not prevented the enactment of dram shop acts, nor discouraged courts from recognizing and expanding the tort liability of the commercial purveyor of alcohol.[6] It has, however, served to protect the social host. As the Supreme Judicial Court noted, there are a "paucity of cases in this country recognizing social host liability,"[7] virtually all of which have been decided in the last decade.[8] The reluctance of courts to recognize the liability of the social host for alcohol related torts cannot be explained on the basis of tort principles. It is premised in significant

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§ 11.5 [1] 398 Mass. 152, 496 N.E.2d 141 (1986).

[2] *Id.* at 161, 496 N.E.2d at 146.

[3] *Id.* at 162, 496 N.E.2d at 146.

[4] *Id.* On this point it should be noted that the Court has not required the plaintiff to show that the commercial vendor knew or should have known that the intoxicated customer would drive a motor vehicle. *See*, Cimino v. Milford Keg, Inc., 385 Mass. 323, 330–31, 431 N.E.2d 920, 926 (1982). The case is discussed in DONOVAN, TORTS, 1982 ANN. SURV. MASS. LAW, § 11.1, at 368.

[5] *McGuiggan*, 398 Mass. at 155, 496 N.E.2d at 143.

[6] *See, e.g.*, DONOVAN, TORTS, 1983 ANN. SURV. MASS. LAW, § 10.1, at 305; DONOVAN, TORTS, 1968 ANN. SURV. MASS. LAW, § 3.5, at 54.

[7] *McGuiggan*, 398 Mass. at 160, 496 N.E.2d at 145.

[8] *Id.* at 161, 496 N.E.2d at 145.

part on considerations of social policy.[9] Morevoer, the implications flowing from the recognition of social host liability are so extensive that some courts have abandoned the field entirely and passed the question to the legislature.[10]

Although the Supreme Judicial Court was not disposed to pass the issue to the legislature, it nevertheless concluded that *McGuiggan* did not present the proper factual picture for the application of the new rule.[11] The *McGuiggan* parents held a graduation party for their eighteen year old son, Daniel, at which several persons acted as bartenders, serving alcohol provided by the parents. Four of Daniel's peers, including another eighteen year old, Magee, attended the party. Magee left the party with several persons, including Daniel. While traveling in Magee's automobile, Daniel became sick and leaned his upper body out of the car's window, hitting his head on a cement post at the side of the road. Daniel later died from his injuries.[12]

Mr. McGuiggan testified that, while he may have provided Magee with an alcoholic drink when he arrived at the party, he did not know how many drinks he had.[13] Both parents further testified that Magee did not appear intoxicated at any time.[14] Other passengers in the automobile confirmed Magee's apparent sobriety.[15] In a criminal proceeding brought as a result of the accident, Magee pled guilty to a charge of operating under the influence of alcohol.[16] A breathalyzer test administered to Magee approximately three hours after the accident revealed a value of .140.[17] According to a physician, this meant that Magee had a blood alcohol content of between .185 and .215 three hours earlier.[18] There was also evidence that Magee had eaten dinner before leaving the party, but there was no evidence as to when he ate this meal or consumed his last drink.[19]

In ruling that the facts did not present a case for social host liability, the Court said: "There is no evidence that either of the McGuiggans knew that Magee was intoxicated at any time while he was at their home. Nor does the evidence show that Magee was obviously intoxicated at any

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[9] *Id.* at 160, 496 N.E.2d at 146.
[10] *Id.* at 161, 496 N.E.2d at 146.
[11] *Id.*
[12] *Id.* at 154, 496 N.E.2d at 142.
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.* at 155, 496 N.E.2d at 142.
[18] *Id.*
[19] *Id.*

relevant time."[20] The evidence of Magee's blood alcohol content was dismissed as irrelevant. That evidence, the Court noted "might be thought to raise a factual dispute as to what Magee's apparent condition was just before he left the McGuiggans' home," but it "ha[d] no bearing on what Magee's apparent condition was at the time he took his last drink."[21]

In a separate opinion Mr. Justice Lynch concurred in the result, but indicated that he did not favor the judicial recognition of social host liability. The issue, he stated, "cries out for a legislative rather than a judicial solution."[22]

§ 11.6. Negligence — Insurance Agent's Failure to Obtain Insurance. In *Flattery v. Gregory*, the Supreme Judicial Court considered, for the first time, the question of whether an insurance agent owes to a traveler, injured by the negligent driving of another, a duty to fulfill the agent's pre-accident promise to the tortfeasor to obtain optional liability coverage on the tortfeasor's motor vehicle.[1] The Court concluded that he did. In December, 1979, the plaintiff was operating a motor vehicle which collided with a Toyota operated by the defendant and jointly owned by him and his wife. The Toyota was insured with bodily liability coverage of only $20,000 per person and $40,000 per accident as a result of the action of the defendant insurance agent in amending and issuing a new policy on the car in July, 1979.[2] The insurance agent had arranged for a 1979 liability policy on the defendant-owners' other car with $100,000/$300,000 limits, the same coverage limits he had obtained on both of their cars in prior years.[3] The plaintiff obtained a judgment against the defendant-owners of $118,181.99.[4] In his amended complaint against the insurance agent, plaintiff alleged that the insureds relied upon the agent to obtain $100,000/$300,000 liability coverage on the Toyota. The plaintiff further claimed that the agent's failure to obtain such coverage constituted negligence resulting in a loss to himself.[5] The amended complaint also included a contract claim alleging that, in return for valuable consideration, the insureds relied upon the agent to procure for them $100,000/$300,000 liability insurance for the type of injury suffered by the plaintiff, and that the agent failed to do so in breach of contract.[6] The complaint did not,

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[20] *Id.* at 161, 496 N.E.2d at 146.
[21] *Id.*
[22] *Id.* at 164, 496 N.E.2d at 147 (Lynch, J., concurring).
§ 11.6 [1] 397 Mass. 143, 489 N.E.2d 1257 (1986).
[2] *Id.* at 144, 489 N.E.2d at 1258.
[3] *Id.*
[4] *Id.*
[5] *Id.* at 144–45, 489 N.E.2d at 1258.
[6] *Id.* at 145, 489 N.E.2d at 1259.

however, seek to reach the agent's obligation to the insureds and apply it to the judgment.[7] The agent moved to dismiss the complaint for failure to state a claim on which relief could be granted,[8] but judgment was entered for the agent under Rule 54.[9] The Supreme Judicial Court reversed.

The Court first found that the plaintiff had alleged sufficient prior dealings between the agent and the insureds to warrant a finding of "a promise implied from custom."[10] This alone, however, would not support the tort count. There had to be a "legally recognized duty" which was owed to the plaintiff as well as to the insureds.[11] While there was no Massachusetts decision precisely on point, there were some analogous precedents. In *LaClair v. Siberline Mfg. Co.*,[12] the Court decided that a corporate president could be found liable to the widow of an employee who was fatally injured in a work related accident, for failing to obtain worker's compensation on behalf of the corporation. Notably, the president, in *LaClair*, made no express promise to the deceased or his widow. Similarly, *Rae v. Air-Speed, Inc.*[13] held that the widow of an employee who died as a result of work related injuries could recover in tort from an insurance agent who had promised the employer that he would obtain worker's compensation insurance but failed to do so. Here again, the promise was made to the employer, not to the employee or to his widow. Finally, in *Craig v. Everett Brooks Co.*,[14] a civil engineer contracted with a real estate developer to place stakes in the ground for the guidance of the road builder. Although there was no direct promise made to the road builder, he was allowed to recover in tort from the engineer for his failure to set the stakes properly. It was emphasized that the road builder had relied upon the engineer's performance of his contractual obligations and that this reliance was known to the engineer.[15] The Court found a "critical distinction" existed between each of these cases and the case *sub judice* which was fatal to the plaintiff's tort claim. In each of the worker's compensation cases, the Court said, "the plaintiff rightfully and foreseeably expected the insurance to be in effect and relied on it."[16] "The expectation was rightful and forseeable because the insurance was man-

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[7] *Id.*
[8] *Id.*
[9] MASS. R. CIV. P. 54.
[10] *Flattery*, 397 Mass. at 146, 489 N.E.2d at 1259.
[11] *Id.*
[12] 379 Mass. 21, 393 N.E.2d 867 (1979).
[13] 386 Mass. 187, 435 N.E.2d 628 (1982).
[14] 351 Mass. 497, 222 N.E.2d 752 (1967).
[15] *Id.* at 501, 222 N.E.2d at 755.
[16] *Flattery*, 397 Mass. at 147, 489 N.E.2d at 1260.

dated by statute."[17] Similarly, there was foreseeable expectation and reliance in *Craig*.[18] In contrast, such foreseeable expectation and reliance was lacking in *Flattery*.[19] Consequently, the Court ruled the tort count in the amended complaint was properly dismissed.[20]

While the tort count was defective, the contract count was not. The Court first noted that the *Rae* Court upheld the plaintiff's action in contract as well as in tort.[21] In *Rae*, the insurance at issue was compelled by statute; in *Flattery*, however, the policy in question was optional. This distinction was important under the tort count, but not under the contract claim.[22] Following the approach of the RESTATEMENT (SECOND) OF CONTRACTS § 302, the Court first had to determine that the plaintiff was "an intended beneficiary" of the services promised by the insurance agent and that the promised services were "for the benefit of" the plaintiff.[23] Adopting § 304 of the RESTATEMENT, the Court held that "[a] promise in a contract creates a duty in the promisor to any *intended beneficiary* to perform the promise, and the *intended beneficiary* may enforce the duty."[24] Noting that it was not necessary that an intended beneficiary be identified when a contract is made,[25] the Court reversed the dismissal of the contract count.

§ 11.7. Wrongful Death — Recovery by Multiple Parties — Automobile Insurance Liability Limitations. In *Doyon v. Travelers Indemnity Co. of America*,[1] the Appeals Court applied the wrongful death statute[2] and decided that a decedent's wife and child were not separate "persons" for the purpose of the "per person" and "per accident" recovery limitations of an automobile insurance policy. Accordingly, the court held that "the claims of a wife and child are simply separate ingredients of a single amount which can be recovered by the personal representative of the decedent for the benefit of all the persons who are to share in the

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[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Rae*, 386 Mass. at 192–96, 435 N.E.2d at 631–33.

[22] *Flattery*, 397 Mass. at 148, 489 N.E.2d at 1260. With regard to the tort claim the Court said "the plaintiff clearly did not foreseeably rely on the [insureds'] motor vehicle being insured in an amount greater than that required by G.L. c. 90, § 34A (1984 ed.)." *Id.* at 147, 489 N.E.2d at 1260.

[23] *Id.* at 148, 489 N.E.2d at 1260.

[24] *Id.* at 148, 489 N.E.2d at 1261 (emphasis supplied by the Court).

[25] *Id.* at 149, 489 N.E.2d at 1261.

§ 11.7. [1] 22 Mass. App. Ct. 336, 493 N.E.2d 887 (1986).

[2] G.L. c. 229, §§ 1–2 (1984).

recovery" under the wrongful death statute.[3] The decision anticipated the interpretation subsequently given the wrongful death statute in *Hallet v. Wrentham*,[4] where the Supreme Judicial Court held that the recovery limitation of the Tort Claims Act applies to the total amount that plaintiffs can recover under the wrongful death act, rather than to separate claims of each beneficiary.

Previously, in *Bilodeau v. Lumbermans Mutual Casualty Co.*,[5] the Supreme Judicial Court decided that a husband and wife were separate "persons" under an insurance policy so that each could recover up to the policy limits, with the husband separately recovering for his personal injuries and the wife for her loss of consortium. The *Doyon* facts were "virtually identical" to those of *Bilodeau*.[6] In *Doyon*, plaintiff's intestate died from injuries incurred when he was struck by an automobile owned and operated by the defendant's insured.[7] The defendant insurance company settled the consortium and parental affection claims of the deceased's wife and son by paying $100,000 pursuant to a settlement agreement which provided that the administrator of the estate "shall have the right to claim that the defendant is liable for additional damages of as much as $100,000, based on the theory that there are two claimants," rather than one.[8] The insurance policy at issue provided coverage for bodily injury to the limit of $100,000 per person and $300,000 per accident.[9] Relying upon *Bilodeau*, the administrator subsequently sought declaratory relief pursuant to his right under the settlement agreement that would permit the wife and child to recover as separate claimants subject to the "per person" limitation of the policy.[10] The superior court granted summary judgment for the administrator and the defendant appealed.[11] The Appeals Court reversed, denying the administrator any further recovery under the insurance policy.[12]

The court held *Bilodeau* inapposite because the principle plaintiff in *Bilodeau* had been injured, but not killed.[13] *Bilodeau*, therefore, did not involve an interpretation of the wrongful death statute. In determining that separate claims do not exist under the wrongful death statute, the court looked both to the history and the language of the statute. During

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[3] *Doyon*, 22 Mass. App. Ct. at 339, 493 N.E.2d at 889.
[4] 398 Mass. 550, 499 N.E.2d 1198 (1986). See § 11.1, *supra* for a discussion of the case.
[5] 392 Mass. 537, 467 N.E.2d 137 (1984).
[6] *Doyon*, 22 Mass. App. Ct. at 337, 493 N.E.2d at 887.
[7] *Id.* at 336, 493 N.E.2d at 887.
[8] *Id.* at 337, 493 N.E.2d at 888.
[9] *Id.* at 337, 493 N.E.2d at 887.
[10] *Id.* at 337, 493 N.E.2d at 887–88.
[11] *Id.* at 337, 493 N.E.2d at 888.
[12] *Id.* at 339, 493 N.E.2d at 889.
[13] *Id.* at 337, 493 N.E.2d at 888.

the period when the predecessor statute provided that courts should assess damages with reference to the degree of culpability, there were changing ceilings on the amount that plaintiffs could recover. Recovery, however, did not vary with the number of persons who were to share in the recovery.[14] The 1973 amendment of the statute did not change this approach. The amendment provided that one who "causes the death of a person shall be liable in damages in the amount of: the fair monetary value of the decedent to the persons entitled to receive the damages recovered . . . ."[15] The court viewed the legislature's use of the singular "amount" and plural "persons" as significant.[16] Moreover, the amendment provided that the "amount" recovered shall "includ[e] but not [be] limited to *compensation for the loss of* the reasonably expected net income, *services, protection, care, assistance, society, companionship, comfort, guidance, counsel, and advice of the decedent* to the persons entitled to the damages recovered . . . ."[17] The court again indicated its belief that the use of the plural in referring to "the persons entitled to the damages recovered" was intentional.[18] The court noted that a wife's claim for loss of consortium and a child's claim for loss of parental companionship and society are within the scope of the statutory language.[19] The court concluded, therefore, that "when all is said and done, the person responsible for the death is liable under [the wrongful death statute] for only a single, indivisible amount."[20]

§ 11.8. Violation of Statutes Protecting the Environment — Public Nuisance — Public Duty Doctrine. In *Connerty v. Metropolitan District Commission*,[1] the Supreme Judicial Court refused to recognize a private claim for recovery based upon the violation of statutes designed to protect the environment from pollution. The plaintiff, a licensed clam digger, brought suit against the Metropolitan District Commission on his own behalf and on behalf of other master clam diggers for damage to their businesses caused by the Commission's dumping of raw sewage into Quincy Bay and Boston Harbor.[2] The MDC did not act callously. It had to make repairs to its wastewater treatment plant located on an island in Quincy

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[14] *Id.* at 338, 493 N.E.2d at 888. For example, the statute originally provided for a recovery limitation of only $25,000. This was subsequently increased to $50,000 (Acts of 1965, c. 683, § 1) and then to $100,000 (Acts of 1971, c. 801, § 1).

[15] Acts of 1973, c. 699, §§ 1–2, inserting G.L. c. 229, §§ 1–2 (1984).

[16] *Doyon*, 22 Mass. App. Ct. at 338–39, 493 N.E.2d at 888–89.

[17] G.L. c. 229, § 2 (1984).

[18] *Doyon*, 22 Mass. App. Ct. at 339, 493 N.E.2d at 889.

[19] *Id.* at 338, 493 N.E.2d at 888.

[20] *Id.* at 339, 493 N.E.2d at 889.

§ 11.8. [1]398Mass. 140, 495 N.E.2d 840 (1986).

[2] *Id.* at 141, 495 N.E.2d at 841.

Bay. Accordingly, it alerted the public in a newspaper announcement that it intended to make repairs over a four-day period, and that these repairs would necessitate suspending chlorination activities at the plant. The newspaper announcement further warned that interruption of those activities would render fish and wildlife in the bay inedible.[3] In anticipation of the MDC's action, the Division of Marine Fisheries closed all Boston Harbor shellfish flats for approximately two weeks.[4] The MDC subsequently commenced its plant repairs which resulted in the release of untreated effluent into the bay.[5] Plaintiff sued alleging violations of several environmental statutes[6] as well as the maintenance of a public and private nuisance.[7] A lower court dismissed the complaint in its entirety for failure to state a claim upon which relief could be granted and the plaintiff appealed.[8] Taking the case on its own motion, the Supreme Judicial Court affirmed.[9]

The Court first rejected the plaintiff's contention that the statutes protecting tidal waters from pollution imposed a special duty of care upon the MDC to the clam diggers beyond that owed the public generally. The plaintiff predicated this argument on the Court's prior willingness to use drunk driving statutes to hold a town liable to motorists injured as a result of the negligent failure of the police to remove an intoxicated driver from the highway.[10] Examining these statutes, the Court found a legislative intent to protect travelers on the highway.[11] The *Connerty* Court distinguished the drunk driving statutes because it could not "discern" in the environmental protection statutes any "intent that any identifiable sub-class should have rights in tort against the Commonwealth."[12] Instead, the Court applied the public duty doctrine, ruling that the environmental statutes in question "establish[ed] the MDC's duties to the

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[3] *Id.* at 142, 495 N.E.2d at 841.

[4] *Id.*

[5] *Id.*

[6] Plaintiff alleged violations of (1) G.L. c. 130, § 25 (1984) which prohibits discharges into coastal waters which endanger public health or which tend to contaminate shellfish areas and which expose the violator to treble damages under c. 130, § 27; (2) G.L. c. 29, § 1 (1984) requiring the MDC to maintain and operate a sewage disposal system to protect the health and natural resources of the Commonwealth; (3) G.L. c. 29, §§ 59 and 59A (1984) which prohibit the discharge of petroleum products or "other matter of refuse" into tidal waters; and (4) G.L. c. 30, § 61 (1984) which requires commissions and agencies of the Commonwealth to use "all practical means and measures to minimize damage to the environment."

[7] See *supra* § 11.3 for a discussion of public nuisance theory.

[8] *Connerty*, 398 Mass. at 141, 495 N.E.2d at 841.

[9] *Id.*

[10] *See* Irwin v. Ware, 392 Mass. 745, 467 N.E.2d 1292 (1984).

[11] *Id.* at 752–63, 467 N.E.2d at 1298–1304.

[12] *Connerty*, 398 Mass. at 144, 495 N.E.2d at 842.

public[,] but they [did] not establish a special duty to the plaintiff beyond that owed to the public."[13] The Court further suggested that the plaintiff's sole statutory remedy lay in Chapter 214, Section 7A, which permits ten or more persons to seek equitable or declaratory relief when environmental damage is occurring or about to occur.[14] Accordingly, the statutes on which plaintiff relied provided no basis for allowing recovery for the economic harm suffered by the plaintiff and the other clam diggers.

The Court found the common law nuisance theories equally unavailing. Plaintiff had alleged that the MDC's actions constituted a "substantial, unreasonable interference with the private rights of the clam diggers to harvest shellfish" and the Commission's "intentional and knowing discharge of raw sewage created a nuisance causing injury to the clam diggers."[15] The Court first considered the plaintiff's right to recover under a private nuisance theory which, the Court noted, was "the remedy for an invasion of a property right" and which could be brought only if the plaintiff had "some interest in the property affected."[16] The claim diggers, however, had nothing akin to a property right in the Court's estimation. "While we have found several cases where fishing licenses have been determined to create property rights," the Court noted, "the licenses at issue in those cases possessed some attribute normally associated with interests in property such as transferability, irrevocability, or a definite and fixed term."[17] A master clam digger's license, on the other hand, was nontransferable and revocable at will by the licensing authority.[18] As a result, the clam diggers had "no property interest in the polluted waters, but a mere revocable right to harvest clams" and, therefore, could not recover under a private nuisance theory.[19]

The lack of property interest, however, was not sufficient to dispose of the public nuisance claim. A nuisance is public, the Court pointed out, when it disrupts "the exercise of a public right by directly encroaching on public property or by causing a common injury."[20] A plaintiff can maintain a private action for a public nuisance whenever he can show that the invasion has caused him "some special injury of a direct and substantial character other than that which the general public shares."[21] This injury can be economic in nature. In *Stop and Shop Cos. v. Fisher*,[22]

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[13] *Id.*
[14] *Id.* at 146, 495 N.E.2d at 844.
[15] *Id.* at 143, 495 N.E.2d at 842.
[16] *Id.* at 147, 495 N.E.2d at 844.
[17] *Id.* at 144 n.5, 495 N.E.2d at 843 n.5.
[18] *Id.*
[19] *Id.* at 147, 495 N.E.2d at 844.
[20] *Id.* at 148, 495 N.E.2d at 845.
[21] *Id.*
[22] 387 Mass. 889, 444 N.E.2d 368 (1983).

for example, the Supreme Judicial Court allowed a private action based upon a public nuisance where the injury unique to the plaintiff was economic harm resulting from the loss of business revenue. The defendants in *Stop and Shop* owned seagoing vessels which had collided with and obstructed a drawbridge, causing substantial impairment of access to two of plaintiff's stores.[23] The Court ruled that such an obstruction could be reasonably found to have caused unique and special injury to a business establishment.[24] Likewise, the *Connerty* Court was satisfied that the plaintiff had stated sufficient facts to find special harm. Although no "property" of the plaintiff had been damaged, the plaintiff had "suffered harm to his livelihood," whereas "the ordinary citizen was merely deprived of a cleaner harbor for a period of time."[25] The Court nevertheless declined to follow *Stop and Shop* because the *Connerty* defendant was a governmental agency rather than a private entity.[26] The Court refused to recognize the liability of a governmental entity for a public nuisance under either the common law or under the Tort Claims Act.[27]

§ 11.9. Loss of Consortium — Loss of Parental Society — Comparative Negligence. In *Morgan v. Lalumiere*,[1] the Appeals Court extended the category of dependent persons eligible to recover for loss of parental society to include adult dependents. It also extended both the dependent person's right to recover for loss of parental society and a spouse's right to recover for loss of consortium to situations where the injured spouse was more than fifty percent negligent. This is the first time that an appellate court of Massachusetts has addressed the question whether the inability of the injured spouse or parent to recover for his or her own injuries under the comparative negligence statute[2] would affect claims for loss of consortium or parental society.[3]

Mrs. Morgan was struck by a car driven by the defendent while she was crossing the street, apparently without looking. She was seriously injured and brought suit against the defendent. Her husband, Ivan, joined in the suit with a claim for loss of consortium; her thirty-year-old, severely handicapped son added a claim for loss of parental society.[4] The jury returned a verdict for the defendent, finding Mrs. Morgan fifty-two

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[23] *Id.* at 890, 444 N.E.2d at 369.
[24] *Id.* at 898–99, 444 N.E.2d at 374.
[25] *Connerty*, 398 Mass. at 148–49, 495 N.E.2d at 845.
[26] *Id.* at 149–50, 495 N.E.2d at 845.
[27] *Id.* at 150, 495 N.E.2d at 846. For a discussion of the Tort Claims Act see *supra* § 11.3.

§ 11.9 [1] 22 Mass. App. Ct. 262, 493 N.E.2d 206 (1986).
[2] G.L. c. 231, § 85 (1984).
[3] *Morgan*, 22 Mass. App. Ct. at 271, 493 N.E.2d at 212.
[4] *Id.* at 263–64, 493 N.E.2d at 208.

percent at fault. However, it awarded her husband $15,000 and her son $12,500 on their claims. Judgment was entered on the husband's verdict, but the trial court granted judgment for the defendent notwithstanding the verdict on the son's claim.[5] The defendent, Mrs. Morgan, and her son all appealed. The Appeals Court affirmed the judgments in favor of Mr. Morgan and against Mrs. Morgan, and reversed the judgment against their son.

Addressing the son's claim, the court noted that before the accident, Mark lived at home where his mother took care of him. Mark suffered from severe disabilities which included blindness, cerebal palsy, and mental retardation.[6] After the accident, Mrs. Morgan was no longer able to take care of her son.[7] The seminal Massachusetts precedent, *Ferriter v. Daniel O'Connell's Sons*,[8] indicated that in order for children to have a viable claim for loss of parental society, they must show that they are "minors dependent on the parent," not only for "economic requirements, but also in filial needs for closeness, guidance and nurture."[9] In *Morgan*, judgment notwithstanding the verdict had been entered against Mark because he was not a minor.[10] The court reversed, believing it was consistent with the humane principles underlying *Ferriter* to extend its protection to an adult such as Mark — that is, to "one who is not a minor but who is a handicapped person who resides in the household of his wrongfully injured mother and who is dependent upon her physically, emotionally, and financially."[11]

The court next decided that the trial court's finding that Mrs. Morgan was greater than fifty percent at fault should not preclude the claim of her husband for loss of consortium or that of her son for loss of parental society. The court first noted that under Massachusetts law, consortium and parental society claims exist independently of the claim of the injured spouse or parent.[12] For this reason, the damages recoverable under such claims have not been reduced in proportion to the degree of fault of the injured spouse or parent.[13] In *Feltch v. General Rental Co.*,[14] the plaintiff

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[5] *Id.* at 264, 493 N.E.2d at 208.

[6] *Id.* at 269, 493 N.E.2d at 211.

[7] *Id.*

[8] 381 Mass. 507, 413 N.E.2d 690 (1980).

[9] *Id.* at 516, 413 N.E.2d at 696.

[10] *Morgan*, 22 Mass. App. Ct. at 269, 493 N.E.2d at 211.

[11] *Id.* at 270, 493 N.E.2d at 211.

[12] *Id.* at 271, 493 N.E.2d at 212.

[13] *Id.* (*citing* Feltch v. General Rental Co., 383 Mass. 603, 606–10, 421 N.E.2d 67, 70–72 (1981)). *See also*, Bilodeau v. Lumbermans Mut. Cas. Co., 392 Mass. 537, 539, 543–44, 467 N.E.2d 137, 139, 141–42 (1984); Olsen v. Bell Tel. Labs Inc., 388 Mass 171, 176–77, 445 N.E.2d 609, 612–13 (1983).

[14] 383 Mass. 603, 421 N.E.2d 67 (1981).

was allowed to recover full loss of consortium even though her spouse had been thirty-seven and one-half percent negligent. Similarly, *Diaz v. Eli Lilly Co.*[15] held that a husband's consortium claim was unaffected by the fact that his wife had previously been defeated in her own claim against the same defendant. The court could see no reason to distinguish the case where the injured spouse was more than fifty percent negligent. The court, however, did admit that, "carried to its extreme," the rule it was promulgating could lead to "incongruous results."[16] The court even admitted that "[a] party only slightly at fault could be compelled to compensate a claimant for his full loss notwithstanding a high degree of contributory fault on the part of the claimant's spouse or parent."[17] Nevertheless, the court concluded that "[i]f there is the potential for an unfair result in an extreme case, the Legislature may reform the rule."[18]

§ 11.10. Contribution — Massachusetts Tort Claims Act. In a case of first impression, *McGrath v. Stanley*,[1] the Supreme Judicial Court held that joint tortfeasors were entitled to contribution under Chapter 231B even though the underlying claim against a public entity had been dismissed for failure to make presentment under the Tort Claims Act.[2] Modeled on the Uniform Contribution Among Joint Tortfeasors Act, Chapter 231B allows for contribution "where two or more persons become jointly liable in tort for the same injury to person or property . . . even though judgment has not been recovered against all or any of them." The legislative intent expressed in this statute, the Court reasoned, "is aimed at eliminating the unfairness of allowing a disproportionate share of a plaintiff's recovery to be borne by one of several joint tortfeasors."[3] To achieve this end, the Court previously had determined that the key phrase in the statute "liable in tort" is to be accorded a broad interpretation.[4] Reiterating this admonition, the Court concluded that "[a]n action for contribution is not barred if, *at the time the tortious activity occurred*, the party from whom contribution is sought could have been held liable in tort."[5] Because the town could have been held "liable in tort" under the Tort Claims Act and had presentment properly been made, the other

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[15] 364 Mass. 153, 302 N.E.2d 555 (1973).

[16] *Morgan*, 22 Mass. App. Ct. at 272, 493 N.E.2d at 212.

[17] *Id.*

[18] *Id.* at 272, 493 N.E.2d at 213.

§ 11.10 [1] 397 Mass. 775, 493 N.E.2d 832 (1986), discussed *supra* in § 11.3.

[2] G.L. c. 258, § 4.

[3] *McGrath*, 397 Mass. at 780–81, 493 N.E.2d at 835.

[4] Hayon v. Coca Cola Bottling Co. of New England, 375 Mass. 644, 648–49, 378 N.E.2d 442, 445 (1978). *See also*, Int'l Fidelity Ins. Co. v. Wilson, 387 Mass. 841, 857, 443 N.E.2d 1308, 1318 (1983).

[5] *McGrath*, 397 Mass at 781, 493 N.E.2d at 835.

defendants were entitled to obtain contribution from the town. The Court also reasoned that presentment "is not a jurisdictional matter, but [only] a statutory condition precedent to recovery."[6] Thus, the Court held that "compliance or lack of compliance with the presentment requirements of section 4 does not affect the underlying liability of tort defendants or the contribution rights of third-party defendants, but merely affects the ability of plaintiffs to pursue actions against public entities."[7]

§ 11.11. Statute of Limitations — Discovery Rule. The discovery rule, which operates in appropriate cases to toll the statute of limitations until an injury is "discovered," has been fashioned in recognition of "the principle that a plaintiff should be put on notice before his claim is barred."[1] In the instance of medical malpractice, therefore, a cause of action "accrue[s] when the plaintiff learns, or reasonably should have learned, that he has been harmed by the [physician's] conduct."[2] Under this formula, the critical question is when does the appropriate recognition occur. Previously, Massachusetts courts determined that each element of a cause of action in negligence — duty, breach, causation, and harm need not be "discovered" before the three-year limitations period of Mass. chapter 260, section 4 begins to run.[3] During this *Survey* year, the Appeals Court held in *Malapanis v. Shirazi*[4] that the statute commences when a reasonably prudent person in the tort claimant's position "reacting to any suspicious circumstances of which he might have been aware . . . should have discovered that he had been harmed by his physician's treatment."[5] In arriving at this result, the court once again applied the rule formulated in products liability cases to the medical malpractice arena.[6]

The *Malapanis* plaintiff was injured in a motorcycle accident in 1972; he was treated by the defendant physician at that time.[7] Among other things, the defendant placed the plaintiff's broken leg in traction. After the leg was removed from traction and the plaintiff had been placed in a

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[6] *Id.* at 781, 493 N.E.2d at 836.

[7] *Id.* at 782, 493 N.E.2d at 836.

§ 11.11 [1] Franklin v. Alpert, 381 Mass. 611, 619, 411 N.E.2d 458, 463 (1980).

[2] *Id.*

[3] *See* Fidler v. E. M. Parker Co., 394 Mass. 534, 546, 476 N.E.2d 595,602 (1985), *approving the standard set forth in* Fidler v. Eastman Kodak Co., 714 F.2d 192, 199 (1st Cir. 1983).

[4] 21 Mass. App. Ct. 378, 487 N.E.2d 533 (1986).

[5] *Id.* at 383, 487 N.E.2d at 537.

[6] The two *Fidler* cases, discussed *supra* at note 3, are product liability cases. Their rationale was applied to the case of medical malpractice in Lear-Heflich v. Schwartz, 21 Mass. App. Ct. 928, 485 N.E.2d 692 (1985).

[7] *Malapanis*, 21 Mass. App. Ct. at 379, 487 N.E.2d at 535.

body cast, he was informed by the defendant that he had been taken out of traction "too soon" and that "the bones would heal in a misaligned position" but that "they would be just fine in that fashion" and that "there would be no complications from it."[8] The only adverse consequence the plaintiff understood would occur from this mishap was that he would have to remain in the body cast four or five weeks longer than originally predicted.[9] After the cast was removed, however, the plaintiff experienced serious problems with his leg. He was told that his angulation problem was not "an unusual result" and that he "would have to put up with the pain and discomfort that existed."[10] Upon discharge in the spring of 1973, the defendant informed the plaintiff that he would lose motion in his leg, that he would have a partial disability, and that he would probably limp, but "that's the way things were."[11] Despite all these problems, the plaintiff did not commence suit until 1982.

In arguing that the statute of limitations should be tolled, the plaintiff relied upon the doctor's statements, particularly the statement that the result attained was not "unusual." These statements, the plaintiff argued, "lulled him into believing that the defendant had done about as good a job as could be expected in repairing a very bad fracture."[12] Although the plaintiff did not claim fraudulent concealment under chapter 260, section 12, he argued that the doctor's statements deterred him from seeking other medical advice until after he saw a newspaper article about a malpractice lawsuit against the defendant. Although these facts gave the court occasion to "pause," it nevertheless concluded that the plaintiff's knowledge of his premature removal from traction and the poor result attained was sufficient "to put him on notice that the defendant's conduct might have caused his harm."[13] Concluding that discovery of the legal theory upon which a claim of malpractice can be based is not among "the inherently unknowable facts" that delay the accrual of a cause of action,[14] the court stated: "All that is necessary to commence the running of the limitations period is knowledge of harm and its likely cause."[15]

§ 11.12. Statutes of Limitations and Repose—Architects, Engineers and Contractors. Chapter 260, section 2B is both a statute of limitations and

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[8] *Id.* at 379, 381, 487 N.E.2d at 535.

[9] *Id.* at 379, 487 N.E.2d at 535.

[10] *Id.* at 380, 381, 487 N.E.2d at 535.

[11] *Id.* at 381, 487 N.E.2d at 536.

[12] *Id.* at 385, 487 N.E.2d at 538.

[13] *Id.* at 385–86, 487 N.E.2d at 538.

[14] *See* Gore v. Daniel O'Connell's Sons, 17 Mass. App. Ct. 645, 647, 461 N.E.2d 256,259 (1984).

[15] *Malapanis*, 21 Mass. App. Ct. at 388, 487 N.E.2d at 540.

a statute of repose.[1] It requires that a suit against an architect, engineer or contractor "shall be commenced only within three years next after the cause of action accrues," but "in no event . . . more than six years after" the completion of the construction project. During the *Survey* year, the Supreme Judicial Court was called upon to interpret these provisions in two separate cases. In the first case, *Tindol v. Boston Housing Authority*,[2] the Court decided that the repose provision of the statute was not tolled because the plaintiff was a minor.[3] It also held that the statute is not affected by the provision of Massachusetts Rule of Civil Procedure 15(c) that provides that an "amendment to a complaint (including an amendment changing a party) relates back to the original pleading."[4] In the other case, *Anthony's Pier Four, Inc. v. Crandall Dry Dock Engineers, Inc.*,[5] the Court held that chapter 260, section 2B applies to tort actions for negligence and breach of implied warranty, but does not apply to contract actions for breach of express warranty.

In *Tindol*, a minor child was burned severely on December 23, 1976 by excessively hot water provided in an apartment owned by the Boston Housing Authority (BHA).[6] The minor's mother commenced suit on January 16, 1979 against the BHA.[7] In November, 1984, she moved to amend the complaint to add as defendants the architects and engineers on the adjoining BHA project.[8] She alleged that they were negligent "in constructing, designing, installing and maintaining the defective hot water system."[9] The amendment was allowed on January 23, 1985. On appeal, the Supreme Judicial Court held that it was error to permit the amendment of the complaint. Although suit was commenced within three years after accrual of the cause of the action, the motion to add the defendant architects and engineers was filed more than six years after the construction had been completed.[10]

The Court based its refusal to toll chapter 260, section 2B on the distinction between statutes of limitations which operate to bar an action and statutes of repose which abolish the remedy even though no cause of action has occurred. "The tolling statutes," the Court stated, "affects

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§ 11.12 [1] Klein v. Catalano, 386 Mass. 701, 702, 437 N.E.2d 514, 516 (1982).

[2] 396 Mass. 515, 487 N.E.2d 488 (1986).

[3] G.L. c. 260, § 7 (1984) provides that if a person is a minor when a cause of action first accrues, the action may be commenced within the statute of limitations period from the time that the minor reaches legal age.

[4] MASS. R. CIV. P. 15(c).

[5] 396 Mass. 818, 489 N.E.2d 172 (1986).

[6] *Tindol*, 396 Mass. at 516, 487 N.E.2d at 489.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

only a statute of limitations."[11] Relying upon its previous decision in *Klein v. Catalano*,[12] the Court declared: "As a statute of repose, G.L. c. 260, § 2B, precludes recovery against those within the protection of the statute for any injury which occurs more than six years after the performance of furnishing of the design planning, construction or general administration of an approvement to real property."[13] The Court found this result to be both fair and intended by the Legislature: "Fairness demands that a defendant at some time should be secure in the knowledge that the slate has been wiped clean."[14]

The Court similarly concluded that the relation back language of Rule 15(c) affects only "the bar of a statute of limitations [which] is conditional," but not the "bar of a statute of repose [which] is absolute."[15] The Court refused to hold chapter 260, section 2B affected by Rule 15(c) because the "application of the 'relation back' doctrine would have the effect of reactivating a cause of action that the Legislature obviously intended to eliminate."[16]

In *Anthony's*, the Court noted that, on its face, section 2B applies only to actions of tort, and not to contract actions.[17] The Court further declared, however, that it is necessary to look to "the gist of the action" alleged because a plaintiff should not be able to escape the consequences of section 2B "merely by labeling the claim contractual."[18] Again following *Klein*,[19] the Court reiterated that "section 2B would bar a breach of implied warranty claim where the elements for breach of implied warranty and for negligence claims are the same."[20] Actions for breach of express warranty, however, are different "because the plaintiff must demonstrate that the defendant promised a specific result."[21] Accordingly, the Court held section 2B applicable to the negligence and implied warranty counts, but not to the express warranty count.[22]

In *Anthony's,* the owner of a Boston restaurant had purchased a ship intending to convert it to a cocktail lounge.[23] He then consulted the

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[11] *Id.* at 518, 487 N.E.2d at 490.

[12] 386 Mass. 701, 437 N.E.2d 514 (1982).

[13] *Tindol*, 396 Mass. at 516, 487 N.E.2d at 490.

[14] *Id.* (citing Rosenberg v. North Bergen, 61 N.J. 190, 199–200, 293 A.2d 662, 667–68 (1972)).

[15] *Id.* at 519, 487 N.E.2d at 491.

[16] *Id.* (quoting James Ferrera & Sons v. Samuels, 21 Mass. App. Ct. 170, 173, 486 N.E.2d 58, 61 (1985)).

[17] *Anthony's*, 396 Mass. at 822, 489 N.E.2d at 179.

[18] *Id.*

[19] 386 Mass. at 719, & n.19, 437 N.E.2d at 526, & n.19.

[20] *Anthony's*, 396 Mass. at 823, 489 N.E.2d at 175.

[21] *Id.*

[22] *Id.* at 829, 489 N.E.2d at 179.

[23] *Id.* at 819, 489 N.E.2d at 173.

defendant, Haley & Aldrich, to determine how best to achieve a permanent mooring to the dock adjacent to the existing restaurant.[24] Another defendant, Crandall Dry Dock, agreed to design a foundation and mooring system for the ship.[25] The work was completed during October, 1968.[26] More than nine years later, unusually high tides resulting from the "Great Blizzard of 1978" caused the ship to float off its cradle and sink.[27] Suit was commenced in 1980.

The complaint had three counts: the first count alleged that defendants were negligent in the design and construction of the mooring system; the second alleged breach of implied warranties; and the third alleged breach of an express warranty that the mooring system would be sufficient to withstand wind and tidal forces.[28] Summary judgment was entered in favor of both defendants[29] on the ground that plaintiff's claims were time barred under chapter 260 section 2B.[30]

After ruling that chapter 260, section 2B did not apply, the Court addressed Crandall's argument that the action was barred by the six year statute of limitations for contract actions under chapter 260, section 2. Crandall had argued that the statute of limitations begins to run on the date of the breach, not the date of the discovery of the breach.[31] If there were a breach, Crandall argued, it occurred in 1968 and was therefore time barred.[32] The plaintiff argued that its cause of action did not accrue until 1978, when discovery of the breach was made.[33]

In ruling in favor of the plaintiff and holding the discovery rule applicable to contract actions under chapter 260, section 2, the Court first stated that "[t]he principle underlying the discovery rule is that 'a plaintiff should be put on notice before his claim is barred.'"[34] The Court then noted that neither it nor the legislature has differentiated design profes-

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[24] *Id.*

[25] *Id.* at 820, 489 N.E.2d at 174.

[26] *Id.*

[27] *Id.* at 819, 489 N.E.2d at 173.

[28] *Id.* at 820–21, 489 N.E.2d at 174.

[29] Actually, there were four defendants in the case. The plaintiff, however, appealed only from the summary judgments in favor of Haley & Aldrich and Crandall. The Supreme Judicial Court affirmed the judgment for Haley & Aldrich because it was unable to find any evidence that Haley & Aldrich made an express warranty. *Id.* at 829, 489 N.E.2d at 179.

[30] *Id.*

[31] This argument was predicated upon Wolverine Ins. Co. v. Tower Iron Works, Inc., 370 F.2d 700, 702 (1st Cir. 1966).

[32] *Anthony's*, 396 Mass. at 824, 489 N.E.2d at 176.

[33] *Id.*

[34] *Id.*

sionals from other professionals subject to malpractice and breach of contract claims.[35] In ruling that the discovery rule should be applied to the express warranty claim, the Court further noted that the plaintiff, as a lay person, "could not be expected to recognize that the design would fail to meet the promised performance standards without hiring other professionals to review the defendant's work."[36]

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[35] *Id.*

[36] *Id.* at 825, 489 N.E.2d at 177.