CHAPTER 12

Civil Procedure

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§ 12.1. Motion for Relief from Judgment. During the *Survey* year, the Supreme Judicial Court decided a case which may alter the usual course of action in suits brought by an insurance company on behalf of a plaintiff who has subrogated his or her claims against a negligent defendant. The decision will be of particular interest to defendants who settle an action with the insurance company's attorney, procure an agreement for judgment and a release of claims, and then assume that their exposure has been terminated.

The plaintiff in *Parrell v. Keenan*[1] had been involved in a motor vehicle accident, with the defendant, an employee of the Town of Milton.[2] At the time of the accident, the defendant was traveling the wrong way on a one-way public street in Milton while plowing snow.[3] As a result, the plaintiff's automobile was damaged and she incurred medical bills of $189.[4]

The plaintiff's insurance company acquired her rights to the extent it paid her for property damage and medical expenses under no-fault insurance personal injury protection coverage.[5] Accordingly, in March, 1977, the insurer brought an action in the district court in the plaintiff's name,[6] seeking to recover the amounts it paid to the plaintiff.[7] An attorney acting for the plaintiff's insurer settled the action with the Town of Milton, the defendant's employer.[8] The attorney entered into an agreement for judg-

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§ 12.1. [1] 389 Mass. 809, 452 N.E.2d 506 (1983).

[2] *Id.* at 810, 452 N.E.2d at 509.

[3] *Id.*

[4] *Id.*

[5] *Id. See* G.L. c. 90, §§ 34M, 34O.

[6] MASS. R. CIV. P. 17(a) provides in pertinent part: "An insurer who has paid all or part of a loss may sue in the name of the assured to whose rights it is subrogated."

[7] 389 Mass. at 810, 452 N.E.2d at 509.

[8] *Id.* at 810, 452 N.E.2d at 510. Because the cause of action arose on March 16, 1976, G.L. c. 258, as amended by Acts of 1978, c. 512 (the Massachusetts Tort Claims Act) was inapplicable. Chapter 258 as it now reads applies only to causes of action arising on or after August 16, 1977. Acts of 1978, c. 512, § 16. Thus the named defendant was properly the public employee.

ment, purporting to act for the plaintiff, and the insurance company issued a release.[9] The agreement for judgment with an entry of judgment satisfied was subsequently filed with the district court in September of 1977.[10]

Approximately three months after the agreement was filed, in December of 1977, the plaintiff, through her private attorney, commenced an action in superior court against the defendant and the Town of Milton, seeking to recover for personal injuries suffered in the accident.[11] The Town and the defendant Keenan filed answers, asserting the judgment in the prior district court action as a defense.[12]

In response, the plaintiff filed a motion for relief from the prior judgment and to strike the agreement for judgment and judgment satisfied.[13] After a hearing, the motion was allowed on the condition that the amount tendered in settlement be returned to the Town.[14] The defendant failed to perfect an interlocutory appeal that he initiated in the appellate division of the district court.[15] The plaintiff then filed motions to amend the original complaint, lodged by the insurer in the district court in March 1977, to add counts against both the defendant and the Town for her personal injuries.[16] A district court judge, who was not the same judge who granted the motion for relief, allowed the motions to amend.[17] The plaintiff's second action, transferred from the superior court to the district court, was subsequently dismissed.[18]

At trial in the district court, the plaintiff was awarded compensation for both property damage and personal injuries.[19] The judge found the counts

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[9] 389 Mass. at 810, 452 N.E.2d at 510.

[10] *Id.*

[11] *Id.* The plaintiff was left with a permanent lump and a scar on her nose. *Id.* She therefore satisfied the requirements of G.L. c. 231, § 6D, which provides that a party must incur medical expenses in excess of $500 or suffer one of five specific types of injury prior to instituting an action in tort for bodily injury arising out of the operation of a motor vehicle within the Commonwealth.

[12] 389 Mass. at 811, 452 N.E.2d at 510.

[13] *Id.*

[14] *Id.* The amount was $600. *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.* Under MASS. R. CIV. P. 15(a), the plaintiff's amendment to the complaint relates back to the original pleading. By amending her complaint, the plaintiff waived her right to an appeal to the superior court. *See* G.L. c. 231, §§ 103, 104. 389 Mass. at 812 n.4, 452 N.E.2d at 510 n.4. The defendant objected to the allowance of the motions and the assignment of the case for trial, citing MASS. DIST./MUN. CTS. R. CIV. P. 64(c)(5). 39 Mass. at 812, 452 N.E.2d at 510. The defendant also argued that the judgment in the first case and his pending appeal from the relief of that judgment precluded the court's action. *Id.* at 812, 452 N.E.2d at 511.

[18] 389 Mass. at 811, 452 N.E.2d at 510.

[19] *Id.* at 812, 452 N.E.2d at 511. The judge awarded $495 for property damage and $3,953 for personal injuries plus interest. *Id.*

against the Town waived, leaving the defendant to satisfy the judgment.[20] In addition, the judge found that the release executed for the plaintiff's insurance company pertained, if at all, solely to the insurance company's claim, and thus bound the plaintiff only as to her insurance claim for property damage and personal injury protection.[21]

The defendant's post-trial motions for a new trial, and to amend the findings and the judgment, were denied, and his report to the appellate division was dismissed.[22] On appeal to the Supreme Judicial Court, the defendant claimed that the district court improperly allowed the motion for relief from judgment and the motions to amend the complaint, and improperly assigned the case for trial.[23]

The Supreme Judicial Court first considered the defendant's challenge to the allowance of the plaintiff's motion for relief from judgment. The critical inquiry relative to the district court's treatment of the plaintiff's motion for relief centered on whether the grounds for the motion properly fell within Massachusetts District and Municipal Court Rule 60(b)(1) or 60(b)(6).[24] Rule 60(b)(1) permits relief from judgment by reason of mistake, inadvertence, surprise, or excusable neglect, while rule 60(b)(6) relief is limited specifically to instances other than those found in subdivisions (1) through (5).[25] The Court rejected the defendant's assertion that

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[20] *Id.*

[21] *Id.* at 812-13, 452 N.E.2d at 511.

[22] *Id.* at 813, 452 N.E.2d at 511. In his report to the appellate division, the defendant asserted that the plaintiff's motions for relief from judgment and to amend the complaint were improperly allowed and that the case was improperly assigned for trial. *Id.* The defendant also argued that the trial judge erred in finding for the plaintiff because the insurance company's release barred any further action by the plaintiff. *Id.* Finally, the defendant contended that his requests for rulings that he was not negligent, that the plaintiff was not permanently disfigured and that the plaintiff could not recover for pain and suffering unless her medical expenses were more than $500 were improperly denied. *Id.* at 813 n.5, 452 N.E.2d at 511 n.5.

[23] *Id.* at 813, 452 N.E.2d at 511.

[24] *Id.* at 813-16, 452 N.E.2d at 511-12. MASS. DIST./MUN. CTS. R. CIV. P. 60 expressly states that MASS. R. CIV. P. 60 governs procedure in the district courts.

[25] 389 Mass. at 814 & n.6, 452 N.E.2d at 511-12 & n.6 (quoting, in part, Chavoor v. Lewis, 383 Mass. 801, 806, 422 N.E.2d 1353, 1357 (1981)). The significance of the distinction is two-fold. First, as clearly stated in rule 60 itself, a motion based upon rule 60(b)(1) cannot be made more than one year after the entry of judgment. This time limit cannot be extended. *See* MASS. DIST./MUN. CTS. R. CIV. P. 60(b); Chavoor v. Lewis, 383 Mass. 801, 803, 422 N.E.2d 1353, 1355 (1981). Rule 60(b)(6) carries no specific time limitation, but only a "reasonable time" requirement, which is committed to the judge's discretion. Since the plaintiff's motion was brought approximately fourteen months after the entry of judgment, she would have been barred under rule 60(b)(1). *See* 389 Mass. at 814-15 & n.7, 452 N.E.2d at 512 & n.7. Second, the merits of a rule 60(b)(6) motion are addressed to the discretion of the judge and the court's action will only be reversed on appeal for abuse of discretion. *See Id.* at 813, 452 N.E.2d at 512.

the plaintiff's motion for relief fell within the ambit of rule 60(b)(1).[26] Instead, the Court found that the plaintiff had properly sought relief under rule 60(b)(6).[27] According to the Court, when considering a motion under rule 60(b)(6), a judge may consider the merit of the moving party's claim or defense, the presence or absence of any extraordinary circumstances, and the potential effect of the grant of the motion on the rights of the parties in controversy.[28]

The Supreme Judicial Court found that the district court judge did not abuse his discretion in granting plaintiff's motion for relief from judgment.[29] The Court held that, having found that the release and agreement for judgment were not executed by the plaintiff or with her authority, the judge could conclude that vacating the judgment was appropriate to accomplish justice.[30] In addition, the Court found that the judge did not abuse his discretion by determining that the time lapse from the first judgment to plaintiff's motion was reasonable.[31]

The Court then addressed the issue of the motions to amend the complaint and assignment of the case for trial. The defendant argued that it was a violation of Massachusetts District and Municipal Court Rule 64(c)(5)[32] for a judge other than the judge who granted the motion for relief from judgment to act on the plaintiff's motions to amend and to assign the case for trial.[33] The defendant maintained that, under the circumstances of the case, the "trial justice" as referred to in rule 64(c)(5) was the judge who heard the motion for relief from judgment.[34] According to the defendant, the second judge should have required the motion judge to rule on his draft report seeking review of the grant of the plaintiff's motion for relief from judgment, which was an interlocutory ruling, and should not

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[26] 389 Mass. at 814-15 n.7, 452 N.E.2d at 512 n.7. The defendant claimed that the plaintiff was taken by surprise by the scope of the release and mistaken in her belief that the subrogation of her claim to the insurance company would not bar a subsequent private action. *Id.* Consequently, the defendant argued, the proper basis for the plaintiff's motion was rule 60(b)(1), which was untimely due to the one year statutory limitation on such motions. *Id.* The Court found no mistake or surprise, stating that the insurance company could only release those claims to which it was subrogated. *Id.*

[27] *Id.*

[28] *Id.* at 815, 452 N.E.2d at 512 (citing United States v. Cato Bros., 273 F.2d 153, 157 (4th Cir. 1959); Murphy v. Administrator of the Div. of Personnel Admin., 377 Mass. 217, 228 n.13, 386 N.E.2d 211, 218 n.13 (1979); Annot., 15 A.L.R. FED. 193 (1973)).

[29] 389 Mass. at 816, 452 N.E.2d at 513.

[30] *Id.* (citing Klaprott v. United States, 335 U.S. 601, 615 (1949), for the proposition that a judge may vacate a judgment when "appropriate to accomplish justice.")

[31] 389 Mass at 816, 452 N.E.2d at 512. *See supra* note 25.

[32] MASSS. DIST./MUN. CTS. R. CIV. P. 64(c)(5) states in pertinent part: "Until the report is allowed, or if disallowed, until a petition to establish the report is filed as hereinafter provided, all motions and interlocutory matters shall be heard by the trial justice."

[33] 389 Mass. at 816, 452 N.E.2d at 513.

[34] *Id.* at 817, 452 N.E.2d at 513.

have allowed the plaintiff's motions to amend the complaint or assigned the case to trial.[35]

The Supreme Judicial Court rejected this argument, holding that once the judgment had been vacated, the case was in a pre-trial posture, and rule 64(c)(5) was then inapplicable.[36] The Court found no procedural requirement that the judge who ruled on the motion for relief from judgment had to hear the plaintiff's other motions.[37] In response to the defendant's arguments, the Court noted that the motion judge never made the defendant's report final, and that the defendant never tried to have the report established.[38] According to the Court, the defendant's interlocutory challenge to the allowance of the plaintiff's motion for relief from judgment under rule 60(b)(6) was included in the post-trial report to the appellate division.[39] In the interest of avoiding further delay and promoting judicial economy, the Court noted, the district court properly allowed the plaintiff to amend the complaint one and a half years after the defendant's unperfected report was filed, and correctly assigned the case for trial.[40] The judge's action, according to the Court, "avoided piecemeal review of interlocutory rulings."[41]

As a result of the decision in *Parrell*, defendants who settle with an insurance company should also obtain a release from further liability from the insured to avoid the possibility of increased liability in the future. The Court in *Parrell* found fourteen months a reasonable time within which a motion for relief from judgment under rule 60(b)(6) may be filed.[42] It is unclear whether a longer period of time would also be found reasonable. Thus, if a defendant wants to ensure that a claim is "laid to rest," a release executed by the injured party is necessary.

In addition, when a defendant files an appeal from a ruling vacating a prior judgment, he should pursue the action in a timely manner. The defendant in *Parrell* lost his chance for an interlocutory appeal on the motion by not establishing his report in the appellate division before the plaintiff sought to amend her original complaint.[43] The district court's allowance of the motion to amend in *Parrell* was granted three years after the original complaint was filed,[44] again demonstrating the defendant's need to ensure that he is totally released from liability at the time of

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[35] *Id.* at 817 n.11, 452 N.E.2d at 513 n.11.
[36] *Id.* at 817, 452 N.E.2d at 513.
[37] *Id.*
[38] *Id.* at 817 n.11, 452 N.E.2d at 513 n.11.
[39] *Id.*
[40] *Id.*
[41] *Id.* (citing Pollack v. Kelly, 372 Mass. 469, 471, 362 N.E.2d 525, 527 (1977)).
[42] *See* 389 Mass. at 814-15 & n.7, 452 N.E.2d at 512 & n.7.
[43] *Id.* at 817 n.11, 452 N.E.2d at 513 n.11.
[44] *Id.* at 810-11, 452 N.E.2d at 510.

original settlement. Absent careful attention to final settlement of all claims surrounding an incident, and assurance that all procedural matters have been finalized, a defendant may find himself litigating an action long after he thought it was settled.

§ 12.2. Statutory Construction — Jurisdiction Over Civil Actions Against Public Employees. In *Harker v. Holyoke*,[1] the Supreme Judicial Court reconciled apparently conflicting grants of jurisdiction in chapter 258, section 3,[2] and chapter 185C, section 3.[3] A majority of the Court[4] held that the exclusive jurisdiction over actions against public employers conferred upon the superior court by chapter 258, section 3 was eliminated by the jurisdiction over "housing problems" conferred upon the housing court by chapter 185C, section 3.[5] The Court also stated that, in the interest of finality of judgments, relitigation of the plaintiff's claims in the superior court was precluded regardless of whether or not the housing court had subject matter jurisdiction.[6]

In *Harker*, the plaintiffs, owners of a two-family home in the city of Holyoke, originally commenced an action in the housing court of Hampden County alleging that the defendants[7] failed to provide adequate water pressure to their home.[8] Contending that this failure supported an action in tort and a breach of contract, the plaintiffs sought injunctive relief and damages for loss of rental income, for loss of good will in their business, and for interference with the enjoyment of their home.[9] After trial in the housing court, but before judgment, the plaintiffs moved for voluntary dismissal of their action on the ground that the housing court lacked subject matter jurisdiction over the action.[10] The motion was

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§ 12.2. [1] 390 Mass. 555, 457 N.E.2d 1115 (1983).

[2] G.L. c. 258, § 3 reads in pertinent part: "the superior court shall have jurisdiction of all civil actions brought against a public employer." The defendants were "public employers" as defined in G.L. c. 258, § 1.

[3] G.L. c. 185C, § 3 provides in pertinent part: "The divisions of the housing court department shall . . . have jurisdiction of all housing problems, including all contract and tort actions which affect the health, safety and welfare of the occupants or owners . . . ."

[4] Although the Court appeared divided on this issue, there was no dissent.

[5] 390 Mass. at 558, 457 N.E.2d at 1117. The opinion does not indicate the Court's analysis, but traditional rules of statutory construction support the Court's conclusion.

[6] *Id.*

[7] In addition to the City of Holyoke, the plaintiffs named as defendants the Holyoke Water Works and the Board of Water Commissioners. 390 Mass. at 555 n.2, 457 N.E.2d at 1115 n.2.

[8] *Id.* at 555-56, 457 N.E.2d at 1115-16.

[9] *Id.* at 556, 457 N.E.2d at 1116.

[10] *Id.* The procedural propriety of the motion is unquestioned. MASS. R. CIV. P. 12(h)(3) mandates dismissal of an action "[w]henever it appears by suggestion of a party or otherwise that the court lacks jurisdiction of the subject matter."

denied and judgment was entered for the defendants.[11] The plaintiffs did not appeal either the denial of their motion to dismiss or the judgment for the defendants in the housing court.[12]

Subsequently, the plaintiffs commenced a superior court action against the same defendants which, except for the addition of a claim under chapter 93A, was identical to the housing court action in all significant respects.[13] The defendants moved for summary judgment on the ground that the superior court action was precluded by the housing court judgment on the principles of res judicata and collateral estoppel.[14] The motion was allowed and the plaintiffs appealed from the entry of judgment dismissing their superior court complaint.[15]

The plaintiffs argued that the superior court action was not barred by the housing court judgment because the housing court lacked subject matter jurisdiction over the controversy.[16] Consequently, the plaintiffs contended, one of the elements necessary to preclude relitigation of an issue, a judgment on the merits by a court of competent jurisdiction, was absent.[17] A majority of the Supreme Judicial Court, however, agreed with the defendants that a harmonious reading of chapter 258 with chapter 185C requires that the grant of jurisdiction over "all housing problems" in chapter 185C, section 3 includes claims against public employers.[18]

The Court's discussion of chapter 258, section 3 and chapter 185C, section 3 was brief, merely pointing out the obvious conflict between the two statutes, even though the Court acknowledged that its decision on the issue was dispositive of the case.[19] Instead, the Court discussed more fully its holding that, in the interest of finality of judgments, relitigation of the plaintiffs' claims was precluded regardless of whether or not the housing court had subject matter jurisdiction.[20]

As the Court observed, the plaintiffs' superior court action was a collateral attack on the housing court judgment.[21] The general rule is that collateral attacks are not permitted.[22] The Court found that since the

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[11] 390 Mass. at 556, 457 N.E.2d at 1116.

[12] *Id.* A preferred course of action would have been for the plaintiffs to appeal the housing court decision, though the final result would most probably have been the same.

[13] *Id.* at 556, 457 N.E.2d at 1116.

[14] *Id.*

[15] *Id.*

[16] *Id.* at 557, 457 N.E.2d at 1116.

[17] *Id. See* Franklin v. North Weymouth Coop. Bank, 283 Mass. 275, 280, 186 N.E. 641, 643 (1933).

[18] 390 Mass. at 557, 457 N.E.2d at 1116-17.

[19] *Id.* at 556-58, 457 N.E.2d at 1116-17.

[20] *Id.* at 558-61, 457 N.E.2d at 1117-18.

[21] *Id.* at 558, 457 N.E.2d at 1117.

[22] A court's power to entertain an independent action to relieve a party from a judgment or to set aside a judgment is not to the contrary, as such an action is a direct attack on a prior

plaintiffs commenced their action in the housing court, had a full and fair trial, lost on the merits, and chose not to appeal, there was no need to favor the principle of validity of judgments over the principle of finality.[23]

The Court emphasized that its holding was not that the parties somehow conferred subject matter jurisdiction on the housing court, nor was the ground for its holding purely issue preclusion, which requires a judgment by a court of competent jurisdiction.[24] Rather, the Court stated, its decision was firmly rooted in the principle that even where a court may lack subject matter jurisdiction, there may be circumstances where any judgment which has become final may be binding upon the parties to the suit, although not upon others.[25] In such cases, the rights of the parties may be limited to appeal or other methods of direct attack.[26] According to the Court, the plaintiffs in *Harker* had an opportunity to fully litigate their claims in the housing court, and were therefore precluded from raising the jurisdictional question in an independent action.[27]

§ 12.3. Intervention — Statutory Construction. In *Attorney General v. Brockton Agricultural Society*,[1] the Supreme Judicial Court addressed issues arising under Massachusetts Rule of Civil Procedure 24(a) and (b), which controls intervention in a civil action by third parties.[2] Rule 24(a)[3]

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judgment. *See* MASS. R. CIV. P. 60(b); J. SMITH & H. ZOBEL, RULES PRACTICE, 8 MASS. PRACTICE SERIES § 60.16 (1977).

[23] 390 Mass. at 559, 457 N.E.2d at 1117.

[24] *Id.* at 559-61, 457 N.E.2d at 1117-18. In discussing the issue preclusion question, the Court took the opportunity to state that to the extent their opinion in Almeida v. Travelers Ins. Co., 383 Mass. 226, 418 N.E.2d 602 (1981), could be read to require a judgment by a court of competent jurisdiction for the rules of claim preclusion or issue preclusion to apply, the *Almeida* decision went beyond the requirements of the case and was overly broad. 390 Mass. at 561, 457 N.E.2d at 1118.

[25] 390 Mass. at 559-60, 457 N.E.2d at 1118.

[26] *Id.* (citing Old Colony Trust Co. v. Porter, 324 Mass. 581, 586, 88 N.E.2d 135, 139 (1949)).

[27] 390 Mass. at 559, 457 N.E.2d at 1118. Note that the plaintiffs' "independent action" was not one seeking the relief permitted by MASS. R. CIV. P. 60(b). Had it been, the Court's analysis, if not the holding, would have differed substantially.

§ 12.3. [1] 390 Mass. 431, 456 N.E.2d 1130 (1983).

[2] Although the Massachusetts Appeals Court had previously considered some issues raised under MASS. R. CIV. P. 24, *Brockton Agricultural Society* is the first Supreme Judicial Court decision on the substance of the rule. *See* Mayflower Dev. Corp. v. Dennis, 11 Mass. App. Ct. 630, 418 N.E.2d 349 (1981); Board of Selectmen of Stockbridge v. Monument Inn, Inc., 8 Mass. App. Ct. 158, 391 N.E.2d 1265 (1979), *appeal after remand*, 14 Mass. App. Ct. 957 (1982); E.W. Foster Co. v. McLaughlin, 7 Mass. App. Ct. 865, 385 N.E.2d 1031 (1979); Rafferty v. Sancta Maria Hospital, 5 Mass. App. Ct. 624, 367 N.E.2d 856 (1977).

[3] MASS. R. CIV. P. 24(a) reads, in pertinent part:

> Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as

determines when intervention of right is warranted, while rule 24(b)[4] provides for permissive intervention.

In *Brockton Agricultural Society*, the attorney general sought an order that the defendant, the Brockton Agricultural Society (the "Society"), a corporation with 830 shares of stock outstanding held by 145 shareholders, must file annual written reports and audited financial statements as a public charity, as required by chapter 12, section 8F.[5] The Society claimed that it was not a public charity.[6]

Approximately fourteen months after the action was commenced, eleven shareholders of the Society filed a motion for leave to intervene as defendants.[7] After a hearing, the superior court denied the motion to intervene, concluding that the shareholders were not entitled to intervene as a matter of right under rule 24(a), and exercising its discretion to deny the motion to intervene under rule 24(b).[8] On appeal, the Supreme Judicial Court affirmed, also holding that there is no constitutional right to intervene founded upon either the United States or the Massachusetts Constitution.[9]

In reviewing the denial of the shareholders' motion, the Supreme Judicial Court first stated that the denial of a claim to intervene as of right is immediately appealable.[10] The Court thus adhered to the position taken by the Appeals Court in *Mayflower Development Corporation v. Dennis*,[11] and followed federal precedent construing the identical provision found in Federal Rule of Civil Procedure 24(a)(2).[12]

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a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

[4] MASS. R. CIV. P. 24(b) reads in pertinent part:

Upon timely application anyone may be permitted to intervene in an action . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common . . . . In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

[5] 390 Mass. at 432, 456 N.E.2d at 1132. The precise requirements of G.L. c. 12, § 8F are not material to this discussion.

[6] 390 Mass. at 432, 456 N.E.2d at 1132. This issue was not resolved by the case under review.

[7] *Id.*

[8] *Id.*

[9] *Id.* at 433, 436-37, 456 N.E.2d at 1133-35. It is unclear whether the constitutional claim was argued before the motion judge.

[10] *Id.* at 433, 456 N.E.2d at 1132-33.

[11] 11 Mass. App. Ct. 630, 418 N.E.2d 349 (1981).

[12] *Id.* at 635, 418 N.E.2d at 353. *See* Rollins Environmental Serv., Inc. v. Superior Court, 368 Mass. 174, 179-80, 330 N.E.2d 814, 818 (1975) (where Massachusetts court has adopted rule of civil procedure in substantially same form as federal rule, judicial construction of federal rule is to be given to Massachusetts rule unless substantial reason to construe otherwise).

The sole issue presented to the Court under the claim of intervention as of right was whether the shareholders' interest was adequately represented by the Society.[13] The Court recognized that the shareholders had an interest in the action brought by the attorney general and that disposition of the action might impair or impede their ability to protect their interest.[14] The shareholders therefore met two of the three criteria set forth in Massachusetts Rule 24(a)(2).[15]

The Supreme Judicial Court held that the burden of showing the inadequacy of representation is on the applicant.[16] The Court stated that the weight of the burden may vary depending on the circumstances.[17] According to the Court, where the interest of the applicant seeking to intervene on the side of a party is identical to that of the party, the burden is substantial, requiring a "compelling showing" of inadequacy.[18] The Court found that the applicants in *Brockton Agricultural Society* failed to meet this burden.[19] In holding that the shareholders had failed to meet their burden, the Court found no adversity of interest between the shareholders and the Society, no collusion between the Society and the office of the attorney general, and no lack of diligence by the Society in defending itself against the attorney general's claim.[20] Noting that this list of possible grounds for finding inadequacy of representation was not exhaustive, the Court nevertheless found that the shareholders had not presented any reason why their claimed interest was not adequately represented by the Society.[21]

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[13] 390 Mass. at 433, 456 N.E.2d at 1133. Nothing in the record indicated that the lower court judge had found the motion untimely.

[14] *Id.*

[15] *See* MASS. R. CIV. P. 24(a)(2). *See also* Mayflower Development Corp. v. Dennis, 11 Mass. App. Ct. 630, 635, 418 N.E.2d 349, 353 (1981). As the *Mayflower* court stated:

> [t]o intervene as of right [the applicant] was required to establish first, that it had an interest in the [underlying] action, second, that it was so situated that disposition of the action may as a practical matter impair or impede its ability to protect that interest, and third, that its interest was not being adequately represented by existing parties.

Id.

[16] *Brockton Agricultural Society*, 390 Mass. at 434, 456 N.E.2d at 1133. While this conclusion may appear to be inescapable, the Court noted that federal decisions on the question were not unanimous. *Id.* at 434 n.3, 456 N.E.2d at 1133 n.3. In placing the burden on the applicant, the Court followed the majority view. *Id.* In *Mayflower*, the Appeals Court imposed the burden on the applicant without discussion. 11 Mass. App. Ct. at 635, 418 N.E.2d at 353.

[17] *Brockton Agricultural Society*, 390 Mass. at 434, 456 N.E.2d at 1133.

[18] *Id.*

[19] *Id.* at 435, 456 N.E.2d at 1133.

[20] *Id.*

[21] *Id.* at 435, 456 N.E.2d at 1133-34.

Turning to the second question of permissive intervention, the Supreme Judicial Court affirmed the lower court's discretionary denial of the shareholders' motion to intervene under rule 24(b).[22] The Court stated that the judge, when addressing the motion, could consider that the shareholders' interest was already adequately represented;[23] that the action had been pending for over a year before intervention was sought, during which time significant pre-trial discovery had already occurred; that permitting the shareholders to intervene would delay disposition of the matter;[24] and that other shareholders, represented by their own counsel, might also seek to intervene if the motion were allowed.[25]

Reviewing the motion judge's exercise of discretion, the Court observed that in a corporation, the majority of shareholders hold ultimate control over the election of officers and directors.[26] The Court then found no record of disagreement among the shareholders concerning the basic issue in *Brockton Agricultural Society*.[27] The Court referred to "the obvious cooperation" between the counsel for the Society and the counsel for the shareholders. This cooperation, the Court stated, suggested that the Society's counsel would consider the views of the shareholders' counsel at trial.[28] In conclusion, the Court noted an absence of factual dispute, and found that differences in the manner of representation of the parties were therefore less likely to influence the outcome.[29]

Finally, the Court addressed the shareholders' constitutional claim. Although the shareholders presented this issue as their constitutional right to participate in the pending action through counsel of their choice, the Court viewed it simply as a claim to a constitutional right to intervene.[30] The Court noted that the shareholders presented no authority for the proposition that a shareholder in a corporation has a constitutional right to intervene in circumstances in which a rule, such as Federal Rule of Civil Procedure 24(a)(2), or Massachusetts Rule of Civil Procedure 24(a)(2), gives the shareholder no right to intervene.[31] The Supreme Judicial Court

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[22] *Id.* at 435, 456 N.E.2d at 1134.

[23] The preceding discussion concerning the applicant's burden under MASS. R. CIV. P. 24(a), authorizing intervention as of right, is pertinent here. It is questionable whether the Court would impose a lighter burden of proof in MASS. R. CIV. P. 24(b), authorizing permissive intervention.

[24] Of the factors listed by the Court, MASS. R. CIV. P. 24(b) only expressly requires consideration of potential delay. The rule, however, also requires consideration of possible prejudice to the adjudication of the rights of the original parties.

[25] 390 Mass. at 435, 456 N.E.2d at 1134.

[26] *Id.* at 435-36, 456 N.E.2d at 1134.

[27] *Id.* at 436, 456 N.E.2d at 1134.

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.* at 436-37, 456 N.E.2d at 1134.

refused to find such a right founded on either the United States or Massachusetts Constitution.[32] Denial of the shareholders' motion to intervene, the Court noted, did not force them to accept the services of an unwanted counsel or create a situation where the Society's counsel would be representing multiple parties, thus creating the possibility of a conflict of interest.[33] The Court concluded by stating that the shareholders had not asserted that res judicata or issue preclusion would bind them to the results of the action.[34] Under the facts in *Brockton Agricultural Society*, therefore, the Court found no violation of the shareholders' due process rights.[35]

§ 12.4. Jurisdiction — Personal — Quasi in rem. During the *Survey* year, the Supreme Judicial Court in *Morrill v. Tong*,[1] a domestic relations case, discussed issues concerning a court's power to exercise quasi in rem jurisdiction over a party's interest in property, and personal jurisdiction over the party. The defendant in *Morrill* appealed from a judgment and order of the probate and family court for garnishment of his Navy pension for child support.[2] The Supreme Judicial Court reversed, ordering dismissal of the action.[3]

The defendant and the plaintiff had been married in Newport, Rhode Island, while the defendant was serving in the United States Navy.[4] For the first five months of their marriage, the couple resided in and was domiciled in Massachusetts.[5] They then moved to Ohio for a short time, and then to New York.[6] Their first child was born in New York.[7] Three months after the birth of their first child, the defendant, having reenlisted in the Navy, moved the family to Newport, Rhode Island, where their second child was born.[8] The couple then moved to California for a number of years, subsequently returned to Massachusetts for approximately one month, and finally purchased and lived in a home in Bristol, Rhode Island, until their separation in 1972.[9] The plaintiff filed an action for divorce in

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[32] *Id.* at 436-37, 456 N.E.2d at 1134-35.

[33] *Id.* at 436, 456 N.E.2d at 1134.

[34] *Id.* at 437, 456 N.E.2d at 1135.

[35] *Id.* at 436-37, 456 N.E.2d at 1134-35.

§ 12.4. [1] 390 Mass. 120, 453 N.E.2d 1221 (1983). The case was transferred from the Appeals Court on a motion of the Supreme Judicial Court.

[2] 390 Mass. at 121, 453 N.E.2d at 1223.

[3] *Id.* at 135, 453 N.E.2d at 1230.

[4] *Id.* at 121, 453 N.E.2d at 1223.

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.* at 121-22, 453 N.E.2d at 1223.

[9] *Id.* at 122, 453 N.E.2d at 1223.

the Rhode Island family court, and the defendant generally appeared through counsel during the proceedings.[10] A final decree of divorce was entered in the Rhode Island court.[11]

The divorce decree provided, in part, that the plaintiff have custody of the children of the marriage and that the defendant have reasonable visitation rights.[12] The defendant was ordered to pay to the plaintiff the sum of $220 a month for the support of the minor children, and to maintain his Navy identification card for the benefit of the children.[13] Subsequent to the entry of the decree, the defendant authorized the director of the Navy Family Allowance Activity, located in Cleveland, Ohio, to send the sum of $220 a month to the plaintiff, who was to notify the director of any change in her address.[14]

Approximately three years after entry of the divorce decree, the plaintiff moved to Massachusetts, where she continued to receive the monthly support payments until the defendant instructed the director of the Navy Family Allowance Activity to discontinue them.[15] The plaintiff then filed a petition in the Massachusetts probate court seeking an order that the Department of the Navy deduct from the defendant's pension and send her an amount equal to the accumulated arrearages on support payments and $220 a month until the children reached majority, and such other relief as the court deemed just and proper.[16]

The defendant specially appeared and moved to dismiss pursuant to the Massachusetts Rule of Domestic Relations Procedure 12(b)(2),[17] alleging lack of personal jurisdiction.[18] The motion was denied. In his answer, the defendant asserted as one affirmative defense the court's lack of personal jurisdiction, because he resided in Spain at the time. In a second affirma-

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[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.* at 122-23, 453 N.E.2d at 1223-24. *See* G.L. c. 208, § 29.

[17] MASS. R. DOM. REL. P. 12(b)(2) is identical to MASS. R. CIV. P. 12(b)(2).

[18] 390 Mass. at 123 & n.4, 453 N.E.2d at 1224 & n.4. The defendant also referred to rule VII of the Uniform Practices of Probate Courts of Massachusetts, but the applicability of that provision was neither argued before, nor considered by, the Court. *Id.* at 123 n.4, 453 N.E.2d at 1224 n.4. That provision provides:

> No money order will be entered against a defendant who has not been served with process within the Commonwealth and does not appear, although his property within the Commonwealth may be attached in accordance with law, and made to report to the satisfaction of a judgment valid only as against such property, unless a summons has been served upon such non-resident at his post office address within the Commonwealth by registered or certified mail.

UNIF. PRACTICES OF PROBATE COURTS VII (Michie/Law. Co-op. 1982).

tive defense, the defendant alleged that the "[p]laintiff . . . has intentionally and continuously alienated the children from their father and has intentionally and continuously deprived him of the affection and companionship of his children. Plaintiff . . . comes into this Court with unclean hands."[19] The defendant also requested that the complaint be dismissed and that the court order such other relief as it deemed just and proper.[20]

At trial, the defendant renewed his motion to dismiss.[21] The motion was denied, and the judge ordered the defendant's pension garnished in accordance with the plaintiff's complaint.[22]

On appeal, the defendant argued that the probate court erred in finding that he had waived his defense of lack of personal jurisdiction, that his pension was subject to the court's quasi in rem jurisdiction and that he had sufficient contacts with Massachusetts for the court to exercise long arm jurisdiction over him.[23] Addressing first the issue of waiver of the defense of lack of personal jurisdiction, the Supreme Judicial Court noted that the probate court judge had viewed the defendant's submission of an answer to the merits of the complaint, filed after the denial of his original motion to dismiss, as a waiver.[24] Additionally, the plaintiff on appeal argued that the defendant had waived his defense of lack of quasi in rem jurisdiction by failing to specifically refer to quasi in rem jurisdiction in his answer.[25] The defendant's motion to dismiss and answer had merely maintained that the defendant's contacts with Massachusetts were insufficient to support the assertion of jurisdiction over him, and did not specifically address that portion of the complaint which sought to garnish his Navy pension.[26] Rejecting this reasoning, the Supreme Judicial Court held that the omission of specific reference to quasi in rem jurisdiction in the written pleadings did not operate as a waiver of that defense because the trial court was sufficiently informed of the bases of the defendant's challenges to its jurisdiction when the motion to dismiss was taken under advisement.[27] Moreover, the Court noted, defense counsel, at oral argument in the probate proceeding, had provided the court with a memoran-

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[19] 390 Mass. at 123, 453 N.E.2d at 1224.

[20] *Id.*

[21] *Id.* at 123-24, 453 N.E.2d at 1224. The trial judge was not the judge had who denied the pre-trial motion.

[22] *Id.* at 124, 453 N.E.2d at 1224.

[23] *Id.*

[24] *Id.* at 125, 453 N.E.2d at 1225.

[25] *Id.* at 124-25, 453 N.E.2d at 1224-25. It is unclear whether or not the plaintiff made this argument to the trial court.

[26] *Id.* at 124-25, 453 N.E.2d at 1225.

[27] *Id.* at 125, 453 N.E.2d at 1225.

dum of law which argued lack of both in personam and quasi in rem jurisdiction.[28]

The Supreme Judicial Court also found that the defendant did not waive his defense of lack of personal jurisdiction by filing an answer to the merits of the complaint after the denial of his original motion to dismiss.[29] The Court disagreed with the probate court judge's determination that the defendant's second affirmative defense, coupled with his prayer for such other relief as the court might deem just and proper, constituted a waiver of his challenge to jurisdiction and a general appearance, submitting him to the power and jurisdiction of the court.[30] Rather than a request for affirmative relief and a voluntary submission to the judgment of the court, the Supreme Judicial Court found that, reading the affirmative defense as a whole, the answer resisted the invocation of the trial court's power by the plaintiff.[31]

Having found that the defendant had not waived his defense of lack of personal jurisdiction, the Court then considered the question of quasi in rem jurisdiction. The Supreme Judicial Court avoided a discussion of the impact of the United States Supreme Court decisions in *Shaffer v. Heitner*,[32] and *Rush v. Savchuk*,[33] on the quasi in rem jurisdiction portion of its earlier decision in *Blitzer v. Blitzer*,[34] the case on which the probate court had relied. According to the Court, the property on which the exercise of quasi in rem jurisdiction was predicated — the defendant's interest in his military pension and Navy identification card — was not subject to quasi in rem jurisdiction.[35]

The probate court had found that the payments and benefits attendant to the defendant's maintenance of his Navy identification card were "present" in Massachusetts since they were available to the defendant's

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[28] *Id.* The Court agreed with commentators that a motion under MASS. R. CIV. P. 12(b)(2), claiming lack of jurisdiction over the person, can embrace the defense of lack of jurisdiction over the interest of the defendant in property located within the Commonwealth. 390 Mass. at 124, 453 N.E.2d at 1224 (citing Fish v. Bamby Bakers, Inc., 76 F.R.D. 511, 513 (N.D.N.Y. 1977); J. SMITH & H. ZOBEL, RULES PRACTICE, 6 MASS. PRACTICE SERIES §§ 12.4, at 296 n.27, 12.9 (1974); and 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1351 (1969)).

[29] 390 Mass. at 125, 453 N.E.2d at 1225.

[30] *Id.* at 126, 453 N.E.2d at 1225.

[31] *Id.* at 126 & n.8, 453 N.E.2d at 1226 & n.8.

[32] 433 U.S. 186 (1977).

[33] 444 U.S. 320 (1980).

[34] 361 Mass. 780, 282 N.E.2d 918 (1972).

[35] *Morrill*, 390 Mass. at 127-28, 453 N.E.2d at 1226. In Blitzer v. Blitzer, 361 Mass. 780, 282 N.E.2d 918 (1972), the Court found that the probate court had the power by a decree quasi in rem to subject a husband's interest in Massachusetts real estate to a valid claim by his wife for alimony. *Id.* at 783-84, 282 N.E.2d at 920-21.

children in Massachusetts.[36] The Supreme Judicial Court noted, however, that the source of the card's benefits remained at all times outside of Massachusetts, and that on the probate court's theory, the location of the res would depend, not upon the actions of the defendant or the presence of his debtor, but upon the transience of the plaintiff.[37] The Court concluded that it was error for the probate court judge to base an exercise of quasi-in-rem jurisdiction on such circumstances.[38]

Finally, the Court considered whether the probate court had properly exercised jurisdiction over the defendant. The probate court judge, relying on provisions found in the Massachusetts long arm statute,[39] had asserted personal jurisdiction over the defendant.[40] The judge had held that the monthly support payments sent to Massachusetts for three years, the maintenance of the defendant's Navy identification card for the children's benefit, the defendant's letters, gifts, and cards to the children and his telephone conversations with them, a letter from the defendant to the plaintiff's lawyer, and the fact that Massachusetts was the first marital home of the parents constituted transaction of business in the Commonwealth sufficient to satisfy the requirements of chapter 223A, section 3(a), the long arm statute.[41] The Supreme Judicial Court rejected this view, stating that the support payments and benefits were sent into Massachusetts only as a result of the defendant's obligation under the Rhode Island divorce decree and the plaintiff's relocation to Massachusetts. Furthermore, the Court stated, the defendant's communications with his children were essentially unconnected with the children's residence.[42] The Court also rejected the contention that the defendant's letter to the plaintiff's Massachusetts attorney[43] constituted an intentional activity invoking the

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[36] *Morrill*, 390 Mass. at 128, 453 N.E.2d at 1227.

[37] *Id.*

[38] *Id.* at 128-29, 453 N.E.2d at 1227.

[39] G.L. c. 223A, § 3, provides in pertinent part: "A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action in law or equity arising from the person's (a) transacting any business in this commonwealth . . . ."

[40] 390 Mass. at 129-30, 453 N.E.2d at 1227-28.

[41] *Id.* at 130, 453 N.E.2d at 1228. G.L. c. 223A, § 3(a), as it then read, allowed the exercise of personal jurisdiction over anyone who acted directly or by an agent in relation to a cause of action in law or equity arising from the person's transacting any business in the Commonwealth.

[42] 390 Mass. at 131, 453 N.E.2d at 1228.

[43] The letter was in response to a letter from the plaintiff's attorney concerning the defendant's termination of payments. It stated that the defendant would go to court if necessary to defend his paternal rights and that he was contemplating seeking either custody of the children or readjustment of the support requirement. *Id.* at 131-32, 453 N.E.2d at 1228-29.

benefits and protection of Massachusetts law, and that his two brief stays in Massachusetts brought him within the reach of the long arm statute.[44]

Having concluded that the Massachusetts long arm statute did not supply a basis for the assertion of jurisdiction over the defendant, the Supreme Judicial Court did not address the issue of constitutional constraints on the exercise of jurisdiction under the long arm statute.[45] Providing a hint of the direction the Court may take in the future, however, the Court stated that had the issue been reached, it would have followed *Kulko v. Superior Court of California*,[46] in which the United States Supreme Court held that where a defendant did not purposefully derive benefit from any activities relating to the state of California, the California Supreme Court's reliance on the defendant's having caused an "effect" in that state was misplaced.[47]

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[44] *Id.*

[45] *Id.* at 133, 453 N.E.2d at 1230.

[46] 436 U.S. 84 (1978).

[47] 390 Mass. at 134, 453 N.E.2d at 1230 (quoting Kulko v. Superior Court of California, 436 U.S. 84, 96 (1978)).