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By Barry Ravech

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Although not marked by any plaque, nor recorded in the National Register of Historic Places, this mansard Victorian residence opposite Harvard Yard is, perhaps, the most significant legal landmark in the commonwealth. Completed in 1882, 1124 Massachusetts Avenue was home to Oliver Wendell Holmes, Jr. and his wife Fannie Bowditch (Dixwell) Holmes during his entire twenty-year tenure at Harvard. He left the property in 1902 upon his appointment to the Supreme Court. Cover photo by Roger Michel.
I. INTRODUCTION

A. Questions Posed

Perhaps sensing some uncertainty, or at least the desire for more clarity concerning the remedies available to persons coincidentally pursuing claims for wrongful death under the wrongful death statute (Massachusetts General Laws, chapter 229, section 2) and Massachusetts General Laws chapter 93A, section 2, the Supreme Judicial Court (“SJC”), prior to the argument in Klairmont v. Gainsboro Restaurant, Inc., solicited amicus briefs respecting three issues:

1. “Whether the wrongful death statute, G.L. c. 229, § 2, is the exclusive vehicle for awarding damages for a wrongful death.” [Answer, No].

2. “Whether multiple damages and attorney’s fees may be awarded in a wrongful death action based on violations of G.L. c. 93A.” [Answer, Yes].

3. “Whether a jury verdict in favor of defendants in a wrongful death action precludes a judge (on reservation of same) from awarding damages to plaintiffs for violations of G.L. c. 93A, based on the same facts.” [Answer, No].

These questions arose in the context of a wrongful death and chapter 93A suit seeking damages against the owners of a restaurant-bar by the estate of a 21-year old man who fell down an inside stairway leading to the basement. It was alleged that the stairway had been negligently built and maintained over an extended period and contrary to the applicable building laws. The young man died of his injuries.

B. Question Three

It is the court’s continuing negative response to the third question, which, while warranted by precedent, remains disquieting. Together with the societal disservice resulting from the diminished right to a jury trial in those chapter 93A cases which are otherwise fully consonant with common law claims for damages and for which equitable relief is not (or no longer) the principal objective of the proceeding, doubts rooted in recent history and the overall development of the statute confound our informed intuition, i.e., our experience and tacit knowledge. By reason of the incorporation into chapter 93A of almost all civil actions seeking money damages, the right to a jury trial has been eroded. When chapter 93A was enacted, whatever may have been intended or anticipated by way of its impact upon its common law underpinnings, those bedrock claims have been largely absorbed within the statute and presently represent nothing more than a substantive tail on the predominant chapter 93A dog.

There is much to criticize in the aftermath of the passage of chapter 93A, a self-styled consumer protection law with significant impacts upon non-consumer, business to business transactions. In reaffirming the principle that a jury’s warranted finding, respecting the penultimate factual issue of causation in a chapter 93A-negligence case, is not binding upon a trial judge, the SJC again has missed the mark.

More than 100 years ago, Justice Holmes expressed his view two or more persons, except in cases in which it has heretofore been otherwise used and practiced, the parties have a right to a trial by jury; and this method of procedure shall be held sacred, unless, in causes arising on the high seas, and such as relate to mariners’ wages, the legislature shall hereafter find it necessary to alter it.

Mass. Const. pt. I, art. 15 (ratified in 1780). In actions at law, “[d]isputed questions of fact were to be settled by a Jury.” Parker v. Simpson, 180 Mass. 334, 350 (1902). In a statement repeated in one form or another over nearly the past 50 years and covering a variety of chapter 93A claims, it has been noted: “Common law claims for deceit and fraudulent misrepresentation [and so-called, leveraged or extortionate breach of contract] often can form the basis for a chapter 93A claim.” Rodi v. S. New England Sch. of Law, 389 F.3d 5, 20 (1st Cir. 2004).


2. With respect to the third question, the SJC cited Specialized Technology Resources, Inc. v. JPS Elastomerics Corp., 80 Mass. App. Ct. 841, 844-46, 851-52 (2011). In Specialized Technology, the Appeals Court held that although the jury had found for the defendant on a number of common law claims and specifically that the defendant had not misappropriated the plaintiff’s trade secret, the trial judge’s power to render a directly contrary ruling that the defendant had misappropriated the plaintiff’s trade secret and violated chapter 93A was supported by “a rich body of precedent.” 80 Mass. App. Ct. at 845.


4. Article XV of the Massachusetts Declaration of Rights provides:

   In all controversies concerning property, and in all suits between
on the making of the law and the role of the judiciary in that endeavor. He laid emphasis on the importance of predictability, and when ordering our civil responsibilities, the wisdom of eschewing morality as a primary animating force. Seeking to “dispel a confusion between morality and law,” Holmes noted that “[a] man who cares nothing for an ethical rule which is believed and practiced by his neighbors is likely nevertheless to care a good deal to avoid being made to pay money.”

Central to his viewpoint was the predictive quality of the law. “The primary rights and duties with which jurisprudence busies itself again are nothing but prophesies.” He also addressed the place of the jury in resolving the many questions which arise in negligence cases. In this respect, it is the jury, not the trial judge, which is the embodiment of the reasonably prudent person. “Legal, like natural divisions, however clear in their general outline, will be found on exact scrutiny to end in a penumbra or debatable land. This is the region of the jury and only cases falling on this doubtful border are likely to be carried far in court.” He continued, “still the tendency of the law must always be to narrow the field of uncertainty.” Further, while history must be part of the rational inquiry for “the light it throws upon the present,” when new laws are passed, which judges must construe, “it is the present and the reliable foreseeable regulated conduct which must guide the courts’ actions.”

We can only speculate regarding the views of Justice Holmes and other pragmatists concerning the General Court’s decision to subject the conduct of substantially all of Massachusetts’s businesses to a judicially-managed civil regulatory regime. It is likely that they would not have embraced the imprecise and morally drenched chapter 93A standards of fairness and disclosure, which have been fittingly characterized as impossible to define. Nor, in this respect, would they have been satisfied with the illusion of cohesion amid the perplexity which exemplifies the law of chapter 93A.

Although theory and ideas are an important legal bulwark, a pragmatist is primarily concerned with predictable consequences and probable outcomes. Simpler programs and solutions are preferred. The judiciary carries the responsibility for, among other things, assuring persons subject to governmental compulsion of a fair and predictable process. This latter goal has been undermined in chapter 93A cases, where in denying the right to a jury trial, the court has fostered a needless dichotomy of results. It has accomplished this dubious achievement through a misguided reliance upon an historical distinction between the features of pre-constitutional claims for which jury trials were available. This form of analysis has been rejected in cognate Seventh Amendment jurisprudence. In combination with unsettled substantive standards, the procedural inconsistencies inspired by divided factual outcomes as occurred in Klairmont, weaken the fabric of fairness upon which so much of the law purportedly rests.

Empirically, the substantive core of the statute set forth in section 2 and acted in sections 9 and 11 has grown over, about, and around its common law antecedents. At its heart, the law remains tied to a shifting base; unpredictable and confusing. It has further modified its founding emphasis from protecting consumers to arm- ing businessmen in an expensive internecine struggle, with larger companies better equipped to engage in the fray. For consumers, individual chapter 93A claims, except those for substantial personal injuries, as in Klairmont, carry little weight. All of the heft lies with the attorney general and class actions.

In Klairmont, the SJC reaffirmed the denial of a right to a jury trial for claims made under chapter 93A. It did so in relation to the trial judge’s rejection of the justified findings of an advisory jury in favor of the judge’s own contrary factual conclusions. In the absence of abiding justification, where finality and justice are sought, an unambiguous conclusion is preferable to an internally incompat- ible result, no matter how limited the advisory nature of one of the sources of the dichotomous outcome. When a jury verdict on causation—even one neutral by its advisory status—is reversed, something more than “this is the way it is done” should be proffered. Among other things, jury verdicts represent a unique popular contribution to the juridical process. Any lessening of their impact underscores the base upon which the entire edifice rests.

The opinion in Klairmont exemplifies the court’s reliance upon apparent aim of the amendment was to bring all persons engaged in trade and commerce within the ambit of chapter 93A and authorize claims alleging unfair or deceptive acts between or among them. The message was and remains that commerce within the ambit of chapter 93A and authorize claims alleging unfair and unscrupulous actions of all businesses, not only vis a vis consumers, but also in connection with their dealings with each other. While protecting consum- ers from unscrupulous business persons, against whom they are presumed to be unable to protect themselves, may make sense, “deputizing” business per- sons to pursue others similarly engaged for treble damages and attorneys’ fees, guided only by a standard of wrongdoing, charitably characterized as elusive, is an entirely different matter. In retrospect, for a law, the hallmark of which was to aid consumers and redress a perceived unfair imbalance, to go through the wholesale transfer to a different transactional reality was unjustified and has been counterproductive.

6. O.W. Holmes, The Path of the Law, 10 HARV. L. REV. 457, 459 (1897). “Manifestly, therefore, nothing but confusion of thought can result from assuming that the rights of man in a moral sense are equally rights in the sense of the Constitution and the law.” Id. at 460. Cj. Gooley v. Mobil Oil Corp., 851 F. 2d 513, 515-16 (1st Cir.1989) (where conduct is unscrupulous and unethical “a violation of chapter 93A may be found.”).

7. Holmes, supra note 6 at 458. For recent discussions of the importance of predic- tability in connection with the assertion of “general jurisdiction” by federal courts over non-resident corporations and “final decisions” for appeal purposes, see Daimler v. Bauman, 2014 U.S. LEXIS 644, and Ray Haluch Gravel Co., v. Central Pension Fund, 2014 U.S. LEXIS 646, respectively.


9. Holmes, supra note 6 at 474.


13. See infra note 91, discussing the enforceability of contractual waiver of class actions in chapter 93A arbitration cases for persons unlikely to pursue those claims on an individual basis. The decisive argument (for the SJC) that the claims would not likely be pursued absent the clout of a class action was rejected by the Supreme Court deciding a case under the broadly encompassing provisions of the Federal Arbitration Act, 9 U.S.C. §§1-16 (2012) in American Express Co. v. Italian Colors Restaurant, 133 S.Ct. 2304, 2311 (2013) (“The class-action waiver merely limits arbitration to the two contracting parties. It no more eliminates those parties’ right to pursue their statutory remedy than did federal law before its adoption of the class action for legal relief in 1938…”).

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phraseology, rather than analysis. As hereinafter discussed, there are other constructive ways to look at jury trials under the not so suddenly emergent chapter 93A albatross, which are consistent with the intent and purpose of the statute and article 15 of the Massachusetts Declaration of Rights.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Jacob's Fall and Death

On or about 1:00 a.m., April 1, 2007, Jacob Friedman and several friends visited the bar and restaurant known as Our House East. The building in which the business operated was owned by a nominee trust controlled by the defendants and was located nearby Northeastern University, where 21 year old Jacob was a student. Along with several alcoholic drinks he imbibed before arriving at Our House, Jacob was served two beers while there. He fell down the staircase and sustained injuries which, shortly thereafter, led to his death.

The precise state of Jacob's intoxication and its contribution to his death, if any, were contested at trial. Along with the effects of Jacob's alcohol consumption, the manner of his fall, the configuration of the hallway and adjacent staircase leading to the basement, and the circumstances surrounding its original construction and re-modeling formed the basis of the inquiry into liability and, ultimately, the punitive award.

At around 1:46 a.m., Jacob became engaged in a cellular telephone conversation. Seeking a quiet place to speak, Jacob walked into the hallway area. On his right was the kitchen area. On his left, and obscured by a grouping of vinyl strips, was an unguarded, steep and neglected staircase leading to the cellar, where supplies were stored. No landing or door protected the staircase. Because no one witnessed the fall, the parties' experts proposed alternative scenarios of how and why Jacob, more likely than not, lost his balance and fell down the stairs. Resolution of the penultimate factual issue lay in the role played by the defendants and the decedent in causing his fall: Why did he fall and who was responsible?

The area where Jacob fell was initially constructed around 1982 or 1983 and accomplished without the benefit of a building permit. In 1984, 1987, and 1998, the building was remedied and underwent changes in use, each of which required a new inspection, building permit and, critically, a code update. There was little, if any, compliance with these preconditions. As built and maintained since its initial construction, the stairway was in serial violation of the then-applicable building codes (the SJC characterized the staircase as containing "multiple and very serious hazards"). By failing to obtain building permits, the defendants evaded the necessity and expense of upgrading the stairway with an appropriate door, a landing, lighting, handrails and the removal of the obscuring vinyl strips. Further, there were a number of incidents at the hallway, stairway and basement which indisputably placed the owner and operator of the bar on notice of the danger posed by the mode of access to and use of the stairway. It is undoubted that because of the configuration of the hallway and stairway, it was foreseeable that a customer like Jacob might fall. The cause of Jacob's fall received comprehensive scrutiny at the trial.

B. Commencement of Litigation

Jacob's parents were his sole heirs, co-administrators and co-plaintiffs in this proceeding. Prior to instituting suit, they sent a demand letter pursuant to chapter 93A, section 9, in which they alleged that the owners of the land and the operators of the bar (all of the defendants) intentionally and willfully constructed and maintained the stairway and its immediate environs in violation of multiple provisions of the applicable building code, and which, pursuant to a regulation of the attorney general constituted unfair or deceptive acts in violation of chapter 93A. The plaintiffs also

14. "It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis." Hyde & Schneider v. United States, 223 U.S. 347, 391 (1909) (Holmes, J., dissenting). Chapter 93A has generated a bountiful assortment of catchwords and shorthand expressions, many of which attempt, futilely, to explicate the substance of the statute. In addition to the statutory identifiers of "unfair" and "deceptive," we are reminded in Klaarmont v. Gainsboro Restaurant, Inc., 465 Mass. 165, 174-75 (2013) (quoting PMP Assoc. v. Globe Newspaper Co., 366 Mass. 593-96 (1964)), wherein the SJC embraced the elusive fairness standards adopted by the Federal Trade Commission. See FTC v. Sperry & Hutchinson Co. 405 U.S. 233, 244 (1972). Thus in PMP, the court set forth the considerations to be used in determining whether a practice is to be deemed unfair:

(1) whether the practice ... is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers or (competitors or other businessmen). If all three factors are present, the challenged conduct will surely violate Section 5 ... if it is exploitive or inequitable and if, in addition to being morally objectionable, it is seriously detrimental to consumers or others.

It is from these too-glib antecedents that a meaningful law is supposed to function. When seeking constancy within this substantive milieu, persons doing business in Massachusetts are disobligingly told that a salient principle underlying chapter 93A is its sui generis ("of its own kind") meaning. Good luck with that! See Kattar, 433 Mass. at 12 ("The relief available under c. 93A is sui generis. It is neither wholly tortious nor wholly contractual in nature."). In V Mark Software, Inc. v. EMC Corp., 37 Mass. App. Ct. 610, 620 (1994), the court stated: "To be held unfair or deceptive under chapter 93A, practices involving even worldly-wise business people do not have to attain the antithoric proportions of immoral, unethical, oppressive, or unscrupulous conduct, but need only be within any recognized or established common law or statutory concept of unfairness. (citations omitted). One reason expressed for this inexactitude is the need to remain flexible; else, the bad guys will figure a way around the law.

15. The trial judge found that Jacob "was under the influence of alcohol prior to and at the time of his fall." Klaarmont v. Gainsboro Restaurant, Inc., 2011 Mass. Super. LEXIS 91, at *13 (Feb. 21, 2011). According to the Brief of Defendants-Appellants at 3, "[a] post-mortem examination at the Brigham and Women's Hospital determined that he had a blood serum alcohol level of 0.246, which computes to a blood alcohol level of 0.208. (T. 2925)."


17. "The defendants knew several people had fallen down the staircase since its construction, and the defendants and management employees of Our House East had been warned multiple times that the staircase was in a dangerous condition and should be fixed." Id. at 184.

18. Pursuant to chapter 93A, §2(e), the "attorney general may make rules and regulations interpreting the provisions of subsection 2(a)." 940 C.M.R. §3.16(3) (1993), promulgated by the attorney general, breathtakingly provides, in part: "an act or practice is a violation of [G. L.] c. 93A, §2(a) if ... it fails to comply..."
claimed that the defendants were strictly liable for violating Massachussets General Laws chapter 143, section 51. The defendants initially offered $25,000.00 and then $75,000.00 in settlement. The offers were rejected. The plaintiffs filed a complaint alleging wrongful death under Massachusetts General Laws chapter 229, section 2, based upon theories of negligence, gross negligence, willful, wanton or reckless conduct and strict liability under Massachusetts General Laws chapter 143, section 51. A separate count for violation of chapter 93A was included in the complaint.

C. The Litigation

The jury decided the common law negligence claims to recover damages under the wrongful death act in the defendants’ favor. The judge directed a verdict in favor of the defendants on the chapter 143, section 51, strict liability claim and consistent with common practice, the judge reserved to herself a ruling on the chapter 93A claim. At the judge’s request, the jury provided an advisory finding on causation on the chapter 93A count. It determined that although the defendants failed to comply with the building code, “the violations were not a substantial contributing cause of Jacob’s death.” The judge further found that while the defendants were negligent, “the negligence was not a substantial factor in causing Jacob’s death.”

Following up on these findings, the jury returned a verdict in favor of the defendants on the plaintiffs’ wrongful death claim. That in so finding, the jury decided the inseparable issue of Jacob’s contributory and superseding negligence/fault/causation in favor of the defendants, is indisputable.

Rejecting the nonbinding advisory verdict on causation and the jury’s absolution of the defendants, the judge decided that “Jacob fell and suffered a fatal injury because the stairs were in an unsafe, defective condition, having been built and rebuilt without the necessary Building Permits and not in compliance with the State Building Code.” The judge concluded that multiple unsafe conditions of the staircase “likely contributed to Jacob’s fall” and that “none of [the unsafe] conditions of the stairs ... would have been present if the defendants had obtained the necessary building permits.” Based upon the foregoing, the judge determined that the conduct of the defendants was unfair, deceptive, knowing, intentional and willful. She awarded the plaintiffs multiple damages, attorney fees and costs under chapter 93A. More precisely, she awarded (i) the estate single damages of $744,480 for its economic loss and (ii) each parent $750,000 on account of the loss of Jacob’s advice, comfort, counsel and consolation. She trebled the total award to $6,733,440, to which was added more than 2 million dollars in counsel fees.

The SJC granted direct appellate review, modified and remanded the damages and attorney’s fees awarded to each of Jacob’s parents as unwarranted under chapter 93A, but otherwise upheld the judge’s findings, rulings and judgment.

III. Issues on Appeal

A. Statement of the Issues

1. May claims under chapter 93A premised solely on violations of the building code constitute unfair or deceptive conduct? What is the effect of 940 Code of Massachussets Regulation section 3.16 (3), where multiple building code violations underlay a chapter 93A violation?

2. May an administrator of an estate bring a claim under chapter 93A separate and apart from a claim under the wrongful death act? Does the chapter 93A claim survive under Massachusetts General Laws chapter 228, section 1, and if so, what damages are recoverable by the estate and may multiple damages and attorney’s fees be awarded?

3. May a judge enter a finding which completely contradicts a jury finding to the contrary? More to the point, would the SJC revisit and revise its earlier affirmative holdings on this issue?

B. Building Code Violations and Chapter 93A

That the defendants engaged in continuing building code violations which potentially endangered the patrons of the bar was a

with existing statutes, rules, regulations or laws, meant for the protection of the public’s health, safety, or welfare promulgated by the Commonwealth or any political subdivision thereof intended to provide the consumers of this Commonwealth protection.... The court listed the many sections of the Massachusetts State Building Code, 780 C.M.R., allegedly violated by the defendant. Klairmont, 465 Mass. at 170 n.11. It would appear that the attorney general’s regulation does not apply to section 11 cases. See Baker v. Goldman Sachs & Co., 2013 U.S. Dist. LEXIS 126023, at *11 (D. Mass., Sept. 4, 2013); Knapp Shoes, Inc. v. Sylvania Shoe Mfg., Corp., 418 Mass. 737, 743 (1994).

Mass. Gen. Laws ch. 143, §51 (2012), provides, in pertinent part: “The owner, lessee, mortgagee in possession or occupant, being the party in control, of a place of assembly ... shall comply with ... the state building code ... and each person shall be liable to any person injured for all damages caused by a violation of any said provisions.”

A person who (1) by his negligence causes the death of a person, or (2) by willful, wanton or reckless act causes the death of a person under such circumstances that the deceased could have recovered damages for personal injuries if his death had not resulted, shall be liable in damages in the amount of: (1) the fair monetary value of the decedent to the persons entitled to receive the damages recovered, as provided in section one, including but not 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; (3) punitive damages in an amount of not less than five thousand dollars in such case as the decedent’s death was caused by the malicious, willful, wanton or reckless conduct of the defendant or by the gross negligence of the defendant. Damages under this section shall be recovered in an action of tort by the executor or administrator of the deceased.

The SJC revisited and revised its earlier affirmatory holdings on this issue.

Id. at 169 n.10. Nothing in the SJC opinion indicates that any of this “c. 93A evidence” formed the basis for the differing outcomes reached on causation by the jury and the judge.

Id. at 170.

See supra note 18.

It is settled, if not uniformly embraced, that the judge is not bound or constrained by the jury’s verdict on the contract and warranty counts, and could properly reach a decision inconsistent with the jury’s. Poly v. Moylan,
difficult proposition for them to turn aside. The defendants pressed their claim that it was Jacob’s intoxication which proximately caused his fall. They further argued that the attorney general’s regulation impermissibly swept too many statutes and similar governmental dictates [here, the building code violations] within the scope of potential liability under chapter 93A. In this respect, the Appeals Court previously had warned that an overbroad reading of the regulation “would siphon into the province of chapter 93A a bottomless reservoir of ulterior public health, safety and welfare infractions regulated by separate programs of the police power.”

The SJC mostly agreed with this latter proposition and limited the application of the regulation to those building code violations which were unfair or deceptive, which, although not self-defining, in this context meant that they created conditions hazardous to patrons drinking alcohol, and allowed them to subsist over an approximately 20 year period. The court specifically held that a violation of a law or regulation, including a violation of the building code, while evidence of negligence, will constitute a violation of chapter 93A, section 2, only if the conduct leading to the violation falls within the “constraints” of the penumbral concept of unfairness or deception, meaning that the deceptive conduct has the capacity to cause persons to act differently. Echoing many prior cases, the court noted that whether a particular violation supports a finding of unfair or deceptive conduct “is best discerned from the circumstances of each case.”

The SJC pinned the unfair and deceptive nature of the building violations on the dangers posed to patrons by the close proximity of the hallway and staircase to the bar and the failure of the management to disclose these conditions, thereby misleading customers, including possibly intoxicated patrons, into believing that the bar, and especially the publicly accessible hallway area, was a safe and quiet place in which to engage in a telephone discussion. Further, these violations were motivated by a desire to avoid the “expense and complications of required improvements.” While this same evidence of motive was also relevant to a finding of negligence by the defendants [think, product liability cases], because the conduct was labeled unfair or deceptive within the expansive definition of those terms under chapter 93A, the trial judge warrantably assessed multiple damages and attorney fees, not just in the absence of a jury finding, but in the face of a contrary one.

C. Exclusive Statutory Remedy for Wrongful Death.

The wrongful death statute provides for the recovery “in tort” by the representative of the decedent’s estate of so-called loss of consortium damages, including reasonably expected net income. Massachusetts General Laws chapter 229, section 6 provides: “In any civil action brought under section two or five A, damages may be recovered for conscious suffering resulting from the same injury, but any sum so recovered shall be held and disposed of by the executors or administrators as assets of the estate of the deceased.” The trial judge rejected the argument that the statute provides the exclusive remedy for an injury which results in death. Rather, she determined that, provided the procedural steps set forth in chapter 229 are followed, a separate and additional claim for death under chapter 93A (“not in tort”) may be pursued by the co-administrators.

Relying upon Migl v. Holyoke and Tarpey v. Crescent Ridge Dairy, Inc., the SJC affirmed this ruling of non-exclusivity. Finding that common law actions parallel to a wrongful death statutory suit are available for injuries and death, the question for the SJC was reduced to whether, under Massachusetts General Laws chapter 228, section 1, Jacob’s [non-common law] chapter 93A claims for damages survived his death. The SJC consulted subpart (2) of section 1 of chapter 228, which provides for the survival of “Actions of tort (a) for ... other damage to the person...” Previously, the SJC had confined the survival of chapter 93A claims to those which were contractual in nature. The question of whether claims which are not contractually derived and are brought under chapter 93A survive death had been left open. Having established a tort-like basis for the chapter 93A claim in the defendants’ continuing failure to address a dangerous situation and in the process, violating numerous building code provisions, the court ruled that “this c.
93A claim presents a cause of action that is substantively akin to the type of torts within the scope of Mass. Gen. Laws ch. 228, §1 and survived Jacob's death.35 Looking to the underlying nature ("gist") of a claim to resolve the applicability of both the substantive and procedural rules applicable to established tort or contract claims is well established.36 The continuing failure of the court to carry this analogy to its logical and appropriate conclusion when re-analyzing the "legal" nature of the allegations underlying the plaintiffs' chapter 93A claim and its impact upon the defendants' right to a jury trial remains perplexing.

D. Damages

Although the jury awarded the plaintiffs nothing, the total amount of the multiple damages, fees and costs bestowed by the trial judge exceeded $9,000,000. The SJC disagreed with the chapter 93A damage award to the co-administrators. More specifically, the court ruled that the trial judge erroneously awarded $750,000 to each plaintiff as compensation for the "personal loss of Jacob's advice, comfort, counsel and consolation." This portion of her award essentially mirrored the consortium type damages available under chapter 229, which the jury had refused to grant. Accordingly, the court held that those damages could not be a part of a chapter 93A recovery.37 The court limited the estate's chapter 93A damages to those that were "causally related" to the violations of chapter 93A and "actually sustained by Jacob up to the point of his death."38 In this respect, for an injury and causally related death under chapter 93A, the estate may be compensated only "to the extent that the decedent, Jacob, would be able to recover on such a claim."39 Because the wrongful death statute permits loss of consortium and conscious suffering damages, the judge erred in awarding this type of damages in the plaintiffs' chapter 93A case. Correction of this error having resulted in a substantial reduction in the award, a remand was ordered for a new consideration of the damages, attorney's fees and costs.

E. Causation – The Fractured Outcome

The SJC rejected the request of the defendants and several amici curiae to reverse the rule which allows a judge to make findings under chapter 93A which are contrary to those made by an advisory jury considering the issue of causation.40 In refusing the defendants' request, the court noted that the defendants' right to a jury trial under the wrongful death act was neither compromised nor overridden by the judge's contrary ruling under chapter 93A. Since there is no right to a jury trial under chapter 93A,41 the jury's response to the requested advisory opinion, where it found no legally significant causal connection between any of the defendants' improper acts and the decedent's injuries and death, was irrelevant to that claim. Thus, the contrary negligence finding under the wrongful death act for the same acts, including acts of which the same evidence was admissible, was dismissed as irrelevant. Simply stated, "the plaintiffs' claim under chapter 93A is a separate and distinct statutory claim for which the plaintiffs may recover separate and distinct damages."42 The conflicting outcomes of two fact finders in any case provoke questions about the policy considerations underlying a procedure which endorses such inconsistent results for the same acts. In refusing to step away from this potentially disharmonious process, the court ought to have provided a more reasoned analysis, especially where the plaintiffs' chapter 93A claim, at trial, had been reduced to an action to recover damages. More directly, the court missed an opportunity to confront the real problem -- the absence of a right to a jury in a damage action, which, of course, is precisely what Klairmont was all about.

IV. DISCUSSION

A. Equitable Relief

As just noted, there is little difficulty with the precedential basis for the court's holding. However, anyone discomforted by the historically formless elaboration of chapter 93A would likely be displeased with Klairmont's affirmation of the subservient role of the jury. Such disquiet is not rooted in the notion that for many statutory and [former] suits in equity, jury trials are unavailable. This has long been the case.43 Rather, here we have the words and considered "ruling" of a jury hearing substantially the same evidence as the trial judge and deciding which of the contestants acted in a reasonably responsible manner. Importantly, the jury was not asked to decide mixed questions of law and fact, or whether the defendants' acts were unfair or deceptive, although a jury could, and, as a matter of policy, should have been so charged.44 Nor was the jury confronted with the need to resolve any of the complexities with which
one might deal in connection with a patent suit involving intricate mechanical issues, technical terms or intricate economic, medical or other obscure subjects and concepts. Klairmont concerned easily understood alleged failures to act with reasonable care, including building code improprieties relating to the construction and maintenance of the hallway and staircase in a restaurant/bar, and whether those violations caused Jacob to fall; or if causation rooted in Jacob’s conduct supervened.

Both the judge and jury were aware of the same mundane circumstances surrounding Jacob’s accident, including the myriad code violations. Importantly, Jacob’s physical and mental condition leading up to and at the time of the fall were well-rehearsed. At its core, this was a garden-variety alcohol-related premises liability damage action, no more arcane than a jury’s analysis of the alleged pregnancy-related job termination in which the court declared a right to a jury trial in Dalis v. Buyer Advertising, Inc.45 A prominent part of the court’s reasoning in support of Ms. Dalis’s right to a jury trial under article 15 rested in her pursuit of damages. Explaining that “the language of article 15 sweeps broadly,” the court upheld the jury trial right, as “the plaintiff does not seek primarily equitable relief.”

The court in Dalis further explained that the “plaintiff’s sex discrimination claim is analogous to common law actions sounding in both tort and contract.”46 The fact that Massachusetts General Laws chapter 151B provides for a panoply of equitable relief in the form of rehiring, modification of employment practices, mandatory training and education, often ordered along with monetary awards, was either ignored or deemed inconsequential. The SJC in Dalis sought to distinguish its prior denial of a jury trial under chapter 93A in Nei v. Burley, noting that “the outcome in Nei turned on the ‘equitable nature of the relief’ sought under c. 93A… By contrast, the nature of the plaintiff’s claim [in Dalis] is more analogous to actions at common law, and the relief sought by the plaintiff is predominantly legal.”47

A fair reading of Nei on this point does not support the court’s assertion. In Nei, the plaintiffs brought suit following their purchase of a purportedly buildable house lot. The plaintiffs alleged that because of a seasonal stream and excessive accumulation of water thereon, the land was not so suited. According to the SJC, the presence of excess water “forced the buyers to truck considerable amounts of fill to the lot … to meet the requirements of the applicable sanitary code.”48 The plaintiffs brought claims of breach of contract, fraud and violation of chapter 93A. The SJC stated that “the complaint avers that the increase in construction costs represents the buyers’ damages.”49 Nothing in the court’s opinion indicates that the plaintiffs were pursuing any equitable relief. Rather, in Nei, the court noted that “the equitable nature of the relief permitted [not sought] and the silence of the Legislature leads us to conclude that there is no right to a trial by jury for actions cognizable under G. L. c. 93A.”50

Further, neither Nei nor Parker v. Simpson, the seminal case interpreting the right to a jury trial under article 15,51 mandated the result in Klairmont. Rather, the SJC missed an opportunity, at the least, to re-order the manner and priority of fact finding in a circumstantial scenario, which constitutes the staple of chapter 93A cases. It is plain that the court has the authority to do so. The same broad outlines with which the court has sown the seeds and harvested the chapter 93A substantive and procedural fruit remain available to moderate this anomalous procedure; or, more forthrightly, overturn the ruling in Nei. In this respect, the opinion in Klairmont was not well-served by the mere recitation of several cases recognizing the permissibility of contrary findings by a judge and a jury. It is time to move on from the awkward and unacceptable procedure rooted in the jury-negating “legal/equitable” motif discussed in Parker.52 In all events, part of that rationale was procedurally mooted with the fusion of actions at law and suits in equity into civil actions with the adoption of the Massachusetts Rules of Civil Procedure.53

B. Causation

One would be hard pressed to find a more appropriate set of circumstances for the application of the insight and experience of a jury than was presented by Klairmont. The judgment of the jury was that Jacob’s fall was not the legal fault of the defendants. Indeed, the jury was asked to provide the judge with specific answers to the causation question and, if not previously, then at that time, they focused on that pivotal issue. The panel forthrightly determined that neither the defendants’ negligence nor their coincident, lengthy and extensive violations of the building code were a substantial contributing cause of Jacob’s death. There can be little doubt that the jury attributed decisive, intervening, causative acts of his injury and death to Jacob.54 In affirming the finding that the defendants’ wrongdoing was causally connected to Jacob’s injury, the SJC did not expond upon the contributory role Jacob’s drinking played in his fall. Nor did the court discuss the legal posture of Jacob’s contributory or comparative fault. All of these matters were folded into a determination that the judge’s finding that the “defendants’ violations of the building code caused Jacob’s fall…” was not clearly erroneous.55

55. In Lynn Gas & Electric Co. v. Meridien Fire Insurance Co., 158 Mass. 570, 575 (1893), the SJC explained proximate and intervening causation, stating that the “active efficient cause that sets in motion a train of events which brings about a result without the intervention of any force started working actively from a new and independent source is the direct and proximate cause….”
With the judge’s contrary conclusion, one may wonder if causation carries a different meaning under chapter 93A than it does for negligent or other determinative conduct under the wrongful death act. It does not. In whatever manner the differences were processed by the respective fact-finders, the results were at stark odds with one another. It is the underlying necessity, practicality and sagacity of continuing to favor a process that sanctions the disavowal of a jury’s considered judgment which educates our discontent. Whatever threadlike differences may be claimed to exist between the jury trial analysis in Nei and Dalis, either in the nature of the claims made, the remedy sought or the underlying statutes, reliance upon Nei to sustain the outcome in Klairmont was inexplicably wide of the mark. After Dalis, the denial of a right to a jury trial in chapter 93A cases is without precedential legitimacy. In a concurring opinion in Hershenow v. Enterprise Rent-A-Car, Justice Cowin disdained the court’s refusal in that case to distinguish its earlier ruling in Leardi v. Brown. With language particularly suitable to a purported distinction between Nei and Dalis, Justice Cowin said, “The court’s effort to distinguish the cases seems to me to arise not so much from analytical conviction but from a desire to avoid acknowledging that Leardi [Nei] was wrongly decided.”

C. The Roots and Evolution of Chapter 93A

Klairmont deserves consideration for many reasons, not the least of which is as a reminder of how far the judiciary has moved the chapter 93A jurisprudential needle since its enactment in 1967. From then to now, the scope of its coverage and its impact upon all civil actions has been extraordinary. Whatever may be the factual underpinning of a claim involving a person engaged in trade or commerce, an attorney who fails to include an allegation of a chapter 93A violation, without good and sufficient reason to do so, is playing with professional malpractice fire. The process followed in Klairmont highlights the impact of the absence of a jury trial for a claim, [or perhaps more accurately, a critical subset of that claim] made under chapter 93A, where the jury’s advisory finding on a core issue, was rejected by the trial judge. The regularity of this occurrence diminishes neither its significance nor its unpropitious effect.

The impetus for chapter 93A was a desire to establish a more equitable balance between consumers and the businesses with whom they deal. As is often the case, a new political reality, here, a wave of so-called “consumerism” garnered popular and legislative attention, not only in Massachusetts, but in state legislatures across the nation. It would be left to the judiciary to supply the substantive and procedural interstices for this far-reaching regulation of practically all Massachusetts’ businesses. While not an unlawful delegation of legislative power to the judiciary, the legislature anticipated a judicial amplification of a law whose scope and meaning it delimited within broad and sketchily defined borders. In this context. A further example of the trial judge’s causal equivocation is manifest in the contribution-related 50 percent reduction of the plaintiffs’ economic damages. See supra note 30.

57. Causation is a necessary element for recovery under chapter 93A. Aspinall v. Philip Morris Cos., 442 Mass. 381, 401 (2004) (“It states nothing more than what our own decisions have made perfectly—causation is a required element of a successful G. L. c. 93A claim.”); McCann v. Davis, Malin & D’Agostine, 423 Mass. 558, 561 (1996) (“The jury finding that the defendants’ negligence was not the proximate cause of the plaintiff’s damages disposed of the G. L. c. 93A claim as well.”); Int’l Fid. Ins. Co. v. Wilson, 387 Mass. 841, 850 (1983) (“In the absence of a causal relationship between the alleged unfair acts and the claimed loss, there can be no recovery.”).


61. Chapter 93A, which was inserted by St. 1967, c. 813, §1, is designated the “Regulation of Business Practice and Consumer Protection Act.” St. 1967, c. 813, §2. Chapter 93A, §9(1), provides “Any person … who has been injured by another person’s use or employment of any method, act or practice declared to be unlawful by [chapter 93A, §2] or any rule or regulation issued thereunder … may bring an action in the superior court ….” Section 2(a) of chapter 93A declares unlawful “methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.” Section 9(4) of chapter 93A provides:

If the court finds in any action commenced [under §9] that there has been a violation of c.93A, §2, the petitioner shall, in addition to other relief provided by this section and irrespective of the amount in controversy, be awarded attorney’s fees and costs incurred in connection with said action ….

The statute was amended in 1969 to provide private relief, including for punitive damages, attorney’s fees, costs and class actions. St. 1969, c. 814, §3. An amendment in 1972 subjected persons engaged in trade or commerce to the provisions of §2, St. 1972, c. 614. In 1979, St. 1979, c. 406, §1, deleted the “loss of money or property” requirement in chapter 93A, §9 and replaced it with a broader “[a]ny person … who has been injured” provision, see Haddad v. Gonzalez, 410 Mass. 855, 865 (1991), which morphed into recovery on account of “the invasion of any legally protected interest of another.” Hershenow, 445 Mass. at 800.


63. Chapter 93A was enacted to “improve the commercial relationship between consumers and business persons and to encourage more equitable behavior in the marketplace.” Poznik v. Mass. Med. Prof’l. Ins. Ass’n, 417 Mass. 48, 53 (1994). “Every consumer is, of course, entitled to the full protection of law. If any person invades a consumer’s legally protected interests and if that invasion causes the consumer a loss—whether that loss is economic or noneconomic—the consumer is entitled to redress under our consumer protection statute.” Hershenow, 445 Mass. at 802. While difficult to contend logically with the sweep of that statement, the manifest consequence of chapter 93A has been to place an entire swath of broadly inclusive regulatory power in the hands of the judiciary, which, the SJC decided, was not to be mandatorily informed by a jury. Nor is this profound modification of the duties and obligations of businesses (“persons engaged in trade or commerce”) limited to the adjustment of rights among businesses and their customers; under chapter 93A, §11, capacious regulates “[encourages more equitable behavior in]” the conduct of businesses, among themselves. By 1972, the perceived imbalance had been extended to include a penumbral fairness/disclosure component in all commercial transactions among business persons in Massachusetts. Thus, did our consumer protection based law transmogrify into a wide-ranging revision of the law respecting dealings among business persons.

64. Annotation Right to Private Action Under State Consumer Protection Act—Preconditions to Action, 117 A.L.R.5th 155, Summary (2013) (“Virtually every state in the nation permits one or more nongovernmental parties to enforce state ‘Little FTC Acts,’ laws of general applicability prohibiting deceptive or unfair acts and practices in the marketplace”); see De Coris v. Commonwealth, 366 Mass. 234, 238 (1975) (“This act is one of several legislative attempts in recent years to regulate business activities with the view to providing proper disclosure of information and a more equitable balance in the relationship of consumers to persons conducting business activities.”). 65. Art. 30 of the Massachusetts Declaration of Rights provides that “the executive [and judicial branch] shall never exercise the legislative…powers.” In Opinion of the Justices, 302 Mass. 605, 614 (1939), the court stated that “the
respect, while performing a “quintessential judicial responsibility,”66 the Massachusetts courts have essentially presided over a continuous “legislative” endeavor.67 Fulfillment of that task has resulted in a corpus juris consisting of thousands of trial and appellate decisions, each helping to shape, but not crystallize, an obscure, vague, almost opaque, yet comprehensive, regulation of business in Massachusetts. Moreover, this aggrandizement of power by the unelected branch has proceeded, for the most part, without mandated input (advisory opinions aside) from a critical and heralded source of our collective community values and a primary authority on reasonableness.68

The fountainhead of chapter 93A is the Federal Trade Commission Act (“FTCA”), originally enacted in 1914, significantly amended in 1938,69 and which in critical contradistinction to chapter 93A, does not provide for private party single or multiple damage relief.70 Rather, proceedings at the Federal Trade Commission (“FTC”) are conducted by an agency informed by its expertise on a host of potential unfair or deceptive sales and marketing practices with appropriate administrative remedies [primarily cease and desist orders] to follow.71 In describing the role of the FTC in interpreting unfair or deceptive act or practices, the Supreme Court persuasively explained the advantages the agency holds over courts undertaking the same task.72 While marked by excellence at all levels, the Massachusetts courts have neither the expertise, the staff nor the resources to properly assess and categorize the myriad commercial practices which predominate a chapter 93A assessment. The substantive touchstone of chapter 93A, with its potential for a sizable penalty upon

Legislature cannot delegate its law making power or any power explicitly reposed in it. At the same time, “if the General Court indicates in broad outline its purposes and the methods by which they are to be accomplished it can delegate to some other body the working out of all the details.” Opinion of the Justices, 334 Mass. 721, 743 (1956). In Springer v. Government of Philippine Islands, 277 U.S. 189, 201-02 (1928), the Supreme Court stated, “there is in the general rule inherent in the American constitutional system, that, unless otherwise expressly provided or incidental to the powers conferred, the legislature cannot exercise either executive or judicial power; the executive cannot exercise either legislative or judicial power; the judiciary cannot exercise either executive or legislative power....” “Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement.” Id. at 202. In his dissent in Springer, Justice Holmes noted: “The great ordinances of the Constitution do not establish and divide fields of black and white. Even the more specific of them are found to terminate in penumbra shading gradually from one extreme to the other....” Id. at 209-10. Whether a specific delegation of power infringes upon art. 30 is a “question of degree.” Commonwealth v. Clemney, 447 Mass. 121, 134-35 (2006). The determinative factors in the unlawful delegation calculus are set forth in Murphy v. Massachusetts Turnpike Authority, 462 Mass. 701, 709-10 (2012).

American appellate courts have been working out the “details” of their authority to engage in judicial review of the Constitution and statutes since immediately following the country’s founding. See Marbury v. Madison, 1 Cranch 137, 153-80 (1803) and Prudential Ins. Co. v. Boston, 369 Mass. 542, 547 (1996) (“[i]t is the function of the court to construe a statute as written and an event or contingency for which no provision is made does not justify judicial legislation.”); see generally Gordon Wood, Empire of Liberty, 440-49 (2009). For an excellent and informative review of the statutory interpretative process in Massachusetts, see Lawrence D. Shubow, Statutory Construction in Massachusetts, 79 Mass. Law. Rev. 114, 116 n.33 (1994) (“These decisions [concerning the law of statutory interpretation] are complex, contradictory and not readily reconcilable.... Scholarly commentators... have contributed to a vast literature...seeking to define the relationship between the courts and legislature on the premise that actual interpretation is judge-driven.”).


So certain is Metropolitan’s interpretation of it that it [argued that the court]... violated the doctrine of separation of powers, as expressed in art. 30 of the Massachusetts Declaration of Rights, in reaching a contrary result. Metropolitan contends that the lower courts “exceeded their judicial authority” and “stretch[ed] the meaning of the [no-fault insurance] statute to create a remedy for the alleged ‘injustice’ claimed by DiGiacomo,”... [characterizing the] court decisions as “judicial legislating.”

This argument reflects a basic misunderstanding of the function of the courts in performing statutory construction. When, as in this case, the meaning of a statute is in dispute, unquestionably it is for the courts to interpret it and apply it to the facts at hand. Statutory interpretation is a quintessential judicial responsibility, to be undertaken using well-established guiding principles.

67. “Law is a statement of circumstances in which the public force will be brought to bear upon men through the courts.” American Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909). A legislature is “an officially elected or otherwise selected body of people vested with the responsibility and power to make laws for a political unit, such as a state or nation.” The American Heritage Dictionary of the English Language, (4th ed. 2000). While the court has taken upon the “law making” aspect of its chapter 93A role in recognition of the breadth it perceived to lie within the statute’s purpose, it has not undertaken any meaningful effort to assert that the legislative branch re-establish its constitutional obligation to make the law, or designate an administrative agency which may be better equipped than courts to do so. This, some would say activist approach is consistent with long established practice of the SJC, which gained national attention in Goodridge v. Department of Public Health, 440 Mass. 309, 317-18, 343 (2003). In Goodridge, the court revisited the societal and its own understanding of the term “marriage” in a public health statute, in light of the contemporarily-perceived requirements of the equal protection and related provisions of the Massachusetts Constitution. The SJC viewed the marital relationship as one which had evolved and, as such, required a further accommodation between our charter and the need to fulfill the demands of an equity-seeking society pursuing the elimination of invidious discrimination. Whether all of the court’s assumptions and conclusions in Goodridge were correct is important, but not self-evidently more important than the role the SJC assumed as the final arbiter of a contentious dispute that many have argued in a representative democracy resided solely with the legislature. The issue was framed, with justification, as an aspect of the protective constitutional mantle to which a minority group was entitled.

In a 1910 letter to Harold Laski, Oliver Wendell Holmes commented upon the subject of lawmaking by judges as follows: “I have regarded those who doubted that judges made law (interstitially) as simply incompetent or else carried away by a hobby.” The Essential Holmes 265 (Richard A. Posner, ed. 1992).

68. Some might perceive it anomalous that liability under chapter 93A is rooted in the discernment of fairness, ethical behavior, and affirmative disclosure obligations, while at the same time remaining disconnected from jury participation as-of-right, where the latter gathers its collective wisdom from the ideals, values, scruples and standards from that same community of ideas.

69. As originally adopted, the FTCA prohibited only unfair methods of competition. Act of Sept. 26, 1914, c. 311, §5, 38 Stat. 717, 719. The FTCA was amended in 1938 to include a prohibition against unfair or deceptive acts or practices. Act of Mar. 11, 1938, c. 49, §3, 52 Stat. 111 (codified as amended at 15 U.S.C. §45[a] [1] (2012)).

70. Alfred Dunhill, Ltd. v. Interstate Cigar Co., 499 F.2d 232, 237 (2d Cir. 1974); see Dreisbach v. Murphy, 658 F.2d 720, 730 (7th Cir. 1981) (“Private litigants may not invoke the jurisdiction of the federal district courts by alleging that defendants engaged in business practices proscribed by § 5(a)(1). The Act rests initial remedial power solely in the Federal Trade Commission.”). It should be recalled that when passed in 1967 chapter 93A, like its precursor, the FTCA, was amended in 1969 to include a prohibition against unfair or deceptive acts or practices. Act of Mar. 21, 1969, c. 40, §3, 83 Stat. 34 (codified as amended at 15 U.S.C. §45[a] [2] (2012)).


72. In FTC v. Colgate Palmolive Co., 380 U.S. 374, 385 (1965), the court stated:

It is important to note the generality of these standards of illegality; the proscriptions in § 5 are flexible, to be defined with particularity.
businesses for falling below its broad and inexact standards, remain the amorphous criteria of fairness and disclosure, both of which the legislature left substantively unstructured. In explicating the legal effect under chapter 93A following upon the interplay of all of the players engaged in trade and commerce, the judiciary has integrated its roles of policymaker and fact finder. In this respect, it has been held that while the factual bases of a chapter 93A determination are circumstantially informed, whether conduct violates the statute “is a legal, not a factual determination.” Because of the breadth and reach of chapter 93A, the merging of these roles, especially on the policy side, carries outsized meaning. Not to be forgotten in this connection, is that the governing language of chapter 93A is entirely rooted in the FTCA, which, significantly [and for 100 years], has not authorized a private damage remedy, let alone one sanctioning treble damages and attorney fees. Moreover, the idea that a legal standard appropriate to the functioning of an administrative agency—which, according to Judge Learned Hand, is charged with making “explicit those unexpressed standards of fair dealing which the conscience of the community may progressively develop”—ought to control the adjudication of potentially punitive civil damage actions between businesses, rather than just consumer transactions, undermines the legitimacy of the entire legislative scheme.

D. Jury Trials – Advisory and Otherwise under Chapter 93A
With the judicial branch—unaided by a jury and in full control by the myriad of cases from the field of business. This statutory scheme necessarily gives the Commission an influential role in interpreting § 5 and in applying it to the facts of particular cases arising out of unprecedented situations. Moreover, as an administrative agency which deals continually with cases in the area, the Commission is often in a better position than are courts to determine when a practice is “deceptive” within the meaning of the Act. Instead of a precise definition, the FTC and the courts overseeing its administration adopted a concept that does not “admit of precise definition but the meaning and application of which must be arrived at by … the gradual process of judicial inclusion and exclusion.” FTC v. R. F. Keppel & Bro., Inc., 291 U.S. 304, 310-12 (1934). In Mostyn v. Department of Environmental Protection, 83 Mass. App. Ct. 788, 797 (2013), the Appeals Court similarly commented:

However, the fact that DEP has to make its regulatory decisions in the face of scientific uncertainty and in a practical, real-world context does not assist Corcoran absent a demonstrated violation of the agency’s statutory or regulatory duties. To the contrary, such considerations highlight the appropriateness of leaving such policymaking to executive agencies armed with both technical expertise and statutorily delegated authority.

For a recent example of the SJC’s filling the perceived gaps in the Massachusetts anti-discrimination statute consistent with the long held view of the MCAD, the administrative agency authorized by Mass. Gen. Laws ch. 151B with adjudicatory and regulatory oversight, see Flagg v. Alimed, Inc. 466 Mass. 23 (2013). In Flagg, the court relied, in substantial part, upon its conception of the foundational purpose of the handicap statute in upholding a complaint alleging “associational handicap.” “The words must be evaluated in the context of the overarching purpose of the statute itself.” Id. at 28. It is noteworthy that the section of chapter 151B condemning handicap discrimination does not expressly recognize this type of claim. The court nonetheless connected (associated) the plaintiff’s allegedly improper termination with his wife’s cancer treatments by way of the anticipated increased medical insurance premiums his employer would have to pay as a consequence of those treatments. That the legislature could have included associational handicap as a basis for recovery, and did not do so, did not stay the hand of the court.

73. “The statute does not define unfairness, recognizing that ‘there is no limit to human inventiveness in the field’… . What is significant is the particular circumstances and context…” as long as it is within ‘the penumbra of some common law… or other established concept of unfairness.” Commonwealth v. Fremont Inv. & Loan, 452 Mass. 733, 742-43 (2008) (citation omitted). Settlement upon a comprehensive meaning of unfair or deceptive practices has not gone smoothly. Difficulties in designating, let alone, differentiating, the evolving illicit forms of conduct which lie along the unfairness/deception spectrum continue. Despite the efforts of talented judges, many of whom are reputable wordsmiths in their own right, satisfactory guidelines for the substantive definitional mainframe of chapter 93A remain elusive. Such divergent phraseology as has been tried has failed either to synthesize or singularize the ideas embodied in the statute. It appears that open-endedness has been achieved to the detriment of predictability. See Mass. Empire Ins. Exch. v. Propac-Mass, Inc., 420 Mass. 39, 42 (1995) (“We view as uninstructive phrases such as ‘level of rascality’ (Levings v. Forbes & Wallace, Inc., 8 Mass. App. Ct. 498, 504 (1979)) and ‘rancid flavor of unfairness’ (Atkinson v. Rosenthal, 33 Mass. App. Ct. 219, 224 (1992)).” It is of little comfort to the persons regulated that an appellate court has empathetically expressed its concern:

The decision in *Klairmont* brings into focus the felt dissonance ensuing from the court's continuing willingness to abridge a practice of jury disregard where the findings of "a judge deciding a chapter 93A claim … conflict with the specific and warranted answers given by the jury on a separate parallel common law claim." 77 How and why is this a good, or indeed an historically compelled, idea? The absence of a right to a jury trial under chapter 93A neither mandates the divided outcome in *Klairmont* nor the adverse effect it has on the administration of civil justice in Massachusetts. Having no right to a jury trial of a chapter 93A claim because of the statute's perceived equitable antecedents 78 does not lead inexorably to the conclusion that where, for example, the issue of causation for a plaintiff seeking damages for personal injuries or death can be segregated from the unfair or deceptive chapter 93A calculus, it ought not to be done that way. One alternative, if requested, is for the jury to decide the issue, either as a part of a mandatory jury issue framing process under Rule 39(c) of the Massachusetts Rules of Civil Procedure, or more directly as a part of a right to a jury trial in a case seeking a legal remedy.79 Preferably, *Nei* should be overturned or, at least modified, to require a requested jury trial, once discovery has revealed that the primary remedy sought is damages and not equitable relief 80

Chapter 93A furnishes no practical and workable definition of an unfair act or practice made unlawful by section 2(a). Attempts to clarify and guide have resulted in more than a recurring definitional lateral arbitrariness. Thus, in *Massachusetts Employers Insurance Exchange v. Propac-Mass, Inc.*, 81 the court seemed to abjure the PMP standard in favor of a "focus on the nature of challenged conduct and on the purpose and effect of that conduct as the crucial factors in making a fairness determination." 82 Whatever the intent or effect of the *Propac-Mass*, variant, *Klairmont* reminds us that we remain bound by the primordial definitional standards of fairness and deception highlighted by the FTC as a part of its 1964 "cigarette [warning] rule." 83 Nor does the definition of "deceptive" provide any further assurance to those who would be bound, "A practice may be deceptive if it could reasonably be found to have caused a person to act differently from the way he otherwise would have acted." 84 It is upon this Continuingly shifting base that, contrary to a jury's finding, a trial judge may award two or three times the plaintiff's personal and economic damages, attorney fees and costs; and did precisely that in *Klairmont*. While many specific practices have been legislatively determined to constitute violations of chapter 93A, 85 it is the judiciary which overwhelmingly decides whether particular conduct violates the statute and the attorney general's

78. It should be recalled that the unavailability of a jury trial stems from article 15, which provides for jury trials "in all suits between two or more persons … except in cases in which it has heretofore been otherwise used and practiced." See supra note 4. Actions to recover damages for personal injuries and death were and remain precisely such "cases."
79. It is of interest that when Rule 39 of the Massachusetts Rules of Civil Procedure was adopted, it did not include the federal analogue which expressly provides for advisory juries. Fed. R. Civ. P. 39 (c) states: "Advisory Jury; Jury Trial by Consent. In an action not triable of right by a jury, the court, on motion or on its own: (1) may try any issue with an advisory jury…." Conversely, Mass. R. Civ. P.39 (c) provides: "Framing Jury Issues. In all actions not triable of right by a jury, the court, except where otherwise provided by law, may upon motion frame issues of fact to be tried by a jury." The Reporter of the Massachusetts Rules states:

Rule 39(c) does not adopt the advisory jury, but retained the prior practice of framing issues of fact to be tried by a jury…. Because Rule 39(c), by definition, refers only to actions "not triable of right by a jury," it will apply principally in actions where the plaintiff seeks only equitable relief…. If, however, issues were framed for a jury the jury was not merely advisory [but rather mandatory].

While soliciting advisory opinions from a jury in equity cases meshes nicely with the history of the equity side of the court, and the theme that chapter 93A cases are those for which equitable relief is available, it does not satisfactorily explain cases for which no significant equitable relief is ultimately being pursued. Like the common law tort cases coincidently being decided by a jury in many chapter 93A cases, and where, as in *Klairmont*, the chapter 93A aspect of the case has been reduced to an action at law for damages, in the absence of a change in applicable law, Rule 39(c) should be used and binding jury issues framed.

The procedure for using advisory juries in chapter 93A cases appears to have been given its first appellate reference in *Charles River Construction Co. v. Kirksey*, 20 Mass. App. Ct. 333, 337-39 (1985), a case decided shortly after *Nei*. There is no analysis of the advisory jury in either *Charles River* or *Nei*. In Acushnet Federal Credit Union v. Roderick, 26 Mass. App. Ct. 604, 606 (1988), an advisory jury was used in a chapter 93A case, again without explanation. Nor was there any reference to Rule 39(c). Further, in this respect, *Kattar v. Demoulas*, 433 Mass. 1, 12 (2000), referred to Linkage Corp. v. Trustees of Boston University, 425 Mass. 1, 22 n.31 (1997), which, in turn, cited *Acushnet* and International Totalizing System, Inc. v. Pepsico, Inc., 29 Mass. App. Ct. 424, 435-36 (1990), neither of which discussed the advantages of using advisory juries in chapter 93A cases. In neither *Klairmont* nor the case cited by it, *Kattar*, is there any explanation or, for that matter, guidance, for the use or the consequences of an advisory jury in chapter 93A cases, other than the self-evident fact that no jury is required under *Nei*. Nor in any of these cases is there any discussion of the significance of the elimination from Rule 39(c) of its federal analogue concerning advisory juries, and replacing it with the binding quality of framing jury issues.

An explanation of sorts was provided in *Fine v. Cohen*, 35 Mass. App. Ct 610, 613 (1993), where the Appeals Court stated:

the Supreme Judicial Court and we, however, have given tacit approval to the use of an advisory verdict on a nonjury claim [emphasis added]. See, e.g., Whitehall Co. v. Barletta, 404 Mass. 497, 499 & n.6 (1989)[judge informed jury that she wanted their answers on a G. L. c. 93A claim to assist her in making a decision]; Chamberlayne Sch. & Chamberlayne Jr. College v. Banker, 30 Mass. App. Ct. 346, 354 (1991) (court may submit c. 93A claim to the jury on a non-binding advisory basis). We see no reason to depart from our tacit approval of this practice where the nonjury claim was tried together with the multiple jury claims in this action. See Smith & Zobel, Rules Practice § 35.5.1 (Supp. 1993).

Forthright explanation and guidance respecting the ubiquitous chapter 93A damage actions, rather than implied assent, would seem to be preferred, especially when inconsistent results are foreseeable and where the voice of a jury is negated respecting a fact and experiential-laden inquiry. If only for their constitutional pedigree, the determination of juries deserve greater deference.

80. The pursuit of damages was a key element of the court's jury trial reasoning in *Dalis*. With so many judicially vitalized chapter 93A cases, it is a fair question whether the commonwealth can afford the increased costs associated with such likely widespread demand for juries. If not, then, because the public fisc is so involved, ought that decision to rest exclusively with the legislature? It would appear that it is for the legislature to decide whether to grant a right to a jury trial, but whether to withhold one is controlled by article 15. The court in *Nei* misapplied that provision. *Nei v. Burley*, 388 Mass. 307, 312 (1983).
81. 29 Fed. Reg. 8325, 8355, 8373 (1964)
Simply put, if the court is asked to resolve a run-of-the-mill claim for damages, there is no need to guild the proverbial ecliptic lily with a finding that certain broadly defined illicit acts are unfair or deceptive. Once the judge ignored the causation finding and the subsidiary conclusions implicitly contained therein, her assessment that the defendants acted unfairly or deceptively in these circumstances was a formalist and rationalizing facade. That Jacob sustained unfair treatment or may have acted differently (assuming he retained the capacity to do so) had a disclosure of the dangerous staircase been made to him is an artless declaration, not a reasoned exposition in support of a multiple damage award. While juries do err, in these circumstances, the jury’s implicit finding that Jacob voluntarily incapacitated himself was well within the ambit of their warrantable conclusions.

The issue which the jury decided adversely to the plaintiffs was that it was Jacob’s consumption of alcohol that caused his fall, not the defendants’ conduct, which under these circumstances, one would almost have to concede was negligent and perhaps deceptive. The social end for which chapter 93A was enacted is not served with a finding of liability, clothed, as it is here, within a non-illuminating veil of rectitude. It is, of course, long settled that punitive or exemplary damages are not allowed in Massachusetts except pursuant to statutory authority. If punitive damages and attorney fees are the price society demands for a knowing or egregious violation of the law, why not modify the common law and ground that penalty on established tort principles guided by a jury and skip the troublesome ‘unfair or deceptive’ rubric? Indeed, the wrongful death statute itself extended over a considerable period of time with resultant injuries otherwise raises the rhetorical inquiry of when is negligent conduct to be an unfair or deceptive practice where all of the injured party’s damages and defenses, have been subsumed within the chapter 93A judicial behemoth. That chapter 93A and the court’s construction of it have re-made the rules of civil liability in Massachusetts cannot be gainsaid. In light of the many alterations to longstanding precepts of non-criminal responsibility vitalized by judicial interpretations of chapter 93A, there is a need to restore a proper balance and a respect for the salutary principles embodied in the constitutional right to a jury trial where, as is often now the case, claimants are pursuing common law legal remedies under the guise of equitably animated chapter 93A suits. While an internal and historic logic grounded in the theoretical antecedents discussed in Nei may have made some ostensible sense at the time, an empirical assessment of the consequences, exemplified by Klairmont, undercuts and renders that analysis superficial, counter-productive and, indeed, counter-intuitive.

Predictability and a sense of finality are values which are integral not only to the judicial process but to the conduct of trade and commerce. Within the juridical system inconsistent outcomes on the same evidence diserves all involved and degrades the process. In Chamberlayne School & Chamberlayne Junior College v. Banker, where the jury awarded damages of $20,000 on the common law count and the judge found damages on a matching count under chapter 93A of $60,000, the Appeals Court explained this anomaly as follows: “Although consistency and principles analogous to issue preclusion have a surface appeal, we think the broader scope and more flexible guidelines of c. 93A, permit a judge to make his or her own decisions under c. 93A without being constrained by the jury’s findings.” This oblique reference to the ideas and values of consistency and jury deference protected by the Supreme Court in its interpretation of the Seventh Amendment deserves more veneration, if for no other reason than the presence in both charters of an esteemed and proven common foundational denominator. If the reasoning in Chamberlayne ever made sense, experience has taught us otherwise.

Notwithstanding the legislative springboard, the time has passed when the meaning of chapter 93A may be separated from its judicial elucidator. They are now integrated and something should be done. Like the court’s ruling in Flagg, which was based upon its facilitating assessment of the purpose of Massachusetts General Laws chapter 151B, it is the court’s equally broad appraisal of the purpose of chapter 93A that has propelled the law to its present state. While the legislature is free to act in most any way it may choose to deal with judicial interpretations of a statute, it remains well within the authority of the court to revisit its previously broadly enabling legal conclusions, even in those instances, where it is reluctant to do so. In this latter regard, where the legislature has abdicated its responsibility either to delegate interstitial law making to an administrative agency with authority to oversee a consistent and principled implementing regulations.

93A, RIGHTS AND REMEDIES, Appendix A 12.
87. See Massachusetts Employers Insurance Exchange v. Prop-Mass, Inc., 420 Mass. 39 (1995). On a related subject, what sound reasoning or policy underlies the determination that an illicitly motivated breach of contract ought to be an unfair or deceptive practice where all of the injured party’s damages are otherwise recoverable? If one chooses to breach, rather than perform a contract, even where motivated by the intent to deprive the other party of his/her expectations or to gain a unique advantage, is it not enough that plaintiff is made whole? Engraving the obscurity-plagued, punitively enhanced, morally suffused unfair/deceptive penumbra on the law of contractual breach results in only more complexity as the courts continue to scramble for an acceptable meaning of the statute. The contractual breach enhancement is made more controversial in the absence of the generally conceded moderating common sense of a jury. Nor is the assessment of multiple damages limited to the chapter 93A claim. Thus, it has been held that if the chapter 93A damages are rooted in a contractual or tortious event or transaction, the damages on the underlying common law claim “had to be multiplied,” R.W. Granger & Sons, Inc. v. J&S Insulation, Inc. 435 Mass. 66, 84 (2001); T. Butera Auburn, LLC v. Williams, 83 Mass. App. Ct. 496, 499 (2013) (“under the plain language of § 11, the underlying contract damages as well as the c. 93A damages...must be doubled.”). Keeping the chapter 93A and common law damages separate and non-duplicative has become somewhat of an intricate exercise. See Costa v. Brait Builders Corp. 463 Mass. 65, 73 (2012).
91. In this respect, see Feeney v. Dell, 466 Mass. 1001 (2013), where, following a ruling of the U.S. Supreme Court in American Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304, 2312 (2013), holding that the Federal Arbitration Act preempted state arbitration law and that persons who had waived a class action remedy in an arbitration agreement were bound by that agreement, the SJC, which had ruled to the contrary, was constrained to reverse its prior
elaboration of the statute, or to protect its citizens with a forthright affirmation of their right to a jury trial, the court ought no longer comfort itself within the cocoon of judicial deference.

When confronted with the outcome in Klairmont, it is fair to question the absence of the input of the most logical representatives of the presumptively protected class of consumers and business persons: the jury. The final result in Klairmont features many themes, including the unbridled scope of 40 years of non-legislative lawmaking and its limitations. Klairmont calls attention to a law with not only an insatiable jurisprudential appetite, but one which proliferates without the full benefit of the community it serves, while coincidentally purporting to vindicate those mutual interests.

Klairmont leaves several questions unanswered: Should the court continue to sanction a procedure whereby a judge may ignore a jury’s decision on causation, especially following the jury’s consideration of the subtleties inhering in the effect of comprehensible violations of a building code in relation to the behavior of an individual voluntarily drinking more than minimal amounts of alcohol? If it is true that enhancement of the law’s foundational equanimity constitutes a communal aspiration, what lesson can be drawn from this outcome and this process? In deference to the authority, importance and dignity with which the judiciary is imbued, in light of the statute’s immoderate development, should the court have rejected the principle of stare decisis and instead revamped the extant process? However one views the varying policy considerations implicit in these queries, whether in some rough state of equipoise, or not, the foundational locus for the resolution of contested factual issues within the matured chapter 93A matrix should reside only with a jury.

E. Seventh Amendment and Article 15

In Curtis v. Loether, the United States Supreme Court was presented with the question of whether rights created by statute required a jury trial. It responded that “if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law, the Seventh Amendment requires jury trial upon demand.” Thus, the Seventh Amendment provides that “in suits at common law...the right to trial by jury shall be preserved.” Long ago, Justice Story explained that under the Seventh Amendment to the United States Constitution, a jury trial was preserved for “not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies administered.” Justice Story added: “[in a just sense, the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever might be the peculiar form which they may assume to settle legal rights.”

In the Massachusetts case of Parker v. Simpson, the plaintiff, as administrator of his mother’s estate brought a bill in equity against his brother, seeking to rescind the transfer of property, which he claimed had been taken from his mother through fraud and undue influence. Whether the plaintiff was entitled to a jury trial turned on the court’s interpretation of article 15, where it is provided that in “all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherwise used and practiced, the parties have a right to a trial by jury.”

The SJC, in an opinion by Justice Hammond, examined the issue in terms of the pre-1780 judicial branch of colonial government, noting that there were “two general systems of jurisprudence working side by side.” In England and pre-revolutionary America, the law and chancery (equity) courts generally resolved different types of claims and, for the most part, provided distinct remedies, the former through an award of damages, the latter, through equitable relief, including through the grant of injunctions, reformation, rescission and cancellation of instruments. Only in the law courts was a right to a trial by jury guaranteed. Seeking to obtain for themselves the same protections enjoyed by their English cousins under the law, article 15 secured to Massachusetts citizens their extant (1780) right to a trial by jury in civil law cases. Claims in equity were not so

32. From at least 1974 in Commonwealth v. DeCotic, 366 Mass. 234, 238 (1974), to the present and continuing, we have witnessed, if not an assault upon long-established principles of tort, contract and related areas of the common law, then a sea change in the application of civil jurisprudence, which has touched, with great effect, every aspect of business conduct within the commonwealth. Are persons profitably engaged in Massachusetts so innately villainous as to be subjected to the myriad uncertainties of this retributive statute? What is the saving grace of a law which is both so imprecise and punishing? Alternatively put, what particular form of conceit underlies the assumption that it makes sense to award treble damages, fees and costs based upon penumbral assessment of unfairness, diluted concepts of deception and affirmative obligations to disclose? Compare Mass. Gen. Laws ch. 231, §851 (2012), which forthrightly provides: “Whoever, by deceit or fraud, sells personal property shall be liable in tort to a purchaser in treble the amount of damages sustained by him.” As Robert Browning wrote in 1855, sometimes “less is more.” http://www.poemhunter.com/poem/andrea-del-sarto

93. When the rationales which gave meaning and coherence to a judicially created rule are no longer vital, and the rule itself is not consonant with the needs of contemporary society, a court not only has the authority but also the duty to reexamine its precedents rather than to apply by rote an antiquated formula. Lewis v. Lewis, 370 Mass. 619, 628 (1970). To the extent the court may be uncomfortable with a statute, it is always possible to solicit further legislative attention as it did in Liberty Mutual Insurance Co. v. Westerlund, 374 Mass. 524, 527 (1978), where in connection with contribution/indemnification among contractors and the effect of payment of worker’s compensation insurance, the court commented, We ... note that strong policy arguments exist on both sides of the issue whether a third party should have a right of recovery on the basis of contribution or indemnification. ... Such conflicting policy considerations are best resolved in the Legislature where the resolution can be based on full consideration of the competing interests and the ramifications involved with any change of the legislative scheme of G. L. c. 152.


95. Id. at 194. The Seventh Amendment provides that “in suits at common law...the right to trial by jury shall be preserved.”


98. See supra note 4.
benefited. For the SJC, the question seems to revolve not around the remedy being sought, but whether the chapter 93A claims existed at common law. For the Supreme Court, the issue is whether the plaintiff is seeking a legal remedy.

While the court in Parker affirmed the denial of the respondent’s request for a trial by jury, Justice Hammond stated: “Nevertheless, speaking for myself alone, I think that the crucial questions of fraud and undue influence at least could be easily separated from the questions arising upon the accounts and could be conveniently tried before a jury, and that they ought to be so tried if either party requests it.” Likewise, the pivotal question of causation in Klairmont should have been finally decided by the jury pursuant to whatever instructions were justified to address the impact of the building code violations. In this respect, there was no need for the jury to trench upon the “unfair,” purportedly unique or remedial aspects of the chapter 93A claim, although with the judge instructing on the law, there is every reason to believe that the jury would have competently resolved those issues. In basic terms, the case, at least that part of it concerning which the jury provided advice, was plainly a tort action for damages fully cognizable at common law. Further, in that part of Klairmont discussing survival of a chapter 93A claim under section 1 of Massachusetts General Laws chapter 228, the court credited this actuality (the tort gist of the action) as the basis for its post-death viability. Nor did the unfair or deceptive categorization of the defendants’ acts reconstitute that “legal” reality into an “equitable” claim. Rather, the evidence in support of the chapter 93A findings was mainly concerned with considerations affecting damage add-ons, not remedial modifiers.

In upholding the denial of a jury trial in chapter 93A cases, the court in Nei did not rely exclusively upon the absence of a right to a jury in 1780, correctly noting instead, that a jury right could always be expressly or impliedly granted by the legislature in connection with its enactment of chapter 93A. In Nei, the SJC had proffered several reasons for denying that a jury claim existed or ought to be implied under chapter 93A. If any of these justifications were initially convincing, the passage of time and the “93A experience” has undercut their merit. First, the court held that the meaning of the “open-ended” and evolving claims for relief for unfair or deceptive practices under chapter 93A, including the creation of new substantive rights “is the traditional province of the court.” Of course, the court interprets and establishes the boundaries of the law. What does that have to do with the constitutional right to a jury? Does this assertion mean that in the period before 1780 the nature and substance of various common law damage claims, whether arising under property, tort or contract law, were not evolving either here or in England? By definition, the common law evolves and did so for centuries in both its law and equity applications.

Second, claims under chapter 93A are not analogous to, and lack many of the elements of, common law torts and breach of contract. Third, the court acknowledged that where an equitable reach and apply suit in equity is combined with a claim of debt, a traditional common law proceeding, a right to a jury trial existed for the debt determination portion of the claim. Does it not follow that the common law negligence/causation portion of

100. See, e.g., Tull v. United States, 481 U.S. 421, 427 (1987). In Puretest Ice Cream, Inc. v. Kraft, Inc., 614 F. Supp. 994, 996 (D. Mass. 1985), the district judge explained that in Nei, the SJC held that because chapter 93A claims did not exist at common law, no jury was required as of right; however under the Seventh Amendment, the right to a jury trial was protected for actions carrying an “historical or analogous connection to claims triable by jury.” Id. Further, the plaintiffs in Puretest were deemed to have forfeited their right to a jury trial because they insisted upon pursuing both damages and injunctive relief. Id. at 997. Importantly, whatever equitable relief the plaintiffs in Klairmont sought had long been rendered secondary to their claim for damages.
101. Parker, 180 Mass. at 356. The de novo of the right to a jury trial in Nei breathed life into the conundrum from which Justice Hammond recoiled and which has continued to this time. In Stockbridge v. Mixer, 215 Mass. 415 (1915), the court considered the right to a jury trial under the predecessor of Mass. Gen. Laws ch. 214, §36, the reach and apply statute, wherein the superior court was granted jurisdiction over “actions by creditors to reach and apply, in payment of a debt, any property, right, title or interest, legal or equitable, of a debtor, within or without the commonwealth, which cannot be reached to be attached or taken on execution.” For the Stockbridge court, the fusion of an action at common law (the establishment of a debt), with the equitable arm of the court, (to collect the debt) did not signal the loss of the right to a jury trial on factual issues be lost through prior determination of equitable claims.”
102. Id. at 313. Precisely how the established judicial responsibility to instruct (both itself and a jury) on the evolving legal boundaries of a chapter 93A action, as it does with other [emerging] common law causes of action, eviscerates the right to a jury trial on factual issues is unclear. It would appear that the court could always instruct a jury that one or more acts of a defendant was neither unfair nor deceptive; or could be, if the jury, properly instructed, so decided.
103. Id. In what manner does the establishment of purportedly non-analogous claims for relief, substantially all of which under chapter 93A are nonetheless corelatives or derivatives of established common law tort or contract causes of action, either singly or in combination, justify short shifting a constitutional right? Travis v. McDonald, 397 Mass. 230, 232 (1986) (“Yet the fact that c. 93A claims are neither ‘wholly contractual’ nor ‘wholly tortious’ causes of action, as these terms were understood at common law, does not imply that these claims are not, at least derivatively, ‘in the nature of contract or tort.’ … Chapter 93A claims normally are within at least the penumbra of common law tort or contract principles.” (emphasis in original)). Other than characterizing an extended period of negligence as unfair or deceptive, what makes the Klairmont plaintiffs’ chapter 93A claims different from similar claims made in the pre-1780 period following an alcohol-related fall in a poorly maintained tavern? Indeed, in what manner does the absence or addition of one or more elements, say of intent or reliance on the one hand, or non-disclosure on the other, so alter the justiciable landscape as to justify, or even explain, dispensing with a revered
the Klairmont-plaintiffs’ claim, even one burnished with an unfair and deceptive patina, should be decided in like manner to a common law debt? Fourth, hardening back to the remedial differences between common law and equity courts, the court determined that the “equitable nature of the relief permitted” meant that a jury trial was not required “for actions cognizable under G. L. c. 93A.”108 Neither the logic nor the expectations embodied within each of these assertions would have been undermined had the issues of causation, unfairness or deception been mandatorily decided by the jury. In this and other respects, the reasoning underlying the denial of a jury trial in Nei and confirmed in Klairmont remains flawed to fault.

As Klairmont proceeded toward its deliberative phase, the issues had crystallized such that the trial judge was aware of the factual matters in need of resolution under both chapter 93A and the wrongful death statute. That the defendants owed a duty to Jacob was not in doubt. Nor was there any question that if the defendants legally caused Jacob’s death, he suffered damages, or in the vernacular of chapter 93A, a compensable invasion of a legally protected interest.109 Rather, it was at that time clear that the outcome of the chapter 93A case rested squarely upon whether the violations of the building laws with their perceived consequential effect upon the condition of the staircase caused Jacob’s injuries; not whether an equitable remedy was sought by the plaintiffs for those violations. Neither the “open-ended” [sui generis] quality of chapter 93A, nor the perceived equitable antecedents undergirding the holdings in Nei and Parker, mandated elimination of the right to a jury trial.110

It is indisputable that in Klairmont, “the rights sought to be determined and enforced are essentially legal as distinguished from equitable rights.”111

The penultimate and easily separable fact question underpinning both the wrongful death (tort) and chapter 93A claims was who, among the decedent and the defendants, caused the former’s fall and death. Consonant with an established, albeit in the writer’s view, entirely counterproductive procedure, the trial judge chose to solicit an advisory, rather than a binding, opinion from the jury on causation.112 If causation existed then the judge would continue her easily separable deliberation and determine if those violations were unfair or deceptive and therefore a chapter 93A violation. While the judge followed established precedent, it is undoubted that the jury was deciding a claim of legal, not equitable rights, supporting the provision of legal, not equitable remedies, and the linchpin of causation would settle the outcome. Indeed, no decision would be required of the judge if the jury found, as it did, that the defendants neither caused Jacob’s fall, nor that the defendants had been guilty of gross negligence or any act that was willful, wanton, or reckless. Nonetheless, the judge overrode the jury. This is no way to treat a “sacred” right.113 In failing to reverse or substantially alter this procedure where the plaintiffs are seeking the legal remedy of money damages in a chapter 93A case, the SJC failed to correct its errant course.

In Wyler v. Bonnell Motors, Inc.,114 the Appeals Court stated that the “subject matter of a 93A claim is sufficiently distinct so that a judge sitting independently on the c. 93A claim may arrive

source of insight into the values underlying reasonable care and the nominative identifiers of chapter 93A? While a court often may be criticized for relying upon a form of pigeonhole justification in place of sound reasoning, this critique carries more heft where, as in Nei, it buttresses part of the rationale for cutting back on the application of a vital constitutional right. 107. Nei, 388 Mass. 313-14.

108. Id. at 314-15. Is there any doubt that, at least since 1974, the superior court has the authority to grant equitable relief in a civil action where warranted by the facts, and is therefore “permitted” under the law to do so? In contradistinction to the bases for denying a jury right in chapter 93A cases explicated in Nei, the Supreme Court has substantially reduced or re-prioritized its like Seventh Amendment inquiry to whether the nature of the remedy sought is legal or equitable. See Woodv. Int’l Bhd. Of Elec. Workers, 502 U.S. 93, 97 (1991) (nature of relief sought rather than historical analogies more important in the analysis); Teamsters v. Terry, 494 U.S. 558, 565 (1990) (relief sought, rather than historical setting or finding common law analog is primary); Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 42 (1989) (relief sought is primary); Tull v. United States, 481 U.S. 412, 421 (1987) (characterizing relief sought as more important than finding precisely analogous common-law cause of action); Curtis v. Loether, 415 U.S. 189, 195-96 (1974) (cause of action is analogous to a number of tort actions recognized at common law; more important, the relief sought—actual and punitive damages— is traditional form of relief offered in courts of law); Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970) (“the ‘legal’ nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries’); see Massachusetts Eye and Ear Infirmary, Inc. v. QLT, Inc., 495 F. Supp. 2d 188, 197 (D. Mass. 2007) (hereinafter “MEEI”) (“There is a right to a trial by jury when the plaintiff seeks actual and treble damages.”).


110. In all, the equitable nature of the relief permitted and the silence of the Legislature leads us to conclude that there is no right to a trial by jury for actions cognizable under G. L. c. 93A.” Nei v. Burley, 388 Mass. 307, 315 (1983).

111. Powers v. Raymond, 137 Mass. 483, 486 (1884). In Powers, the SJC stated: “The remedy which the plaintiff seeks is substantially the common law remedy. He seeks to establish his debt against the Raymonds and to have it paid out of their property, which he alleges they have conveyed to Salmon by a conveyance which is fraudulent and void as to him. The rights sought to be determined and enforced are essentially legal, as distinguished from equitable rights. The statute has changed the mode of procedure, but it would be trifling with the Constitution to hold that, by changing the forms of procedure, the substantial rights declared by it can be taken away.

112. The tripartite jury participation options available to a trial judge, including binding jury findings, were settled in Travis v. McDonald, 397 Mass. 230, 233-34 (1986), and Service Publications, Inc. v. Goverman, 396 Mass. 567, 577-78 (1986).

113. The SJC edified the jury’s role in connection with the assessment of punitive damages in Aleo v. SLB Toys, USA, Inc., 466 Mass. 398, 413 (2013), where it quoted from McCleskey v. Kemp, 481 U.S. 279, 311 (1987), as follows: “[I] f the jury’s function to make the difficult and uniquely human judgments that defy codification and that ‘build[ ] discretion, equity, and flexibility into a legal system.’” Similarly, in Dalis v. Buyer Advertising, Inc., 418 Mass. 220, 222 (1994), the SJC stated: “The jury system, as the ‘sacred’ method for resolving factual disputes, is the most important means by which laypersons can participate in and understand the legal system [citation omitted]. It brings the ‘rules of law to the touchstone of contemporary common sense.’” (quoting 1 W. Holdsworth, A History of English Law 348-49 (3d ed. 1922).) “Jurors bring to a case their common sense and community values: their ‘very inexpensiveness is an asset because it secures a fresh perception of each trial, avoiding the stereotypes said to infect the judicial eye.” Parklane Hosiery Co. v. Shore, 439 U.S. 532, 355 (1979) (Rehnquist, J., dissenting) (quoting H. Kalven & H. Zeisel, The American Jury 8 (1966)).

In MEEI, 495 F. Supp. 2d 188 (D. Mass. 2007), Judge Young discussed the experience of the Massachusetts state court in chapter 93A jury-tried cases. He noted that the salutary “practice of submitting chapter 93A cases to the jury has resulted in the vigorous development of chapter 93A jurisprudence because jury
V. Conclusion

To seek redress for a perceived imbalance in the relationship between consumers and business persons remains a laudable legislative objective, especially where the new standard is one of fairness and disclosure. For any representative society, the mores underlying fairness, equity, disclosure and a level informational playing field for fact-finding necessarily requires the most precise explication of the law. "Id. at 194. In In re Acushnet River & New Bedford Harbor: Proceedings re Alleged PCB Pollution, 712 F. Supp. 994, 1005 (D. Mass. 1989), Judge Young further stated:

All of our rules of law purport to be based on the collective values of the community. Indeed, many of them explicitly refer to the behavior of the "reasonable person" as the determinative factor. Yet how would courts know these values or assess the conduct of reasonable people without the aid of the jury? The jury is the essential crucible inextricably melding the judicial system and the community it serves. Jurors bring their good sense and practical knowledge into our courts.

115. Id. at 568.
116. See supra note 30. While the PMP factors would seem to allow for inclusion of Jacob's conduct in the circumstantial calculus, the issue, like so much else within the chapter 93A inquiry, is suffused within a cumbersome smokescreen. Thus, while the conduct of the defendants was adjudged to be unfair and deceptive, their actions in fact constitute a negligent failure to properly care for the safety of their customers over an extended period of time; no matter how one chooses to portray the building code violations. Instead of folding the considerations of contributory fault in a negligence claim (even one with aggravating circumstances) into a gauzy penumbral formula, would it not have been preferable for the SJC to directly address (perhaps in the same manner as did the trial judge) the consequential role played by the tragedy's main participant? If nothing else, the values inhering in the long-neglected concerns of transparency and directness would be served.

On at least one prior occasion, the SJC has seen fit to establish its own common law defense of contributory negligence. In Clark v. Rowe, 428 Mass. 339 (1998), the SJC confronted the issue of whether it should apply the principles of contributory fault to a legal malpractice claim. The question arose out of the converging contractual and negligent bases for the claim. Prior to Clark, Mass. Gen. Laws, ch. 231, §85 had replaced the existing law of all or nothing contributory negligence in the recovery of damages with a regime of comparative fault. The court analogized legal malpractice actions to similar claims of professional negligence: "It is unseemly and improper in the administration of justice—and only secondarily, as the teacher of the law—comes the judiciary. As a constitutionally-recognized assemblage, it is the jury which fully and completely represents the governed in a democracy; and it does so in a discrete and solemn manner. The judiciary is a separate (non-legislative) and non-subordinate branch of government, whose independence is prized and protected. In continuing its adherence to the hollowed-out reasoning of Nei, a discrepant and counter-intuitive procedure which countenances the overruling of a warranted jury finding of causation, the SJC has sacrificed too much.

While issues of importance concerning the wrongful death statute and the scope of a particularly broad regulation of the attorney general were appropriately decided in Klairmont, it is the inconsistent results of the judge and the jury on the pivotal issue of causation and ultimate fault which the court failed to satisfactorily address. It is unseemly when a pure question of fact in an action to recover damages is decided differently by a judge than a jury, with the participants in a dynamic system of trade or commerce ought to be protected and encouraged. At the same time, where a judgment is made about the disputed factual actions of contesting parties striving for a just result, the first determinative option, at least in the absence of weighty countervailing arguments, lies with a jury, the community's established representative agency. For all of the familiar reasons, it is the jury which provides the initial and foremost legitimacy to a justice system and then—and only secondarily, as the teacher of the law—comes the judiciary. As a constitutionally-recognized assemblage, it is the jury which fully and completely represents the governed in a democracy; and it does so in a discrete and solemn manner. The judiciary is a separate (non-legislative) and non-subordinate branch of government, whose independence is prized and protected. In continuing its adherence to the hollowed-out reasoning of Nei, a discrepant and counter-intuitive procedure which countenances the overruling of a warranted jury finding of causation, the SJC has sacrificed too much.

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former taking precedence. This is so, in part, because the communal compact, manifest in our venerated charter and the greater identified purposes it serves are compromised. The SJC delegitimized and devalued a finding of a jury and endorsed a process which, at a minimum, is systemically dispiriting.

The allocation of fact finding responsibility in such a prominent part of our system of civil justice should not continue to be so easily subverted. Klairmont presented an opportunity to revisit a judicially established rule which undermines a fundamental tradition and which is demonstrably inconsistent with the critical values embedded in the Massachusetts and federal constitutions. A place must be held open for common sense, while honoring the history and meaning of article 15. There is nothing inviolate about the rule that inconsistent findings of a judge and jury on the same facts must favor the court. Indeed, the opposite is preferred and generally followed.123 While stare decisis is an important and necessary part of the common law, it should not thwart an otherwise warranted verdict of a jury.124 It is the latter institution which must be respected as it remains a vital wellspring for citizen participation in our democratic experiment.

If not the court, then the legislature should revisit the jury trial conundrum embodied in Nei and Klairmont. For those concerned that either fairness or freedom from deception will be threatened if the right to a jury trial is instituted in chapter 93A damage actions, they underestimate the dedication of the Massachusetts courts to enhancing and protecting the principles embodied in those ideas. Overriding a considered and justified jury finding on causation is unacceptable. If nothing else, the split outcome in Klairmont, with its denigration of an advisory jury ruling on causation, focuses attention upon that tacitly recognized mischief-maker.124 There is a superior process which can be realized through a rectified reading of article 15.

Acushnet River, 712 F. Supp. at 1007 (citing I A. de Tocqueville, Democracy in America 291, 297 (H. Reeve trans. 1945) (1838)).

120. See also Mass. R. Civ. P. 38 (“The right of trial by jury as declared by Part 1, Article 15 of the Constitution of this Commonwealth or as given by a statute shall be preserved to the parties inviolate.”).


Treating the jury’s finding as advisory or provisional, then, and taking account of all the evidence, I adopt the jury finding on compensatory damages for fraud as the measure of compensatory damages under the ch. 93A claim. I need not consider whether the same result may be required on grounds analogous to issue preclusion, or on some other ground, in order to foreclose the unseemly spectacle of entering judgment on different counts in the same case for amounts that differ only because two independent fact finders have arrived at different results, on evidence that supports either result.

(emphasis added).

122. See Dalis v. Buyer Advertising, Inc., 418 Mass. 220, 222-23 (1994); see also Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 501 (1959) (“Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care”).

123. There are myriad opinions where we have overruled earlier decisions after concluding that the holding on an issue is no longer correct…. Adherence to the principle of stare decisis provides continuity and predictability in the law, but the principle is not absolute. No court is infallible, and this court is not barred from departing from previous pronouncements if the benefits of so doing outweigh the values underlying stare decisis.

Hershenow v. Enterprise Rent-A-Car of Boston, Inc., 445 Mass. 790, 805-06 (2006) (Cowin, J., concurring.) In State v. Culver, 23 N.J. 495, 505, cert. denied, 354 U.S. 925 (1957), the principle of stare decisis as a critical part of the common law was discussed as follows:

One of the great virtues of the common law is its dynamic nature that makes it adaptable to the requirements of society at the time of its application in court. There is not a rule of the common law in force today that has not evolved from some earlier rule of common law, gradually in some instances, more suddenly in others, leaving the common law of today when compared with the common law of centuries ago as different as day is from night. The nature of the common law requires that each time a rule of law is applied it be carefully scrutinized to make sure that the conditions and needs of the times have not so changed as to make further application of it the instrument of injustice.


124. See supra note 79

The Promise and Reality of Chapter 93A / 17
Case Comment

Commonwealth v. Walczak

A Divided SJC Establishes A New Rule for Juvenile Murder Prosecutions But Leaves Important Questions To Be Resolved By Future Cases

In Commonwealth v. Walczak, the Massachusetts Supreme Judicial Court (“SJC”) affirmed the dismissal of a second-degree murder indictment against Javon Walczak. All seven justices agreed that the evidence before the grand jury had adequately established probable cause to believe that Walczak, who was 16 at the time, murdered his victim. That is where their unanimity ended, however. Four justices held that the indictment was, nevertheless, invalid. But even this four-member majority could not reach consensus; the justices concluded, based upon two different rationales, that the prosecution should have provided legal instructions to the grand jury on certain mitigating circumstances that were based on the evidence and could have reduced the charge of second-degree murder to voluntary manslaughter.

Walczak was a highly unusual decision in that the case produced four separate opinions, which reflected three fundamentally different approaches to the current charging procedure in the commonwealth for murder prosecutions against juveniles:

• In an introductory opinion “by the Court,” the justices summarized their unanimous view concerning the Superior Court judge’s dismissal of the indictment, previewed the three different decisions noted below—and stated the new rule for future cases;  
• Justice Lenk authored the controlling opinion, which no other justice joined, and she focused on the less culpable status of juveniles as compared to adults;  
• Justice Gants, with whom Justices Botsford and Duffly joined, concurred, but he emphasized the special role of the grand jury; and  
• Justice Spina, with whom Chief Justice Ireland and Justice Cordy joined, dissented in part because he deferred to the constitutional prerogative of the Legislature to permit the direct indictment of juveniles for murder.

In the end, despite the disagreement among the justices and their multiplicity of opinions, Walczak established a new rule that requires the prosecution to give legal instructions to the grand jury “where [it] seeks to indict a juvenile for murder and where there is substantial evidence of mitigating circumstances or defenses (other than lack of criminal responsibility) presented to the grand jury.” Walczak further requires that such instructions shall be “transcribed as part of the transcription of the grand jury proceedings.”

This new rule is a major departure from prior precedent, which required prosecutors to give legal instructions only when the grand jury expressly requested such guidance. Going forward, in cases like Walczak, prosecutors will now be required to provide additional legal instructions concerning mitigating circumstances, even if the grand jury does not ask about that evidence or its significance with respect to the charging decision. How will prosecutors implement this new rule, and how will the courts enforce it? What will be transcribed for the record, and how will transcription affect the interaction between prosecutors and the grand jury? In addition to those important questions, the SJC left for future cases—for example, those involving adult defendants and charges other than murder—the task of establishing the outer boundaries of this new rule.

The Facts

The Death of Rene Valdez

On August 9, 2010, Rene Valdez and his friend, Darren Colucci, arranged to meet the defendant, Javon Walczak, to buy marijuana from him. But Valdez and Colucci planned to rob Walczak, rather than pay for the drugs. Later that evening, on a street corner in Lynn, Walczak met Valdez and Colucci, who were not armed, even though they anticipated a physical altercation. Valdez announced that they “were going to take [Walczak’s marijuana] without paying.” Colucci poked Walczak, and Walczak then “attacked” Valdez. Punches were thrown, and during the ensuing scuffle, Walczak pulled out a knife and repeatedly stabbed Valdez. Both Walczak and Colucci fled the scene. When police officers arrived, they found Valdez, bleeding from his neck. Valdez died later that night. The autopsy report noted “eleven total sharp wounds of the body,” and concluded that Valdez had been stabbed to death.

2. Id. at 808-10.  
3. Id. at 810-36.  
4. Id. at 836-44.  
5. Id. at 844-56.  
7. Id.  
8. Id. at 812.  
9. Id.  
10. Id.  
12. Id.  
13. Id. at 813-14.  
14. Id.  
15. Id. at 814.  
17. Id. at 814.
The First Indictment of Javon Walczak

On October 27, 2010, a grand jury sitting in Essex County returned an indictment charging Walczak with second-degree murder in violation of Massachusetts General Laws chapter 265, section 1. Walczak moved to dismiss, arguing that the prosecution presented insufficient evidence to the grand jury in violation of Commonwealth v. McCarthy, and also that it failed to disclose material exculpatory evidence, specifically the statement by Valdez’s cousin that Colucci had a gun, in violation of Commonwealth v. O’Dell. The trial judge denied the McCarthy motion, finding the evidence “barely” sufficient to establish probable cause, but he allowed the O’Dell motion, ruling that the prosecution improperly elicited the cousin’s testimony (that Colucci had no gun) while withholding evidence about his contrary statement to the police (that Colucci had been armed).

As a result, the trial judge dismissed the murder indictment against Walczak without prejudice.

The Second Indictment of Javon Walczak

On May 27, 2011, another grand jury returned a new indictment charging Walczak with second-degree murder. This time, the prosecution presented the cousin’s complete statement to the police and highlighted his inconsistent accounts about whether Colucci, in fact, had a gun. Walczak again moved to dismiss. After a nonevidentiary hearing, the trial judge “reconsider[ed his] prior ruling” on the McCarthy motion and decided that the evidence was insufficient to support the second-degree murder charge. According to the judge, the evidence confirmed that Walczak pulled out his knife only after the attempted robbery; it did not suggest, however, that he “had not acted on reasonable provocation or sudden combat, either of which mitigate murder to voluntary manslaughter.”

The Current Charging Procedure in the Commonwealth

Given the significant differences between the juvenile and adult criminal justice systems, the decision whether to try a juvenile as an adult in Superior Court looms large. In 1996, the process for making that consequential decision changed dramatically. Before 1996, juveniles could not be tried as adults (even in murder cases) without a judge first considering their juvenile status in a two-part transfer hearing. After considering whether there was probable cause to believe that the juvenile committed the offense, the judge considered “the juvenile’s dangerousness and amenability to rehabilitation.” Only then, and only in “exceptional circumstances,” a judge could transfer a juvenile to Superior Court to be tried as an adult.

The Unanimous SJC Agrees That The Evidence Adequately Established Probable Cause To Indict Walczak For Second-Degree Murder

The elements of second-degree murder are well-settled, and they include “(1) an unlawful killing and (2) malice.” In Walczak, all seven justices agreed that the evidence before the grand jury was sufficient to satisfy the probable cause standard for both elements. Malice may be established three ways: the defendant (1) “intended to cause the victim’s death,” (2) “intended to cause grievous bodily harm to the victim,” or (3) “committed an intentional act which, in the circumstances known to the defendant, a reasonable person would have known created a plain and strong likelihood of death.” In this case, Walczak’s malice could be inferred from circumstantial evidence, including his intentional use of a knife and the number of wounds that he inflicted upon Valdez with that deadly weapon.
As the SJC observed in an earlier murder case, “[t]he nature of the killing, repeated stabings toward the victim’s heart and lungs, displayed malice ‘in the plainest sense’.”

An unlawful killing is a one committed “without excuse.” Here, the only plausible excuse for Walczak would have been self-defense, but evidence of self-defense does not necessarily “preclude an indictment charging murder.” Further, it was far from clear that Walczak actually acted in self-defense, given the applicable legal standard. Walczak used deadly force, but he may not have been in “imminent danger of death or serious bodily harm,” may not have availed himself of “all proper means to avoid physical combat,” and may have acted as the “first aggressor” by throwing the first punch.

That evidence, according to the SJC, should have been the end of the McCarthy analysis, because the prosecution established probable cause for the grand jury. The SJC held that, in dismissing the second indictment against Walczak, the trial judge erred by adding a third element to the charged crime: the absence of reasonable provocation or sudden combat. While such circumstances can mitigate second-degree murder to voluntary manslaughter, not every fistfight fits the bill. The complete absence of reasonable provocation and sudden combat is not itself an element of second-degree murder. Thus, the Commonwealth need not present evidence to “disprove” those mitigating circumstances. In Walczak, the SJC unanimously agreed that the prosecution satisfied its burden to establish probable cause as to each element of the charged crime and that the trial judge erred in ruling otherwise.

A Deeply Divided SJC Rules That The Indictment Against Walczak Must, Nevertheless, Be Dismissed Without Prejudice

As an alternative basis to affirm the dismissal, Walczak argued that the second indictment was invalid under Commonwealth v. O’Dell, as the trial judge had ruled regarding the first indictment, because “the grand jury lacked legal instruction as to those circumstances raised by the evidence ... mitigating murder in the second degree to voluntary manslaughter.” That contention ran contrary to prior precedent holding that, at the grand jury stage, the prosecution need not provide legal instructions “out of a concern that such a requirement ‘would add delay and complexity to grand jury proceedings] without serving any significant purpose.’” In fact, since its decision in Attorney General v. Pelletier, which established the duty of the prosecution, “in appropriate instances,” to give legal instructions to the grand jury, the SJC has identified only one such circumstance, namely when the grand jury expressly asks for an explanation of the law. Put another way, the SJC has “never required instructions without a request,” and in this case, there was no request by the grand jury. Yet four justices were persuaded that this case presented an “appropriate instance[ ]”—indeed, the first such instance since Pelletier—in which legal instructions should have been given to the grand jury and in which the failure to instruct invalidated the indictment.

Justice Lenk—The Less Culpable Status of Juveniles

Justice Lenk defined the “unique circumstances” in Walczak to include two critical features: (1) the Commonwealth sought a murder indictment against a juvenile, and (2) there was “significant evidence of mitigating circumstances” that the grand jury could credit, thereby justifying a lesser charge of voluntary manslaughter. It was the first of these features that set Justice Lenk, who primarily focused on the less culpable status of juveniles, apart from the other justices.

According to Justice Lenk, juveniles are different. In support of her view, she read a trilogy of recent cases from the U.S. Supreme Court, Miller v. Alabama, Graham v. Florida, and Roper v. Simmons, as having broadly recognized “the reduced culpability of minors as compared to adults.” These cases, according Justice Lenk, “reaffirmed the ‘diminished culpability and greater prospects for reform’ of juveniles.” In an apparent nod to Chief Justice Ireland, who joined Justice Spina in dissent, Justice Lenk also noted that, in Massachusetts, the juvenile justice system has long been premised on “similar considerations.” At bottom, Justice Lenk was troubled that a critical aspect of the criminal justice system—the decision by the grand jury whether to indict and, if so, for what crime—failed to “take[e] the defendant’s youth into consideration in any way.”

According to Justice Lenk, since the passage of the 1996 act, the grand jury has become “the sole gatekeeper between the adult and juvenile justice systems.” Under the former transfer process, a judge, who was required to consider a juvenile’s youth, played that decisive role; in the current system, the grand jury does so, without consideration for the defendant’s age. In Walczak, for example, the grand jury’s decision to return an indictment for second-degree murder “in effect transferred the case from Juvenile to Superior Court” and mandated that Walczak would be treated as “an adult

43. Id. at 818 (quoting Commonwealth v. Silva, 455 Mass. 503, 511 (2009)).
44. Id. (internal quotations omitted).
46. At id. at 812.
47. See id. at 809.
48. Id. at 822 (citing Commonwealth v. O’Dell, 392 Mass. 445, 451 (1984)).
49. Id. at 823 (citing Commonwealth v. Noble, 429 Mass. 44, 48 (1999)).
53. Id. at 831 n.25 (citing R.L. Ireland, Juvenile Laws § 1.3, at 18 (2d ed. 2006)).
54. Id. at 811.
55. Id. at 824.
for all purposes,” including sentencing. Given the magnitude of that decision, Justice Lenk concluded that the grand jury should have been “instructed as to the elements of the degree of murder for which an indictment is sought, as well as any defenses or mitigating circumstances that are raised by the evidence.”

Of course, the grand jury could indict Walczak for second-degree murder, but it should understand the significance of that decision, given his special status as a juvenile.

It seems sensible that, because the grand jury now plays a critical gate-keeping role in deciding whether juveniles face charges as youthful offenders in Juvenile Court or adults in Superior Court, it should be adequately equipped with the legal guidance necessary to discharge that significant responsibility. How that principle will play out in practice is somewhat difficult to foresee, however. Justice Spina fairly asked “how the grand jury are to perform their role as gatekeeper,” noting that “there is no basis to believe the grand jury possess any special expertise, or indeed any expertise, in juvenile matters that exceeds that of Superior Court judges.”

Under the new rule fashioned by Justice Lenk, the grand jury must “be instructed that their decision to indict the juvenile for murder … will result in the juvenile’s being tried in the Superior Court ‘in accordance with the usual course and manner of criminal proceedings.’” What will a grand jury do with that information? It seems unlikely that a grand jury—which does not know enough to ask such legal questions in the first place—will understand what the “usual course” entails in Superior Court or how the fate of juveniles may differ in Juvenile Court. After Walczak, must that be explained as well, and if so, with what additional instructions? And must all of the back-and-forth between the prosecutor and the grand jury be transcribed for the record?

Justice Gants—The Special Function of the Grand Jury

Like Justice Lenk, Justice Gants, joined by Justices Botsford and Duffly, concluded that this case represented an “appropriate instance[]” to depart from the general rule and require legal instructions, even though the grand jury did not ask for them. Justice Gants wrote:

[W]here … the prosecutor seeks an indictment for murder despite evidence of mitigating circumstances that is so substantial that concealing it would impair the integrity of the grand jury, the prosecutor is required to give the grand jury legal instruction on the elements of murder in the second degree and on the legal significance of the mitigating circumstances.

Justice Gants saw no reason to limit this principle to cases in which “the grand jury know enough about the law of homicide to ask for such an instruction.” Going a step further than Justice Lenk, he would also require legal instructions for the grand jury “regardless of whether the person accused is a juvenile or an adult.”

For Justice Gants, the key issue was the strength of the evidence in mitigation, not the age of the defendant at the time of the offense.

Rather than focus on the specific fact that Javon Walczak was 16 when he killed Rene Valdez, or the general concept that juveniles are less culpable than adults, Justice Gants relied upon fundamental principles concerning the grand jury. Thus, instead of starting with the recent trilogy of Supreme Court cases concerning juveniles—Miller, Graham and Roper—Justice Gants began with the constitutional right, under Article 12 of the Massachusetts Declaration of Rights, of all defendants “not to be indicted for a felony unless a grand jury, based on sufficient evidence, find probable cause to believe that the defendant committed the crime charged.”

He noted that the SJC has “long recognized” the import of the grand jury:

The right of individual citizens to be secure from an open and public accusation of crime, and from the trouble, expense and anxiety of a public trial, before a probable cause is established by presentment and indictment of a grand jury, in cases of high offences, is justly regarded as one of the securities to the innocent against hasty, malicious and oppressive public prosecutions, and as one of the ancient immunities and privileges of English liberty.

Given the grand jury’s time-honored role, the SJC has zealously protected the integrity of its proceedings. For example, in Commonwealth v. Mayfield, the SJC ruled that, “[w]here evidence of mitigating circumstances is withheld from a grand jury for the purpose of obtaining an indictment and where the withholding of such evidence probably influenced the grand jury’s decision to indict, the integrity of the grand jury proceeding is compromised and dismissal without prejudice is required.” In Commonwealth v. O’Dell, the SJC raised a similar concern, dismissing an indictment because the “integrity of the grand jury proceeding [had been] impaired by an unfair and misleading presentation to the grand jury of a portion of a statement attributed to the defendant without revealing that an exculpatory portion of the purported statement had been excised.”

In Walczak, Justice Gants extended these basic principles concerning the integrity of grand jury proceedings to include the novel requirement that, in limited circumstances, the prosecution must give legal instructions without which the grand jury cannot properly consider important evidence concerning possible mitigating circumstances:

[W]here … it would impair the integrity of the grand jury if evidence were withheld regarding the circumstances suggesting that the defendant killed in the heat of passion arising from reasonable provocation or sudden combat, it equally impair the integrity of the grand jury if legal instructions are withheld that would enable them to understand the legal significance of such evidence.

58. Id. at 833.
59. Id. at 852, 855.
60. Id. at 836 n.33 (quoting MASS. GEN. LAWS ch. 119, §74).
61. Id. at 841 (quoting Attorney General v. Pelletier, 240 Mass. 264, 307 (1922)).
63. Id. at 841.
64. Id.
65. Id. at 837.
66. Id. (quoting Jones v. Robbins, 74 Mass. (8 Gray) 329, 344 (1857)).
Why demand the prosecution present exculpatory or mitigating evidence to the grand jury, but not require it to give legal instructions that are needed to understand why such evidence is meaningful and relevant to the decision whether to indict the defendant and, if so, for what crime?

While Justice Gants swept more broadly than Justice Lenk, the language of his concurring opinion limits the potential reach of his proposed rule. Throughout his opinion, he repeatedly emphasized the high standard that he endorsed: the evidence of mitigating circumstances or defenses must be “so strong.”70 Consistent with that approach, Justice Gants characterized Walczak as “one of those rare cases” where the evidence of reasonable provocation and sudden combat was “so strong that the integrity of the grand jury was impaired by the absence of any legal instruction.”71 Without instructions, this evidence was likely “meaningless” to the grand jury.72

Despite the apparent effort of Justice Gants to limit the reach of his proposed rule, some lingering questions about line-drawing persist. Justice Gants expressly excluded from consideration issues of “criminal responsibility,” because those issues raise difficult pre-trial discovery problems.73 Putting aside criminal responsibility, should the prosecution be required to instruct on all mitigating circumstances or defenses? The evidence in Walczak presented a strong case in mitigation for reasonable provocation and sudden combat. But what if a juvenile defendant had been intoxicated, a circumstance that could reduce first-degree murder to second-degree murder (but not manslaughter)? Also, Justice Gants expressly limited his opinion to murder cases. But why stop there? Although he offered a practical rationale,74 Justice Gants conceded that at least some other crimes may fit the same mold. More importantly, his concern for the integrity of grand jury proceedings suggests a broader compass. If the failure to instruct on relevant legal issues compromises the integrity of the charging process, why should it matter what crime has been charged? The constitutional right of the defendant to fair process remains the same, whether the charge is first-degree murder or simple assault.

Justice Spina—The Constitutional Prerogative of the Legislature

Justice Spina, who agreed that the evidence was sufficient to establish probable cause but disagreed that the indictment was invalid for lack of any legal instructions, rejected the core principles that drove Justices Lenk and Gants. While the present system for juvenile murder prosecutions may be subject to reasonable criticism, it is the framework that the legislature adopted, and Justice Spina insisted that the SJC is not free to replace it with some other process of its own choosing.

Regarding the role of the grand jury, Justice Spina took a relatively narrow view. Without derogating its historic function, Justice Spina emphasized both the grand jury’s “limited” role as an investigatory and accusatory body, as well as its lower standard of proof—that is, probable cause, not proof beyond a reasonable doubt.75 Any inquiry beyond probable cause is “in the nature of an adjudicatory decision and appropriately should be reserved for the petit jury.”76 According to Justice Spina, demanding that a grand jury consider potential defenses, before a trial, is “a complex exercise that needlessly squanders dwindling resources for no discernibly useful purpose.”77

Justice Spina also stressed that most “irregularities” before the grand jury “can be addressed and corrected at a subsequent trial, even after a petit jury.”78 That is one reason why appellate courts are generally reluctant to peek behind the curtain of grand jury secrecy. Justice Spina also recognized, but distinguished, the precedents in which the SJC has set aside indictments due to significant misconduct (usually, by prosecutors) that impaired the integrity of the grand jury proceedings:

> The question in this case is not whether the integrity of the grand jury was impaired by misconduct that unfairly resulted in an indictment. Rather, the question here is whether the failure to instruct the grand jury on manslaughter, for which there is no duty, nevertheless is so unfair that the integrity of the grand jury is impaired and the only remedy is to impose such a duty.79

Stated succinctly, Justice Spina concluded that, because a grand jury need not give any consideration to mitigating circumstances, the failure to instruct the grand jury on such concepts cannot possibly impair the integrity of its proceedings such that dismissal of an indictment is required.

Justice Spina also dismissed the trilogy of Supreme Court cases as irrelevant to the issues presented in Walczak. Justice Spina read Miller, Graham and Roper as “focus[ing] exclusively on sentencing and the application of the prohibition in the Eighth Amendment to the United States Constitution against cruel and unusual punishment to certain juveniles who had been charged as adults.”80 In contrast, Walczak raised issues concerning the indictment, not sentencing.81 In addition, the “juveniles are different” cases involved constitutional challenges, but Walczak did not.82 In fact, Justice Spina cast doubt on whether any constitutional challenge to the current charging process would have merit, noting that the Supreme Court in Miller cited Massachusetts as one of 14 states that proceed by direct indictment “yet it never hinted that there might be any impropriety in the chosen process.”83 He also critiqued Justice Lenk for overstating the difference between the juvenile and adult systems, insisting that “Massachusetts already provides more protections to juveniles than is constitutionally required,” and that Walczak himself was “hardly wanting for protections.”84

Although he defended the current system as providing

70. Id. at 842-44.
71. Id. at 844.
72. Id.
73. Id. at 842 n.4.
74. Commonwealth v. Walczak, 463 Mass. 808, 840 (2012) (“In contrast with indictments for some other crimes, an indictment charging murder does not even list the elements of the crime.”).
75. Id. at 849.
76. Id.
77. Id.; see id. at 851.
78. Id. at 845.
80. Id. at 852-53.
81. Id. at 853.
82. See id.
83. Id. at 855-56 (citing Miller v. Alabama, 132 S. Ct. 2455, 2474 & n.15 (2012)).
constitutional process and reflecting sound policy. Justice Spina considered the entire debate to be beside the point. Highlighting the “comprehensive overhaul of the juvenile justice system” in the 1996 act, Justice Spina argued that the SJC could not properly decide to reinstate the former transfer process or fashion an alternative:

The Legislature is presumed to have known of the traditional role of the grand jury when it enacted the youthful offender act in 1996, yet it did not expand the role for cases in which a prosecutor seeks to indict a juvenile for murder. Instead, it streamlined the transfer process for a narrow class of crimes, namely, murder. Any rationale for expanding the role of the grand jury to act as gatekeeper in the transfer process is inconsistent with the 1996 legislation. As such, insofar as today’s decision depends in part on that expansion, it is based on an improper exercise of the legislative function.86

Justice Spina went so far as to accuse the SJC of violating Article 30 of the Massachusetts Declaration of Rights, which vests legislative power in the legislature, by “burdening the transfer process created by the Legislature.”87

Justice Spina dissented from the new rule that the prosecution must give legal instructions to the grand jury when it seeks to indict a juvenile defendant for murder and strong evidence establishes mitigating circumstances or defenses to that charge. But does Justice Spina believe that the prosecution has any duty whatsoever to present evidence that a defendant, like Walczak, may have acted in the heat of passion? If the SJC’s prior decision in O’Dell requires the prosecution to present such mitigating evidence to the grand jury, how does Justice Spina respond to the concern expressed by Justice Gants, that “[t]he law of homicide is too complex reasonably to expect a grand jury to know the legal significance of reasonable provocation or sudden combat without instruction by a prosecutor, or even to recognize that it may be an issue for which they should seek legal guidance”?88

Moreover, the confidence that Justice Spina expressed in the petit jury to correct any “irregularities” before the grand jury may be overstated. How can a petit jury remedy an erroneous decision by a grand jury to indict a juvenile defendant for murder and, in so doing, track the prosecution for the Superior Court? After all, in returning its verdict at trial, a petit jury cannot send a prosecution back to the Juvenile Court, where the grand jury could have directed it from the outset. As Justice Lenk noted: “Even if the juvenile is tried fairly in Superior Court, he or she has still lost the opportunity to be tried as a delinquent or youthful offender in the Juvenile Court.”89

Finally, the claim that the legislature was free to enact the current system for murder prosecutions against juveniles may miss a key point. The general rule that legal instructions are not required (except in cases when the grand jury asks for them) is based on the SJC’s decision in Pelletier, not any statute. Certainly, the SJC can revisit, almost 100 years later, its landmark decision in light of the legislature’s more recent decision to scrap the transfer process and establish a new process by which juveniles may be indicted for second-degree murder and tried as adults in the Superior Court. The SJC can decide—as a majority now has—that its general rule does not apply when prosecutors seek to indict juveniles for murder and there is strong evidence in mitigation, but rather that legal instructions are required in those special cases, regardless of whether the grand jury asks for them.

What Next?

The decision in Walczak revealed deep divisions within the SJC concerning the less culpable status of juveniles, the special function of the grand jury, and the constitutional prerogative of the legislature to alter the charging process. By invalidating the second indictment and establishing a new rule for juvenile murder prosecutions, the decision departed from the long-standing rule, which has prevailed since Pelletier, that the prosecution need not give legal instructions to the grand jury (unless it asks for them). But how far does this new rule reach? For now, it remains limited to the facts presented in Walczak. In future cases involving adult defendants, will Justice Lenk hew to her view that “juveniles are different,” and side with Justice Spina? Or will she agree with Justice Gants that, in certain murder cases involving adults, the failure to instruct the grand jury can impair the integrity of its proceedings? In future cases involving charges other than murder, but where there is strong evidence of mitigating circumstances, will Justice Gants further extend the fundamental principles upon which he relied in Walczak? Or will he conclude that “murder is different”? If the Supreme Court continues the trend of Miller, Graham and Roper, will Justice Spina reconsider that area of law and acknowledge the need to ensure that, before juveniles are sent to Superior Court to be tried as adults, their youth must be taken into proper consideration? As a practical matter, how will the new rule that the required legal instructions must be transcribed alter the current practices of prosecutors and the ways in which they interact with the grand jury? Finally, given the concerns forcefully addressed by four justices about the current system for prosecuting juveniles for murder in the Commonwealth, will the legislature take up the issue and fashion a new statutory gate-keeping process?

These questions, and others, remain to be answered. In the meantime, the fate of Javon Walczak—whether he would be tried as an adult or adjudicated as a juvenile—has been decided. The prosecution presented its case to a third grand jury, which heard the evidence concerning the mitigating circumstances and also received legal instructions about those circumstances. The grand jury then indicted Walczak for voluntary manslaughter, sending his case to the Juvenile Court, rather than the Superior Court.

—Daniel Marx

85. Id. at 852.
86. Id. at 856.
87. Id.
88. Id. at 839-40.


**BOOK REVIEW**

SAVING JUSTICE – Watergate, the Saturday Night Massacre, and Other Adventures of a Solicitor General, by Robert Bork (Encounter Books, 2013), 123 pages

Robert Bork: “And, of course, I’ll have to hear the tapes.”

Alexander Haig: “You can’t hear the tapes.”

Sometimes the length of a book is almost exactly inversely proportional to its importance. The late Robert Bork’s memoir, Saving Justice, may be such a book. Its insights into an era, a profession, and one of the most consequential jobs in the country make it one of the best books on the law to come out in recent years. Bork was a law professor at Yale Law School when he was appointed Solicitor General of the United States by President Richard M. Nixon. Although he only served in that post for a short time, his tenure was more than eventful enough.

“There shall be an officer, learned in the law, to assist the Attorney General.”1 The Solicitor General is that officer. As Bork puts it, “[t]he Solicitor General is the chief appellate advocate for the United States government. His primary responsibility is to represent the federal government before the Supreme Court.”2 But the Solicitor General’s duties do not end there. This book takes us on a vivid and, at times, byzantine journey through the jungles of Cambodia (but not literally), the corridors of the Department of Justice, and the halls of the Supreme Court, viewed through the gimlet eye of Robert Bork.

The Cambodia controversy gives some of the flavor of the book. In April 1973, antiwar organizations went to federal court and filed a complaint seeking to halt the United States Air Force’s bombing campaign of eastern Cambodia, triggered by that country’s playing ally, South Vietnam. The idea of it may sound odd today, but the best books on the law to come out in recent years. Bork was a law professor at Yale Law School when he was appointed Solicitor General of the United States by President Richard M. Nixon. Although he only served in that post for a short time, his tenure was more than eventful enough.

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The Cambodia controversy gives some of the flavor of the book. In April 1973, antiwar organizations went to federal court and filed a complaint seeking to halt the United States Air Force’s bombing campaign of eastern Cambodia, triggered by that country’s playing ally, South Vietnam. The idea of it may sound odd today, but the district court provided declaratory and injunctive relief, finding on July 25, 1973, that “there is no existing Congressional authority to order military forces into combat in Cambodia or to release bombs over Cambodia, and that military activities in Cambodia by American armed forces are unauthorized and unlawful ….”3

Thus, the bombing was ordered halted, effective July 27, a brief stay of execution having been entered. This, the Nixon Administration would not countenance, on the grounds that the war-making power was the exclusive prerogative of the Executive. The judge’s action, the government asserted, likely endangered troops in the field, and was far beyond the authority of any judicial officer. On July 27, the Court of Appeals for the Second Circuit stayed the injunction. On August 1, the plaintiffs petitioned the Supreme Court Justice for the Second Circuit to lift that stay. Thurgood Marshall refused. The United States was represented in that proceeding by the Office of the Solicitor General, led by Robert Bork, who had been appointed only a month earlier. Unsatisfied, the plaintiffs then exercised their right to repair to another Justice of the Supreme Court, and William O. Douglas quickly scheduled oral argument at the United States Post Office in Yakima, Washington, his summer home.4 Douglas vacated the Second Circuit’s stay and the trial court’s original injunction was once again in force, which is to say that a sitting federal trial court judge at home in the states had ordered the United States military to cease and desist its operations in a live theater of war. In Bork’s own words: “Douglas was not deterred by questions of justiciability, standing, or political question, doctrines that might have ended the case in the government’s favor. Indeed, by Douglas’s reasoning the United States could not conduct a war or engage in any use of force without a full-scale trial.”5

As Solicitor General, Bork’s next step was easy – only because he had no other choice. On behalf of the United States, he petitioned the Justice for the Second Circuit, Thurgood Marshall, to reimpose the stay and allow the military to do its battlefield work.

Finally, at the end of the day on August 4, Justice Marshall, after obtaining the agreement of every other member of the Court with the exception of Justice Douglas, who dissented, stayed the district court’s order.6 As Bork notes somewhat acidly: “The bombing proceeded and ended on the schedule for the withdrawal of our troops agreed to by the President and Congress.”7 Surely the above incident qualifies as a little adventure that is every litigator’s dream. But, for Robert Bork in 1973, such instances of legal high adventure were merely par for the course.

Sometimes the job of Solicitor General hits somewhat closer to home. In April 1973, Spiro Agnew was Richard Nixon’s vice president and a Maryland grand jury was taking a particular interest in him. That investigation centered on allegations that Agnew, while he was Governor of Maryland, accepted cash bribes from certain unsavory characters in exchange for construction contracts. As Bork observes, “By the time I heard about it, there was even some question about whether Agnew continued receiving kickbacks while vice president (he had).”8

Agnew professed his innocence within the walls of the White House and even, amazingly, “asked if the White House could speak with Senator John Glenn Beall, Jr., brother of the United States Attorney [who was supervising the investigation], ‘to alert him that the White House didn’t want Agnew’s name to come up in an unnecessary or embarrassing way.’ President Nixon rightly declined to do so.”9 United States (and former Massachusetts Attorney General Elliot Richardson did not see it as a close case at all. Neither did the President.

All involved sought to quickly and quietly push Agnew out. Or, more accurately, set the stage in such a way that Agnew would

5. Bork, supra note 2 at 49.
7. Bork, supra note 2 at 52.
8. Id. at 37.
himself choose to resign. But, “Agnew remained adamant about his innocence. Never one to miss out on making a little extra cash – as we were discovering more and more by the day – Agnew also insisted that if the White House did force him out, he hoped to remain in the administration a few more months to ensure his pension would vest.”

So the Solicitor General, and the Justice Department, had to figure out how to handle “a vice presidential criminal.” Some in the White House believed, as Agnew’s attorneys did, that the Vice President could plausibly argue that he was immune from criminal prosecution by dint of his office. Bork thought not. He wrote a now-somewhat famous memorandum explaining why, and the issue of vice presidential and presidential immunity from court processes remains a hotly contested one.

Both Bork and Richardson, according to Bork, were steadfast in their determination to see an indictment of Agnew through, no matter the reaction. There was, however, considerable resistance to this in certain quarters of the White House. It was not so much that they believed that Agnew was not culpable, but that some were seeking whatever excuse was handy in order to delay any criminal charges. In a particularly memorable scene, Bork tells of both he and Richardson walking to an Oval Office meeting, the subject of which was what to do with Agnew. A quick detour into the men’s room by both, and a hurried turning on of the faucets within, leads to what must surely be one of the most unusual moments of truth in the history of the White House. The two men each vowed to resign if their advice regarding Agnew’s fate was not taken. Says Bork: “Neither of us could see continuing with our jobs and ignoring a criminal in our midst.”

Judge Bork, though, never got to argue his brief in opposition to the proposition that a vice president was immune from criminal prosecution. After the brief was filed in the federal district court of Maryland, Agnew resigned. He resolved the matter, pleading no contest to a single count of tax evasion, and receiving a probationary term for his admission.

Such drama with the Vice President, of course, would pale in comparison to other events involving the President himself. On May 19, 1973, Richardson appointed Archibald Cox, President Kennedy’s Solicitor General, as Special Prosecutor for the Watergate affair.

Bork notes his first experiences with the Office of the Special Prosecutor, and his natural concerns about the expansiveness of its charter, “as if their mission was to build a case of any sort against anybody in the administration.” Such apprehension about independent prosecutors and their wide-ranging, nearly unsupervised powers of investigation have a long and prominent pedigree, much of it explored and considered well after Bork’s tenure.

Bork discusses how he carefully navigated these dangerous legal and political shoals as Solicitor General. Any hope he may have had of limning with hard specificity the Special Prosecutor’s charter or the scope of the government’s deliberative process privilege in the context of the Prosecutor’s investigation, would run headlong into charges that he, and the Department of Justice itself, were simply protecting the President, not defending substantive institutional interests and prerogatives of almost timeless vintage.

Finally, as Watergate hurtled inexorably towards Richard Nixon’s apparently inevitable undoing, Bork would be a crucial player in a dark episode that would be comical if the stakes had not been so high. On July 16, 1973, a former White House Deputy Assistant, Fox Butterfield, appeared before the Senate Watergate Committee (formally, the Senate Select Committee to Investigate Campaign Practices) “and revealed the existence of a secret taping system that Nixon had installed in the White House, telling the Committee members that all conversations in the White House were recorded.” A number of the tapes were then subpoenaed by Cox, and the battle over them was epic. Negotiations between the Special Prosecutor and the President were, understandably, heated to say the least, with the White House claiming the tapes were in essence recordings of confidential conversations between a President and his close advisers and were therefore privileged and exempt from production. Bork tells the tale engagingly, even though the ending is not exactly a surprise. An early attempt at compromise was presented to Cox, who smartly refused it out of hand, that, in response to the subpoena, the President himself would prepare “authenticated” versions of the tapes. Attorney General Richardson had another idea, and proposed that “John Stennis, the senior senator from Mississippi, wouldscrutinize the tapes – withholding any sections with national security implications – and deliver the authenticated tapes to Cox.” Cox refused, and did so in a televised press conference, no less (although, to be fair, Cox did alert the Attorney General to his plan beforehand).

Richardson was being pressured by the White House to fire Cox, but this was the last thing that he wanted to do. Openly proclaiming that he simply could not fire the Special Prosecutor, Richardson turned to Deputy Attorney General William Ruckelshaus, who also demurred. So Ruckelshaus turned to Bork: “Can you fire him, Bob?” To which Bork gave a near career-defining response: “Give

10. Id. at 55.
11. Id.
12. See, e.g., Memorandum from Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, Re: Amenability of the President, Vice President, and other Civil Officers to Federal Criminal Prosecution while in Office (Sept. 24, 1973); Clinton v. Jones, 520 U.S. 681, 693-694 (1997) (declining to recognize immunity from civil suit challenging legality of a President’s unofficial conduct).
14. Id. at 67.
15. While there is not the space here to re-mine such well-trodden ground, the reader who hungers for more can find it without much trouble. See, e.g., Carl Bernstein and Bob Woodward, All the President’s Men (Simon and Schuster 1999); George V. Higgins, The Friends of Richard Nixon (Little, Brown 1975).
16. Bork, supra note 2 at 72.
17. See, e.g., Morrison v. Olson, 487 U.S. 654, 708 (1988) (“It [the Independent Counsel statute] effects a revolution in our constitutional jurisprudence for the Court, once it has determined that (1) purely executive functions are at issue here, and (2) those functions have been given to a person whose actions are not fully within the supervision and control of the President. ... It is not for us to determine, and we have never presumed to determine, how much of the purely executive powers of government must be within the control of the President. They all are.”) (Scalia, J., dissenting).
18. See, e.g., Electronic Frontier Foundation v. Department of Justice, 739 F.3d 1, 7-10 (D.C. Cir. 2014).
20. Id. at 77.
21. Id.
22. Id. at 78-79.
23. Id. at 80.
me a moment to think.”24 And so he did, and Bork explains his reasoning thusly:

I recognized that the president had a clear legal authority to fire Cox and a good reason to do so. It seemed obvious to me that a lower-level executive officer could not publicly defy the president on national and, indeed, international television. … Furthermore … I was the last man in succession. Had I refused to fire Cox, it was extremely unlikely that any other political appointee would have been willing to take a temporary appointment as attorney general.25

Indeed, Bork feared the appointment of a totally unqualified political appointee who merely would be the most obvious sort of rubber stamp for a White House that had seemingly (and, with hindsight, actually) gotten out of control. Bork feared a consequence of such an appointment would be mass resignations at the Department of Justice. But we will never know if he was right. Richardson and Ruckelshaus soon gave their notice, and in this way the stage was set for what has become luridly known in Watergate lore as the Saturday Night Massacre.

After meeting with White House chief of staff Alexander Haig (Bork does not appear to have been his biggest fan), the newly-minted Acting Attorney General went into the Oval Office to meet the President. Bork observes:

My recollection is that the Oval Office was dim and shadowy, but that may be more a reflection of Nixon’s and my mood than the room’s physical condition. Nixon was distraught. He had not anticipated that Richardson would refuse to fire Cox and resign, nor that Ruckelshaus would subsequently do the same.26

Then Nixon asked Bork point blank: “Do you want to be attorney general?” and Bork summarily declined.27 In an interesting commentary on that exchange, Bork says:

I am certain Nixon was not offering me the job but rather was assessing the kind of man he had to deal with. I said it wouldn’t be appropriate because I had decided from the first moment I realized I was going to be asked to fire Cox that if I carried out the discharge I could not profit personally, or even appear to profit, in any way.28

Bork would lead the Justice Department as Acting Attorney General only, and the Watergate investigation would continue. “[I] intended to preserve the integrity of the investigation,” he writes, “and the only thing we could do was press forward and be fired if that was the way it turned out.”29

Indeed, Bork instructed the Special Prosecutor’s Office, now doing business without Cox at the helm, that it was free to subpoena any and all tapes, if that was what the investigation required. A new Special Prosecutor was soon appointed, Leon Jaworski, a man of impeccable character, integrity, and competence. The investigation proceeded, Nixon’s tapes were subpoenaed, and the landmark result was United States v. Nixon, where the Supreme Court ordered the President of the United States to produce the tapes pursuant to the grand jury subpoena.30 When the tapes were finally handed over, Jaworski was surprised to find that “Nixon’s tapes were not complete. In particular, there was an unexplainable eighteen-minute gap in the tapes, which apparently could not be retrieved by any technology then available. The announcement of the gap marked the beginning of the final lap of the Nixon presidency, and it would unravel over the next year.”31 In hindsight, then, it appears that Bork’s judgment was consistent and sound throughout, although short-term surface appearances may not always have been optimal.

Saving Justice is an outstanding chronicle of an extraordinary period of American history, seen through the eyes of a remarkable man of learning and integrity. After his service as Acting Attorney General, Bork returned to Yale to teach. There he stayed until, after a short stint in private practice in Washington, D.C., he was appointed in 1982 by President Ronald Reagan to the United States Court of Appeals for the D.C. Circuit. Bork distinguished himself on that court, writing some of the most thought-provoking, rigorous, and intellectually brave examples of the jurist’s craft.32

Six years later, President Reagan nominated Judge Bork to the United States Supreme Court. That notorious confirmation fight, in its own way perhaps just as significant in its effect on politics and constitutional law as the Watergate litigation, will not be gone over here.33 In the end, whatever else may be said about Robert Bork, and much has surely been said, one simply cannot say that the man who was Solicitor General and Acting Attorney General in the circumstances discussed above, the jurist who composed the concurrences and dissents in the circuit court cases, and the scholar whose many brilliant, pathbreaking law articles34 have had a truly commanding influence on modern constitutional scholarship and jurisprudence, was not qualified to sit on the United States Supreme Court.

—Dean Mazzone

24. Bork, supra note 2 at 80.
25. Id. at 81.
26. Id. at 84.
27. Id.
28. Id.
29. Bork, supra note 2 at 92.
30. U.S. v. Nixon, 418 U.S. 683, 713 (1974) (“We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial”).
31. Bork, supra note 2 at 111.