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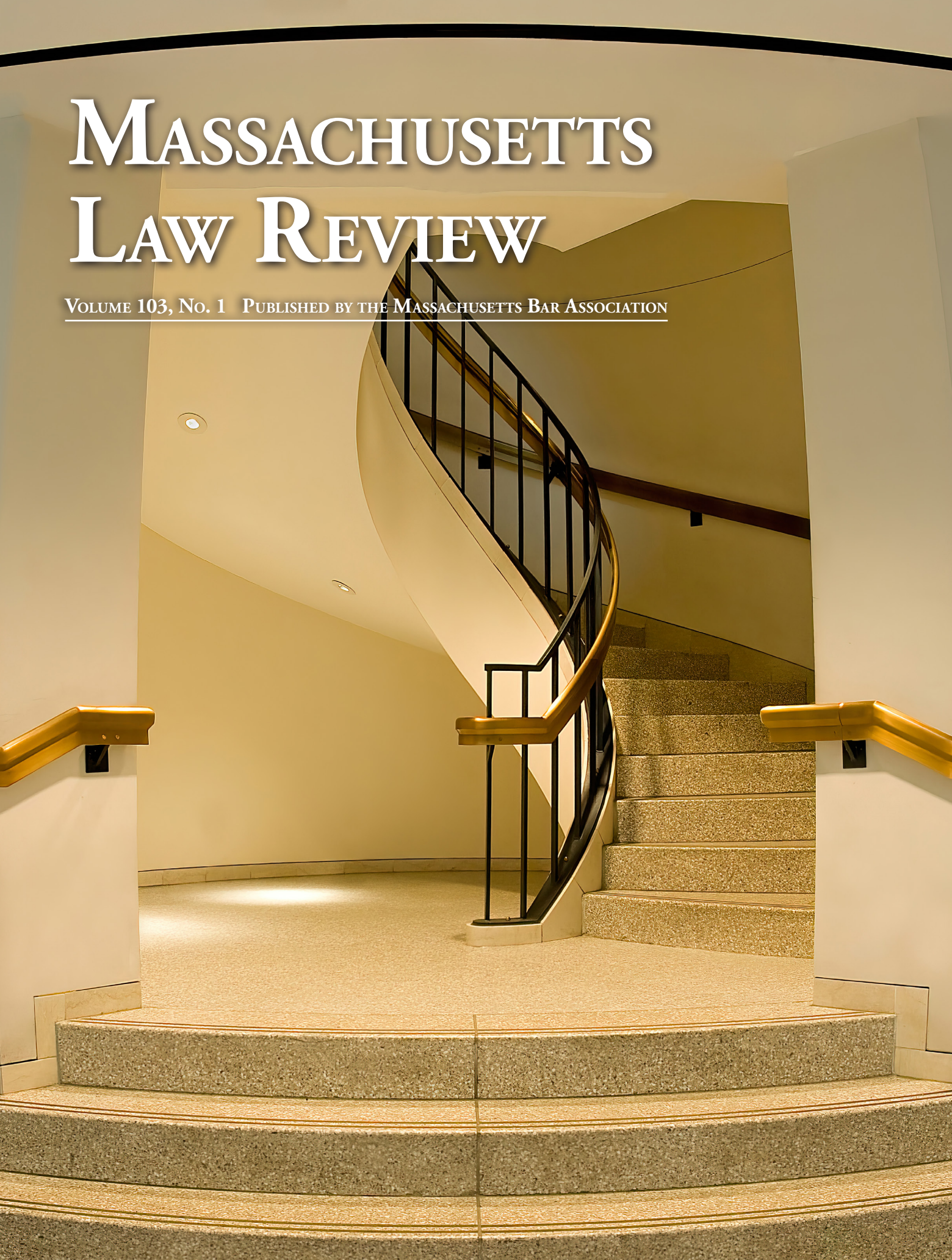

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Approaching 50 Years of Modern Day Wrongful Death Litigation in Massachusetts

By Hon. Valerie A. Yarashus

As we approach the 50th anniversary of the 1973 amendments to the Massachusetts wrongful death statute, it is appropriate to recognize the pivotal nature of these legislative amendments, which transformed wrongful death litigation in the commonwealth.[1,2] Taken together with the Supreme Judicial Court's (SJC's) recognition of the common law origin of wrongful death cases in 1972 in the case of *Gaudette v. Webb*,[3] these changes to our statute and case law brought Massachusetts into the modern era of wrongful death litigation.

While the evolution and significance of *Gaudette v. Webb* have been widely recognized (although still litigated), the importance of the 1973 statutory amendments has been buried over time. This article will examine the impact of the 1973 statutory amendments, which continue to play a central role in the litigation of wrongful death cases.

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I. History of wrongful death statutes in Massachusetts

In Massachusetts, compensatory damages[4] are awarded to the next of kin for negligent conduct that causes a person's death, and, in addition, punitive damages[5] are available when the conduct is grossly negligent or reckless. This dual measure of damages is perhaps the defining feature of Massachusetts wrongful death law today. However, the availability of both compensatory and punitive damages — with their differing goals and differing measures of damages — has not always been the case. Instead, the legislative changes to the wrongful death statute in 1973 (effective Jan. 1, 1974) revolutionized the way that Massachusetts courts deal with wrongful death liability and damages. Therefore, this article suggests that 1973, rather than 1958[6], is the year that the legislature enacted our wrongful death statute "more or less as it stands today."[7]

A. The history of wrongful death statutes in Massachusetts begins in 1693-4 — General Laws, Chapter 229, § 1

Massachusetts is widely credited as the first state in the country to enact a wrongful death statute.[8] It is true that the first wrongful death statute in the United States, which related to non-governmental entities, was enacted in 1840, in Massachusetts.[9] However, there was an earlier statute that created a right of recovery against towns

1. This article is dedicated to Paul R. Sugarman, Esq., who was president of the Massachusetts Bar Association around the time of the enactment of these transformative legislative amendments and is widely credited with their passage. I was privileged to be law partners with Attorney Sugarman for many years at Sugarman and Sugarman PC, and I am forever indebted to Attorney Sugarman for his mentoring and friendship over the last 31 years.

2. I would like to acknowledge and thank several outstanding law students who volunteered their time to help with gathering material and final edits to this article, including Kimberly Foreiter, Kelley Huber, Amanda Iacono, Sarah Gonsensauser and Molly Richard. I am also grateful to Chief Justice Judith Fabricant (ret.), Hon. Douglas Wilkins, Hon. Kathe Tuttman (ret.), Hon. Debra Squires-Lee, Marc Laredo, Esq. and A. Hether Cahill, Esq. for their wise editing suggestions on different drafts of this article. Any errors that remain are my own.

3. Gaudette v. Webb, 362 Mass. 60 (1972).

4. Compensatory damages are intended to compensate the beneficiaries for their loss. In the case of death, the damages are intended to compensate the beneficiaries for the loss of the relationship with the decedent, including both economic damages and non-economic damages, over the period of their projected joint life expectancy. *See* Klairmont v. Gainsboro Rest., Inc., 465 Mass. 165, 178 (2013). The amount of the damages will vary according to the nature of the relationship between the beneficiaries and the decedent.

5. Punitive damages, by contrast, are determined without regard to the nature of the relationships that have been lost, but rather by the egregiousness of the conduct of the defendant that led to the death of the decedent. Laramie v. Philip Morris USA, Inc., 488 Mass. 399, 407 (2021). The purpose of punitive damages is to punish past aggravated conduct and deter future bad conduct of this defendant as well as others. Aleo v. SLB Toys USA, Inc., 466 Mass 398, 412 (2013).

6. The SJC stated recently in dicta: "In 1958, the Legislature enacted the language [of G.L. c. 229, § 2] more or less as it stands today." GGNSC Admin. Serv., LLC v. Schrader, 484 Mass. 181, 187 (2020). For the reasons set forth toward the end of this article, it is easy to see why anyone reviewing the legislative history, as summarized, would reach this conclusion.

7. *Id.*

8. *Id.* ("In 1840, Massachusetts was the first State to enact a wrongful death statute," *citing* Willis & Peverall, "The 'Vanishing Trial': Arbitrating Wrongful Death," 53 U. Rich. L. Rev. 1339, 1359 (2019) ("After Massachusetts codified the first wrongful death statute in 1840, other states responded in kind by announcing that a wife or child dependent upon the income of a deceased male could recover for loss of services and income.").

9. *Id.*

and counties for death due to defective roads and bridges, PL 1693-4, c. 6, § 6, which was previously recognized by our courts as the first wrongful death statute.[10] In 2008, the SJC noted that "[t]he earliest wrongful death statute in what is now the Commonwealth is Province Laws 1693-4, c. 6, § 6, which made municipalities liable for damages to a decedent's relatives when the person's death was caused by 'a defect in a highway, causeway or bridge.'"[11] This statute was passed 95 years before Massachusetts became a state, 146 years before G.L. c. 229, § 2 was enacted in 1840, and 329 years ago.[12]

The 1693-4 statute allowed a civil cause of action for death caused by "a defect or a want of repair of or a want of a sufficient railing in or upon a way, causeway or bridge."[13] The "defective way" statute was amended nine times (in 1786, 1881, 1917, 1929, 1943, 1946, 1947, 1949 and 1961), including increased limits on the caps on damages, until 1981, when the SJC held that the Massachusetts Tort Claims Act (G.L. c. 258), with its higher damages cap of $100,000, superseded and implicitly repealed this section.[14] For the period of time between 1693-4 and 1840, G.L. c. 229, § 1 defined the scope of liability by the type of conduct (i.e., maintaining an unsafe road or bridge by reason of an insufficient railing or other defect) that fell within the statute, it limited the category of defendants that could be found negligent (i.e., to counties and towns), it delineated the next of kin who could recover, and it limited the type and amount of damages recoverable. The original statute in effect from 1693 to 1786 specified the precise amount of damages recoverable (i.e., 100 pounds).[15] The *damages* were a fixed amount, which did not appear to vary either with the egregiousness of the defendant's conduct or with the loss sustained by the surviving next of kin.

To our modern ears, the distinction between civil and criminal law was blurred in wrongful death cases in the 18th and 19th centuries. For example, the 1786 amendment for death due to a defect on a road or bridge provided that:

> And if the life of any person shall be lost through the deficiency of the way, causeway, or bridge, or for want of rails on any bridge, the county, town or persons who are obliged by law to repair and amend the same, shall be liable to be amerced[16] in *one hundred pounds,* to be paid to the executor or administrator of the deceased, for the use of the heirs, devisees or creditors, upon a conviction between the Court of General Sessions of the Peace, or Supreme Judicial Court, on a presentment or indictment of the Grand Jury.[17]

Beginning with the statutory amendment in 1786, the cause of action was to be brought by the commonwealth on a presentment or indictment of the grand jury, but the money damages would still go to the next of kin, rather than to the commonwealth as a fine. Therefore, although this was a criminal case brought by the Commonwealth of Massachusetts, monetary damages would be the remedy provided to the family under this statute and would be paid to the executor or administrator of the deceased.[18]

B. 1840 statute — General Laws, Chapter 229, § 2 and the early amendments

While G.L. c. 229, § 1 created liability based upon a defect in a road or bridge, § 2 allowed for a much broader scope of liability. In the original language of the 1840 statute, liability was created for "the death of passengers carried by certain enumerated modes of conveyance," including "railroad, steamboat, stage coach, [etc.]."[19] The amount of damages to be assessed against these common carriers was to be determined by the degree of fault, and set at a range of $500 to $5,000.[20]

The purpose of civil damages in death cases has been a key issue from the very earliest cases. In *Carey v. Berkshire R. Co.,* the SJC held that:

> A limited penalty is imposed, as a punishment of carelessness in common carriers. And as this penalty is to be recovered by indictment, it is doubtless to be greater or smaller, within the prescribed maximum and minimum, *according to the degree of blame which attaches to the defendants, and not according to the loss sustained by the widow and heirs* of the deceased. The penalty, when

10. Hudson v. Lynn and Boston R.R. Co., 185 Mass. 510, 513-14 (1904):

> [T]he statute as to carriers (St. 1840, c. 80), referred to in Carey v. Berkshire Railroad, was not the first act of the kind. The first act of this kind was a highway act passed a little over [50] years before the carrier act of 1840, p.224, c. 80. [It] provided that 'if the life of a traveller was lost through a defect in a public way the county, town or persons whose duty it was to keep it in repair should "be liable to be amerced in one hundred pounds" for the use of the heirs, devisees or creditors "upon a conviction ... on a presentment or indictment of the grand jury." St. 1786, c. 81, § 7, now R. L. c. 51, § 17. This act was taken from an earlier provincial statute, Prov. St. 1693-4, c. 6, § 6, 1 Prov. Laws, (State ed.) 137. The provincial statute contained the same provision except that it did not provide that the hundred pounds should be recovered by indictment.

11. Matsuyama v. Birnbaum, 452 Mass. 1, 21 (2008).

12. "And be it further enacted by the authority aforesaid, [Sect. 6.] that if, through neglect or not keeping in sufficient repair any highway, causeway, or bridge, any person happen [sic] to lose his life in passing any such highway, causeway, or bridge, … through any defect in or want of necessary repair of such highway, causeway, or bridge, the county or town respectively to which of right it belongs to maintain and keep the same in repair, having been warned or notified of such defect and the need of repairs, and amendment thereof, either in writing, under the hand of two witnesses, or by presentment thereof made at the sessions of the peace, shall pay unto the parents, husband, wife, children or next of kin to any person so losing his or her life the sum of one hundred pounds…" PL 1693-4, c. 6, § 6.

13. *Id.*

14. Gallant v. Worcester, 383 Mass. 707 (1981).

15. *Id.*

16. The term used in the statute, "amerced," is commonly defined as a punishment or penalty or fine that is discretionary rather than fixed by statute.

17. St. 1786, c. 81, § 7 (emphasis in original).

18. *See, e.g.,* Commonwealth v. Bos. & Worcester R.R. Corp., 65 Mass. 512, 517 (1853).

19. Carey v. Berkshire R.R. Co., 55 Mass. 475, 479 (1848). "And by our St. of 1840, c. 80, if the life of any passenger shall be lost by the negligence or carelessness of the proprietors of a railroad, steamboat, stage coach, &c., or of their servants or agents, such proprietors shall be liable to a fine, not exceeding five thousand dollars, nor less than five hundred dollars, to be recovered by indictment, to the use of the executor or administrator of the deceased person, for the benefit of his widow and heirs." *Id.*

20. *See Hudson*, 185 Mass. 510, 513, 516 (1904).

> thus recovered, is conferred on the widow and heirs, not as damages for their loss, but as a gratuity[21] from the commonwealth.[22]

Thus, the damages would be paid to the personal representative of the estate for the benefit of the surviving next of kin, but the amount would be determined by the degree of fault of the defendant, rather than the loss to the decedent's family.

Over the years, the wrongful death statute was amended numerous times, including amendments that introduced the concept of contributory negligence of the decedent serving as a bar to recovery, provided that the decedent was not a passenger or an employee.[23] Over the years, the statute of limitations changed several times, and the maximum amount recoverable changed as well.

By 1840, although the concepts of negligence and gross negligence already existed as distinct concepts, Massachusetts did not distinguish between the two as a basis for different categories of damages recoverable in death cases, except to the extent that the greater the negligence or carelessness, the greater the damages would be, up to the statutory limit. Indeed, the wrongful death statute in Massachusetts during the second half of the 19th century allowed liability against common carriers if the company itself was negligent, but only allowed vicarious liability based on an employee's actions if the employee was grossly negligent.[24,25]

By legislative amendments to various statutes in 1871, 1874, 1881, and 1886, the personal representative of the estate was permitted to recover damages for the next of kin under either a criminal indictment, or a civil action in tort, but not both.[26] "Where a penalty

21. Understandably, this term was offensive to surviving families. The *Gaudette* court noted that "[w]hatever the necessity for attempting to explain or justify recovery for wrongful death in 1848 or in 1922, there is no such necessity today. There is no element of 'gratuity' in the payment of damages by a wrongdoer or in their recovery by victims of the wrongdoing." *Gaudette*, 362 Mass. 60, 67 n. 5 (1972).

22. *Carey*, 55 Mass. at 480.

23. "In 1853 [the law permitting recovery] was extended to cases where a steam railroad had wrongfully caused the death of 'any person, not being a passenger or employee . . . such person being in the exercise of due care and diligence.' St. 1853, c. 414, now R. L. c. 111, § 267. In 1864 the statute as to steam railroads was extended to street railways, St. 1864, c. 229, § 37, now R. L. c. 111, § 267, in 1871, to collisions at grade crossings where the statutory signals were not given, St. 1871, c. 352, now R. L. c. 111, § 268, and in 1883, employees of steam railroads were put on the same footing, in case they were killed by a steam railroad, as persons who were not passengers. St. 1883, c. 243, now R. L. c. 111, § 267. Employees of street railways had been put on that footing by St. 1864, c. 229, § 37, and in 1897 all persons and corporations were put on the same basis as steam railroads and street railways. St. 1897, c. 416, now R. L. c. 171, § 2." *Hudson*, 185 Mass. at 514.

24. Brooks v. Fitchburg & L. St. Ry. Co., 200 Mass. 8, 10 (1908) ("[The statute] imposed liability for the mere negligence of its servants and agents, while railroads and other common carriers were liable only for the gross negligence of their servants or agents."); Commonwealth v. Vermont & Mass. R.R. Co., 108 Mass. 7, 10-11 (1871).

25. For a fascinating and much more detailed overview of the history of railroad liability in Massachusetts, *see Brooks*, 200 Mass. at 10.

26.

> By St. 1881, c. 199 (that is to say, after the system had been in operation and applicable to the death of a traveller on a defective highway for nearly ninety years and had been made applicable to many other cases since 1840, when it was extended to carriers), a civil remedy was given in addition to the remedy by indictment, in all cases except where death was caused by a street railway, namely, in case of steam railroads (§ 1), grade crossing accidents (§ 2), carriers (§ 3), and defects in highways (§ 4). And by St. 1886, c. 140, (under which the action now before us was brought,) the omission of street railways from the act of 1881 was remedied. Before St. 1886, c. 140, the only remedy in case of street railways was by indictment. Holland v. Lynn & B.R. Co., 144 Mass. 425 (1887).
>
> Two years after it was established in Commonwealth v. Boston & Lowell Railroad that an indictment could be maintained for wrongfully causing the death of a passenger not in the exercise of due care, it was decided that an action of tort could be maintained under St. 1881, c. 199 (Pub. Sts. c. 112, § 212) for the death of a passenger who was not in the exercise of clue care. Merrill v. Eastern R.R. Co., 139 Mass. 252 (1885). This conclusion was reached on the ground that so far as the liability of the defendant corporation is concerned, "no distinction can be made between an indictment and an action of tort, under the Pub. St. c. 112, § 212." *Id.* at 257. This case was followed in McKimble v. Boston & M.R.R., 139 Mass. 542 (1885); 141 Mass. 463 (1886).

Before and since the decision in *Merrill*, the SJC has stated that the effect of these two statutes (St. 1881, c. 199, and St. 1886, c. 140) is to give a civil remedy for the recovery of this penalty (which is imposed by way of punishment) in addition to the remedy by indictment. For instance, in Kelley v. Boston & Maine R.R., 135 Mass. 448, 449 (1883), C. Allen, J., recognized:

> But no criminal jurisdiction existing under the earlier statute (St. 1874, c. 372, § 163) is taken away by the St. of 1881, c. 199; and the purpose of the later statute was to give a new remedy to the party by a civil action, in addition to that already existing by indictment.

Also, in Littlejohn v. Fitchburg R.R. Co., 148 Mass. 478, 482 (1889), Holmes, J. stated:

> But the present action is statutory and penal in its character. The statute does not extend the liability for personal injuries to those injuries which cause death, as in Little v. Dusenberry, 46 N.J. Law, 614 (where also, so far as appears, the defendant may have been negligent). It creates a liability of a different nature. The action which it gives to the administrator is merely a substitute for the indictment also provided for, and it is expressly enacted that the damages shall be "assessed with reference to the degree of culpability of the corporation, or of its servants or agents."

In Doyle v. Fitchburg R.R. Co., 162 Mass. 66, 71 (1894), Morton, J., in delivering the opinion of the court, said:

> Originally the remedy was by indictment. Afterwards it was extended to an action of tort. St. 1871, c. 381, § 49. St. 1874, c. 372, § 163. St. 1881, c. 199, § 1, 6. But only one of the remedies can be pursued by the executor or administrator. And whether the amount is recovered by the indictment or in an action of tort, it goes in either case to the widow and children and next of kin …. It is in substance a penalty given to the widow and children and next of kin, instead of to the Commonwealth, and as such the intestate could not release the defendant from liability for it.

Hudson, 185 Mass. 510, 515-17 (1904); *Brooks*, 200 Mass. at 14 ("The remedy by an action of tort, which had, by St. 1881, p. 521, c. 199, been given where there was liability for death, against steam railroads and other common carriers, was extended to street railway companies by St. 1886, c. 140.").

[was] imposed by way of punishment in a criminal prosecution, the amount of the penalty [was] fixed by the presiding judge in passing sentence."[27] When the jury was the one to assess damages as part of the civil action of tort through the amendments in 1881 and 1886, the courts once again confirmed in the statutory language that the compensation was to be determined as punitive damages (i.e., with respect to the degree of fault of the defendant).[28]

While the two forms of the remedy were different, the measure of damages remained the same, whether for punitive damages available through the wrongful death statute as a civil statutory tort action or for punishment assessed in a criminal case.[29]

Around the turn of the 20th century, the legislature allowed new civil tort actions in certain wrongful death cases, without the option of obtaining damages as part of the criminal process. Specifically, gas and electric companies could be liable for a wrongful death through a tort action, but the statute did not create any remedy for damages by indictment.[30] In 1898, a legislative amendment allowed liability against any person or company (not just common carriers or specifically named industries) whose negligence — or whose employee's gross negligence — caused the death of a person.[31] The remedy was a civil tort action, and the option of obtaining damages by indictment remained limited to railroads and street railways.[32,33]

Throughout the early part of the 20th century, wrongful death damages in Massachusetts remained punitive rather than compensatory.[34] The damages caused by a death often involved some period of pain and suffering before death, which was not covered by the wrongful death statute. In 1911, the statute was amended so that the personal representative of an estate could file one civil action that included a cause of action for conscious pain and suffering, as well as a cause of action for wrongful death.[35] The portion of the case dealing with the conscious pain and suffering before death proceeded by common law, which was based on compensation. The portion of the

27. *Hudson,* 185 Mass. at 517-18.

28. *See* Porter v. Sorell, 280 Mass. 457, 461 (1932). As stated in Hudson, 185 Mass. at 518:

> … when it was provided by statute that an action of tort could be maintained where death was caused through the wrongful act of the defendant, it thereby became the province of the jury to fix the amount of the penalty to be imposed, and it became necessary to specify how the amount of it should be assessed. It was provided that the amount to be recovered in the action of tort was "to be assessed with reference to the degree of culpability of said corporation, or of its servants or agents." That fixed the character of the action of tort under these two acts. St. 1881, p. 521, c. 199, and St. 1886, p. 117, c. 140. By that provision the effect of these two acts was to give a civil remedy for the recovery of a penalty imposed by way of punishment.

29. *Littlejohn*, 148 Mass. 478, 482 (1889). Justice Oliver Wendell Holmes explained in that case that: "[t]he action which it gives to the administrator is merely a substitute for the indictment also provided for, and it is expressly enacted that the damages shall be 'assessed with reference to the degree of culpability of the corporation, or of its servants or agents.' Pub. St. c. 112, § 212." *See Carey*, 55 Mass. 475, 480 (1848); *Vermont RR*, 108 Mass. 7, 12 (1871).

30. "… St. 1897, c. 416 … subjected corporations operating gas or electric light plants or systems to an action of tort, where the life of a person, exercising due diligence and not an employee, was lost by the negligence of the corporation or the unfitness or gross negligence of its servants or agents, but this statute did not confer the remedy by indictment." Brooks v. Fitchburg & L. St. Ry. Co., 200 Mass. 8, 14 (1908).

31. St. 1898, c. 565. *See Brooks,* 200 Mass. at 15. ("St. 1898, c. 565, provided an action of tort against any person or corporation whose negligence or the gross negligence of whose servants or agents caused the loss of life of a person, other than an employee, in the exercise of due care.").

32. "[T]he remedy for indictment was provided against railroads and street railways, while only the action of tort exists against the other persons liable." *Brooks*, 200 Mass. at 16.

33.

> By St. 1881, p. 521, c. 199, the important change was made in the law as to loss of life occasioned by railroad companies and proprietors of any steamboat, stage coach or common carriers of passengers, and for the life of a person lost by a defective highway, in that a new remedy, namely, an action of tort, was given for the benefit of the widow and near kindred of the person deceased. Section 6 of this act preserved as concurrent the remedy by indictment existing against railroads by St. 1874, pp. 396, 397, c. 372, §§ 163, 164, but made no corresponding preservation of remedy against other common carriers or municipalities. This act did not include street railways by name. When the Public Statutes were enacted, the liability to indictment disappeared against all except railroads and street railways.

Brooks, 200 Mass. at 13.

34. The SJC further stated:

> Our statute is confined to the death of passengers carried by certain enumerated modes of conveyance. A limited penalty is imposed, as a punishment of carelessness in common carriers. And as this penalty is to be recovered by indictment, it is doubtless to be greater or smaller, within the prescribed maximum and minimum, according to the degree of blame which attaches to the defendants, and not according to the loss sustained by the widow and heirs of the deceased. The penalty, when thus recovered, is conferred on the widow and heirs, not as damages for their loss, but as a gratuity from the Commonwealth.

Hudson, 185 Mass. 510, 513 (1904).

35. St. 1911, c. 31. The SJC explained:

> … [T]he effect of the [1911] amendment was and is to do away with the necessity of bringing two separate actions and to allow a count for conscious suffering at common law to be joined to a count for death under the statute and the recovery of damages under each with like effect as if two separate actions had been brought. By the addition of the count for conscious suffering what was before an action for death alone becomes in effect two actions joined in one with the right of recovery limited in the count for death to the amount established by the statute, and with no limit in the other count except that fixed by the rules of the common law.

Gilpatrick v. Cotting, 214 Mass. 426, 426 (1913).

case dealing with the loss caused by the death itself was still handled through the statutory punitive damages.[36]

C. 1947 and 1949 amendments

In 1947, for the first time, the legislature changed the wrongful death statute so that damages were to be awarded on a compensatory basis. The new law, enacted as emergency legislation, provided that if any person:

> so causes the death of a person in the exercise of due care who is not in his or its employment or service, he or it shall be liable in damages, in an amount not less than two thousand nor more than fifteen thousand dollars, to be assessed with reference to the pecuniary loss sustained by the parties entitled to benefit hereunder and recovered by the executor or administrator of the deceased person in an action of tort … and distributed one half to the surviving wife or husband and one half to the children of the deceased dependent upon him for support at the time of his death, or, if there are no such dependent children, to the surviving wife or husband, or, if there is no surviving wife or husband, to the next of kin.[37]

This dramatic change from punitive to compensatory damages lasted only two years, and in 1949, the statute was amended once again to return to a punitive measure of damages.[38]

D. 1958 amendments

The 1958 amendments, which included a significant redrafting of the statute, left the key statutory provision regarding punitive damages untouched. In this iteration, damages continued to be assessed solely "with reference to the degree of … culpability..."[39] Thus, while the 1958 amendments were significant, they did not create a modern conception of damages for wrongful death cases in Massachusetts.

In 1958, the statute allowed liability against "[a] person who (1) by his negligence causes the death of a person in the exercise of due care, or (2) by wilful, 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" or (3) is a common carrier that negligently causes the death of a person [whether or not the decedent was in the exercise of due care].[40] The statute went on to specify that under any of these theories of liability, the damages were to be assessed with respect to the culpability of the negligent person/entity/employee.

In 1965, the SJC reaffirmed that:

> The death act in effect at the time of the accident [G. L. c. 229, § 2, as appearing in St. 1958, c. 238, § 1] provided that the wrongdoer "shall be liable in damages in the sum of not less than two thousand nor more than twenty thousand dollars, to be assessed with reference to the degree of his culpability. . . ." G. L. c. 229, § 2. Thus the quantum of the defendant's negligence is the sole factor in assessing damages. *Porter v. Sorell*, 280 Mass. 457, 459. We think that just as the negligence of the defendant's decedent may be inferred from the facts in the case, the degree of his culpability can also be inferred.[41]

In 1972, the year before the key legislative amendments in 1973, the SJC reviewed the history of the wrongful death statute and noted that as of 1972, damages continued to be punitive rather than compensatory.[42] The *Gaudette* court ruled that, while "our wrongful death statutes will no longer be regarded as 'creating the right to recovery' for wrongful death [because a common law origin was finally acknowledged], they will be viewed rather as: . . . requiring

36. In 1912, the SJC summarized the legislative changes as follows:

> Originally in this commonwealth loss of life of a passenger or of a person who is not a passenger or in the emply [sic] of the corporation, if caused by the negligence of the carrier or by the unfitness or gross negligence of its servants or agents while engaged in its business, was punishable by a fine limited to a minimum or maximum amount to be recovered by indictment to the use of the widow and children of the deceased in certain proportion, or if there were no children the widow received the whole, and if neither widow nor children survived him the penalty went to his next of kin. By subsequent legislation the provision has been supplemented by the addition of an action of tort and the liability extended to persons and corporations who are not carriers of passengers. St. 1840, c. 80; St. 1853, c. 414; Gen. St. c. 63, §§ 97, 98; *Id.* c. 160, § 34; St. 1874, c. 372, § 163; St. 1881, c. 199; Pub. St. c. 112, § 212; *Id.* c. 73, § 6; St. 1897, c. 416; St. 1898, c. 565; Rev. Laws, c. 111, § 261; *Id.* c. 171, § 2; St. 1906, c. 463, pt. 1, § 63; St. 1907, c. 392; Com. v. Boston & Maine R.R., 133 Mass. 383; Kelley v. Boston & Maine R.R., 135 Mass. 448; Brooks v. Fitchburg & Leominster St. Ry., 200 Mass. 8, 86 N. E. 289, where the statutes relating to street railways are collated. The development of our legislation, and many of the decisions are reviewed by Loring, J., in Hudson v. Lynn & Boston R.R., 185 Mass. 510, 71 N. E. 66. And if the more recent legislation seems to indicate a tendency to assimilate the remedy to an action of tort for negligence where the injury does not result in death, yet the statute on which the present action is based still recognizes the punitive nature of the civil remedy by requiring the assessment of damages to be "with reference to the degree of … culpability" either of the employer or of his employee through whose negligence the death of a person has been wrongfully caused. Grella v. Lewis Wharf Co., 211 Mass. 54, 97 N. E. 745; St. 1911, c. 31. The statute may be designated as remedial for the reason that a remedy is provided where before its enactment none existed. But the damages assessed are distinctly grounded upon the defendant's culpable misconduct and are diminished or enhanced according to the degree of his delinquency. *See* Com. v. B. & A. R. R., 121 Mass. 36; Brooks v. Fitchburg & Leominster St. Ry., 200 Mass. 8, 86 N. E. 289; Renaud v. N. Y., N. H. & H. R. R., 210 Mass. 553, 97 N. E. 98.

Brown v. Thayer, 212 Mass. 392, 398-99 (1912).

37. St. 1947, C.506, sec. 1A.

38. *Gaudette*, 362 Mass. 60, 66 n. 4 (1972); *see* Zabin & Connolly, "The New Wrongful Death Act in Massachusetts Steps into the Twentieth Century," 58 Mass. L.Q. 345, 369 (1973).

39. St. 1958, c. 238, § 1.

40. *Id.*

41. Noon v. Bedford, 349 Mass. 537, 544 (1965).

42. *Gaudette*, 362 Mass. at 66 n. 4 ("By St. 1947, c. 506, §§ 1, 1A, recovery was changed to a compensatory basis, but by St. 1949, c. 427, the punitive approach was reinstated. With the exception of this two-year period wrongful death damages in Massachusetts have continued to the present day to be awarded on a 'punitive' basis, i.e., computed with reference to the degree of culpability of the defendant.") (citations omitted).

that damages recoverable for wrongful death be based upon the degree of the defendant's culpability."[43]

E. 1973 amendments, effective Jan. 1, 1974

In 1973, the way that juries assessed damages in wrongful death cases changed dramatically with the passage of Chapter 699, "An Act Further Regulating the Amount of Damages Recoverable in Actions for Death." In cases where a defendant negligently caused the death of the person, individualized compensatory damages were fully available. For the first time in Massachusetts, both types of damages (compensatory and punitive) were available in egregious cases where the defendant's gross negligence or recklessness had caused a fatality. This revolutionized the way that wrongful death cases were tried in Massachusetts and brought Massachusetts in line with the majority of states that had rewritten their wrongful death statutes in a similar fashion.[44]

In addressing the legislature concerning this bill, Governor Francis W. Sargent supported the most important changes and wrote:

> This legislation would change the existing Massachusetts statute governing recovery for "wrongful death" from one allowing punitive damages not to exceed $200,000 depending upon the defendant's degree of culpability to one providing for recovery on a compensatory basis.
>
> We are all familiar with the apparently unfair results which have sometimes stemmed from our current law. I agree with your judgment that this statute should be revised in order to permit recovery which would include compensation for "the loss of the reasonably expected net income, services, protection, care, assistance, society, companionship, comfort, guidance, counsel, and advice of the decedent …"[45]

At the time, the seminal law review article on this change in the law highlighted the significance of it as follows:

> On January 1, 1974, Massachusetts, one of the last two holdouts of the Common Law world against the compensatory Wrongful Death Act, will have a Wrongful Death Act as broad and liberal as any in effect anywhere else (save, possibly, Japan.) The new [1973] amendment to Massachusetts General Laws, … Chapter 229, § 2 … completely changes the whole principle of the law of damages in wrongful death for Massachusetts. It changes the measure of damages from a measure to be determined "with reference to the culpability" of the Defendant to a measure to be assessed on the basis solely of the pecuniary loss to the deceased's dependents. The Act also introduces a wholly new concept into Massachusetts law — the common law concept of punitive damages in cases where death is caused by aggravated fault on the part of the Defendant.[46]

The one change in the bill originally passed by the legislature that the governor did not support was compensation for the "grief, anguish and bereavement of the survivors,"[47] and so that portion was removed by the legislature before the governor signed the bill into law.

1. Compensatory damages became available as the primary measure of damages

The wording of the legislation to provide compensatory damages carefully tracked common law claims that already existed in personal injury cases for loss of consortium.[48] The new statute provided that when a person causes the death of another person through negligence, the negligent person/entity:

> … 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 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…[49]

The most widely used portion of our current law on wrongful death damages — regarding the "fair monetary value of the decedent" to the statutory next of kin — thus came about with the first of two 1973 amendments, effective Jan. 1, 1974.[50] Unlike the 1947 amendments that briefly allowed compensatory damages in one total amount to be divided by a statutory formula, the 1973 amendments allowed juries to consider the full loss of the fair monetary value of the decedent to each beneficiary, including all the items that juries would have considered previously under common law loss of consortium claims, in a personal injury case that did not result in death.

43. *Id*. at 71.

44. Zabin & Connolly, *supra*, at 345.

45. The Commonwealth of Massachusetts, *Message from His Excellency the Governor, Returning, Under the Provisions of Article LVI of the Amendments to the Constitution, with Recommendations of Amendment, the Engrossed Bill Further Regulating the Amount of Damages Recoverable in Action for Death,* Senate No. 1860, p. 3 (Aug. 1973) [hereinafter Governor's Message].

46. Zabin & Connolly, *supra*, at 345.

47. Governor's Message, *supra* note 45, at p. 3-4.

48. *See* Hallett v. Wrentham, 398 Mass. 550 (1986) (listing the elements of damages permitted under G.L. c. 229, § 2 for next of kin and prohibiting an independent tort-based right of recovery for post-death loss of consortium). For this reason, it is appropriate to understand and refer to the compensatory portion of wrongful death damages as consortium-like (statutory) damages. Santos v. Lumbermens Mut. Cas. Co., 408 Mass. 70, 78 (1990) (a beneficiary in a wrongful death case "utilizes the administrator as a 'conduit' to recover his consortium-like claims").

49. G.L. c. 229, § 2 (1973).

50. The second legislative amendment to the wrongful death statute passed in 1973 changed the statute of limitations from two to three years.

Throughout the history of wrongful death law in Massachusetts, individual beneficiaries had no right to bring their own action; whoever controlled the estate had the right to control the lawsuit. This portion of the law remained the same. However, after the 1973 amendments went into effect, the personal representative no longer received one single amount, to be divided by a formula as set forth in the statutory scheme. Rather, each beneficiary was entitled to have his/her damages determined by the jury as a separate calculation; this is the very heart of the meaning of compensatory damages.[51] Compensatory damages are awarded based on the evidence about the loss to the surviving family named in § 1, without regard to any formula or share.[52]

Accordingly, many plaintiff's lawyers now choose to have economists testify to the projected net income of the decedent. Factors like the age, health, and life expectancy of the decedent, which were technically irrelevant with a punitive damages scheme, became relevant and important for the jury to understand. The number and identity of the beneficiaries, which were irrelevant before the new legislation went into effect,[53] became central to evaluating damages. The relationship of each beneficiary to the decedent became an appropriate and proper area of inquiry during the trial, as this became the largest measure of damages in many cases.

Massachusetts courts have interpreted the interplay between G.L. 229, § 1 and § 2 to mean that § 1 determined the "next of kin" who could recover in a wrongful death action.[54] However, § 2 required an individual assessment of the amount that each such person would receive for compensatory damages.[55] This is relatively straightforward in the case of a verdict because each beneficiary receives his/her award of damages on a verdict slip. When there is a settlement, on the other hand, the amount or percentage is not fixed. Rather, the personal representative has a fiduciary responsibility to allocate damages in a manner that is fair and reasonable in light of what a jury would have been expected to do. Thus, our courts have upheld a determination that a parent who abandoned a child should be allocated a nominal amount, rather than half, in a wrongful death action for the death of the child.[56]

These statutory compensatory damages (which cover the period of time after death) go to the individual next of kin, rather than to the estate, unlike punitive damages. This, in itself, is significant. These consortium-like statutory damages are to be understood as a separate injury/loss to each of the next of kin.[57] The personal representative of the estate serves as a "conduit" on behalf of the beneficiaries to recover their consortium-like statutory damages after death.[58] A person entitled to have a consortium claim for the period of time before death (as opposed to after death) would not bring that action through the personal representative, although that claim generally would be brought together and determined by a jury at the same time as the wrongful death action. In the most common type of case, a surviving spouse might serve as the personal representative of the estate. If death was not immediate and there was sufficient time between injury and death for there to be a loss of consortium, then the spouse/personal representative would be entitled to bring his/her own individual consortium claims, along with the wrongful death case. The individual claims would be for the loss of consortium *before* death and the other claims would be brought on behalf of the estate as well as the statutory next of kin. There are no common law claims for loss of consortium *after* death, because those have been supplanted by the wrongful death statute.[59]

Compensatory damages for the conscious pain and suffering of the decedent before death continue to be brought as part of the wrongful death lawsuit; these damages go into the estate rather than to a designated next of kin. This portion of the law regarding conscious pain and suffering of the decedent was not changed by the 1973 amendments.

There is no requirement that the personal representative be one of the beneficiaries, and indeed this is something that has to be determined at the beginning of the case. Usually this occurs by agreement (in cases of intestacy) or as specified in a will, but occasionally this will need to be determined by the probate court before anything else may proceed. A wrongful death case cannot be filed in suit until someone is appointed as the personal representative.[60] A limited type of administration known as a "voluntary administration" does not provide sufficient authority to file suit under G.L. c. 229, § 2 or to settle a wrongful death claim.[61] Rather, "[t]he wrongful death statute is clear that an action for wrongful death must be brought by the executor or administrator of the deceased."[62,63,64]

51. Burt v. Meyer, 400 Mass. 185, 188-189 (1987).

52. *Id.* at 190-91.

53. *Gaudette*, 362 Mass. 60, 73 n. 9 (1972) ("Liability based upon the degree of culpability of the defendant cannot be varied according to the number of beneficiaries who are guilty or innocent. Compare Brown v. Thayer, 212 Mass. 392, 399.")

54. *GGNSC*, 484 Mass. 181, 187, n. 13 (2020) ("General Laws c. 229, § 1, creates a roadmap of who constitutes a beneficiary of the decedent.").

55. Guy v. Johnson, 15 Mass. App. Ct. 757 (1983); *Burt*, 400 Mass. 185 (1987).

56. *See Guy,* 15 Mass. App. Ct. 757.

57. *Santos*, 408 Mass. 70, 78-79 (1990) ("the amount recovered in a wrongful death action is not a 'single indivisible amount' as the Appeals Court suggested (Doyon v. Travelers Indem. Co., 22 Mass. App. Ct. 336 (1986), but an amount which is intended to be distributed to the various beneficiaries and the estate").

58. *Id*. at 77-78.

59. *Hallett*, 398 Mass. 550, 556 (1986) ("We conclude that the wrongful death act, G.L. c. 229, § 2, provides the exclusive action for the recovery of the damages it encompasses by the designated beneficiaries. The plaintiffs may not maintain a separate action for loss of consortium.")

60. MacDonald v. Moore, 358 Mass. 801 (1970).

61. Marco v. Green, 415 Mass. 732 (1993).

62. Estate of Gavin v. Tewksbury State Hosp., 468 Mass. 123, 136 (2014) (citations omitted). *Cf.* Estate of Moulton v. Puopolo, 467 Mass. 478, 480 n.8 (2014) ("wrongful death action brought by estate not precluded when Commonwealth withdrew initial objection and parties proceeded as if estate were properly before Superior Court throughout litigation"); Estate of Gavin v. Tewksbury State Hosp., 468 Mass. 123, 136 (2014) ("…we reject the estate's argument that a wrongful death action may properly be brought by the estate or even a temporary executor …").

63. *See also Santos*, 408 Mass. 70, 76 (1990) ("Under the wrongful death statute, G.L. c. 229, § 2, a 'personal representative' may bring an action 'on behalf of the designated categories of beneficiaries.'") (citations omitted). Since the Uniform Probate Code was enacted in Massachusetts, the term "personal representative" is now used in favor of the older terms, "executor" or "administrator."

64. The issue of whether a "late and limited personal representative" has the power to file a wrongful death claim to recover various categories of damages is beyond the scope of this article.

2. Punitive damages available for gross negligence and recklessness

The 1973 amendments to the wrongful death statute provided for: "(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 …"[65] Consistent with the modern trend, and in light of public policy decisions to discourage aggravated behavior resulting in fatalities, the 1973 amendment was the first time in Massachusetts that there were no caps or maximum amount of punitive damages contained within the wrongful death statute. As the SJC observed:

> Now [following enactment of the legislative amendment in 1973] Massachusetts has a statute which provides for true punitive damages. Since it no longer must attempt to compensate beneficiaries by use of "punitive" damages, it may now use punitive damages to truly punish the wrongdoer." Zabin & Connolly, *The New Wrongful Death Act in Massachusetts Steps into the Twentieth Century*, 58 Mass. L.Q. 345, 371 (1973). *But see* J.R. Nolan, *Tort Law* § 334 (1979).[66]

Compensatory damages and punitive damages are generally awarded at the same time and by the same fact finder.[67] The rationale for punitive damages has nothing to do with compensation for the fair monetary value of the decedent to the next of kin. Instead:

> … the purposes of punitive damages include "condemnation and deterrence," *Dartt v. Browning-Ferris Indus., Inc.* (Mass.), 427 Mass. 1, 17, 691 N.E.2d 526 (1998), quoting *Bain v. Springfield,* 424 Mass. 758, 767, 678 N.E.2d 155 (1997), . . . a "proper punitive damage award" is one that is "sufficient . . . to send a clear message to the [defendant] of condemnation for its reprehensible behavior…." *Clifton v. Massachusetts Bay Transp. Auth.*, 445 Mass. 611, 624, 839 N.E.2d 314 (2005). *See* Zabin & Connolly, *The New Wrongful Death Act in Massachusetts Steps into the Twentieth Century,* 58 Mass. L.Q. 345, 369 (1973-1974) ("punitive damages . . . are awarded . . . to punish the defendant and make an example of him").[68]

The punitive damages award is "to punish a defendant for its unlawful conduct that caused a plaintiff's specific harm."[69]

Punitive damages are not awarded automatically in wrongful death cases. Rather, they are only available upon a verdict of gross negligence and/or recklessness. A plaintiff must plead this theory in the complaint and prove it at trial.

In a wrongful death case, the damages that go directly into the estate include conscious pain and suffering before death, punitive damages, interest, and funeral/burial expenses.[70] Punitive damages are recoverable by the estate, regardless of whether or not there are any statutory next of kin as beneficiaries.[71] If the law were only compensatory, wrongdoers could escape civil liability when there were no next of kin, but this result is prevented at least in theory in aggravated cases by the existence of punitive damages.[72]

Liens and expenses owed by the estate must be satisfied before any net funds can be distributed, and so it is notable that punitive damages must go into the estate as part of the general funds, rather than being designated for a particular person. In the case of a decedent who has left a will, the proceeds in the estate will go to the beneficiaries named in the will, after all liens and expenses of the estate have been satisfied, rather than the next of kin defined in § 1. For a person who has died intestate, the net funds remaining in the estate will be distributed according to the distribution set forth by statute.[73]

Punitive damages in Massachusetts are only permitted when they are authorized by statute,[74] which means that wrongful death cases are unique when compared to any type of personal injury case, no matter how severe the injury or how egregious the conduct leading to life-altering injury.[75] The only other statute that allows multiple damages in personal injury cases is Chapter 93A, which permits double or treble damages upon a showing of a knowing and willful

65. It is interesting to note that the leading case that sets forth the gross negligence standard used in wrongful death cases, *see* Parsons v. Ameri, 97 Mass. App. Ct. 96, 105-106 (2020), arose not in the context of wrongful death but due to the loss of shipped goods (i.e., pieces of silk). Altman v. Aronson, 231 Mass. 588 (1919).

66. *Burt*, 400 Mass. 185, 188-89 (1987).

67. *Aleo*, 466 Mass. at 412.

68. *Aleo*, 466 Mass. at 412.

69. *Laramie*, 488 Mass. at 407 (2021) ("An award of punitive damages … may not be used to punish a defendant for harm inflicted upon nonparties, or 'strangers to the litigation.'")

70. *Santos*, 408 Mass. 70, 77-78 (1990).

71. *Id.*

72. "The existence of a person or persons damaged by the decedent's death is thus a precondition for the award of compensatory damages. If no one suffers damage as a result of the death, the tortfeasor escapes liability for compensatory damages." *Burt*, 400 Mass. 185, 189 (1987). Moreover, "…the assessment of punitive damages should not depend on the existence of a particular class of heirs. The nature of the tortfeasor's conduct, not the existence of specified beneficiaries, should be the test. *See* Freeman v. World Airways, Inc., … Punitive damages essentially constitute a windfall to punish the tortfeasor, not an effort to recompense particular harmed individuals." *Id.* at 190.

73. *Santos*, 408 Mass. 70, 77-78 (1990).

74. *Aleo*, 466 Mass. 398, 399 (2013).

75. The one partial or quasi-exception is death cases where a breach of warranty is proven under G.L. c. 93A, with a willful or knowing violation that entitles a plaintiff to double or treble damages. Even under those circumstances, however, damages are limited to double or treble the amount of compensatory damages.

violation of the statute.[76] Chapter 93A does not allow individualized punitive damages, however, in the same way that the wrongful death statute allows a jury to determine the precise amount of appropriate damages given the specific conduct in the case as it related to that defendant, subject only to constitutional limits.[77]

Since punitive damages are considered taxable and are relatively rare in jury verdicts, settlement and distribution agreements generally do not allocate any funds to punitive damages. Indeed, one reason that it may be preferable for plaintiffs to settle a case rather than take a jury verdict for the same amount is that plaintiffs have more control in determining how to allocate the funds between various claims and various beneficiaries, even if the gross amount paid on behalf of the defendant(s) were to remain the same.

The category of punitive damages is particularly relevant now, at a time in our society when liability waivers are being signed with increasing frequency. A person who signs a liability waiver may indeed preclude the personal representative of his/her estate from bringing wrongful death claims based on negligence.[78] However, "'while a party may contract against liability for harm caused by its negligence, it may not do so with respect to its gross negligence' or, for that matter, its reckless or intentional conduct."[79] "Nonetheless, only the decedent's executor or administrator has the right to bring a cause of action for gross negligence, not the statutory beneficiaries."[80]

3. Breach of warranty claims for wrongful death

Although in a different category than the changes mentioned above, one other legislative change occurred in 1973 that bears mentioning. The 1973 legislative amendments also added breach of warranty claims for the first time as a basis for liability in wrongful death cases. This was also a significant change in updating the law. There are multiple types of warranties that can be breached, including but not limited to breach of warranty of merchantability and breach of warranty of habitability. These claims are not identical to negligence claims, but rather are frequently pled in addition to negligence claims in appropriate cases.

Under Massachusetts law, a colloquial but correct simplification is that recklessness[81] requires more egregious conduct than gross negligence,[82] gross negligence requires more egregious conduct than negligence, and negligence requires more egregious conduct than breach of warranty.

The law on breach of warranty of merchantability continues to be important and highly relevant to many wrongful death cases today. In a death case against tobacco companies, the SJC summarized the law as follows:

> Under the wrongful death statute, G.L. c. 229, § 2, [the defendant] is liable if its negligence or wilful, wanton, or reckless act caused Marie's death, or if it "is responsible for a breach of warranty arising under Article 2 of [G.L. c. 106]" that caused her death. Under G.L. c. 106, § 2-314 (2) (c), of the Uniform Commercial Code, apart from exceptions not applicable here, a warranty that goods, such as cigarettes, are merchantable is implied in a contract for their sale, and goods are merchantable if they are "fit for the ordinary purposes for which such goods are used." "A seller breaches its warranty obligation when a product that is 'defective and unreasonably dangerous' . . . for the '[o]rdinary purposes' for which it is 'fit' causes injury." *Haglund v. Philip Morris Inc.*, 446 Mass. 741, 746, 847 N.E.2d 315 (2006) (Haglund), quoting *Colter v. Barber-Greene Co.*, 403 Mass. 50, 62, 525 N.E.2d 1305 (1988) (*Colter*). A product may be defective and unreasonably dangerous because of a manufacturing defect, a design defect, or a warning defect, that is, a failure reasonably to warn of the product's foreseeable risks of harm. *See* Restatement (Third) of Torts: Products Liability § 2, at 14 (1998) (Third Restatement) ("product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings").[83]

Under breach of warranty claims, a product may be found to be defectively designed even if all other manufacturers designed the product in the same unsafe way at the time:

> We have consistently held that a product may be defectively designed even if the characteristic that makes the product unreasonably dangerous is shared with every other competitive product on the market. *See Haglund, supra* at 748 ("plaintiff need only convince the jury that a safer alternative design was feasible, not that any manufacturer in the industry employed it or even contemplated it"); *Back, supra* at 636 (manufacturer of motor home found liable in design defect case even though "vehicle conformed to all product safety standards prevailing in the industry" when vehicle was manufactured). "Thus, warranty liability may be imposed even where the product . . . conformed to industry standards . . . and passed regulatory muster…." *Haglund, supra*.[84]

76. Mass. Gen. Laws ch. 93A

77. *Laramie*, 488 Mass. 399, 408 (2021). *See Aleo,* 466 Mass. at 412-13.

78. Doherty v. Diving Unlimited Int'l, Inc., 484 Mass. 193, n. 5 (2020) (citations omitted).

79. *Id.*

80. *Id.* at 196 n. 5 (citations omitted).

81. The SJC has indicated that it is appropriate to refer to "wilful, wanton or reckless" conduct as "reckless" conduct. *See* Sandler v. Com., 419 Mass. 334, 335 (1995).

82. *Id.; see* Banks v. Braman, 188 Mass. 367, 368 (1905).

83. Evans v. Lorillard Tobacco Co., 465 Mass. 411, 422 (2013).

84. *Id.* at 432-33.

Courts have recognized important safety public policies behind these statutes, and there are significant implications that flow from proving a breach of warranty of merchantability. For example, when a defective and unsafe product has led to a person's wrongful death, if the jury finds a breach of warranty of merchantability, then the comparative negligence statute may not be used to reduce the amount of the recovery.[85] Moreover, there may be sufficient evidence to support a finding of breach of warranty, but insufficient evidence to support a finding of negligence, as occurred in *Evans, supra*.

II. Why this history is not readily apparent

For a fleeting period of time, courts widely acknowledged the significance of the 1973 legislative amendments.[86] However, with the passage of time, this history of punitive and compensatory damages has been obscured in tracing the development of Massachusetts wrongful death law, and 1958 has been identified as the pivotal year for the wrongful death statute.[87] As outlined throughout this article, this author would suggest that the most significant legislative amendments that serve as the foundation of today's law occurred in 1973, not 1958. Moreover, the period of 1947 to 1949 was an aberration in the way that damages were measured, and the law quickly reverted to one of punitive damages, up until the amendments of 1973.

Apart from attorneys who have been practicing long enough to remember this revolutionary change in wrongful death damages (as well as those familiar with the most important law review article on the subject written by Albert Zabin and Thomas Connolly),[88] the importance of the 1973 amendments has been largely buried.

This may be one reason that the *Matsuyama* court in 2008 did not note the 1973 statutory changes to the wrongful death act, but rather referred approvingly to the 1972 *Gaudette* decision concerning the purpose of damages, noting that: "The development of our law of wrongful death to encompass loss of chance of survival claims is entirely consistent with this court's holding in *Gaudette v. Webb,*[89] that the wrongful death statute will be viewed in part as 'requiring that damages recoverable for wrongful death be *based upon the degree of the defendant's culpability.*'"[90] In yet another place, the decision noted: "Nothing in our decision today disturbs the other requirements of the wrongful death statute enumerated in *Gaudette v. Webb,*[91] including requirements regarding who may bring the action; when it must be commenced; *and the range of damages that may be recovered from each defendant.*"[92] The inconsistency, of course, is that in the year after *Gaudette* was decided, the legislature entirely rewrote the wrongful death statute and dramatically changed the measure and scope of damages.

The reason this history has been missed appears to be the way that the editor's notes summarize the legislative amendments to the statute. One would not know by reading the legislative history that due to the 1973 amendments, the law began to allow full, individualized compensatory damages to each of the statutory next of kin, and full punitive damages for grossly negligent, reckless, willful or wanton conduct leading to a wrongful death. Instead, the editor's notes summarize the amendments as follows:

> **The first 1973 amendment,** (ch. 699), rewrote this section, changing the amount of damages recoverable; it also struck out in clause (1) of the first sentence the provision that the deceased must have been exercising due care, and added clause (5), as to death resulting from a breach of warranty, to the first sentence. Section 2 of the amending act provides as follows:
>
> > Section 2. This act shall take effect on January first, nineteen hundred and seventy-four, and shall apply to causes of action arising on or after said date.

85. Correia v. Firestone Tire & Rubber Co., 388 Mass. 342 (1983).

86. *See, e.g.,* Guy v. Johnson, 15 Mass. App. Ct. 757, 758 (1983) ("Since the coming in of a basic statutory reform in 1973 (by St. 1973, c. 699), the damages for wrongful death are no longer expressed in terms of the degree of culpability of the tortfeasor, but rather as the fair value of the decedent to those entitled to recover. *See* G.L. c. 229, § 2.").

87. *GGNSC*, 484 Mass. 181, 187 n. 12 (2020) "After 1958, amendments to the statute were relatively minimal, for example, increasing the statute of limitations, St. 1989, c. 215, § 1, and increasing the amount recoverable by the claimant, St. 1972, c. 440, § 1." In another passage of the same case, the court wrote that:

> The Legislature set the foundation of the statute's modern iteration in 1946, by establishing liability for towns and common carriers whose negligence resulted in death. St. 1946, c. 614, § 1. The Legislature amended the statute in 1947, broadening the liability for "wilful, wanton, or reckless" behavior. St. 1947, c. 506, § 1A.
>
> In 1958, the Legislature enacted the language more or less as it stands today. St. 1958, c. 238, § 1.
>
> Section 2 of G.L. c. 229 states, in pertinent part:
>
> > A person who (1) by his negligence causes the death of a person in the exercise of due care, 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 [G.L. c. 229, § 1] … . Damages under this section shall be recovered in an action of tort by the executor or administrator of the deceased.

Id. at 187.

88. Zabin & Connolly, *supra*, at 345.

89. 362 Mass. 60, 71 (1972).

90. *Matsuyama*, 452 Mass. 1, 24-25 (2008) (emphasis added).

91. 362 Mass. at 71.

92. *Matsuyama*, 452 Mass. 1, 24, n. 39 (2008) (emphasis added).

The second 1973 amendment, (ch. 957), increased the time within which action should be commenced, as stated in the last sentence, from two to three years. Section 2 of the amending act provides as follows:

> Section 2. This act shall take effect on January first, nineteen hundred and seventy-four, and shall apply to causes of action arising on or after said date.[93]

For the editor's notes to summarize that "the first 1973 amendment, (ch. 699), rewrote this section, changing the amount of damages recoverable" does not adequately convey that the whole manner in which damages were to be measured was dramatically altered. It is true that the amount of damages recoverable was changed (because the arbitrary cap of $200,000 was removed and replaced with individualized damages). However, nowhere do the editor's notes summarizing the legislative history signal that full compensatory damages were allowed for the first time in Massachusetts history.

With this legislative summary, it is no surprise that courts and legal scholars have not been able to place the 1973 amendments on a timeline for the history of wrongful death law in Massachusetts, despite their monumental significance.[94] The availability of both compensatory and punitive damages defines wrongful death cases today; it serves the multiple purposes of compensation for the next of kin, as well as punishment and deterrence for wrongdoers within the civil justice system. Breach of warranty claims allow wrongful death actions to be brought against companies that design and sell unreasonably dangerous products that cause deaths, regardless of whether other companies were making the same decisions at the time, if the elements of breach of warranty are satisfied.

III. Conclusion

Wrongful death litigation in Massachusetts was transformed by the critically important legislative amendments of 1973. Surviving families are entitled to have individualized damages determined for the loss of their relationship for their projected joint life expectancy, both economic and non-economic. Punitive damages — limited only by constitutional principles of fairness rather than a statutory cap — are available in cases where gross negligence or recklessness caused a preventable death. Breach of warranty may serve as a basis of liability for unreasonably dangerous products, even in the absence of negligence. All of this happened as a result of the 1973 amendments to the wrongful death statute. Now that we are approaching the 50th anniversary of those amendments, it is time to recognize again the enormous significance of this hidden statutory history in the evolution of wrongful death liability and damages in Massachusetts.

93. Mass. Gen. Laws Ann. ch. 229, § 1 (West).

94. Breach of warranty claims fall into a different category because this change is indeed noted in the summary of the legislative history of Chapter 229.

Case Comment

Theory Meets Reality: Clarifying the Standard in Multiple Cause Negligence Cases

Doull v. Foster, 487 Mass. 1 (2021)

I. INTRODUCTION

Writing for a majority of the Supreme Judicial Court (SJC) in *Doull v. Foster*,[1] Justice Scott Kafker began with a classic understatement: "[c]ausation has been a continually contested concept in tort law."[2] As every lawyer and law student knows, the superficially straightforward negligence paradigm — duty, breach, causation and damages — frequently crashes on the rocks of causation. What does it mean for a tortfeasor's act or omission to be the "cause" of a plaintiff's damages? How should courts and juries determine liability when multiple factors allegedly contributed to a loss?

In *Doull*, the SJC held that in most cases involving multiple causes, the traditional but-for test will apply, rather than the substantial contributing factor standard.[3] In doing so, the court abrogated decades of precedent that had relied on the latter standard in multiple cause tort cases. It did so in the name of clarifying the causation standard; the issue arose in the context of a dispute over the language of jury instructions, and the majority expressed a concern that juries be able to comprehend what they are required to do. A vigorous concurrence by Justices David Lowy and Frank Gaziano accused the majority of crafting a solution in search of a problem.

II. THE FACTS OF THE CASE

The case concerns medical malpractice. Between 2008 and 2011, Laura Doull was a patient of Anna C. Foster, a nurse practitioner, and her supervisor, Dr. Richard J. Miller, an internist who owned the practice where Doull was treated.[4] In August 2008, Foster prescribed a topically applied progesterone cream to treat Doull's perimenopause-related symptoms.[5] Although Foster did not document her conversations with Doull, she admitted they did not discuss the possibility the cream could cause blood clots because Foster did not consider clots to be a risk.[6] Doull used the cream from 2008 through 2011.[7]

In the spring of 2011, Doull visited the medical office on three occasions, complaining about shortness of breath, each time meeting with Foster but not Miller.[8] Foster attributed the symptoms to Doull's history of asthma and allergies.[9] In May 2011, Doull suffered a "seizure-like event" and was admitted to the hospital, where she was diagnosed with chronic thromboembolic pulmonary hypertension (CTEPH), a severe form of pulmonary embolism.[10] In cases of CTEPH, blood clots block portions of the pulmonary arteries to the lung, increasing pressure in the arteries and causing the heart to fail.[11] Surgery in November 2011 to remove the blockages failed.[12] Medication did not abate the disease.[13] Doull passed away in 2015 at the age of 43.[14]

III. THE PROCEDURAL HISTORY AND THE INSTRUCTIONS TO THE JURY

Suit commenced before Doull died, when she and various family members sued Foster and Miller for negligence, failing to obtain informed consent, and loss of consortium.[15] After Doull's passing, her estate prosecuted the claim on her behalf, adding a claim for wrongful death.[16] The manufacturer of the progesterone cream was added as a defendant.[17]

1. 487 Mass. 1 (2021).
2. *Id.*
3. *Id.* at 9.
4. *Id.* at 1.
5. *Id.*
6. *Id.* at 1-2.
7. Doull v. Foster, 487 Mass. 1 (2021).
8. *Id.*
9. *Id.*
10. *Id.* at 2.
11. *Id.*
12. *Id.*
13. Doull v. Foster, 487 Mass. 1, 2 (2021).
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*

At trial, the plaintiffs presented three theories of negligence, alleging that: Miller and Foster failed to obtain Doull's informed consent to the cream; Foster failed to diagnose Doull's pulmonary embolism; and Miller failed to adequately supervise Foster.[18] Their expert testified that the cream likely caused the blood clots and that Foster had failed to investigate adequately Doull's shortness of breath complaints during the spring 2011 visits.[19] Diagnosis of the embolism in 2011 could have prevented the onset of CTEPH, the expert opined, and Miller's failure to supervise Foster's actions breached the doctor's duty of care.[20] In response, the defense expert disagreed that progesterone cream applied topically increases the risk of blood clots.[21] He also disagreed that Doull's CTPEH would have been preventable if diagnosed in the spring of 2011.[22]

Instructing the jury, Superior Court Judge Mary-Lou Rup delivered a but-for definition of causation:

> With regard to this issue of causation, the Defendant in question's conduct was a cause of the Plaintiff's harm, that is Laura Doull's harm, if the harm would not have occurred absent, that is but for [sic] the Defendant's negligence. In other words, if the harm would have happened anyway, that Defendant is not liable.[23]

The jury returned verdicts for the defendants.[24] In answers to special questions, the jury found that Foster negligently failed to diagnose Doull's pulmonary embolism, but this was not the cause of either her seizure-like event in 2011 or her death in 2015.[25] Likewise, the jury found that Miller had negligently failed to supervise Foster, but his failure did not cause harm to Doull.[26]

The plaintiffs moved for a new trial based on their contention that the judge erroneously instructed the jury on causation. Specifically, the plaintiffs argued that the judge should have instructed the jury using the substantial contributing factor standard — rather than the but-for standard — because their case presented several possible causes (involving multiple tortfeasors) of Doull's injuries and death.[27] Taking the case on direct appellate review, the SJC affirmed the defense verdict and the judge's causation instruction. In so doing, the SJC clarified how juries should be instructed in cases involving multiple causes of harm. The court explicitly adopted the definition set forth in the Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010) (Restatement (Third)).[28] The court extended its holding to multiple sufficient cause cases, except in litigation involving asbestos and other toxic torts.[29]

In a concurrence, Justices Lowy and Gaziano agreed with the SJC majority in affirming the defense verdict.[30] They disagreed with the majority's abandoning the substantial factor test in cases involving multiple causes.[31]

IV. DISCUSSION

A. Factual Causation

In negligence cases, causation embodies two components: the defendant must be both the factual cause and legal cause of the harm.[32] Traditionally, commentators and courts have explained factual causation in terms of a counterfactual "but-for" standard: "An act or omission is not regarded as a cause of an event if the particular event would have occurred without it."[33] Put another way, the finder of fact must decide whether the defendant's conduct was necessary to bring about the harm. The standard ensures that defendants will be liable only for harms actually caused by their negligence, as opposed to harms indirectly related to it. As the SJC noted in *Doull v. Foster,* a majority of courts have required but-for causation in most negligence cases.[34]

But-for causation, however, may not work in some situations. Courts have accordingly adjusted it to avoid illogical and unjust results. One situation, recognized by the SJC in *Doull v. Foster*, involves cases of "multiple sufficient causes," meaning two or more competing tortious causes, each of which is sufficient without the other to cause the harm.[35] The classic case involves two separate fires merging and destroying a house. If either fire could have independently burned the home, then neither fire could be a but-for cause of the harm (since the home would have burned without that fire), thereby relieving both tortfeasors of liability. Obviously, a defendant whose tortious act was fully capable of causing the plaintiff's harm should not escape liability due to the fortuity of another sufficient cause.

18. *Id.*
19. Doull v. Foster, 487 Mass. 1, 2 (2021).
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* at 3.
24. *Id.* at 2.
25. Doull v. Foster, 487 Mass. 1, 2 (2021).
26. The jury eliminated informed consent as a possible theory, leaving only the failure to diagnose and the failure to supervise. *Id.* at 14, concurrence footnote 1.
27. Doull v. Foster, 487 Mass. at 3.
28. *Id.* at 1.
29. *Id.* at 9.
30. *Id.* at 14.
31. *Id.*
32. Legal causation, also known as proximate cause, requires that the defendant's conduct fall within the "'scope of liability.'" Doull v. Foster, 487 Mass. at 3, citing Restatement (Third) of Torts §. 26 cmt. a. Put another way, the resulting injury must fall within the "foreseeable risk arising from the negligent conduct." *Id.,* citing Kent v. Commonwealth, 437 Mass. 312, 320 (2002). This aspect of causation depends on "considerations of policy and pragmatic judgment." *Id.* The *Doull* case and this Comment address factual, not legal, causation. Confusingly, the prior Restatements of Torts used "legal cause" as a catch-all for what are now referred to as factual and proximate cause. *See, e.g.,* Restatement (Second) of Torts (1956) (Restatement (Second)) § 431 ("an actor's conduct is a legal cause of harm to another if his conduct is a substantial factor in bringing about the harm").
33. W.L. Prosser & W.P. Keeton, Torts, § 41 at 263 (5th ed. 1984); Hollidge v. Duncan, 199 Mass. 121, 124 (1908) (affirming determination that plaintiff's injuries would not have occurred "but for the defendant's negligence").
34. Doull v. Foster, 487 Mass. 1, 4 (2021).
35. Multiple sufficient causes should be distinguished from generic multiple cause cases. All tort injuries involve multiple causes, but in most cases, the other causes are not tortious and therefore irrelevant to the causation inquiry.

Toxic torts present a similar challenge: often, a plaintiff was exposed to numerous harmful substances (such as asbestos) over time, none of which on its own may have caused the plaintiff's harm. If the plaintiff had to prove but-for causation, all defendants would likely escape responsibility. Our law has developed to recognize that a plaintiff should not be penalized if there were multiple sufficient causes of harm. The Restatement describes this situation as "overdetermined" harm, that is, conduct that causes harm when combined with other tortious behavior.

Because of the unique circumstances of multiple sufficient causes, courts in those cases replaced but-for causation with the substantial factor test, which provides that a defendant may be liable if her conduct was sufficient to bring about the harm even if another factor also was sufficient. The two tests approach the question from different angles: the substantial factor test focuses on what actually happened and whether the defendant's conduct played a role in producing the result. By contrast, the but-for test begins with a counterfactual proposition: what would have happened in the absence of the defendant's conduct?

Confusingly, the substantial factor test crept into negligence cases where multiple causes (as distinct from multiple sufficient causes) were alleged. Since most negligence cases may involve multiple causes (even if those causal factors were not sufficient on their own to have harmed the plaintiff and even if they were not tortious), the instruction became a fixture.[36] Courts instructed juries that a defendant could not be liable unless her conduct was a substantial factor in bringing about the harm, and (except in multiple sufficient cause cases) to be a substantial factor, the defendant also had to be a but-for cause of the harm.[37] Thus, in cases where but-for causation on its own would have (and should have) sufficed, judges gratuitously added an instruction that the defendant's conduct also had to be a substantial factor in causing the plaintiff's harm. And, to make matters even more confusing and circular, courts defined substantial factor in vague terms that appeared to mimic, but not acknowledge, a but-for analysis.

Hence, the confusion the SJC set out to clarify in *Doull v. Foster*. The confusion originated in the First and Second Restatements of Torts, which relied on a hybrid of the substantial factor and but-for tests when defining factual causation in all negligence cases. Therefore, prior to analyzing *Doull*, it is helpful to discuss the earlier versions of the Restatements, which provided a theoretical basis for the substantial factor test.

B. The Restatements

Starting with the first Restatement (First) of Torts, the drafters abjured but-for causation. According to the Restatement (Second), a defendant's conduct would be a cause of "harm to another if his conduct is a substantial factor in bringing about the harm."[38] In Section 432 of the Restatement (Second), the drafters addressed both multiple cause and multiple sufficient cause cases. Without using the phrase "but-for," the drafters instructed that "[t]he actor's conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent."[39] Although the definition omits the phrase "but-for," the definition asks what would have happened in the absence of the defendant's conduct, just as the traditional test did. Thus, the substantial factor test, as defined in the first two Restatements, confusingly imported the concept of but-for causation into the definition of substantial factor.[40]

The drafters of the Restatement (Third) acknowledged the ambiguity in the substantial factor test and set out to fix it.[41] The Restatement (Third) recognized that the phrase may be either too demanding or too lenient, depending on how the jury interprets it.[42] For example, the comments to the Restatement (Second) admonish that "[i]t is not enough that the harm would not have occurred had the actor not been negligent, … the negligence must also be a substantial factor in bringing about the plaintiff's harm."[43] This implies a "but-for plus" formulation. On the other hand, absent an explicit instruction that the defendant's conduct must have been a necessary force, the fact finder could impose liability in situations where the chain of events was broken.

One source of confusion was the mistaken idea that there can be only a single cause of harm. As the drafters of the Restatement (Third) pointed out, "[a]n actor's tortious conduct need only be a factual cause of the other's harm. The existence of other causes of the harm does not affect whether specified tortious conduct was a necessary condition for the harm to occur."[44] In other words, the actor's conduct need not be the sole cause of harm.[45] Indeed, there will always be multiple factors leading to a resulting event, although most will be insignificant for purposes of tort law.[46] As long as the harm would not have occurred absent the tortious conduct, the defendant is a factual cause.[47]

As the Reporters' Notes to the Restatement (Third) observed, with the exception of multiple sufficient causes, the substantial factor test:

36. *See* Doull v. Foster, 487 Mass. 1.

37. *Id.* at 5, citing Restatement (Second) of Torts § 431 and 432(1).

38. Restatement (Second) of Torts § 431. As discussed *supra* at footnote 6, the Restatement (Second) also confusingly used the term "legal cause" instead of factual cause.

39. Restatement (Second) of Torts § 431(1).

40. When confronting the more limited situation of multiple sufficient causes, the Restatement (Second) drafters advised as follows: "If two forces are actively operating, one because of the actor's negligence, the other not because of any misconduct on his part, and each of itself is sufficient to bring about harm to another, the actor's negligence may be found to be a substantial factor in bringing it about." Restatement (Second) of Torts § 432(2).

41. Restatement (Third) of Torts § 26 cmt. j ("The substantial factor test has not, however, withstood the test of time, as it has proved confusing and been misused"); *see also* Restatement (Third) of Torts § 27, Reporters' Notes to comment b, p. 386.

42. Restatement (Third) of Torts § 26 cmt. j.

43. Restatement (Second) of Torts § 431 cmt. a.

44. Restatement (Third) of Torts § 26 cmt. c (emphasis in original).

45. Restatement (Third) of Torts § 26 Reporters' Notes to cmt. c, p. 360.

46. Restatement (Third) of Torts § 26 cmt. c.

47. Only where multiple sufficient causes exist (the two fire example), would an additional instruction be necessary. This is addressed in Section 27 of the Restatement (Third). *See, infra* p. 11, n. 57.

> provides nothing of use in determining whether factual cause exists. The essential requirement … is that the party's tortious conduct be a necessary condition for the occurrence of the plaintiff's harm: the harm would not have occurred but for the conduct. To the extent that substantial factor is employed instead of the but-for test, it is undesirably vague.[48]

It could take on whatever significance a jury ascribed to it.

The drafters offered a new formulation. Section 26 of the Restatement (Third) provides that "[c]onduct is a factual cause of harm if the harm would not have occurred absent the conduct."[49] The new test is the but-for test without the specific words. It removes entirely the notion of a substantial factor, which appears nowhere in the Restatement (Third). It is based on the notion that a plaintiff need not eliminate all other causes of her harm, as long as the harm would not have occurred but for the defendant's conduct.

C. *Doull v. Foster*

1) The Majority Opinion

Taking their cue from the drafters of the Restatement (Third), a majority of the SJC explicitly abandoned the substantial factor test in *Doull v. Foster*. The court maintained the substantial factor test in cases only in toxic tort litigation, and rejected its use in all other cases, including those involving multiple sufficient causes.

In doing so, the SJC recognized lingering confusion over multiple cause cases. The court cited approvingly the Restatement (Third)'s criticism of the substantial factor test as lacking clear guidance on how a jury should decide if a defendant's conduct made a difference to the harm that brought the plaintiff to court.[50] In addition, many commentators have disparaged the test as "less than intelligible" or "obfuscating."[51] The SJC observed that using the word "substantial" could imply a more demanding standard than the traditional but-for test.[52] The current model jury instruction in Massachusetts defines "substantial" as "not insignificant" and "a material and important ingredient in causing the harm."[53] The *Doull* majority expressed concern that this language could be interpreted as more than but-for causation. On the other hand, without the clear guidance of a but-for instruction, the jury could skip the analysis and impose liability on a defendant whose conduct lacks the requisite causal effect.[54]

In *Doull*, the SJC noted the confusion and potentially deleterious impact on jury deliberations. As the court recognized, "[i]f a substantial factor instruction is required whenever there is more than one potential cause, then the substantial factor standard could supplant the but-for standard as the primary standard for factual causation. What originated as an exception to but-for causation would swallow the rule."[55]

As an alternative to substantial factor, the SJC held that "[w]here multiple causes are alleged, it is appropriate to instruct a jury that there can be more than one factual cause of a harm."[56] According to the court, such an instruction obviates the need for substantial factor as a test for causation.[57] The court also predicted that eliminating the substantial factor test will relieve confusion at trial.[58] Instead, in all but the rarest trials, the jury will receive only the but-for instruction.

The SJC majority extended its holding beyond multiple cause cases to multiple sufficient cause cases as well. Thus, in the "rare cases presenting the problem of multiple sufficient causes, the jury should receive additional instructions on factual causation."[59] The court advised judges to begin with the "twin fires example so that the complicated concept can be more easily understood by the jury."[60] The court then proposed a model instruction that admonishes the jury that a defendant whose tortious act was fully capable of causing the harm should not escape liability merely due to the "happenstance of another sufficient cause, like the second fire, operating at the same time," and that when there are two or more competing causes, the factual causation requirement is satisfied.[61] Providing the additional instruction eliminates the need for any reference to the defendant's conduct being a substantial factor in causing the harm.

The SJC did not eliminate the substantial factor test for toxic tort and asbestos litigation. For now, those cases will continue to rely on the substantial factor test.[62] However, the court invited future challenges to the use of the test in those cases, recognizing that there are a variety of potential approaches.[63]

2) The Concurrence

Concurring in the judgment, Justices Lowy and Gaziano disagreed that the substantial factor test was confusing. Justice Lowy noted that a but-for instruction was appropriate in the case, since the jury had eliminated all but one alleged cause: Foster's failure to diagnose/Miller's failure to supervise.[64] The concurrence also expressed concern that reliance only on a but-for instruction in multiple cause

48. Restatement (Third) of Torts § 26, Reporters' Notes to cmt. j, p. 367.
49. Restatement (Third) of Torts § 26.
50. Doull v. Foster, 487 Mass. 1, 7 (2021).
51. *Id.* at 7, fn. 15.
52. *Id.* at 14.
53. *Id.* at 7, citing Massachusetts Superior Court Civil Practice Jury Instructions, § 4.3.4(b) (Mass. Cont. Legal Educ. 3d ed. 2014).
54. *Id.* at 8.
55. *Id.* at 8.
56. Doull v. Foster, 487 Mass. 1, 6 n.13 (2021).
57. *Id.* at 6, citing Restatement (Third) of Torts, Reporters' Notes to § 26 cmt. j.
58. *Id.* at 7-8.
59. *Id.* at 10 (emphasis added).
60. *Id.* at 10.
61. *Id.,* citing Restatement (Third) of Torts § 27 cmt. a.
62. Doull v. Foster, 487 Mass. 1, 9 n.22 (2021).
63. *Id.* at 9 n.22.
64. *Id.* at 25, concurrence fn. 1. (Lowy, J., concurring).

cases (and a "but-for plus" instruction in multiple sufficient cause cases) would disadvantage plaintiffs.[65] The concurrence made two general points: (1) there is nothing confusing about the substantial factor test and (2) rather than alleviate misunderstanding, reliance solely on a but-for instruction could make matters worse.

On the first point, Justice Lowy argued that the substantial factor test is no different than the but-for test. Both require the defendant's conduct to "actually make a difference as to whether an event occurs."[66] He wrote, "It would be difficult to contemplate how conduct could 'substantially' contribute to an outcome and yet the outcome would have happened without that conduct."[67] While the argument may be semantically accurate, it does not account for the current practice of using both the but-for test and the substantial factor test when instructing on causation. In addition, if the two tests are "essentially identical,"[68] there would be no need to replace or add to the but-for test with an additional instruction. As the majority made clear, the but-for test more directly explains the analysis for factual causation. And, as noted above, the phrase "substantial factor" (without more) simply begs the question. If one had to choose one test over the other, the but-for standard embeds a clear and helpful way for a lay jury to evaluate cause and effect.

On the second point, the concurrence worried that the but-for test would confuse jurors in multiple cause cases. Because the but-for test is counterfactual (asking what would have happened if the defendant's tortious conduct had not occurred rather than what facts contributed to the harm), Justice Lowy fretted that juries would engage in a series of "what if" speculations about "alternative realities."[69] Along the same lines, Justice Lowy saw elimination of the substantial factor test as tipping the scales in favor of defendants, who could offer up endless theoretical causes and thereby confuse the jury.[70] However, as the court majority explained, in cases of multiple sufficient causes, a judge may ameliorate the confusion by explaining that a defendant's conduct need not be the sole cause of harm, simply one cause of many.

As a matter of jurisprudence, the concurrence accused the majority of trying to fix a nonexistent problem. Justice Lowy noted that the substantial factor test provides a sharper instruction than but-for causation in multiple cause cases.[71] He also lamented that the majority ignored decades of the court's decisions that had successfully applied the substantial factor test. In Justice Lowy's view, the Restatement (Third)'s rejection of the substantial factor test did not provide sufficient justification for the court's doing so as well.[72]

D. The Practical Implications of *Doull v. Foster*

Context is key. *Doull* arose as a challenge to a jury instruction. While appellate judges and Restatement reporters have the luxury of engaging in philosophical disputations about the meaning of "cause," trial judges must put theory into practice. Consequently, *Doull* must be evaluated against one important metric: will juries understand this stuff?

Simplifying and clarifying the jury instruction was a major focus of the majority opinion. As Justice Kafker wrote, the formulation in the first two Restatements was vague and confusing. By completely eliminating substantial factor from the instruction, the court hoped to provide a single, straightforward instruction for juries to decide if a defendant's conduct was a cause of the plaintiff's harm. In this regard, the most important part of the opinion was its recognition that there may be multiple causes of a plaintiff's harm, and the plaintiff need not prove that the defendant's conduct was the sole cause, nor does the plaintiff have to eliminate all but one cause.[73]

As the *Doull* concurrence observed, the majority did not discard the old substantial factor test because the facts of the case proved its futility; nothing about the case cried out for a change in the law. Indeed, the majority affirmed the verdict, which was based on a but-for instruction. As Justice Lowy noted in his concurrence, the only intervening event was the Restatement, which itself discarded the substantial factor test in 2010. He accused his colleagues of "replicat[ing] an abstract and academic discussion of the problems that the Restatement [(Third)] found with the standard."[74] The majority would probably agree. The law evolves in fits and starts, but simply because a change is finally made, we should not doubt its benefits. Despite the abstract, theoretical ruminations of the Restatement drafters, abandoning the substantial factor test should improve the reliability of jury instructions in negligence cases. In other words, it was time for it to go.

In future negligence cases in the commonwealth (with the exception for now of toxic torts), juries will receive a standard instruction, regardless of whether the case involves a simple slip/fall or a complicated medical malpractice. Judges will use the but-for test in all cases. In matters of multiple sufficient causes (e.g., the twin fires scenario), judges will supplement the but-for instruction with verbiage set out in *Doull*. The additional language will clarify that the defendant's conduct need not be the sole cause of harm, and it will avoid the confusing trap of the substantial factor test.

— Joseph S. Berman

Any views expressed herein are those of the author himself and are not the views of any organization with which he works or is affiliated.

65. *Id.* at 14.

66. *Id.*

67. *Id.* at 14, concurrence fn. 2.

68. Doull v. Foster, 487 Mass. 1, 26 n.2 (2021), citing June v. Union Carbide Corp., 577 F.3d 1234, 1239 (10th Cir. 2009).

69. *Id.* at 15.

70. That eliminating the substantial factor test may tilt the scales in favor of defendants finds support in the fact that the plaintiff in Doull appealed the lack of the instruction. In addition, the Massachusetts Academy of Trial Attorneys filed an amicus curaie brief urging the SJC to retain the substantial factor test, while the Massachusetts Defense Lawyers Association filed a brief arguing the opposite. However, these preconceived notions may not be logical. As the drafters of the Restatement (Third) observe, the ambiguity in the substantial factor test may work to the detriment of plaintiffs, for example, if it leads a jury to misapprehend that all other causes of harm must be eliminated. Restatement (Third), Reporters' Notes to Section 26 comment j, p. 370.

71. Doull v. Foster, 487 Mass. 1, 15 (2021).

72. *Id.* at 17-18.

73. *Id.* at 6.

74. *Id.* at 16.

Case Comment

The Applicability of Chapter 93A to Intra-enterprise Disputes in the Wake of *Governo Law Firm LLC v. Bergeron* — Where Do We Go From Here?

Governo Law Firm LLC v. Bergeron, 487 Mass. 188 (2021)

Introduction

Massachusetts General Laws (G.L.) chapter 93A prohibits "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce" and permits a court to punish such misdeeds with an award of damages, possibly doubled or trebled, and attorneys' fees.[1] Given its broad scope and potent remedies, claims under chapter 93A are a regular part of business disputes in Massachusetts. Since its enactment, there have been a series of cases that have addressed the meaning of "trade or commerce" and thus the reach of chapter 93A. A number of those rulings have involved intra-enterprise disputes, such as between employers and employees and owners of entities. Over the last few decades, our courts also have addressed conduct outside of the enterprise that had its genesis in relationships within the enterprise itself.

On April 9, 2021, the Supreme Judicial Court (SJC) issued its opinion in *Governo Law Firm LLC v. Bergeron*, which potentially expands the applicability of chapter 93A to certain intra-enterprise disputes.[2] This comment will provide a brief history of chapter 93A; explain how the courts in a series of cases held that chapter 93A did not apply to employer-employee, shareholder, and other internal disputes; and discuss later refinements of those rulings. The comment will then turn to the *Governo* ruling itself and its implications for future disputes.

Chapter 93A

Chapter 93A was enacted in 1967.[3] Initially crafted to allow the attorney general to seek redress for "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce," it soon expanded to permit private rights of action by consumers (1969) and then businesses (1972).[4] The scope of chapter 93A is deliberately broad — an act or practice may be deemed unfair if it is "within at least the penumbra of some common-law, statutory, or other established concept of unfairness."[5] However, what is deemed to be unfair is narrower in the business context than in consumer-business disputes; in the business-to-business context, as Appeals Court Justice Rudolph Kass stated in *Levings v. Forbes & Wallace, Inc.*, "[t]he objectionable conduct must attain a level of rascality that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce."[6] Even with this heightened standard, because of its broad reach, fact-specific analyses, and the potential for an award of double or treble damages and attorneys' fees, 93A claims have become routine in business disputes.[7]

Exceptions for Private and Intra-Enterprise Disputes

Soon after its enactment, the Massachusetts appellate courts issued a series of rulings that placed outer limits on the types of transactions covered by chapter 93A. In 1983, a decade after the

1. Mass. Gen. Laws ch. 93A, §§ 2, 9, 11.

2. Governo Law Firm LLC v. Bergeron, 487 Mass. 188 (2021). The decision was authored by Justice Dalila Wendlandt, and all seven justices of the SJC were on the panel that issued the decision.

3. *See generally* Michael C. Gilleran, *The Law of Chapter 93A*, (2nd ed. 2007 & Supp. 2020). As the SJC has noted, the statute "directs us to consider the interpretations of unfair acts and practices under § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (1970), as construed by the Federal Trade Commission (commission) and the Federal courts." PMP Associates, Inc. v. Globe Newspaper Co., 366 Mass. 593, 596 (1975).

4. Mass. Gen. Laws c. 93A, §§ 2, 4, 9, and 11. The attorney general has broad powers under chapter 93A, including the ability to conduct civil investigations and seek injunctive relief and monetary penalties. Mass. Gen. Laws c. 93A, §§ 2, 4, and 6. However, the attorney general's role in chapter 93A litigation is outside the scope of this comment.

5. Commonwealth v. Fremont Investment and Loan, 452 Mass. 733, 743 (2008) (quoting PMP, 366 Mass. at 596). While the "penumbra" phrase is frequently quoted as the definition of unfair, the PMP ruling itself listed it as only one means "to be used in determining whether a practice is to be deemed unfair…." PMP, 566 Mass. at 596. The full passage from PMP is: "(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)." *Id*. What is clear from our case law is that chapter 93A is designed to reach a broad range of conduct, some of which is not readily definable but can only be decided on a case-by-case basis.

6. Levings v. Forbes & Wallace, Inc., 8 Mass. App. Ct. 498, 504 (1979).

7. The statute also tries to promote settlement of disputes. A consumer making a chapter 93A claim must first send a demand letter to the alleged wrongdoer. Mass. Gen. Laws c. 93A, § 9. If the entity responds within 30 days with a reasonable offer of settlement, that offer can be used as a defense to later 93A claims. *Id.* It is hard to know how effective the demand letter remedy is because, by its very nature, a successful demand letter will avoid litigation. "The demand letter requirement 'is not merely a procedural nicety, but, rather, "a prerequisite to suit,"' … 'designed "to encourage negotiation and settlement" and "as a control on the amount of damages.'" McKenna v. Wells Fargo Bank, N.A., 693 F.3d 207, 217-18 (1st Cir. 2012) (citations omitted). The demand letter requirement in the consumer context can be a trap for the unwary attorney.

In the business context, there is no demand requirement, but the alleged wrongdoer can tender an offer of settlement with its answer. Mass. Gen. Laws c. 93A, § 11; Nader v. Citron, 372 Mass. 96, 99-101 (1977). If the offer is deemed to be reasonable, that will be a defense to a claim for multiple damages and attorneys' fees. Mass. Gen. Laws ch. 93A, §§ 9 and 11. As a practical matter, there seem to be relatively few instances where an offer of settlement is conveyed along with the answer.

enactment of section 11, the SJC summarized its prior rulings as follows: "[a]s this court has frequently stated, § 11 of G.L. c. 93A was intended to refer to individuals acting in a business context in their dealings with other business persons and not to every commercial transaction whatsoever."[8] Thus, chapter 93A does not apply to private transactions that do not take place in trade or commerce.[9] Whether "an isolated transaction takes place in a 'business context' must be determined from the circumstances of each case."[10] So, in *Linkage Corp. v. Trustees of Boston University,* the SJC ruled that Boston University, a nonprofit educational institution, was properly found liable under chapter 93A because "in the particular circumstances of this case, Boston University was engaged in 'trade or commerce'" in connection with the termination of a contract that it had with Linkage "to create and provide educational, training, and other programs of a technical nature at a satellite facility owned by Boston University."[11]

In their rulings, the Massachusetts appellate courts had seemingly drawn bright lines in the employment and other intra-enterprise dispute context. For example, in *Manning v. Zuckerman,* the editor of *The Atlantic* magazine sued his employer and the entity's new owner, claiming that the corporation and the new owner had "committed unfair and deceptive acts in connection with an agreement terminating his employment."[12] The court rejected the editor's claims, holding that the claims had "occurred in the context of the parties' employment relationship … or arose out of that relationship, and not in an arms-length commercial transaction between distinct business entities."[13] The court ruled that "[d]isputes arising out of the employment relationship between an employer and an employee are not cognizable under c. 93A."[14,15]

In *Szalla v. Locke*, the SJC summarized a series of rulings of Massachusetts appellate courts, holding that "[i]t is well established that disputes between parties in the same venture do not fall within the scope of G.L. c. 93A, § 11."[16] In rulings prior to *Szalla*, our courts had held that chapter 93A does not apply to disputes between shareholders in a closely held entity,[17] claims by a shareholder against a corporation regarding corporate governance,[18] and disputes between partners.[19]

In 2014, the SJC once again reaffirmed that chapter 93A does not apply to intra-enterprise disputes.[20] In *Selmark*, Marathon and Selmark were two "closely held Massachusetts corporations…."[21] Erhlich was a shareholder of Marathon, as was Selmark.[22] Elofson was the majority owner of both entities and "supervised and terminated" Erhlich.[23] The court rejected Ehrlich's chapter 93A claims, holding that (a) the fact that "Selmark and Marathon believe they are separate entities" did not change the fact that "[t]he 'intra-organizational' connection among the parties is undeniable"; (b) conduct that took place in connection with agreements before they were signed was still part of the intra-enterprise process; and (c) post-termination conduct "was still governed by the fiduciary obligations that they owed as joint shareholders of Marathon, which places the conduct outside the scope of c. 93A."[24]

More uncertain was how to draw the line between employment

8. Manning v. Zuckerman, 388 Mass. 8, 10 (1983); *see* Weeks v. Harbor Nat'l Bank, 388 Mass. 141 (1983).

9. *See generally Gilleran*, §§ 2.7-2.11.

10. Begelfer v. Najarian, 381 Mass.177, 190-91 (1980). In making this assessment, the SJC held that:

> we assess the nature of the transaction, the character of the parties involved, and the activities engaged in by the parties…. Other relevant factors are whether similar transactions have been undertaken in the past, whether the transaction is motivated by business or personal reasons (as in the sale of a home), and whether the participant played an active part in the transaction. We do not read § 11 as requiring that a commercial transaction must take place only in the ordinary course of a person's business or occupation before its participants may be subject to liability under Mass. Gen. Laws ch. 93A, § 11.

Id. at 191. Thus, for example, chapter 93A does not apply to a private sale of real estate. Lantner v. Carson, 374 Mass. 606 (1978).

11. Linkage Corp. v. Trustees of Boston Univ., 425 Mass. 1, 2, 24, cert. denied, 522 U.S. 1015 (1997); *see* Milliken & Co. v. Duro Textiles, LLC, 451 Mass. 547, 562-65 (2008) (creditor had insufficient "relationship" with parties who allegedly organized scheme to acquire assets of company and thereby prevent company from being able to pay its debts to find liability under chapter 93A).

12. Manning v. Zuckerman, 388 Mass. 8, 8 (1983).

13. *Id*. at 11.

14. *Id*. at 15.

15. As the *Manning* court noted, employees have an array of other protections in the employer-employee context that are designed to level the playing field in certain situations. *See Id.* at 11-14. For example, claims of discrimination can lead to an award of attorneys' fees and punitive damages. *See* Mass. Gen. Laws c. 151B, §§ 4, 9. An employer's failure to pay wages can result in the imposition of mandatory treble damages plus attorneys' fees. Mass. Gen. Laws c. 149, §§ 148, 150. Moreover, wages are not just limited to base wages but also include vacation pay and, in some instances, commissions. Massachusetts v. Morash, 490 U.S. 107 (1989) (vacation pay); *see* Levesque v. Schroder Inv. Mgmt. N. Am., Inc., 368 F.Supp.3d 302, 313 (D. Mass. 2019) ("the Wage Act generally does not encompass bonuses but protects commission payments that are 'due and payable' and 'arithmetically determinable.'").

16. Szalla v. Locke, 421 Mass. 448, 451 (1995); *see* Psy-Ed Corp. v. Klein, 459 Mass. 697, 719 (2011) (no chapter 93A violation where "dispute arose out of a private transaction between the Psy-Ed board and Klein in his role as a former employee and shareholder of the company"); First Enters., Ltd v. Cooper, 425 Mass 344, 347-48 (1997) (statements made by attorney not actionable under chapter 93A because they related to "an internal business dispute"); Farsheed v. Syed, 85 Mass. App. Ct. 1128 (2014) (unpublished per Rule 1.28) (plaintiff who was deprived of opportunity to invest in closely held business could not maintain chapter 93A claim).

17. Zimmerman v. Bogoff, 402 Mass. 650, 662-63 (1988).

18. Riseman v. Orion Research, Inc., 394 Mass. 311, 313-14 (1985).

19. Newton v. Moffie, 13 Mass. App. Ct. 462, 469-70 (1982).

20. Selmark Associates, Inc. v. Ehrlich, 467 Mass. 525, 549-51 (2014). Interestingly, the only reference in *Governo* to the *Selmark* case is in regard to the adequacy of jury instructions. *Governo*, 487 Mass. at 194.

21. *Selmark*, 467 Mass. at 526.

22. *Id.* at 550.

23. *Id.*

24. *Id*. at 550-51.

or other intra-entity conduct, which is not actionable under chapter 93A, and post-relationship conduct, which often is. Thus, in *Augat, Inc. v. Aegis, Inc.,* the SJC reaffirmed that third parties could be held liable under chapter 93A for working with an employee to breach his duty to his employer, even if the employee himself was immune from liability under 93A.[25]

The more difficult questions revolved around the conduct of the now-former employee. The Appeals Court struggled with this issue in a pair of cases, *Peggy Lawton Kitchens, Inc. v. Hogan* and *Informix, Inc. v. Rennell*.[26] In *Peggy Lawton*, a company sued a former employee for stealing its secret recipe for making chocolate chip cookies.[27] The court ruled that the employee could be held liable under chapter 93A because his "use of … the trade secret was made when he was no longer an employee…."[28] In contrast, in *Informix* (decided 12 years later), a different Appeals Court panel held that an employee's "postemployment violations … of confidentiality and noncompetition provisions in a confidentiality agreement entered into with … his former employer" were not within the scope of chapter 93A.[29] Distinguishing *Peggy Lawton*, the court held that the conduct in *Peggy Lawton* did not involve a confidentiality or noncompetition agreement, and "the theft of trade secrets … was independent of and did not arise from the former employment relationship.[30] A 2011 ruling of the Appeals Court attempted to reconcile these rulings, holding that even though an "employee was bound by a confidentiality agreement as part of his employment contract, his misappropriation of the trade secret was actionable independent of his contractual obligations and accordingly may support a claim under c. 93A."[31]

The *Governo* Ruling

In 2016, a number of attorneys at the Governo Law Firm (GLF) were engaged in negotiations to buy the practice from GLF's owner, David Governo, while at the same time engaging in actions — including conversion of GLF's property — designed to help them launch a separate law firm.[32] Negotiations failed, and six attorneys at GLF immediately left and formed a new entity, CMBG3 Law LLC (CMBG3).[33] Their conduct prior to and upon departure spawned a lawsuit, with GLF claiming that the attorneys had improperly downloaded and taken "a research library, databases, and administrative files" from GLF prior to their departure and put them on CMBG3's computers.[34] GLF further alleged that the attorneys "accessed GLF's materials … to assist in their representation of clients in paid legal work for CMBG3."[35] A trial was held, and the trial judge instructed the jury that "93A does not apply to anything a defendant did toward the Governo Firm while they were still employed there."[36]

The "jury found some or all of the defendants liable on the claims for conversion, breach of the duty of loyalty, and conspiracy, and none of the defendants liable for unfair or deceptive trade practices in violation of G.L. c. 93A, § 11."[37] GLF appealed, claiming that the trial judge had improperly instructed the jury on whether chapter 93A applied to the defendants' actions.[38] The SJC granted a request for direct appellate review, vacated the judgment on the chapter 93A claim, and remanded that claim for a new trial.[39]

The court began by describing the departing attorneys' conduct in harsh terms: they "secretly download[ed]" materials; "surreptitiously

25. Augat, Inc. v. Aegis, Inc., 409 Mass. 165, 172 (1991); *see* Green v. Parts Distribution Xpress, 2011 WL 5928580 *4 (D. Mass. 2011) (Casper, J.) ("non-party to an employment relationship can be held liable under chapter 93A for aiding and abetting the wrongdoing of a party to an employment relationship regardless of whether the party to the employment relationship can itself be held liable under chapter 93A"). In Baker v. Wilmer Cutler Pickering, 91 Mass. App. Ct. 835, 849-51 (2017), the Appeals Court considered whether a law firm that rendered services to a closely held limited liability company could be held liable under chapter 93A for breaching a fiduciary duty to a minority owner. Describing it as "a novel and close question," the court held that the claim would withstand a motion to dismiss because "the plaintiffs have alleged sufficient facts to plausibly suggest an entitlement to relief." *Id*. at 850.

26. Peggy Lawton Kitchens, Inc. v. Hogan, 18 Mass. App. Ct. 937, 939-40 (1984) (rescript); Informix, Inc. v. Rennell, 41 Mass. App. Ct. 161, 162-63 (1996).

27. *Peggy Lawton*, 18 Mass. App. Ct. at 937.

28. *Id*. at 141.

29. *Informix*, 41 Mass. App. Ct. at 161.

30. *Id*. at 163 n. 2.

31. Specialized Tech. Resources, Inc. v. JPS Elastomerica Corp., 80 Mass. App. Ct. 841, 847 (2011). *See Gilleran,* at §2.8 (Supp 2020) ("Just as there is a split of authority about whether a former employer can bring suit under 93A against its former employee, who has now gone to work for a competitor, there is a split in authority about whether the former employer can bring suit under 93A against the competitor who has now hired the former employee.").

32. Governo Law Firm LLC v. Bergeron, 487 Mass. 188, 189 (2021).

33. *Id*.

34. *Id*. at 191.

35. *Id*. at 192.

36. *Id*. at 193. The trial was conducted by Superior Court Justice Kenneth Salinger sitting in the Business Litigation Session of the Superior Court.

37. *Id*. at 189-90. (footnote omitted).

38. Governo Law Firm LLC v. Bergeron, 487 Mass. 188, 193 (2021). The trial judge's instruction, as set forth by the SJC, was as follows:

> Conduct is part of trade or commerce, as a general matter, if it takes place in a business context and it's not personal or private in nature. But by law an employee and employer are [not] in trade or commerce with each other for purposes of the statute. That means that [G.L. c.] 93A does not apply to anything a defendant did toward the Governo Firm while they were still employed there. So anything that happened before the 20th of November, 2016, whether it was negotiations, copying of materials, anything else[,] that's all irrelevant for purposes of [the G.L. c. 93A claim]. Instead for this claim the Governo Firm must prove the defendants did something to compete with the Governo Firm after they left that firm that was unfair or deceptive. So given the evidence in this case, the Governo Firm must convince you that the defendant[s] used confidential information or documents belonging to the Governo Firm, to compete against that firm in an [unfair] or deceptive manner and that they did so after their employment at the Governo Firm had [ended].

39. *Id*. at 189, 190, 202. "The remainder of the judgment … [was] affirmed." *Id*. at 202.

removed these materials"; and then "used the stolen materials and derived profits therefrom."[40] It provided a more detailed recitation of the facts before turning to the principal issue in the case — the applicability of chapter 93A to the departing attorneys' conduct.[41,42]

The court ruled that "the inapplicability of G.L. c. 93A, § 11 to disputes arising from an employment relationship does not mean that an employee never can be liable to its employer under G.L. c. 93A, § 11."[43] The court held that it had only carved out "certain employment disputes from the broad reach of G.L. c. 93A, § 11…."[44] The court ruled that:

> [w]here an employee misappropriates his or her employer's proprietary materials during the course of employment and then uses the purloined materials in the marketplace, that conduct is not purely an internal matter; rather, it comprises a marketplace transaction that may give rise to a claim under G.L. c. 93A, § 11.[45]

The employment relationship was not a "shield … from liability under G.L. c. 93A, § 11, where they subsequently used the ill-gotten materials to compete with their now-former employer."[46] The court concluded that "[t]he erroneous instruction was prejudicial," vacated the judgment, and remanded for a new trial.[47]

What does the *Governo* ruling mean for future cases?

While the *Governo* ruling has some surface appeal — it punishes what seems to be wrongful conduct — it has the potential to upend seemingly settled case law.

There are strong public policy reasons for not allowing chapter 93A to intrude into the intra-enterprise sphere. As originally drafted, chapter 93A was designed as a vehicle for giving power to consumers who were the subject of unfair or deceptive acts by businesses. The demand letter requirement, coupled with the power of a court to order double or treble damages plus attorneys' fees, helped level the playing field in consumer disputes.

The extension to business versus business disputes was a natural outgrowth of that desire to level the playing field. Although entities large and small can utilize chapter 93A, it is particularly helpful to a smaller entity that may be the victim of unscrupulous business practices by a larger company. The subsequent restrictions on chapter 93A in the intra-enterprise context fit that scenario. There is less need for the power of chapter 93A in private disputes (such as an isolated sale of real estate), trust matters, and disputes among business owners and between employers and employees. In many such cases, as the court noted in *Zimmerman v. Bogoff*, "the aggrieved party has available an alternative avenue of relief in the form of a suit for breach of fiduciary duty."[48]

Governo seems to say that a breach of fiduciary duty claim now is not enough and that an aggrieved party can assert a chapter 93A claim as well. This leads to many new questions, including:

- Will a breach of fiduciary duty by a shareholder of a closely held business who competes with the enterprise now give rise to a chapter 93A claim?
- How is stealing trade secrets truly different than improperly using confidential information in breach of a fiduciary duty?
- What if the wrongful conduct involves the alleged breach of a confidentiality agreement *and* the general misuse of confidential information? Should the former not be part of a chapter 93A claim while the latter could form the basis for such a claim?
- Will attorneys now routinely include chapter 93A claims in intra-enterprise disputes and argue that at least some of the wrongful conduct took place outside of the enterprise itself?

Given *Governo's* broad language, these are all open questions that will need to be resolved by our courts.

— Marc C. Laredo

40. *Id*. at 189.

41. The court disposed of defendants' arguments that the appeal of the 93A issue was not timely and had not been properly preserved in a pair of footnotes. *Id*. at 192-93 n. 10 and 12. As to the former, the SJC ruled that since "[a] judgment is not final for purposes of Mass. R. App. P. 4 (a) until all claims against all parties have been resolved" and the final action in the lower court — "GLF's demand for equitable relief" — was not resolved until Sept. 13, the notice of appeal filed on Sept. 18 was timely filed. *Id*. at 192 n. 10. The court likewise rejected the preservation argument, holding that "GLF timely objected to the G.L. c. 93A jury instruction, repeatedly bringing to the judge's attention (both prior to and immediately following the jury charge) its objections." *Id*. at 193 n. 12.

42. The remaining legal issue in the case involved the calculation of interest. Governo Law Firm LLC v. Bergeron, 487 Mass. 188, 198-202 (2021). The court ruled that prejudgment interest was not in order, but postjudgment interest was appropriate. *Id*. at 190, 198-202.

43. *Id*. at 195.

44. *Id.*

45. *Id*. at 195-96.

46. *Id*. at 196.

47. Governo Law Firm LLC v. Bergeron, 487 Mass. 188, 196, 202 (2021).

48. *Zimmerman*, 402 Mass. at 663.

Book Review

The Essential Scalia: On the Constitution, the Courts, and the Rule of Law

By Antonin Scalia, Jeffrey S. Sutton (Editor), Edward Whelan (Editor), Elena Kagan (Foreword) (Crown Forum, 2020), 368 pages

In the five years since his passing, there have been several books written about Justice Antonin Scalia, each having a different take on the justice's life, beliefs and work.[1] Like those books, this one made for an enjoyable and informative read. In a personal foreword by Justice Elana Kagan, who argued cases before Justice Scalia and then shared the bench with him, she notes how she "misse[s] the enjoyment and excitement — even the exasperation — that came from thinking about Nino's latest opinion."[2] As she notes, his writing was "clever and pungent, pithy and sharp, plainspoken yet utterly original."[3] I will add that it was often hilarious and his use of imagery (some of which I will include below) was legendary. This book, brilliantly edited by two former law clerks to Justice Scalia — Edward Whelan and Chief Judge Jeffrey S. Sutton on the U.S. Court of Appeals for the Sixth Circuit[4] — explores varying aspects of Justice Scalia's ideas, writing, beliefs, speeches, articles and philosophy. Whelan and Sutton have distilled the justice's work into a variety of categories that highlight the essence of the justice himself. For ease of reading, the topics are presented in individualized vignettes, which have been edited to remove unnecessary passages, quotes, ellipses or brackets.[5] The book does not read with the weight, clumsiness or character of a textbook. Rather, it reads much like Justice Scalia's opinions themselves. In fact, as Justice Kagan noted in her foreword, Justice Scalia "couldn't write a heavy sentence if he tried."[6]

The overarching categories of material covered in the book include: General Principles of Interpretation, Constitutional Interpretation, Statutory Interpretation, and Review of Agency Action.[7] Within each of these are subcategories of Justice Scalia's work as a professor, government official, lecturer and member of the judiciary. To get a real flavor for what the book generously offers, a few of these subcategories are explored below.

A perfect starting point is originalism. The editors share a quip that the justice employed when speaking on the topic.[8] People would often ask him, "When did you become an originalist?" in the same tone of wonder that they might use in asking, "When did you start eating human flesh?"[9] To expound on the principle of originalism, the editors drew from two different speeches Justice Scalia gave in 1994 and 2012.[10] As described by Justice Scalia, an originalist believes that the provisions of the Constitution have a fixed meaning, which does not change, absent an amendment.[11] The provisions mean today what they meant when they were adopted, nothing more, nothing less.[12] At the same time, originalism permits new applications of old constitutional rules.[13] New technologies unknown at the time of the Founding Fathers require the originalist to follow the trajectory of any provision of the Constitution or the Bill of Rights to reach a result informed by the provision and reasoned judgment.[14] This methodology is a far cry from

1. Some of those books have been edited by Edward Whelan, one of the two editors of this book. *See* Antonin Scalia, *Scalia Speaks: Reflections on Law, Faith, and Life Well Lived* (Christopher J. Scalia & Edward Whelan eds., 2017); *Antonin Scalia, On Faith: Lessons from an American Believer* (Christopher J. Scalia & Edward Whelan eds., 2019).
2. Elena Kagan, Foreword to Scalia, *supra* note 1, at xv.
3. *Id.*
4. Scalia, *supra* note 1, at 334; "The Honorable Jeffrey S. Sutton Assumed the Position of Chief Judge, Sixth Circuit | United States Court of Appeals," https://www.ca6.uscourts.gov/news/, honorable-jeffrey-s-sutton-assumed-position-chief-judge (last visited June 27, 2021).
5. Scalia, *supra* note 1, at xxix. This reviewer will endeavor to do the same when possible.
6. Elena Kagan, Foreword to Scalia, *supra* note 1, at xviii.
7. Scalia, *supra* note 1, at xi-xiv.
8. *Id.* at 12.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. Scalia, *supra* note 1, at 12.
14. *Id.*

a non-originalist approach, which is grounded in the idea that the Constitution changes with the passing months of the calendar, i.e., the "living Constitution."[15] Justice Scalia illustrates the originalist premise by recounting what Chief Justice John Marshall famously held in *McCulloch v. Maryland*,[16] that "we must never forget that it is a constitution we are expounding."[17] This was not Marshall's endorsement of a living Constitution that must grow, change and expand with the times.[18] Rather, as Justice Scalia saw it, this was Marshall explaining that the Constitution must govern for ages in circumstances that cannot be foreseen, and in that light, its permanent meaning must be broadly construed to give the government the tools it needs both now and in the future.[19]

Once defined, the remainder of the originalism chapter is filled with examples of how the living Constitution philosophy or method of interpretation has informed a variety of the Supreme Court's historical decisions in the areas of the First, Fourth, Fifth, Eighth and 14th amendments.[20] Justice Scalia's speeches provided an extensive discussion of how the "living Constitution" philosophy is most reflected in the Court's Eighth Amendment jurisprudence.[21] He focused on the proscription of the use of "cruel and unusual punishments," viewed through the lens of "evolving standards of decency" — nowhere found in the text of the amendment — that necessarily assumes that societies always mature in a positive fashion.[22]

The chapter, like Justice Scalia's speeches, is informative and interesting. It even refutes an usual criticism of originalism that it is just camouflage for the imposition of conservative views.[23] In support, Justice Scalia offers as an example his vote in *Texas v. Johnson*,[24] which gave Justice William Brennan the 5-to-4 majority in the famous American flag-burning case despite Justice Scalia detesting the idea of burning the nation's flag.[25] If he were king, he would make it illegal to burn the flag, but by employing originalism, Justice Scalia was required to accept that the First Amendment guarantees the right to express contempt for the government.[26] Far from facilitating conservative opinions, originalism prevents judges (liberal or conservative) from judging according to their desires.[27]

Logically, the next chapter takes on originalism's twin, textualism, which Justice Scalia explains is the same principle as originalism but applied in the context of interpreting statutes.[28] In both contexts, the principal aim is to capture the meaning of the text of a legal provision at the time it was adopted.[29] Discerning the "intent of the legislature" does not necessarily square with the generally accepted rules of statutory construction.[30] The text itself is what matters.[31] When that text of a statute is clear, one need not go further in ascribing a meaning to it.[32] The danger lies with ambiguous text and the subjective expedition for intent.[33] Government by unexpressed intent could lead to tyranny because it is the law that governs, not the intent of the lawgiver.[34] To amplify the point, Justice Scalia cites to our very own Massachusetts Constitution, in which John Adams famously wrote we are "a government of laws and not of men."[35] In the end, the divination of unexpressed legislative intent will result in judges pursuing their own objectives and desires, thereby supplanting the legislative purpose with judicial prerogative.[36] Stated positively, Justice Scalia quotes a law review article authored by Justice Oliver Wendell Holmes Jr., in which he states, "We do not inquire what the legislature meant; we ask only what the statute means."[37] This is textualism.[38]

This chapter also corrects a common misunderstanding. Textualism should not be confused with so-called strict constructionism.[39] Justice Scalia was not a strict constructionist and thought no one ought to be.[40] "A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means."[41] Textualism is formalistic — as it should be, because law itself is formal.[42] Justice Scalia praised formalism, as it is what makes a government a government of laws and not of men.[43]

The book also contains an impressive assortment of some of Justice Scalia's greatest opinions in a variety of areas. Each has its own special contribution to our law, but others stand out for his use of imagery to illustrate a principle, a disagreement or a vivid comparison. The first such case is Justice Scalia's dissent in *Morrison v.*

15. *Id*. at 12-13.
16. McCulloch v. Maryland, 17 U.S. 316 (1819).
17. *Id.* at 407.
18. Scalia, *supra* note 1, at 13.
19. *Id*.
20. *Id.* at 14-16.
21. *Id*. at 15-16.
22. *Id.*
23. *Id.* at 17-18.
24. Texas v. Johnson, 491 U.S. 397, 399 (1989) (holding that it is a violation of the First Amendment to make unlawful the burning of the American flag).
25. Scalia, *supra* note 1, at 18.
26. *Id.*
27. *Id.*
28. *Id.* at 25.
29. *Id.* This portion of the book is an excerpt from Justice Scalia's 1997 book, *A Matter of Interpretation. Id.; see* Antonin Scalia, A *Matter of Interpretation: Federal Courts and the Law* (1997).
30. Scalia, *supra* note 1, at 25.
31. *Id*.
32. *Id.*
33. *Id*. at 26-27.
34. *Id.* at 26.
35. *Id.;* Mass. Const., Pt. 1, art. XXX.
36. Scalia, *supra* note 1, at 26-27; *see The Federalist No. 47* (James Madison) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.").
37. Scalia, *supra* note 1, at 29; Oliver Wendell Holmes, "The Theory of Legal Interpretation," 12 Harv. L. Rev. 417, 419 (1899).
38. Scalia, *supra* note 1, at 29.
39. *Id.* at 30.
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*

Olson,[44] which involved the question of the constitutionality of the independent counsel provisions of the Ethics in Government Act of 1978.[45] The act created a special court, designated by the chief justice, to which the attorney general would report cases in which executive branch officials were believed to have violated federal law.[46] When reasonable grounds existed, the special court would appoint an independent counsel to investigate the matter.[47] Only the attorney general could remove an independent counsel from his position, and only for "good cause."[48]

Justice Scalia began his solo dissent from Chief Justice William Rehnquist's majority opinion with his recurring theme borrowed from John Adams: "It is the proud boast of our democracy that we have a government of laws and not of men."[49] The framers of our Constitution knew that separation of powers was the means to a just government.[50] "That is what [*Morrison v. Olson*] is all about. Power. The allocation of power among Congress, the President, and the courts in such fashion as to preserve the equilibrium the Constitution sought to establish — so that 'a gradual concentration of the several powers in the same department' . . . can effectively be resisted."[51] As Justice Scalia wrote, "[f]requently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf."[52]

Justice Scalia uses this clever imagery to lay plain the danger at issue. Article II, § 1, cl. 1, of the Constitution provides: "The executive Power shall be vested in a President of the United States."[53] That does not mean some of the executive power, but all of the executive power.[54] The duties of the independent counsel at issue under the act — investigation and prosecution of crime — are quintessentially executive functions.[55] Justice Scalia also concluded that the act deprived the president of exclusive control over the exercise of executive power.[56] In fact, it was the whole purpose of the act to do just that, i.e., the wolf comes as a wolf.[57]

Another powerful example (and my favorite) of Justice Scalia's unique use of imagery can be found in his concurring opinion in *Lamb's Chapel v. Center Moriches Union Free School District*,[58] in which the Supreme Court unanimously held (by Justice Byron White) that the school district violated the church's free speech rights when it permitted school facilities to be used for community activities, but denied the use of the facilities for a religious film series.[59] The court also agreed that allowing such use would not violate the Establishment Clause,[60] but Justice Scalia objected to the majority's use — and the court's intermittent use — of the so-called *Lemon* test.[61]

Justice Scalia likened the court's invocation of the *Lemon* test to "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad[.] [A]fter being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District. Its most recent burial, only last Term, was, to be sure, not fully six feet under: Our decision in *Lee v. Weisman*[62] conspicuously avoided using the supposed 'test,'

44. Morrison v. Olson, 487 U.S. 654 (1988).

45. Scalia, *supra* note 1, at 53.

46. *Id.*

47. *Id.*

48. *Id*.

49. *Id.; Morrison*, 487 U.S. at 697 (Scalia, J., dissenting).

50. Scalia, *supra* note 1, at 54; *Morrison*, 487 U.S. at 699 (Scalia, J., dissenting); *see The Federalist No. 47* (James Madison).

51. Scalia, *supra* note 1, at 54 (quoting *The Federalist No. 51* (James Madison)); *Morrison*, 487 U.S. at 699 (Scalia, J., dissenting).

52. Scalia, *supra* note 1, at 54; *Morrison*, 487 U.S. at 699 (Scalia, J., dissenting). The cautionary idiom of the wolf in sheep's clothing can be found in Jesus' sermon on the mount recounted in the Gospel of St. Matthew 7:15: "Beware of false prophets, which come to you in sheep's clothing, but inwardly they are ravening wolves." *St. Matthew 7:15* (King James). The idiom is also found in an Aesop fable, in which a wolf wears a sheep skin to blend into the flock of sheep and make hunting easier. *The Wolf in Sheep's Clothing,* Read.gov, http://read.gov/aesop/022.html (last visited June 27, 2021).

53. U.S. Const. art. II, § 1, cl. 1.

54. Scalia, *supra* note 1, at 54; *Morrison*, 487 U.S. at 705 (Scalia, J., dissenting).

55. Scalia, *supra* note 1, at 55; *Morrison*, 487 U.S. at 706 (Scalia, J., dissenting).

56. Scalia, *supra* note 1, at 55; *Morrison*, 487 U.S. at 706 (Scalia, J., dissenting).

57. The wisdom of Justice Scalia's dissent came to fruition a decade later when Congress chose not to reauthorize the act and let it expire in 1999. Scalia, *supra* note 1, at 53.

58. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993).

59. Scalia, *supra* note 1, at 129; *Lamb's Chapel*, 508 U.S. at 394.

60. Scalia, *supra* note 1, at 129; *Lamb's Chapel*, 508 U.S. at 395.

61. Scalia, *supra* note 1, at 129; *Lamb's Chapel*, 508 U.S. at 398-400 (Scalia, J., concurring). The *Lemon* test originated in Lemon v. Kurtzman, 403 U.S. 602 (1971), where the court created a three-part test to determine whether a law satisfies the Establishment Clause. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster an excessive government entanglement with religion." *Lemon*, 403 U.S. at 612-613 (internal citation and quotation omitted).

62. Lee v. Weisman, 505 U.S. 577, 586-587 (1992) (declining to accept the invitation of petitioners and amici the United States to reconsider the court's decision in *Lemon*, explaining that the court "can decide the case without reconsidering the general constitutional framework by which public schools' efforts to accommodate religion are measured").

but also declined the invitation to repudiate it. Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart (the author of today's opinion repeatedly),[63] and a sixth has joined an opinion doing so."[64]

The secret of the *Lemon* test's survival, Justice Scalia thought, is that it is so easy to kill.[65] "It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will.[66] When we wish to strike down a practice it forbids, we invoke it;[67] when we wish to uphold a practice it forbids, we ignore it entirely.[68] Sometimes, we take a middle course, calling its three prongs 'no more than helpful signposts.'[69] Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him."[70]

Thereafter, Justice Scalia declined to apply *Lemon* — whether it validated or invalidated the government action in question, which explained why he would not join the Court's opinion.[71] Whether the Lemon test is the constitutional equivalent of Michael Myers (*Halloween*)[72] or Jason Voorhees (*Friday the 13th*)[73] is an open question, but the vivid imagery employed by Justice Scalia over the years has no legal writing comparison. Like his writing, Justice Scalia's decades of opinions supporting religious freedom also have no parallel.

The above is a mere sample of the collection of brilliant writing that characterizes Justice Scalia's career on and off the bench. The book is an enjoyable read regardless of whether you are a Justice Scalia admirer, or whether you prefer your Constitution living or dead. The clarity and purpose of his writing, his wisdom, and his ability to lay out foundations and forecasts have no contemporary equivalent. History should be kind to Justice Scalia, and this book explains why. So, whether you will learn from the content of this book or challenge it, like Justice Kagan writes in her foreword, "I envy the reader who has picked up this book."[74]

— Justice William J. Meade

63. *See* Cty. of Allegheny v. Am. C.L. Union Greater Pittsburgh Chapter, 492 U.S. 573, 655-57 (1989) (Kennedy, J., concurring in part and dissenting in part), abrogated by Town of Greece, N.Y. v. Galloway, 572 U.S. 565 (2014); Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 346-49 (1987) (O'Connor, J., concurring); Wallace v. Jaffree, 472 U.S. 38, 107-13 (1985) (Rehnquist, J., dissenting); id. at 90-91 (White, J., dissenting); Sch. Dist. of City of Grand Rapids v. Ball, 473 U.S. 373, 400-01 (1985) (Rehnquist, J., dissenting), overruled by Agostini v. Felton, 521 U.S. 203 (1997); Widmar v. Vincent, 454 U.S. 263, 282 (1981) (White, J., dissenting); New York v. Cathedral Acad., 434 U.S. 125, 134-35 (1977) (White, J., dissenting); Roemer v. Bd. of Pub. Works of Maryland, 426 U.S. 736, 768 (1976) (White, J. and Rehnquist, J., concurring); Comm. for Pub. Ed. & Religious Liberty v. Nyquist, 413 U.S. 756, 811-12 (1973) (Rehnquist, J., Burger, J., and White, J., concurring in part and dissenting in part).

64. Scalia, *supra* note 1, at 129; *Lamb's Chapel,* 508 U.S. at 398 (Scalia, J., concurring).

65. Scalia, *supra* note 1, at 129; *Lamb's Chapel,* 508 U.S. at 399 (Scalia, J., concurring).

66. *See, e.g.,* Lynch v. Donnelly, 465 U.S. 668, 679 (1984) (noting instances in which court has not applied *Lemon* test).

67. *See, e.g.,* Aguilar v. Felton, 473 U.S. 402 (1985) (striking down state remedial education program administered in part in parochial schools), overruled by Agostini v. Felton, 521 U.S. 203 (1997).

68. *See, e.g.,* Marsh v. Chambers, 463 U.S. 783 (1983) (upholding state legislative chaplains).

69. Hunt v. McNair, 413 U.S. 734, 741 (1973).

70. Scalia, *supra* note 1, at 129; *Lamb's Chapel,* 508 U.S. at 399 (Scalia, J., concurring).

71. Scalia, *supra* note 1, at 129; *Lamb's Chapel*, 508 U.S. at 399-400 (Scalia, J., concurring).

72. *Halloween* (Compass International Pictures 1978).

73. *Friday the 13th* (Paramount Pictures 1980).

74. Elena Kagan, Foreword to Scalia, *supra* note 1, at xv, xviii.

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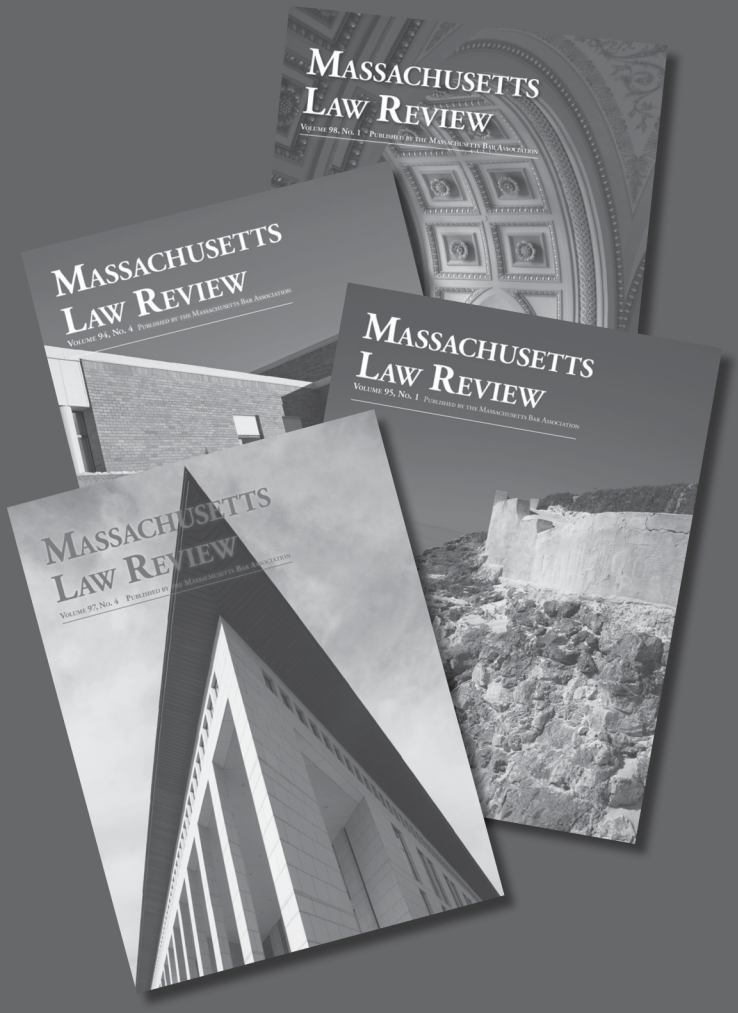

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