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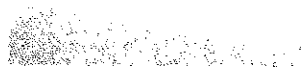

Natural Law and The Prudent Man Standard in Negligence Theory of Tort Law: Pollock, Prosser, Aquinas and Cicero

JOSEPH C. CASCARELLI†

Does Natural Law have any theoretical or practical application in modern common law tort theory of Negligence? In his essay entitled *The History of the Law of Nature*, Sir Frederick Pollock makes the following observation:

> One of the most characteristic and important features of the modern Common Law is the manner in which we fix the measure of legal duties and responsibilities, where not otherwise specified, by reference to a reasonable man's caution, foresight or expectation, ascertained in the first instance by the common sense of juries, and gradually consolidated into judicial rules of law. The notions of a reasonable price and of reasonable time are familiar in our law of sale and mercantile law generally. Within the last century and a quarter or thereabouts, the whole doctrine of negligence has been built upon the foundation of holding every lawful man answerable to for at least the amount of prudence which might be expected of an average reasonable man in the circumstances. Now St. Germain pointed out as early as the sixteenth century that the word 'reason' and 'reasonable' denote for the common lawyer the ideas which the civilian or canonist puts under the head of 'Law of Nature'. Thus natural law may fairly claim, in principle though not by name, the reasonable man of English and American law and all his works, which are many.[1]

Pollock certainly makes an interesting observation, but is he correct or mistaken? Is it really true that scholastic or medieval concepts still influence modern jurisprudence? What does the evidence in the common law, in the comments of notable authors on tort theory, and the writings of the medieval Schoolmen suggest? This article attempts to investigate the legitimacy of Pollock's observation in the light of Professor Prosser's commentaries on the theory of negligence[2] and St. Thomas Aquinas' comments on the scholastic understanding of justice, negligence, and prudence.[3]

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1. SIR FREDERICK POLLOCK, ESSAYS IN THE LAW 69 (Archon Books 1969).

2. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS, (4th ed. 1971).

3. ST. THOMAS AQUINAS, THE "SUMMA THEOLOGICA" OF ST. THOMAS AQUINAS, II-II, QQ.46-62, 79-80. (Fathers of the English Dominican Province trans.; originally published in English in 1911 by

I. NEGLIGENCE AS MORAL CONDUCT: FAILING TO CHOOSE RIGHTLY

We begin by describing what Negligence means. According to Prosser, Negligence is a matter of risk of recognizable danger of injury.[4] From our common experience, we know that injury or the risk of injury can occur through intentional acts as well as unintentional acts. Negligence, however, deals with injuries or the risk of injury brought about by unintended acts. Professor Prosser writes:

> In negligence, the actor *does not desire* to bring about the consequences that follow, nor does he know that they are substantially certain to occur, or believe that they will. There is merely a risk of such consequences, sufficiently great to lead a *reasonable man* in his position to anticipate them, and to guard against them.[5]

Precisely because it is conduct rather than intent that determines liability in the Negligence theory of torts, the standard for judging a party's conduct is said to be objective, not subjective. Concurring, Prosser quotes from Professor Terry, who says "Negligence is conduct, *not a state of mind.*"[6] This explains, in part, the use of the reasonable man standard by the courts which is a standard of care that is, as Professor Prosser points out, a standard of conduct rather than of intent or consequences.[7] But who is this reasonable man? What does this term mean? From where did this concept of the "reasonable man" originate? Sir Frederick Pollock indicates that "the word 'reason' and 'reasonable' denote for the common lawyer the ideas which the civilian or canonist puts under the head of 'Law of Nature.'"[8]

An examination of the scholastic and canonist discussion of St. Thomas Aquinas is necessary in order to analyze whether Pollock's assertions are correct.[9] Aquinas begins his discussion of Negligence by saying: "Negligence denotes lack of due solicitude."[10] St. Thomas continues: "Diligence seems to be the same as solicitude, because the more we love (*diligimus*) a thing the

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Benziger Brothers; rev. ed. 1920; reissued in three volumes, 1948; reprinted by Christian Classics 1981).

4. PROSSER, *supra* note 2, at 145.

5. *Id., citing* Warren A. Seavy, *Negligence — Subjective or Objective*, 41 HARV. L. REV. 1, 17 (1927) (emphasis added).

6. *Id., citing* Henry T. Terry, *Negligence*, 29 HARV. L. REV. 40 (1915) (emphasis added).

7. *See id.* at 146.

8. POLLOCK, *supra* note 1, at 69.

9. St. Thomas Aquinas was an Italian philosopher and theologian. He was born in Roccasecca (approximately midway between Rome and Naples), in the year of Our Lord, 1225. St. Thomas Aquinas died on 7 March 1274.

10. AQUINAS, *supra* note 3, pt. II-II, Q.54, art. 1, at 1413. *See also* WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 1355 (2nd College ed. 1974) (defining *solicitude* as "the state of being solicitous; care, concern, etc., . . . *SYN.* see CARE"). THE NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE defines *care* as "2. close attention or careful heed [to drive with care] . . . *SYN.* — *solicitude* implies thoughtfulness . . . for the welfare, safety, or comfort of another. . . ." *Id.* at 214.

more solicitous are we about it."[11] Even at this early stage of the discussion, we can begin to see the root or origin of modern Tort Law's use of the phrase "due diligence." In other words, due diligence pertains to being solicitous about what is Good.

Accordingly, St. Thomas says, "Properly speaking the matter of negligence is a good that one ought to *do*. . . ."[12] Thus, even as early as the thirteenth century, it was commonly recognized that Negligence, properly understood, deals with *conduct* rather than intent or consequences, just as Professor Prosser points out in the twentieth century. But, what is conduct, if not an act of the Will, an act of command in an actor? Precisely because "negligence regards the act of command," St. Thomas suggests "the negligent man fails through lack of a prompt will."[13] This is logical.

Accidents occur because people fail to have "a prompt will" in regards to something they ought to do. For example, the driver of an automobile could be pre-occupied with his own thoughts, engaged in some distracting conversation with a passenger, be on his car-phone, or simply changing channels on his car-radio. When this hypothetical driver runs a traffic signal in an intersection or rear-ends another driver who slows down on the highway, it is the lack of "a prompt will" in this driver that is at fault. A second example is the homeowner who finds it too unpleasant to leave the warmth and comfort of his house to go outside into the cold to shovel the snow from his sidewalk. His lack of "a prompt will" may lead to the snow turning to ice and eventually a pedestrian slipping and falling on the sidewalk.

St. Thomas asserts that "a negligent man is one who fails to choose (*nec eligens*). . . ."[14] In these two hypothetical situations, the driver and the homeowner simply fail to choose to act on what they reasonably know they should have been doing. The word *Negligence* has its roots in two Latin words, *nec* and *eligens*: *eligens* referring to choosing, and *nec* referring to its negation, in the sense of the act of *failing* to choose. A negligent man, therefore, is one who, through some inattentiveness on the part of his Will, fails to choose "the good that one ought to do."[15]

In these two hypothetical situations, common sense tells us that "paying attention at the wheel" is the "good" that this driver should have been doing in order to avoid this motor vehicle accident, while "shoveling the sidewalk" is the "good" that this homeowner should have done in order to prevent this pedestrian from falling and injuring himself on the ice. Negligence is, therefore, "a

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11. AQUINAS, *supra* note 3, pt. II-II, Q.54, art. 1, Reply Obj. 1, at 1413.
12. *Id.* pt. II-II, Q.54, art. 1, Reply Obj. 3, at 1414 (emphasis added).
13. *Id.* pt. II-II, Q.54, art. 2, Reply Obj. 3, at 1414 (emphasis added).
14. *Id.* pt. II-II, Q.54, art. 2, c. at 1414. (emphasis in original).
15. *Id.* pt. II-II, Q.54, art. 1, Reply Obj.3, at 1414.

lack of goodness."[16] This is why we would say that our hypothetical driver and homeowner are "at fault."[17] Although contemporary legal scholars may prefer to avoid "moralistic" words like *fault*, this is next to impossible. Professor Prosser makes this point, perhaps unwittingly, when he comments on the definition of "fault." Professor Prosser begins by arguing that traditional notions of morality are, or should be, deemed obsolete in professional discourse on Negligence. However, at the conclusion of his argument, Professor Prosser appears to have accepted the fact that morality *is* involved and unavoidable, although he calls this morality "social morality" instead of "personal blame." Prosser writes:

> It is now more or less generally recognized that the "fault" upon which liability may rest is social fault, which may but does not necessarily coincide with personal immorality. The law finds "fault" in a failure to live up to an ideal standard of conduct which may be beyond the knowledge or capacity of the individual, and in acts which are normal and usual in the community, and without moral reproach in its eyes. It will impose liability for good intentions and for innocent mistakes. One who trespasses upon the land of another in the honest, reasonable belief that it is his own, or buys stolen chattels in good faith, or innocently publishes a statement which proves to be a libel of another, is held liable without any personal guilt, because his conduct, while innocent, is still so far anti-social that the law considers that he should pay for the harm he does. In the legal sense, "fault" has come to mean no more than a departure from the conduct required of a man by society for the protection of others, and it is the public and social interest which determines what is required. . . . [It] is social morality, and not personal blame, which is involved.[18]

Whatever may be the merits of Professor Prosser's arguments aimed at neutralizing the moral aspect of the Negligence theory, Negligence ultimately deals with human conduct that impacts on the common good,[19] that is, "society." Consequently, avoidance of "moralistic-sounding" words like "fault," when discussing Negligence, is professionally impossible. As St. Thomas argues, "[Negligence] arises out of a certain remissness of the will, the result of being a lack of solicitude on the part of reason in *commanding what it should command,*

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16. *Id.*

17. *See* NEW WORLD DICTIONARY, *supra* note 10, at 510 (defining *fault* as: "1. orig., failure to have or to do what is required; lack; fault"). Webster suggests that the word *fault* comes from the Old French word, *faulte*, which denotes "a lack." *See id.*

18. PROSSER, *supra* note 2, at 18.

19. St. Thomas Aquinas writes:

> [S]ince it belongs to prudence rightly to counsel, judge, and command concerning the means of obtaining a due end, it is evident that prudence regards not only the private good of the individual, *but also the common good of the multitude.* AQUINAS, *supra* note 3, pt. II-II, Q.47, art. 10, c. at 1389 (emphasis added)

or as it should command."[20] Commandments mandate what must be *done* and what must be *avoided.* This is the definition of Duty. Commandments admonish the individual to fulfill his and her duties in regards to moral conduct. This, therefore, is the essence of Negligence: identifying a *recognizable duty* and determining whether there has been *a breach of that duty.* Every lawyer recognizes these as the first two elements in the common law action (and now, in many jurisdictions, the Civil Action) that is termed Negligence.[21] Whether the reader appreciates it or not, the Negligence theory of tort law deals essentially with regulating moral conduct by means of the judicial and even the legislative process.

II. JUDGING NEGLIGENCE FAIRLY: THE REASONABLE MAN WHO SEEKS THE GOOD AND AVOIDS EVIL

If Negligence amounts to a certain lacking of solicitude in one's moral conduct, and if Negligence theory of tort law aims at regulating this type of moral conduct, then the central focus of the judicial process in Negligence cases is this: how can courts judge fairly such failure to be moral in one's conduct? Historically, the courts have employed the "reasonable man" standard of care in Negligence theory because the "reasonable man" is a standard of conduct (i.e., objective) rather than of intent or consequences (i.e., subjective). Prosser cites *Blyth v. Birmingham Waterworks Co.*, where Judge Alderson writes: "[n]egligence is the omission to do something which a *reasonable* man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a *prudent and reasonable man* would not do."[22] Judge Alderson's "omission to do something which a reasonable man . . . would do" is the equivalent of Aquinas' "certain remissness of the will, the result being a lack of solicitude *on the part of reason* in commanding what it should command, or as it should command."[23] Prosser states that "it is evident that all such phrases" — namely the "reasonable man of ordinary prudence," the "reasonable man," the "prudent man," and the "man of ordinary sense using ordinary care and skill" — "are intended to mean very much the same thing."[24]

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20. *Id.* pt. II-II, Q.54, art. 3, c. at 1414-1415 (emphasis added).

21. The four elements to the common law Negligence cause of action are: (1) a duty recognized by the law; (2) breach of that duty by the defendant; (3) causal connection between that breach of duty and resulting injury, known as "proximate cause," and (4) resulting injury to the plaintiff. *See* PROSSER, *supra* note 2, at 143.

22. *Id.* at 150, *citing* Blyth v. Birmingham Waterworks Co., 11 Ex. 781, 784, 156 Eng.Rep. 1047 (1856) (emphasis added). This standard of care — namely, that of the "reasonable man of ordinary prudence" — was first enunciated at common law in the Eighteenth Century case of Vaughan v. Menlove, 3 Bing.N.C. 468, 132 Eng.Rep. 490 (1738). *Id.*

23. AQUINAS, *supra* note 3, pt. II-II, Q.54, art. 3, c. at 1414-1415 (emphasis added).

24. PROSSER, *supra* note 2, at 143 (emphasis added).

Prosser's assertion echoes Pollock's earlier comment: "the whole doctrine of negligence has been built upon the foundation of holding every lawful man answerable for at least *the amount of prudence* which might be expected of an average *reasonable* man in the circumstances."[25] Notably, Pollock links "prudence" to "reason." This prompts the question: in what way is "reason" and "prudence" related; how do they differ? In order to answer these questions, an examination of Pollock's discourse and a return to those "canonists" who predate the English Barrister of the Sixteenth Century, Christopher St. Germain, is necessary.

Writing in the Thirteenth Century, St. Thomas Aquinas, who quotes St. Augustine, begins: "Prudence is the knowledge of what to seek and what to avoid."[26] But, what should one seek and what should one avoid? The first Law of Nature tells us: *Seek the Good and Avoid Evil.* Aquinas writes:

> [T]he first principle in the *practical reason* is what is based on the meaning of "good"; and it is: *The good is what all desire.* This is, then, the first principle of law: *Good is to be done and sought after, evil is to be avoided.* On this all the other precepts of the *law of nature* are based.[27]

Once again, Pollock makes a valid point when he writes, "[n]ow St. Germain pointed out as early as the Sixteenth Century that the word *'reason'* and *'reasonable'* denote for the common lawyer the ideas which the civilian or canonist puts under the head of *'Law of Nature.'*"[28]

According to Aquinas, this first Law of Nature is a rule of the practical reason that tells man — indeed commands man — to Seek the Good and Avoid Evil. But, for whom is Good to be sought and Evil avoided? Certainly, one seeks the Good and avoids Evil for himself. But what is one's obligation towards his neighbor? Drawing his inspiration from Nature, the pagan Aristotle affirmed three centuries before Christ that "all men are, by nature, social and political."[29]

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25. POLLOCK, *supra* note 1 (emphasis added).

26. AQUINAS, *supra* note 3, pt. II-II, Q.47, art. 1, c. at 1383 (quoting St. Augustine QQ. lxxxii, q. 61).

27. AQUINAS, THE POCKET AQUINAS, pt. I-II, Q.94, art. 2, at 197 (Vernon J. Bourke, trans., Pocket Book 1960) (emphasis in original). Elsewhere St. Thomas writes:

> [T]here is in man an inclination toward the good that is in accord with the nature of reason, and this is proper to him. Thus, man has a natural inclination toward knowing the truth about God, and toward living in society. On this level, those things within the scope of this inclination pertain to the natural law; for instance, that man should avoid ignorance, *that he should not offend those with whom he must associate*, and others of this kind that are concerned with this level." *Id.* at 198 (emphasis added).

28. POLLOCK, *supra* note 1 (emphasis added).

29. ARISTOTLE, THE POLITICS, §1252a15-b9 - §1253a9-38. (Sir Ernest Barker, trans., Oxford University Press 1958).

However, even if Nature did not encourage man to be solicitous towards one's neighbor, the Old Testament and the New Testament certainly do. They command the individual to seek Good and avoid Evil for one's neighbors, not just for the sake of oneself. In Sacred Scripture, for instance, the Lord God "spoke to Moses, saying: . . . Seek not revenge, nor be mindful of the injury of thy citizen. *Thou shalt love thy friend as thyself.* . . ."[30] When a certain doctor of the Law asked Jesus, "What is the greatest commandment?" Jesus responded: "Thou shalt love the Lord thy God with thy whole heart, and with thy whole soul, and with thy whole mind. This is the greatest and first commandment. And the second is like to this: *Thou shalt love thy neighbor as thyself.* On these two commandments dependeth the whole law and the prophets."[31]

In the New Testament, St. Paul writes, "[a]ll the law is fulfilled in one word, even in this, *Thou shalt love thy neighbor as thyself.*"[32] And, again, it is written in the Old Testament, "[i]f a stranger dwell in your land, and abide among you, do not upraid him: But let him be among you as one of the same country; *and you shall love him as yourselves.* . . ."[33] In a word, both the Law of Nature and the Commandment of Nature's God mandate that one ought to be solicitous towards the Good of one's neighbor, and not merely to one's self.

Recalling the importance of the word — *solicitous* — Aquinas begins his discussion of Negligence, noting that "negligence denotes lack of due solicitude" and that "Diligence seems to be the same as solicitude, because the more we love (*diligimus*) a thing the more solicitous are we about it."[34] When called by Nature and by Nature's God to be solicitous, the individual is called to *care* about his neighbor's Good. Hence, it is not surprising that the language of our modern Tort Law employs the phrase, *due care.*[35] But what does it mean when it is said that *due care* should be exercised towards one's neighbor? Does this concept mean that we are supposed to care for our neighbor in a sentimental way to the point of becoming excessive in regards to concern for our neighbor's Good?[36] In practice this may become problematic since "excess" implies going beyond what is reasonable. But the courts, when phrasing this standard of care, have properly judged this standard to be *due care*: the word *due* qualifies and therefore *limits* the word *care.* If Pollock is correct, then it is Prudence, rather

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30. *Leviticus* 19: 1, 18. (Douay-Rheims translation).

31. *Matthew* 22: 37-40. (Douay-Rheims translation).

32. *Galatians* 5: 14. (Douay-Rheims translation).

33. *Leviticus* 19: 33-34. (Douay-Rheims translation).

34. AQUINAS, *supra* note 3, pt. II-II, Q.54, art. 1, Reply Obj. 1 at 1413.

35. *See* BLACK'S LAW DICTIONARY 589 (Revised 4th ed. 1968) where *due care* is defined as "[t]hat care which an ordinarily prudent person would have exercised under the circumstances" and that "'[d]ue care,' 'reasonable care,' and 'ordinary care' are convertible terms." *Id.*

36. It bears repeating that *The New World Dictionary* defines *care* as "2. close attention or careful heed [to drive with *care*] . . . *SYN.* — solicitude implies thoughtfulness, *often excessive apprehension,* for the welfare, safety, or comfort of another. . . ." THE NEW WORLD DICTIONARY, *supra* note 10, at 214 (emphasis added).

than sentiment or sentimentality, that is key *to the amount of* care that is *due* or owed to one's neighbor for his own good: "[T]he whole doctrine of negligence has been built upon on the foundation of holding every lawful man answerable to for at least *the amount of prudence* which might be expected of an average *reasonable* man in the circumstances."[37]

III. PRUDENCE: THE PRACTICAL REASONING OF THE AVERAGE, ORDINARY MAN

The polemic persists: What is Prudence and what is a "prudent man?" St. Thomas quotes St. Isidore, stating: "A prudent man is one who sees as it were from afar, for his sight is keen, and he foresees the event of uncertainties."[38] Does this mean that the prudent man is a type of prophet or a person who has exclusive possession of a bewitched crystal ball? To the contrary, the prudent man is a relatively simple man: He is a man of reason to the extent that he is open to reason; or, more precisely, he is open to the duties that reason may command him to perform. Secondly, the prudent man appears to be the kind of man who allows his own Will to be subordinate to Reason, and therefore subordinate to the commands of Reason. For, if the negligent man be someone who lacks "a prompt will," then the prudent man is someone who possesses "a prompt will." This possession of "a prompt will" defines the prudent man.

The more difficult question remains: How is this actually done *inside* the man? St. Thomas explains, starting with the basics: "[T]o obtain knowledge of the future from knowledge of the present or past, which pertains to prudence, belongs properly to the reason, because *this is done by a process of comparison.* It follows therefore that prudence, properly speaking, is *in* the reason."[39] The key phrases are "*in* the reason" and "process of comparison." What subtlety is St. Thomas intimating by his use of this phrase "in the reason?" Does *Prudence* not connote the same meaning as *reason*? St. Thomas explains:

> [S]ince prudence is in the reason, as stated above, it [prudence] is differentiated from the other intellectual virtues by a material difference of objects. *Wisdom, knowledge* and *understanding* are about necessary things, whereas *art* and *prudence* are about contingent things, art being concerned with *things made*, that is, with things produced in external matter, such as a house, a knife and so forth; and prudence, being concerned with *things done*, that is, with things that have their being in the doer himself. . . . On the other hand prudence is differentiated from the moral virtues according to a formal aspect distinctive of powers, i.e., the intellective power, wherein is prudence, and the

37. POLLOCK, *supra* note 1 (emphasis added).

38. AQUINAS, *supra* note 3, pt. II-II, Q. 47, art. 1, c. at 1383 (quoting St. Isidore's *Etymology*, Ch. X).

39. *Id.* (emphasis added).

> appetitive power, wherein is moral virtue. Hence it is evident that prudence is a special virtue, distinct from all other virtues.[40]

Although Prudence is related to Reason (i.e., prudence exists "*in* the reason"), Prudence appears to be separate from "reason itself." *Reason*, strictly speaking, includes many faculties, of which Prudence is but one of them. Prudence, to be precise, is also a virtue — even if it is a "special virtue." Virtue is essentially a habit; more precisely, it is a good habit.[41] But, Prudence is not just a moral virtue, such as Generosity, or Magnificence, or High-mindedness, or Gentleness. A virtue like Generosity is the mean between two extremes of the appetite, namely, extravagance and stinginess.[42] Magnificence is another moral virtue that is the mean that controls the two appetitive powers at opposite poles, namely, vulgarity and niggardliness.[43] High-mindedness (Magnanimity) is the mean between pettiness at one end and vanity at the other end of the appetitive scale.[44] And, Gentleness is the moral virtue that controls the extremes of apathy and short-temperedness.[45] Although it is a virtue in its own right because it controls human conduct, Prudence does *not* direct itself towards controlling the *appetitive* powers in man, such as do the moral virtues of generosity, magnificence, magnanimity, and gentleness. Instead, Prudence is an "*intellective* power" that is directed towards "things done" and "to be done" for the "good of one's neighbor." In other words, the moral virtues just mentioned are directed towards "self-improvement" (using contemporary usage), whereas Prudence is directed at the "public or societal interest" (using Professor Prosser's terminology). Although Prudence is an "intellective" as opposed to an "appetitive" power, it is important to appreciate that Prudence differs from Wisdom. In contemporary usage, there is a tendency to use Prudence and Wisdom interchangeably. But, epistemologically as well as in application, Prudence and Wisdom are not the same. Each virtue has its own different objective. Wisdom (knowledge and understanding in its highest sense) has for its object, "necessary things." St. Thomas places God, or at least knowledge about the truth relating

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40. *Id.* pt. II-II, Q.47, art. 5, c. at 1386 (emphasis in original).

41. *See id.* pt. I-II, Q. 55, art. 4, c. at 821 (emphasis added):

> [T]he formal cause of virtue, as of everything, is gathered from its genus and difference, when it is defined as a *good quality*: for *quality* is the genus of virtue, and the difference, *good*. But the definition would be more suitable if for *quality* we substitute *habit*, which is the proximate genus.

Elsewhere, St. Thomas points out that

> *[R]ational powers*, which are proper to man, are not determinate to one particular action, but are inclined indifferently to many: and they *are determinate to acts by means of habits*. . . . Therefore human virtues are habits. *Id.* pt. I-II, Q.55, art. 1, c. at 819 (emphasis added).

42. *See* ARISTOTLE, NICHOMACHEAN ETHICS, §1119a-20 - §1121b-10, at 83-88 (Martin Ostwald trans., Bobbs-Merrill 1962).

43. *See id.* §1122a-19 - §1123a-30, at 89-93.

44. *See id.* §1123b-5 - §1125a-30, at 93-99.

45. *See id.* §1125b-32 - §1126b-9, at 100-102.

to Divinity and Divine Law, into this category of "necessary things." Things that are "necessary" are things that simply do *not* change.[46] Such "things", for example, include the fact that God exists;[47] that God is one;[48] and, that God is incorporeal, and therefore is unchangeable.[49] Prudence, however, does not con-

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46. *See* JOSEPH RICKABY, S.J., OF GOD AND HIS CREATURES: AN ANNOTATED TRANSLATION OF THE SUMMA CONTRA GENTILES 256 (The Carroll Press 1950):

> Now between the parts of the universe the first apparent difference is that of contingent and necessary. Beings of a *higher* order are *necessary* and *indestructible* and *unchangeable*. 3 *Summa Contra Gentiles*, ch. 94 (emphasis added).

47. *See* RABBI MOSES MAIMONIDES, GUIDE OF THE PERPLEXED, I. 63, §82a, at 154 (Shlomo Pines trans., University of Chicago Press 1963) (emphasis added):

> Accordingly when God, may He be held sublime and magnified, revealed Himself to Moses our Master and ordered him to address a call to the people and to convey to them his prophetic mission, [Moses] said: the first thing that they will ask of me is that I should make them acquire true knowledge that there exists a god with reference to the world; after that I shall make the claim that He has sent me. For at that time all the people except a few were not aware of the existence of the deity, and the utmost limits of their speculation did not transcend the sphere, its faculties, and its actions, for they did not separate themselves from things perceived by the senses and had not attained intellectual perfection. Accordingly God made known to [Moses] the knowledge that he was to convey to them and through which they would acquire a true notion of the existence of God, this knowledge being: *I am that I am*. . . . Accordingly Scripture makes, as it were, a clear statement that the subject is identical with the predicate. *This makes clear that He is existent not through existence.* This notion may be summarized and interpreted in the following way: *the existent that is the existent, or the necessarily existent.* This is what demonstration necessarily leads to: namely, to the view that there is a necessarily existent thing that has never been, or will ever be, nonexistent.

See also AQUINAS, *supra* note 3, pt. I, Q.2, art. 3, c. at 13:

> On the contrary, It is said in the person of God: *I am Who am.* (*Exodus* III : 14). I answer that, the existence of God can be proved in five ways.

48. *See* MAIMONIDES, *supra* note 47, I. 53, §63b – §64a, at 122-123 (emphasis added):

> For this reason, we, the community of those who profess the Unity [of God] by virtue of a knowledge of the truth — just as we do not say there is in His essence a superadded notion by virtue of which He has created the heavens, and another one by virtue of which He has created the elements, and a third one by virtue of which He has created the intellect — so we do not say that there is in Him a superadded notion by virtue of which He possesses power, and another by virtue of which He possesses will, and a third one by virtue of which He knows the things created by Him. *His essence is*, on the contrary, *one and simple, having no notion that is superadded to it in any respect.* This essence has created everything that it has created and knows it, but absolutely not by virtue of superadded notions.

See also AQUINAS, *supra* note 3, pt. I, Q.11, art. 3, at 47 (emphasis added):

> *On the contrary*, It is written, *Hear, O Israel, the Lord our God is one Lord.* (*Deuteronomy* VI: 4). *I answer that*, It can be shown from these three sources that *God is one.* First from His simplicity . . . Secondly, this is proved from the infinity of His perfection . . . Thirdly, this is shown from the unity of the world.

49. *See* MAIMONIDES, *supra* note 47, I. 18. §24a, at 44 (emphasis added):

> For *God*, may He be exalted, *is not a body*. . . . [A]ccordingly He, may He be exalted, does not draw near to or approach a thing, nor does anything draw near to or approach Him, may He be exalted, inasmuch as the abolition of corporeality entails that space be abolished; so

cern itself with this kind of knowledge. Prudence concerns itself with contingent things that *are subject to change*.[50] In a word, Prudence relates to acts that are peculiarly *Human*, i.e., involves moral conduct. The first Law of Nature — Seek the Good and Avoid Evil — is among those things that are constant, unchangeable.[51] As St. Augustine says, Prudence is "knowledge of what to seek and what to avoid."[52] Prudence, therefore, directs an individual towards discovering the means for bringing about the Good and avoiding Evil. More accurately, Prudence is a rational faculty that *reasons about "contingent things"* and *guides our habits*. These habits, in the course of time, give rise to moral virtues. Moral virtue leads to discovering the *right* means for bringing about the Good, both for one's self and for one's neighbor. St. Thomas writes: "[T]he Philosopher [i.e., Aristotle] says (*Ethic vi.* 12) that moral virtue ensures the rectitude of the intention of the end, while *prudence ensures the rectitude of the means*. Therefore, it does not belong to prudence to appoint the end to moral virtues, *but only to regulate the means*."[53]

In the days of Christopher St. Germain, this end towards which human conduct is directed—Seeking the Good and Avoiding Evil—was called *synderesis*. St. Germain, an English barrister of the early Sixteenth Century and author of *Doctor and Student*, an influential treatise on the Common Law, explains:

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that there is no nearness and proximity, and no remoteness, no union and no separation, no contrast and no succession.

See also AQUINAS, *supra* note 3, pt. I, Q.3, art. 1, c. at 15 (emphasis added):

> *On the contrary*, It is written in the *Gospel of St. John* (IV: 24): *God is a spirit. I answer that, It is absolutely true that God is not a body*; and this can be shown in three ways. First, because no body is in motion unless it be put in motion . . . [and] it has already been proved (Q.2, A.3), that God is the First Mover, and is Himself unmoved. Therefore, it is clear that God is not a body. Secondly, because the first being must of necessity be in act, and in no way in potentiality. . . . Now it has been already proved that God is the First Being. It is therefore impossible that in God there should be any potentiality. But everybody is in potentiality, because the continuous, as such, is divisible to infinity; it is therefore impossible that God should be a body. Thirdly, because God is the most noble of beings.

50. AQUINAS, *supra* note 46 (emphasis added):

> Now between the parts of the universe the first apparent difference is that of contingent and necessary. Beings of a higher order are necessary and indestructible and unchangeable: from which condition beings fall away, the lower the rank in which they are placed; so that the *lowest beings suffer destruction in their being and change in their constitution*, and produce their effect, necessarily, but *contingently*.

51. *See* ERIC D'ARCY, CONSCIENCE AND ITS RIGHT TO FREEDOM 42 (Sheed and Ward 1961) (emphasis added):

> [T]hus synderesis cannot err since *synderesis provides principles* (i.e., do good and avoid evil) *which do not vary*, just as the laws that govern the physical universe do not vary.

52. AQUINAS, *supra* note 3, pt. II-II, Q.47, art. 1, c. at 1383 (quoting St. Augustine QQ. lxxxii, q. 61).

53. *Id.* pt. II-II, Q. 47, art. 6, c. at 1387 (emphasis added).

> *Synderesis* is a natural power of the soul, set in the highest part thereof, *moving and stirring it to good, and abhorring evil.* . . . And this *synderesis* is the beginning of all things that may be learned by speculation or study, and ministreth the general grounds and principles thereof; and also of all things that are to be done by man. An example of such things as may be learned by speculation appeareth thus: *synderesis* saith that . . . *things that are to be done, or not to be done*: as where *synderesis* saith no evil is to be done and followeth, and evil to be fled, and such others. . . .[54]

In Aquinas' day, the ability to discover the means for effecting this command of Nature was called Prudence. By the Sixteenth Century, writers of jurisprudence began disregarding the distinction between Prudence and Reason, simply preferring the latter to encompass both. This is epitomized in the words of St. Germain: "[A]nd therefore *synderesis* is *called by some men the law of reason*, for it ministreth the principles of the law of reason; which be in every man by nature, in that he is a reasonable creature."[55] This goal towards which human action and moral virtue is directed — seeking the Good and avoiding Evil, which is called synderesis — is one of those "necessary things," like God Himself, that does not change. Synderesis is one those universal principles which appears self-evident, having a universal validity but which can be neither proved nor disproved in logic. Prudence does not question the validity of this command, *Seek the Good*, etc. That is, Prudence does not attempt to prove that this command is true or false. Still, Prudence is an "intellective virtue" because it exists "*in* the reason."[56] Indeed, Prudence is an act of Reason. But human reason has two aspects: One is speculative and concerned with "necessary things;" the other is practical and concerned with "contingent things." Precisely because Prudence searches the right means for carrying out this command — Seek the Good and avoid Evil — *in the concrete case*, Prudence is, therefore, a *practical*, rather than a speculative "intellective virtue." Accordingly, St. Thomas writes:

> Now, just as, in the speculative reason, there are certain things naturally known, about which is *understanding*, and certain things of which we obtain knowledge through them, viz., conclusions, about which is *science*, *so in the practical reason, certain things pre-exist, as naturally known principles, and such are the ends of the moral virtues*, since the end is in practical matters what principles are in speculative matters; . . . certain things are in the practical reason by way of conclusions, and such are the means which we gather

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54. CHRISTOPHER ST. GERMAIN, *"What Synderesis Is"*, DOCTOR AND STUDENT (1518), dialogue I, chapter XIII, 39-40 (Legal Classics Library ed. 1988).

55. *Id.*

56. St. Thomas refers to this as *necessarily contingent.* That is, Prudence exists in the reason by necessity because human reason is the *sine qua non* that makes a human being what he is. However, because Prudence is not the end of moral virtue, which is the Good, but rather deals with discovering the *right means* to bring about human Good which is subject to change, Prudence is contingent. Thus, Prudence is both necessary and continent, but in the sense of being *necessarily contingent.*

> from the ends themselves. *Of such is prudence, which applies universal principles to the particular conclusions of practical matters.* Consequently it does not belong to prudence to appoint the end to moral virtues, *but only to regulate the means.*[57]

The fact that Prudence is both an intellective virtue and a practical virtue has important implications for modern Tort Law. Precisely because Prudence is an intellective virtue — which connotes that Prudence exists "*in* the reason" — the courts are correct and indeed have been correct over the centuries to uphold as a rule of law that the "reasonable and prudent man standard" is truly an *objective* standard for measuring human conduct. At the same time, since Prudence is a practical virtue, the courts are likewise correct to relate this "reasonable and prudent man standard" to the prudence of the average, ordinary man. In other words, the knowledge and experiences of the "reasonable and prudent man" do not consist of special knowledge belonging to philosophers and theologians, nor the expertise of a lawyer. On this score, Prosser writes:

> Since it is impossible to prescribe definite rules in advance for every combination of circumstances which may arise, the details of the standard must be filled in in each particular case. The question then is what the reasonable man would have done under the circumstances. *Under our system of procedure, this question is to be determined in all doubtful cases by the jury, because the public insists that its conduct be judged in part by the man in the street rather than by lawyers*, and the jury serves as a shock-absorber to cushion the impact of the law.[58]

Throughout the history of common law, our courts have never, *a priori*, imposed on juries these "*details* of the standard" that make the "reasonable and prudent man" what he is. Following appropriate instructions to the jury,[59] these "details" are worked out by the jury every time it applies the trial court's in-

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57. AQUINAS, *supra* note 3, pt. II-II, Q.47, art. 6, c. at 1387 (emphasis added).

58. PROSSER, *supra* note 2, at 207 (emphasis added).

59. Professor Prosser recites the following jury instruction on negligence and the prudent man standard:

> Every person is negligent when, without intending to do any wrong, he does such an act or omits to take such precaution that under the circumstances he, as an ordinarily prudent person, ought reasonably to foresee that he will thereby expose the interests of another to an unreasonable risk of harm. In determining whether his conduct will subject the interests of another to an unreasonable risk of harm, a person is required to take into account such of the surrounding circumstances as would be taken into account by a reasonably prudent person and possess such knowledge as is possessed by a reasonably prudent person and to use such judgment and discretion as is exercised *by persons of reasonable intelligence under the same or similar circumstances. Id.* at 207 (emphasis added).

Professor Prosser points out that this particular instruction was inspired by the RESTATEMENT OF TORTS, and is the instruction of Chief Justice Rosenberry cited in Osborne v. Montgomery, 203 Wis. 223, 234 N.W. 372 (1931). *See id.*

structions to the peculiar facts presented at trial.[60] It is through the collective knowledge and experiences of juries, in trial after trial, that the "reasonable and prudent man" standard has developed and continues to develop, today. In virtue of the fact that juries are composed of one's peers, the "reasonable and prudent man" standard was ultimately defined in terms of a "practical" prudence that the average and ordinary man brought with him to the jury-box. Although an occasional expert (a philosopher, theologian, scientist or even a lawyer) might sit as a juror, the prudence relative to such experts has never determined the definitive standard of care in the traditional, common law negligence case.[61] Pollock clarifies this point:

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60. The argument that the collective judgment of the Many is to be favored over the wisdom of the Few is nearly as old as civilization itself. Writing in the third century B.C., Aristotle wrote convincingly on the subject of juries:

> There is this to be said for the Many. Each of them by himself may not be of a good quality; but when they all come together it is possible that they may surpass — collectively and as a body, although not individually, — the quality of the few best. . . . *When there are many, each can bring his share of goodness and moral prudence.* . . . In the actual practice of our own day the people in their gatherings have both a judicial and a deliberative capacity, and in both capacities they make decisions which are concerned with *particular matters*. Any individual member of these assemblies is probably inferior to the one best man. But the state is composed of many individuals. . . . Again, *a numerous body is less likely to be corrupted.* A large volume of water is not so liable to contamination as a small; and the people is not so liable to corruption as the few. *The judgment of a single man is bound to be corrupted when he is overpowered by anger, or by any other emotion; but it is not easy for all to get angry and go wrong simultaneously.* ARISTOTLE, *supra* note 29, at §1281b and §1286a. (emphasis added).

In *Nichomachean Ethics*, Aristotle says that we begin our search to discover what is best for man's happiness by invariably starting with "what is known to us," and from this point we move forward. Aristotle, therefore, commences his discussion of moral virtue by beginning with the definition of *the Good as collectively known by the Many*. In short, *we start with the common sense shared by Many* before we begin to make refinements. *See* ARISTOTLE, *supra* note 42, §1095b-1 - §1095b-9, and §1095b-15 - §1096a-5, at 7, 8-9.

This same natural process takes place when juries deliberate and render a verdict. They bring to bear their collective knowledge and experience. The biases or prejudices they might otherwise have and privately espouse as individuals, juries tend to abandon as a public, deliberative body. In place of these biases and prejudices, the collective prudence of juries tends to make its way to the foreground. *See, e.g.*, LYSANDER SPOONER, AN ESSAY ON THE TRIAL BY JURY 124-125 (The Legal Classics Library 1989). *See also* FRANCIS L. WELLMAN, THE ART OF CROSS-EXAMINATION 14 (The Legal Classics Library 1983), who writes:

> Modern juries especially in large cities, are composed of practical business men accustomed to think for themselves, experienced in the ways of life, capable of forming estimates and making nice distinctions, unmoved by the passions and prejudices to which court oratory is nearly always directed. Nowadays, jurymen, as a rule, are wont to bestow upon testimony the most intelligent and painstaking attention, *and have a keen scent for truth.*

In the course of time, this process of trying cases before juries has helped us, historically, to come to an improved understanding of what a "reasonable and prudent man" is "under the circumstances."

61. It is, of course, recognized that in a *professional* malpractice case the standard of care is adjusted to reflect the standard of prudence relative to a *professional* community, which is by definition a com-

> One of the most characteristic and important features of the modern Common Law is the manner in which we fix the measure of legal duties and responsibilities, where not otherwise specified, by reference to a reasonable man's caution, foresight or expectation, *ascertained in the first instance by the common sense of juries*, and gradually consolidated into judicial rules of law.[62]

IV: THE REASONABLE AND PRUDENT MAN STANDARD: OBJECTIVE OR SUBJECTIVE?

Notably, Prosser states that "the conduct of the reasonable man will vary with the situation with which he is confronted."[63] Juries are frequently instructed to take circumstances into account during their deliberations. Specifically, when the jury is instructed on the definition of Negligence, the trial judge states that Negligence consists in failing to do "what the reasonable man would do 'under the same or similar circumstances.'"[64] This instruction has led Prosser to draw an expected conclusion: "Under the latitude of this phrase, the courts have made allowance not only for the external facts, but for many of the characteristics of the actor himself, and have applied, in many respects, *a more or less subjective standard.*"[65] Is the reasonable man standard not really objective at all but instead a "more or less *subjective* standard?" If so, then what does this mean for a trial on the merits of the case? The purpose of a trial is to be a *truth-seeking venture*. But "subjectivity" in standards, especially in the area of human conduct, suggests that truth is either non-existent or is incapable, if not impossible, of being realized. Yet, the goal of a trial is to reach the truth surrounding a controversy that has brought the litigants together into court. This has been our tradition in the common law for approximately eight centuries, indeed for as long as civilization has existed in the West. Sir John Fortescue, commenting on jury trials in the Fifteenth Century, continues to have relevance today:

> Twelve good and lawful men having at length been sworn in the form aforesaid, and having as aforesaid sufficient possessions over and above moveables with which to maintain their status, neither suspected by nor hostile to either party, but neighbours to them, the whole record and process of the plea pend-

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munity of experts (rather than a lay community marked by the prudence of "ordinary" and "average" men). *See* PROSSER, *supra* note 2, at 104, 161-166.

However, the underlying premise, namely, that negligence of the professional defendant is proved when it is shown that he or she has deviated from a duty imposed by some standard of prudence appropriate to the defendant's position or station, is nothing more than a logical outcome of the historical origins of the prudent man standard at common law. But to dwell on this point is to miss the central focus of this discussion, which is an inquiry into whether Pollock is correct in his assessment that the prudent man standard in negligence theory of tort law is ultimately grounded in Natural Law.

62. POLLOCK, *supra* note 1 (emphasis added).

63. PROSSER, *supra* note 2, at 151.

64. *See id.*

65. *See id.* at 151 (emphasis added).

> ing between the parties shall be read to them [i.e., the jury] by the court in English [as opposed to Latin or Norman French], and the issue of the plea, the *truth* of which they are to certify to the court, shall be clearly explained to them [again, the jury]. Thereupon, each party shall declare in the presence of the court, either by himself or by his counsel, and explain to these jurors all and singular of the *matters and evidence which* he believes may *show them the truth of the issue in question*. . . . These *witnesses,* charged by the justices, *shall testify* on the holy evangels of God *all they know concerning the truth* of the issue about which the parties contend. And if need be, the *witnesses shall be separated* until they have deposed all they wish, *so that the evidence of one of them shall not instruct or induce another to testify in the same manner.* All this having been done, the jurors shall then *confer together* at their pleasure *as to the truth of the issue*, deliberating as much as they wish in the custody of the officers of the court, in a place assigned to them for the purpose, *lest in the meantime anyone should suborn them*; they shall return into court, and *certify* to the *justices the truth of the issue thus joined*, in the presence of the parties, if they desire to be present, particularly the plaintiff. The decision of the jurors is called by the laws of England "verdict"; and then accord to the tenor of the verdict the justices shall render and formulate their judgment.[66]

Indeed, the word "verdict" comes directly from the Latin word *veredictum* which means "a *true* declaration."[67] Truth, then, is the object of a trial; and if Justice be the goal of Law, then no less so is Truth.[68] Consequently, Cicero was inspired to write: "It may be thus clear that in the very definition of the term '*law*' there inheres the idea and principle of choosing what is *just and true*."[69]

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66. SIR JOHN FORTESCUE, DE LAUDIBUS LEGUM ANGLIE, ch. xxvi., 59, 61 (Chrimes trans., Hyperion Press 1979) (emphasis added).

67. *See* BLACK'S LAW DICTIONARY, *supra* note 35, at 1730. Literally speaking, *verdict* comes from two Latin words *vere* [true] and *dictum* [saying] which means "true saying." *See* THE NEW WORLD DICTIONARY, *supra* note 17, at 1577.

68. *See* AQUINAS, *supra* note 3, pt. II-II, Q.109, art. 3, c. at 1656. St. Thomas elsewhere writes:

> [J]ustice sets up a certain equality between things, and this the virtue of truth does also, for it equals signs to the things which concern man. . . ." Aquinas continues: "Since man is a social animal, one man naturally owes another whatever is necessary for the preservation of human society. Now it would be impossible for men to live together, *unless they believed one another, as declaring the truth one to another.* Hence *the virtue of truth does, in a manner [similar to justice], regard something as being due*. . . . [Thus] the truth of justice may be understood as referring to the fact that, out of justice, a man manifests the truth, as for instance, when a man confesses the truth [of a crime] or gives true evidence in a court of justice. This truth is a particular act of justice . . . because, to wit, in this manifestation of the truth a man's chief intention is to give another his due. *Id.* at pt. II-II, Reply Obj. 1, at 1656 (emphasis added).

69. CICERO, DE LEGIBUS, II. 5. 13, at 385. (Clinton Walker Keyes, PhD, trans., Harvard University Press 1961) (emphasis added). Marcus Tullius Cicero, Roman writer, statesman, orator, philosopher and member of Rome's Equestrian order, was born, in 106 BC, in Arpinum (now Arpino, Italy, approximately sixty five miles southeast of Rome). Cicero relentlessly advocated for the restoration of the Republic against the factions in Rome that favored Dictatorship. Believing that this end could be accomplished by Octavian, the adopted son of Julius Caesar who as assassinated in 44 BC, Cicero supported Octavian during the power struggle with Roman consul, Marc Antony. But, when Octavian

In short, if the "reasonable and prudent man" standard be nothing more than "a more or less subjective standard," in effect it is conceded that Truth is "more or less irrelevant" in a trial. If this conclusion is true, then Justice is fundamentally flawed. Law becomes nothing more than gamesmanship. No doubt certain lawyers as well as certain clients subscribe to such a notion. This subscription is unfortunate because the purpose of law is to do more than simply make some people rich. Law serves a higher purpose. Law means to be one with Truth and Justice, so that all, and not only a few, benefit. This is not just the American way; it is the only way, unless one concedes that Thracymachus is correct in his assertion that "Justice is nothing more than the advantage of the stronger."[70] But should one's view be so cynical? Before it is decided, recall what Pollock says: "the word 'reason' and 'reasonable' denote for the common lawyer the ideas which the civilian or canonist puts under the head of 'Law of Nature.'"[71] Why does Pollock make this connection between Common Law and the Law of Nature? Is it that Pollock simply refuses to give in to this cynicism that refuses to believe that there is Justice in the Law? Pollock seems to imply that the Law of Nature operates successfully within the context of the common law by means of "reason," properly understood. In the tradition of natural law, Reason leads us towards Justice. Traditionally, the Law of Nature and Justice are intertwined to the point of being synonymous. Cicero writes:

> Well then, the most learned men have determined to begin with Law, and it would seem that they are right, if, according to their definition, Law is the highest reason, implanted in Nature, which commands what ought to be done and forbids the opposite. This reason, when firmly fixed and fully developed in the human mind, is Law. And so they believe that Law is intelligence, whose natural function it is to command right conduct and forbid wrongdoing. They think that this quality has derived its name in Greek from the idea of granting to every man his own, and in our language [i.e., Latin] I believe it has been named from the idea of choosing [i.e., *lex* from *lego*, "to choose"]. For as they have attributed the idea of fairness to the word *law*, so we have given it that of selection, though both ideas properly belong to Law. Now if this is correct, as I think it to be in general, then *the origin of Justice is to be found in Law, for Law is a natural force; it is the mind and reason of the intelligent man, the standard by which Justice and Injustice are measured.*[72]

According to Cicero, Nature is our fixed point in a sea of change. Nature is, therefore, true. Reason is the operation of judgment in Nature, or more accu-

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(later, the Emperor Augustus) reconciled with Marc Antony, Cicero was beheaded by Marc Antony's soldiers on 7 December 43 BC, as an enemy of the Roman State. *See* Moses Hadas, BASIC WORKS OF CICERO, Modern Library College Editions, introduction pp. ix-xi.

70. PLATO, REPUBLIC, § 338c (Allan Bloom, trans., Basic Books 1968).

71. POLLOCK, *supra* note 1.

72. CICERO, *supra* note 69, at 317, 319 (emphasis added).

rately, within human nature. Law speaks to man through Reason. Thus, the "reasonable and prudent man standard" is a *truly* objective standard because this standard is fixed in human nature, governed by laws that speak to man through use of reason. Prudence will be remembered as being "*in* the reason," according to Aquinas. Therefore, the query remains: whether Prosser is mistaken when he asserts that the "reasonable man standard" is nothing more than a "more or less subjective standard? Does Professor Prosser simply misunderstand the "Law of Nature" or natural law underpinnings of *Prudence* and how it actually operates within the standard Jury Instruction?[73]

The expression, "under the same or similar circumstances," unfortunately, is an obstacle to those who seek to believe that Justice exists, but who ultimately conclude that Justice either does not manifest itself or is nothing more than the advantage of the adversary who is smarter, shrewder, or stronger. Indeed it does happen, sometimes, that the smarter or shrewder or stronger adversary may "win." However, this event does not prove that Justice does not exist. Aquinas is said to have quipped, "a single bad act does not make a good man bad, anymore than a single good act doth make a bad man good."[74] Consequently, Justice is to be judged on its own merits, not by the occasional "win" of a smarter, shrewder, or stronger adversary. The problem, then, is not with Justice. The problem rests with the *person* who fails to grasp the true nature of Justice.

To begin on a basic level, one federal court has held that the word *justice* means "[t]he principle of rectitude and just dealing of men with each other. . . ."[75] St. Thomas continues this theme, writing:

> For it belongs to justice to establish equality in our relations with others. . . . Now a person establishes the equality of justice by doing good, i.e. by rendering to another his due: and he preserves the already established equality of justice by declining from evil, that is by inflicting no injury on his neighbor.[76]

Simply stated, Justice is one with synderesis, the first Law of Nature: Seek the Good and Avoid Evil. In the symbolism of Western Civilization, Justice is depicted as a Scale where the pans on each side, representing the interests of the

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73. Again, that standard Jury Instruction, recited by Prosser, includes a definition of Negligence that consists in the failure to do what a reasonable man would do "'*under the same or similar circumstances.*'" PROSSER, *supra* note 59, at 207 (emphasis added).

74. Formally, St. Thomas writes:

> *On the contrary*, The Philosopher [Aristotle writes] (*Ethic* i. 7): *As neither does one swallow nor one day make spring: so neither does one day nor a short time make a man blessed and happy.* But *happiness is an operation in respect of a habit of perfect virtue* (*Ethic* i., *ibid.*, 10, 13). Therefore a habit of virtue, and for the same reason, other habits, is not caused by one act. AQUINAS, *supra* note 3, pt. I-II, Q.51, art. 3, c. at 805. (emphasis in original).

75. Lamborn v. United States, 65 F.Supp. 569, 576 (1946).

76. AQUINAS, *supra* note 3, pt. II-II, Q.79, art. 1, c. at 1517.

litigating parties, are adjusted until a balance is achieved. In a similar fashion, St. Thomas presses this point about balance and equality:

> It is proper to justice, as compared with the other virtues, to direct man in his relations with others: because it [justice] denotes a kind of equality, as its very name implies; indeed we are wont to say that *things are adjusted when they are made equal, for equality is in reference of one thing to some other.*[77]

Justice is a kind of equality. The way this equality is achieved marks the difference between two kinds of Justice: Commutative Justice and Distributive Justice. The distinction is an important one because those who are skeptical about Justice tend to be among those who, unwittingly, seek Commutative Justice in an arena in which Distributive Justice operates. A century ago, the Mississippi Supreme Court in *Bowman v. MacLaughlin* accurately described the distinction between these two kinds of justice. The Court writes:

> 'To render *commutative justice* the judge must make an equality between the parties, *that no one may be a gainer by another's loss,'* while *'distributive justice,'* is described as 'that virtue whose object it is to distribute rewards and punishment to each one according to his merits, observing *a just proportion by comparing one person or fact with another.*' The Frederican Code is summoned up in one single brief rule of right, namely: 'Give every one his own.'[78]

From this Court's insight, it can be said that Commutative Justice is a kind of *absolute* equality, a "one-for-one" equality. In politics, this type of justice is epitomized in democracies that base voting on the principle of "on man, one vote." Indeed, justice can occur in this state of affairs. Commutative Justice, properly speaking, belongs to the kind of absolute equality that is sought and

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77. AQUINAS, *supra* note 3, pt. II-II, Q.57, art. 1, c. at 1425.

78. Bowman v. MacLaughlin, 45 Miss. 461, 495-496 (1871) (emphasis added). This definition of Justice by the Mississippi Supreme Court is, wittingly or unwittingly, vintage Aquinas and Aristotle. Recall that St. Thomas says that "it belongs to justice to establish equality in our relations with others. . ." AQUINAS, *supra* note 3, pt. II-II, Q. 79, art. 1, c. at 1517. Commenting on Aristotle's definition of "commutative justice," St. Thomas says that

> [I]n *commutative* justice the equal is observed according to arithmetic proportion. . . . Between these two, gain and loss, stands a mean, that equal which we call the just thing. Consequently that *just thing*, which gives directions in transactions, *is a mean between gain and loss* as both these terms are commonly understood. . . . Aristotle affirms that because the just thing is a mean between gain and loss, it follow that when men are in doubt about the mean they have recourse to a judge. AQUINAS, COMMENTARY ON ARISTOTLE'S NICHOMACHEAN ETHICS, V, vi., §§ 951-955, (C. I. Litzinger, O.P., trans., Henry Regnery Co. 1964) (emphasis added).

Regarding "distributive justice," St. Thomas writes:

> [H]e [Aristotle] proves that the mean of *distributive justice* should be taken according to *a certain relationship of proportion.* . . . In this way a thing is said to be just in distributions inasmuch as allotment is made *according to merit as each is worthy to receive. Id.* at V, iv, §§ 932-936. (emphasis added)

obtained in mathematics: two plus two equals four; there can be no other correct answer. Commutative Justice supplies the kind of certainty that is pursued by *knowledge*; but the word *knowledge* as used in this instance is not common sense knowledge; rather, it is *inductive* knowledge, which is a specialized knowledge that is, today, generally referred to as *science*.

Commutative Justice, which is based on mathematical principle or scientific knowledge, is not the kind of justice obtainable or desirable in Tort Law, except in medical malpractice or products liability cases. (But even in medical malpractice or products liability cases, while scientific knowledge is certainly relevant to proving failure on the part of a physician to comply with certain medical standards of care or relevant to proving some structural or mechanical defect in a products liability case, the Commutative Justice principle still fails when damages must be proven). Commutative Justice works better in Contract Law than in Tort Law. For example, when a promissor fails to live up to his agreement resulting in an unfair gain accruing to the promissor, a court can remedy the promissee's loss by returning the parties to their *status quo ante bellum.* This usually means having the promissor give or give back to the promissee a sum of money that frequently is an amount set forth within the written contract as liquidated damages or at least is a sum of money that can be fairly calculated, arithmetically, from the context of the agreement between the parties. But in most Tort cases, Commutative Justice will produce unjust results because Tort Law deals with human conduct that is essentially moral conduct which necessarily cannot be measured in mathematical terms or formulae. This is unlike contracts or written agreements wherein loss to a party is, at bottom, ascertainable by some arithmetical equation implicit from the agreement itself.[79] Alternatively,

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79. This is not to suggest that the breach of promise supported by consideration is not immoral. It is. Breaches of contract violate the common law rule and principal of natural justice, *Pacta sunt observanda*, which means that agreements are for keeping. Rather, the point attempted to be made here is this: While Commutative Justice and Distributive Justice seek the same goal, namely, "giving to each his due," the "due" that is to be given to the injured party can be attempted in two different ways. In Commutative Justice, the "due" that is to be given to the injured party can be arrived at — literally "figured out" — by means of a mathematical formula. In the usual Contracts case, this works rather well. But, in Tort cases, this generally does not work so well, and sometimes it does not work at all. Some jurisdictions have experimented with the pseudo-mathematical formula of allowing juries to determine a plaintiff's injuries in a personal injury case on a *per diem* basis — that is, assigning a dollar figure for a single day of pain and suffering, and then allowing the jury to extrapolate this figure over a number of days into the future. The problem with this "solution," as many courts have quickly come to conclude, is that this "dollar figure for a single day" is ultimately an arbitrary figure. It cannot help but be arbitrary precisely because "money damages" are incapable of being an *in-kind* remedy — a "one-for-one" compensation for "pain and suffering."

In a Contracts case, there is a one-for-one compensation that joins loss to damages. For example, when an agreement is made, the plaintiff is looking to make a certain sum of money as a result of his business dealing with the defendant; after breach of the agreement by the defendant, the plaintiff faces a lost opportunity to make that certain sum of money; therefore, at the conclusion of a successful litigation, the plaintiff is capable of getting back from the defendant exactly what the plaintiff lost as a result of the defendant's unlawful gain. *See* AQUINAS COMMENTARY ON THE ETHICS, *supra* note 78, at

a different kind of justice that is more appropriate in Tort cases which is Distributive Justice. In the words of the Mississippi Supreme Court, Distributive Justice is "that virtue whose object it is to distribute rewards and punishment to each one according to his merits, *observing a just proportion by comparing one person or fact with another.*"[80] Distributive Justice is the kind of justice that is *a propos* to situations relating to "what a reasonable man would do *under the same or similar circumstances.*"[81] What a reasonable man would do "under the same or similar circumstances" cannot and indeed should not be judged in absolute, i.e., mathematical or scientific terms. This is because the net effect or consequence in a Negligence action — injury to the plaintiff — may be a result of more than one cause or series of proximate causes, not the least of which may be the plaintiff's own actions or conduct. In other words, the plaintiff may, himself, be contributorily or comparatively at fault for the accident that has caused him injury. How these causes may be weighed in the Scales of Justice, along with the defendant's own negligence, does not easily fit into a pre-determined mathematical or scientific formula. Instead, the only practical solution to the problem of "how to make the plaintiff whole again" — even if it be far from perfect — is to allow a jury to arrive at a monetary verdict by relying on their own practical judgment, which inevitably means relying on their own personal knowledge and collective experiences about pain, suffering, discomfort, inconvenience, etc., rather than by simply "doing math." In the end, juries arrive at verdicts in tort cases by weighing proximate causes to the extent to which injuries may be connected to these causes, whether they are the result of the defendant's negligence or the plaintiff's own comparative or contributory negligence. As St. Thomas Aquinas points out, "effects are called 'necessary' or 'contingent' according to their *proximate* causes, not according to their remote

§§ 951-955. This is why Commutative Justice works in Contracts cases. There is compensation that is capable of being rendered to the plaintiff *in-kind* for his loss. Usually, the contract or agreement sets forth exactly what that loss will be or is capable of being figured out mathematically, either by means of fair market price or liquidated damages clause. But, a Torts case is very different precisely because the plaintiff is not capable of being returned *in-kind* that which he enjoyed prior to the defendant's negligent actions. Prior to an accident the plaintiff enjoyed good health. After the accident, the plaintiff suffered an injury and resulting pain and suffering. The *in-kind* or "one-for-one" compensation that the plaintiff should receive in a Torts case in order to make him whole again is a full return to good health *and* a full recapture of time that he lost while being in a state of bad health resulting from the accident. Hence, Commutative Justice is not appropriate in Tort cases, notwithstanding judicial and legislative attempts at fixing compensation by means of some *per diem* formula. In-Kind or "one-for-one" Justice is therefore inappropriate in Tort cases. Instead, Distributive Justice seems more appropriate because it allows juries to fix compensation by means of exercising a kind of judicial conscience that seems natural to Tort cases. In the course of comparing one fact with another, including the weighing the merits of the parties' actions, the Jury distributes an award to the plaintiff in accordance with the merit of the plaintiff's injuries, while the punishing the defendant for his lack of due solicitude, while also taking into account the plaintiff's own fault, if any, in causing the incident that caused him injury. *See* AQUINAS COMMENTARY ON THE ETHICS, *supra* note 78, at §§ 932-936.

80. *Bowman*, 45 Miss. at 465.

81. PROSSER, *supra* note 2, at 207.

causes."[82] Causes tend to be individual and at times unique, and therefore are not generally universal. Hence, causes vary from actor to actor, and from circumstance to circumstance.

Appropriately, St. Thomas writes: "the *means* to the end, in human concerns, far from being fixed, are of *manifold variety* according to the variety *of persons and affairs*."[83] Given so many variable causes at play in human conduct, Justice, especially in Negligence cases, can only be measured on a case-by-case basis by means of "*observing a just proportion by comparing one person or fact with another*."[84] This explains why summary judgment motions are generally denied in Negligence cases whenever the issue, on motion for summary judgment, is or centers around "reasonableness" or "wanton misconduct" on the defendant's part.[85] Consequently, Distributive or "proportionate" Justice, rather than Commutative or "arithmetic" justice, is most appropriate in Tort Law, especially in Negligence cases where human conduct, which is essentially moral conduct, is to be judged.

Return to Professor Prosser's inquiry: is the "reasonable and prudent man" standard truly *objective* in negligence cases despite the court's instruction to the jury to be "mindful that negligence consists in failure to do what a reasonable man would do *under the same or similar circumstances*?"[86] The answer to this question is a confident affirmative. As previously discussed, *contingent* things relate to things that are subject to *change*. Since it is concerned with "contingent things," Prudence is, therefore, concerned with things that are subject to change.[87] Human conduct is varied and changeable. Injuries are proximately

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82. AQUINAS, *supra* note 46. It is worth noting St. Thomas' use of the phrase *proximate cause* within this context, just as we have seen his use of the word *diligimus* [diligence] referring to being solicitous about things we love, and *nec eligens* [negligence] referring to a failure to choose to be solicitous about things that we should, such as our neighbor's Good. Negligence theory in modern Tort Law still uses the language of St. Thomas.

83. AQUINAS, *supra* note 3, pt. II-II, Q.47, art. 15, c. at 1392 (emphasis added).

84. Bowman, *supra* note 78. *See also* AQUINAS, *supra* note 3, pt. II-II, Q.57, art. 1, c. at 1425; AQUINAS, *supra* note 78, §§ 932-936.

85. *See* Summit Fasteners, Inc. v. Harleysville Nat. Bank & Trust Co., Inc., 410 Pa. Super. 56, 599 A.2d 203 (1991) *app.den'd* 606 A.2d 902. (As a general rule, it is for the jury to determine whether the defendant has been guilty of wanton misconduct under the circumstances; where the plaintiff introduces evidence that the defendant acted in reckless disregard of an existing peril, the issue of wanton misconduct should be submitted to the jury.) *See also* Bloom v. DuBois Regional Medical Center, 409 Pa. Super. 83, 597 A.2d 671 (1991) (Whether an act or failure to act constitutes negligence of any degree is an issue that may be removed from consideration of the jury and decided as a matter of law only where the case is entirely free from doubt that there is no possibility that a reasonable jury could find negligence). *See also* Seewagen v. Vanderklevet, 488 A.2d 21 (Super.Ct. Pa. 1985) (The determination of reasonableness of each party's actions and reconciliation of conflicting statements is within the province of the jury). Finally, *see* East Texas Motor Freight, Diamond Division v. Lloyd, 335 Pa. Super. 464, 484 A.2d 797 (1984) (The existence of negligence is usually a question to be submitted to the jury upon proper instructions, and the court should not remove such issue from the jury unless the facts leave no room for doubt).

86. PROSSER, *supra* note 2, at 207 (emphasis added).

87. *See* AQUINAS, *supra* note 46.

caused by this limitless variety in human conduct. Prudence deals with the ability to *reasonably foresee and avoid* the various causes stemming from human conduct that can bring about Evil instead of Good to one's neighbor. Prudence involves this "process of comparing one person or fact with another."[88] Precisely because Distributive Justice observes a "just proportion between one person or fact with another," juries are required, and rightly so, to be "mindful that negligence consists in failing to do what a reasonable man would do *under the same or similar circumstances.*"[89] Far from being subjective, the "reasonable man" standard is pre-eminently objective because it encompasses a standard of prudence that is natural to man's constitution and contemporaneously founded upon that first principle of natural justice, *Seek the Good and Avoid Evil.* As Cicero was inspired to write: "Nature . . . has sharpened the vision both of the eyes and of the mind so that they can choose the good and reject the opposite — *a virtue which is called prudence because it foresees.*"[90]

V. PRUDENCE AS PROCESS OF COMPARISON: DISCOVERING THE *PROPORTIONATELY* TRUE IN THE MAJORITY OF CASES

Prudence, therefore, deals with this process of the mind that enables an individual to reasonably foresee the various kinds of human conduct that can bring about Evil, instead of Good, to our neighbor. St. Thomas takes up where Cicero leaves off saying:

> [*F*]*uture contingents*, in so far as they can be directed by men to the end of human life, *are the matter of prudence*; and each of these things is implied in the word *foresight*, for it implies the notion of something distant, to which that which occurs in the present has to be directed. Therefore, *foresight* is a part of prudence.[91]

This natural law understanding of Prudence is at the root or origin of the doctrine of "unforeseeable consequences" in modern Tort Law, even if the words "natural law" are not used by Professor Prosser when he writes:

> Negligence, it must be repeated, is conduct which falls below the standard established by law for the protection of others against unreasonable risk. It necessarily involves a *foreseeable* risk, a threatened danger of injury, and conduct unreasonable in proportion to the danger. If the defendant could *not reasonably foresee* any injury as the result of his act, or if his conduct was

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88. *See* Bowman, *supra* note 78. *See also* AQUINAS, *supra* note 3, pt. II-II, Q.47, art. 1, c. at 1383.

89. *See* Bowman, *supra* note 78. *See also* AQUINAS, COMMENTARY ON THE ETHICS, *supra* note 78, at §§ 951-955; PROSSER, *supra* note 2, at 207.

90. CICERO, *supra* note 69, at 365.

91. AQUINAS, *supra* note 3, pt. II-II, Q.49, art. 6, c. at 1399 (emphasis added). St. Thomas completes this thought by adding: "Hence it is that the very name of prudence is taken from foresight (*providentia*) as from its principal part." *See also*, pt. II-II, Reply Obj. 1, c. at 1399.

> reasonable in the light of what he could anticipate, there is no negligence, and no liability.[92]

The relationship between Prudence being "*in* the reason" and Prudence being a "process of comparison" becomes clearer. Recall that St. Thomas says: "to obtain knowledge of the future from knowledge of the present or past, which pertains to prudence, belong[s] properly to the reason, *because this is done by a process of comparison*. It follows, therefore, that prudence, properly speaking, is *in* the reason."[93]

The "prudent man" emerges, at last, as a man of flesh and bones. The prudent man is a person who has become good or apt at this "process of comparison." He or she is the one who has become good at "*observing a just proportion by comparing one person or fact with another.*"[94] And how does one become good or apt at this "process of comparison?" St. Thomas suggests that several things are at play in this process. It begins with Prudence being an "intellective virtue."[95] Because Prudence is a virtue, prudence is a *habit*. In other words, Prudence is *not* something that is automatic; it must be acquired. Prudence takes time to be acquired. Prudence starts with experience. Experience is a function of being taught good moral conduct and practical ways over the course of time. St. Thomas reinforces this notion: "The Philosopher [Aristotle] says (*Ethic* ii, 1) that 'intellectual virtue is both originated and fostered by teaching; it therefore demands *experience* and *time*.' Now prudence is an intellectual virtue as stated above (Art. 4). Therefore, *prudence is in us*, not by nature, *but by teaching and experience*."[96]

In addition to "time and experience," Prudence requires "memory of many things." St. Thomas continues: "Now experience is the result of many memories as stated in *Met[aphysics]* i, 1, and therefore prudence requires *the memory of many things*. Hence memory is fittingly accounted as part of prudence."[97] Time, experience, and memory of many things comprise that fund of information which the "prudent man" will fall back on when he applies the principle — seek the Good and avoid Evil — in concrete cases. This practical reasoning about what is or might be Good in the concrete case is what St. Thomas calls "understanding" relative to "contingent" or "changeable" things:

> I answer that [understanding is a reckoned part of prudence, and] 'understanding' denotes here, not the intellectual power, but the right estimate about some final principle, [i.e., Seek the Good, Avoid Evil], which is taken as self-evi-

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92. PROSSER, *supra* note 2, at 250 (emphasis added).

93. AQUINAS, *supra* note 3, pt. II-II, Q. 47, art. 1, c. at 1383 (emphasis added).

94. *See* Bowman, *supra* note 78. *See also* AQUINAS, COMMENTARY ON ETHICS, *supra* note 78, at §§ 932-936.

95. AQUINAS, *supra* note 3, pt. II-II, Q.47, art. 15, c. at 1392.

96. *Id.* (emphasis added).

97. *Id.* pt. II-II, Q.49, art. 1, c. at 1395 (emphasis added).

> dent: Thus we are said to understand the first principles of demonstrations. *Now every deduction of reason proceeds from certain statements which are taken as primary: wherefore every process of reasoning must needs proceed from some understanding.* Therefore, since prudence is right action applied to action, the whole process of prudence must have its source in understanding. Hence it is that understanding is reckoned a part of prudence.[98]

A prudent man is, therefore, one who has become good at applying "universal principles [e.g., seek the Good and avoid Evil] to particular conclusions about practical matters."[99] In order to arrive at this point, the prudent man must first be capable of understanding, if only in some basic way, that his duty *is* to "seek the Good" and then "to *do* Good." The suggestion here is that *proper training in good conduct* is essential for the development of Prudence in an individual.

After acquiring many experiences in the practicalities of life where his training in moral conduct is put to the test, the prudent man begins to come into his and her own. The practicalities of daily life constitute the subject matter of "contingent things," meaning "things subject to change." This provides the proving ground for the formation of the prudent man. The prudent man is one who realizes that these things which are subject to change are to be judged "proportionately" — not mathematically or scientifically — in relation to that first principle of moral virtue, which is "Seek the Good and Avoid Evil." The prudent man understands that human actions *cannot* be judged as "simply and necessarily true" in the way that, in arithmetic, it is "simply and necessarily true" that "two plus two equals four."

In short, the prudent man acquires that certain training of the mind (the product of time, teaching, experience, and the formation of good moral habits) that helps him to discover what is "*proportionately true*" in the "*majority of cases,*" in contrast to seeking after absolutes where none (with the exception of the rule that commands us to seek the Good and avoid Evil) is to be found. Thus, St. Thomas Aquinas writes:

> I answer that, Prudence regards contingent matters of action, as stated above (Q. 47, Art. 5). Now, in such like matters a man can be directed, not by those things that are simply and necessarily true, but by those which occur *in the majority of cases: because principles must be proportionate to their conclusions, and like must be concluded from like* (*Ethic* vi) [*Anal. Post.* i, 32].[100]

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98. *Id.* pt. II-II, Q.49, art. 2, c. at 1396 (emphasis added).

99. *See* AQUINAS, *supra* note 3, pt. II-II, Q.47, art. 6, c. at 1387 (emphasis added). St. Thomas writes:

> But certain things are in the practical reason by way of conclusions, and such are the means which we gather from the ends themselves. About these is prudence, which *applies universal principles to the particular conclusions of practical matters.* Consequently, it does not belong to prudence to appoint the end to moral virtues, *but only to regulate the means*

100. *Id.* pt. II-II, Q.49, art. 1, c. at 1395 (emphasis added).

The prudent man is, therefore, pre-eminently a practical man. He makes judgments about practical things or about "contingent matters of action," rather than about absolute things. The prudent man, in the course of daily living, seeks to discover what is or what might be Just in the majority of cases. This is the essence of Prudence. When the prudent man is called to sit in the jury box, he seeks to discover what is Just in the instant case before this jury, rather than seeking to give permanent answers to the philosopher's question: "What is Justice?" Consequently, it is only natural that a jury, which is supposed to be the embodiment of reasonable and prudent men and women, would be instructed by the court to be "mindful that negligence consists in the failing to do what a reasonable and prudent man would do *under the same or similar circumstances.*"[101] The cynic's concern that Justice does not exist rarely leaves a lasting impression on jurors simply because jurors are called to be mindful that they must consider what a reasonable and prudent man would do "under the same or similar circumstances." This is the very nature of Prudence. This is because jurors tend to be practical people.

The mistake that cynics make about Prudence is a common one based upon a misunderstanding of the relationship between Prudence, Reason, and Intelligence. Although Prudence may be "*in* the reason," Prudence is nonetheless distinguishable from Intelligence, properly understood. As St. Thomas explains: "intelligence takes its name from being an intimate penetration of the truth, while *reason* is so called from being *inquisitive and discursive.*"[102] Intelligence is knowledge of *truth qua truth.* This knowledge is science, properly understood, penetrating such eternal truths, for example, that God exists, that God is one, that God is incorporeal, that creation of the world in time can be neither proved nor disproved, and *why* we should seek the Good and avoid Evil. Though having a special relation to truth, Reason is, in the final analysis, different from Truth. Reason is an act or *operation* of the mind, rather than the source of knowledge or warehouse of information. Reason is *discursive*, meaning an ongoing "process of comparison" that "applies the knowledge of some universal principle" to "a contingent matter of human action," i.e., moral conduct.[103] One might consider it in this light: Reason is not "thought for the sake of thought" but rather "thought for the sake of acting well."

St. Thomas states the case better: "The worth of prudence consists not in thought merely, *but in its application to action*, which is the *end* of the *practical* reason."[104] Precisely because human conduct is as diverse as the variety of the actor's habits and the circumstances in which an actor may find himself, the

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101. PROSSER, *supra* note 59, at 207 (emphasis added).

102. AQUINAS, *supra* note 3, pt. II-II, Q.49, art. 5, Reply Obj. 3, c. at 1398 (emphasis added).

103. *Id. supra* note 3, pt. II-II, Q. 49, art. 5, Reply Obj.3, c. at 1398; pt. II-II, Q. 49, art. 1, c. at 1395; pt. II-II, Q.47, art. 6, c. at 1387; pt. I-II, Q.55, art. 1, at 819.

104. *Id.* pt. II-II, Q.47, art. 1, Reply Obj. 3, c. at 1383 (emphasis added).

"reasonable and prudent man" turns out to be, above all else, "an apt reasoner." St. Thomas writes:

> "[P]rudence above all requires that man be an apt reasoner, so that he may *rightly* apply universals to particulars, which latter are various and uncertain."[105]

This assertion is consistent with the logic of modern Tort Law. A lay defendant in a negligence case, (as opposed to an expert defendant, such as a doctor or lawyer in a malpractice case) is not subject to being judged by the standard of a scientist's or philosopher's intelligence or even a lawyer's knowledge of the law. To the contrary, he is rightly judged by the standard of a man who has the habit of aptly applying the principle, "seek the Good and avoid Evil," *in the majority of cases.* This is the "common sense of the juries" to which Pollock refers when he writes: "One of the most characteristic and important features of the modern Common Law is the manner in which we fix the measure of legal duties and responsibilities, where not otherwise specified, by reference to a reasonable man's caution, foresight or expectation, *ascertained in the first instance by the common sense of juries*, and gradually consolidated into judicial rules of law."[106]

VI. NATURAL LAW AND APPLYING THE STANDARD: JUSTICE AND JUDICIAL CONSCIENCE

The fact that the "reasonable and prudent man" describes a person who, in reality, falls short of aptly applying this principle ("seek the Good and avoid Evil") in *all* cases does not make the "reasonable and prudent man" cease to be reasonable *or* prudent. It only means that the "reasonable and prudent man" is not God. But this hardly constitutes justification for cynicism or qualified rejection of the "reasonable and prudent man" as the appropriate standard of due care in Negligence cases. From the point of view of Justice, the "reasonable and prudent man" standard can be the only standard of due care in Negligence cases.

Cicero once said, "we are born for Justice."[107] Justice is not the monopoly of only a few who are or who claim to be perfect. Justice is open to all and ascertainable by many. It is important to recall that Justice is an adjustment of equality between parties. Recall, also, that the measure of equality that can be adjusted in Tort Law is not capable of the same measurement of equality that can be had in a mathematical equation. The "reasonable and prudent man" standard can be said to be Just precisely because this standard takes into careful

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105. *Id.* pt. II-II, Q.49, art. 5, Reply Obj. 2, c. at 1398 (emphasis added).

106. POLLOCK, *supra* note 1 (emphasis added).

107. CICERO, *supra* note 69, at 329. Cicero's complete statement is, "we are born for Justice, and that right is based, not upon men's opinions, but upon Nature." *Id.*

consideration the "prudence of a reasonable man" relative to all of the various physical and mental differences that can be found in a defendant, whether he or she be blind, an epileptic, a child, or an individual without any apparent physical distress or mental disability. Flexibility does not make the "reasonable and prudent man" standard a subjective standard. To the contrary, this flexibility is a testament to its Justice.

Aristotle helps to clarify this seeming contradiction in respect of Justice by making use of an analogy in regards to Medicine. Good health, says Aristotle, is both absolute and relative.[108] Absolutely speaking, good health aims at averting the evils of disease so that a man can be active in life. Yet, in real life, a physician does not apply his art of medicine in the abstract but "practices his medicine in particular cases."[109] The fact that a physician may fail to completely avert a disease in a particular patient does not necessarily mean that this man is debilitated in life: the evils of a particular disease, even if not eliminated, can be so reduced that a man can still live an active life. Thus it may be said of this patient that, despite his particular disease, he nonetheless enjoys good health because of the art of medicine. Good health, to repeat, is both absolute and relative. For example, good health for a diabetic clearly does not mean the same thing as good health for a person who does not have diabetes. The hypothetical diabetic will never be capable of enjoying the same *degree* of good health that the hypothetical non-diabetic will necessarily enjoy. Still, it cannot be said that individual diabetics are not in good health simply because they have diabetes. So long as the particular diabetic consistently maintains his

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108. In *The Politics*, Aristotle writes:

> There are two things in which well-being always and everywhere consists. The first is to determine aright the aim and end of your actions. The second is to find out the actions which will best conduce to that end. These two things — ends and means — may be concordant or discordant. Sometimes the aim is determined aright, but there is a failure to attain it in action. Sometimes the means to the end are successfully attained, but the end originally fixed is only a poor sort of end. Sometimes there is failure in both respects: a doctor, for example, may not only misjudge the proper nature of physical health, but he may also fail to discover the means that produce the object which he actually has in view. *The proper course, in all arts and sciences, is to get a grasp of both equally — alike of the end itself, and of the actions which conduce to the end. . . . By 'relative' we mean a mode of action which is necessary and enforced; by 'absolute' we mean a mode of action which has intrinsic value.* ARISTOTLE, *supra* note 29, §1331a29-b24 - §1331a25, at 312 (emphasis added).

Following this theme in *Nichomachean Ethics*, Aristotle writes:

> As a general rule, rest and abstaining from food are good for a man with a fever, but perhaps they are not good in a particular case. But an expert boxer perhaps does not make all his pupils adopt the same style of fighting. . . . But a physician, a physical trainer, and any other such person can take the best care in a particular case *when he knows the general rules, that is, when he knows what is good for every one and what is good for a particular kind of person;* for the sciences are said to be, and actually are, concerned with what is common to particular cases. ARISTOTLE, *supra* note 42, §1180b8 - 1180b16, at 298 (emphasis added).

109. ARISTOTLE, *supra* note 42, §1097a10, at 14.

blood sugar at levels prescribed by modern medicine, he can be sufficiently healthy to live an active life. There are, in fact, many healthy diabetics who participate in the full spectrum of life's activities, ranging from sports (e.g., Bobby Clarke, a hockey player) to show business (e.g., Mary Tyler Moore, an actress).

Consequently, it can be said truly of the hypothetical diabetic that he approaches good health absolutely. Still, good health in a particular diabetic is relative to appropriate blood sugar levels he regularly maintains (or does not maintain), mechanically by means of insulin and diet, consistent (or inconsistent) with that degree of absolute good health enjoyed by those who, in the absence of diabetes, maintain appropriate blood sugar levels naturally. Good health in the diabetic who leads an active life despite having diabetes can, therefore, be said to be both absolute and relative.[110]

Justice in law is analogous to good health in medicine. Just as the standard of "good health" is relative to the particular patient, the "reasonable and prudent man" standard is relative to the individual defendant. In no event is the standard of "good health" in Medicine, or the "reasonable and prudent man" standard in Tort Law anything but Just simply because these standards relate to the concrete, i.e., contingent or changeable, case. Stated differently, the concrete case does not convert the "reasonable and prudent man" standard from an objective to a subjective standard as Professor Prosser seems to suggest, implying that Justice probably does not really exist.

It bears repeating Aquinas' commentary on Aristotle: "the *good that is absolute will not have a goodness different in nature from this particular good*, although there can be a difference in other respects than the nature of good."[111] Justice, like good health sought by Medicine, does not lose its goodness in any absolute way simply because Justice takes into consideration variety in the concrete case. Law and Medicine are premised upon this single, universal, and first principle of Nature: Seek the Good, Avoid Evil. The Good (i.e., the universal) simply waits to be discovered by man in the concrete (i.e., the particular and contingent) case. This is the purpose of both Law and Medicine. The "reasonable and prudent man" seeks Justice, just as his kinsman in medicine, the "reasonable and prudent physician," seeks good health for his patients.

On occasion, it is true that a jury will render a verdict that appears to be unjust in a particular lawsuit. It is not to be denied that juries sometimes apply

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110. *See* AQUINAS, COMMENTARY ON THE NICHOMACHEAN ETHICS, *supra* note 78, I, vii, §83, at 36 (emphasis added) *citing* ARISTOTLE, NICHOMACHEAN ETHICS, §1096a34, Aristotle writes:

> Someone will rightly ask what they mean in calling anything 'absolute' if in both absolute man and in this particular man there exists one and the same nature, that of man. This is the truth for they differ in no way as man. *On the same supposition an absolute good or a good in itself and a particular good do not differ as good.*

111. AQUINAS, *supra* note 110, §84, at 38.

the rule — Seek the Good and Avoid Evil — imperfectly. Often, what is not appreciated is the fact that this failure is less an indictment of Justice than it is an indictment of Reason. Unfortunately, it is a simple fact of life that Reason is less than perfect. Indeed, as St. Thomas points out, "the need for reason is from a *defect* in the intellect."[112] Stated differently, if the intellect were not defective there would be no need for Reason at all. According to the Great Tradition,[113] this defect of the intellect is, just as in the case of diseases and physical disabilities of the body, the proximate result of original sin as told in the story of *Genesis* in the Bible. The fact that juries can and do apply the "reasonable and prudent man" standard imperfectly, at times, is really an admission that *conscience* is capable of error. Return to Pollock's statement: "St. Germain pointed out as early as the sixteenth century that the word 'reason' and 'reasonable' denote for the common lawyer the ideas which the civilian or canonist puts under the head of 'Law of Nature.' "[114] In his legal treatise which he called *Doctor and Student*, Christopher St. Germain takes up the topic of conscience in its relation to synderesis. As previously discussed, St. Germain states that *Synderesis* is:

> [A] natural power of the soul, set in the highest part thereof, *moving and stirring it to good, and abhorring evil*. . . . And this *synderesis* is the beginning of all things that may be learned by speculation or study, and ministreth the general grounds and principles thereof; and also of all things that are to be done by man. An example of such things as may be learned by speculation appeareth thus: synderesis saith that . . . *things that are to be done, or not to be done*: as where *synderesis* saith no evil is to be done and followeth, and evil to be fled, and such others. . . . And therefore *synderesis is called by some men the law of reason*, for it ministreth the principles of the law of reason; which be in every man by nature, in that he is a reasonable creature.[115]

Regarding *Conscience*, St. Germain writes:

> This word *conscience*, which in Latin is called *conscientia*, is compounded of this preposition *cum*, that is to say in English, *with*; and of this noun *scientia*, that is to say in English, *knowledge*: and so conscience is as much to say as

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112. AQUINAS, *supra* note 3, pt. II-II, Q.49, art. 5, Reply Obj. 2, at 1398 (emphasis added).

113. In philosophical circles, the 'Great Tradition' refers to the Judeo-Christian tradition in Western Civilization. According to this tradition, man's defects in mind, body, and soul begin at the moment when Adam and Eve disobey God's Commandment that they not eat the fruit from the Tree of *Knowledge* of Good and Evil. When our first parents disobeyed God, they lost their original innocence (i.e. goodness). That is, they lost their intuitive knowledge of God; and, in its place Adam and Eve (mankind) got precisely what they asked for: *the history of man has, since then, been a process of discovering the difference between Good and Evil in concrete cases*. *See* GENESIS 2: 16-17 and 3: 6-7, 17-19, 22. *See also* MAIMONIDES, *supra* note 47, §14a-14b, at 24-25. *See* AQUINAS *supra* note 3, pt. I, Q.94, art. 1, c. at 478-479; pt. II-II, Q.163, art. 1, c. at 1856-1857.

114. POLLOCK, *supra* note 1.

115. ST. GERMAIN, *supra* note 54, at 39-40 (emphasis added).

> knowledge of one thing with another thing; and *conscience* so taken, *is nothing else but an applying any science or knowledge to some particular act of man.* And so *conscience may sometimes err, and sometimes not err* . . . that conscience is an habit of mind discerning between good and evil.[116]

The essential difference between synderesis and conscience is this: synderesis — the principle that one should seek the good and avoid evil — is incapable of error. The *application* of synderesis *to concrete cases* — or conscience — is what is capable of error. Eric d'Arcy, writing in this century, paraphrases St. Germain's distinction saying that "*synderesis* cannot err since *synderesis* provides principles (i.e., do good and avoid evil) which do not vary, just as the laws that govern the physical universe do not vary;'" although "there may be error in applying first principles to the individual case, either by faulty ratiocination, or by mistakenly accepted fact . . . *then it is not synderesis which is wrong, but the judgment of conscience.*"[117] In other words, the fact that juries apply the "reasonable and prudent man" standard imperfectly at times is really an admission that *judicial conscience*[118] is capable of error.

This, however, does not mean there is no Justice in Tort Law or that the "reasonable and prudent man" standard is unjust. It illustrates, rather, that juries are not a pantheon of gods. So long as a jury be untainted by bias or prejudice; and, so long as a jury deliberates on a case intending to apply the universal principle of *Seek the Good and Avoid Evil* to the particular facts presented to the jury on the available evidence elicited at trial; which is the same as saying that, so long as the jury applies the court's instructions on the law of Negligence of that forum to the particular facts in the case, then that jury's decision is and will be a Just one. Justice is one with synderesis — that is, seeking the good at trial. If the damages awarded to the plaintiff prove un-

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116. *Id.* at 42 (emphasis added).

117. D'ARCY, *supra* note 47, at 41, 42. *See also* M. PRUMMER, 1 MANUELE THEOLOGIAE MORALIS 197-198 (Herder 1958):

> *Synderesis* is the habitual grasp of the first moral principles; its function is to dictate *in general* that good should be done and evil avoided. . . . The function of *conscience* is to decide in a *particular* case what is to be done or avoided. Conscience is capable of error, synderesis is not.

See also AQUINAS, IN II SENT., dist. 24, Q. 2, art. 3:

> Natural law denotes the principles themselves, the universal principles of the law; synderesis, the habitual grasp of them; conscience, an application, after the fashion of a conclusion, of the natural law to something which should be done.

118. *See* AQUINAS, *supra* note 3, pt. I, Q. 79, art. 13, c. at 408:

> [T]he application of knowledge or science to what we do . . . is made in three ways. . . . In the third way, so far as by conscience *we judge* that some thing is well done or is ill done, and in this sense conscience is said to *excuse, accuse, or torment.* (emphasis added).

Faulty ratiocination (faulty reasoning, in other words) and mistakenly accepted facts — not Justice — is the true cause of error, and, therefore, the true cause of injustice in the concrete case.

satisfactory to the parties, one might conclude that the jury failed to appreciate the full extent of the plaintiff's injuries and, therefore, the jury's verdict is imperfect. But an imperfect verdict is not necessarily an unjust one. A jury's verdict becomes unjust when it *deliberately* seeks Evil, instead of Good: in a Negligence case, injustice occurs when a jury *deliberately seeks to reward a person for his lack of due solicitude towards his neighbor.*

VII. CONCLUSION

This author has attempted to demonstrate that the "reasonable and prudent man" standard is a flexible standard, not because it is a subjective standard but because it is consistent with man's nature, which, in the tradition that St. Thomas Aquinas defends, is a Nature fallen from grace. The "reasonable and prudent man" standard — be it the "reasonable and prudent man" standard of a blind man, or an epileptic, or a child, or even a defendant with no known physical or mental disability — is as objective as the physical and mental defects that exist in human nature are a necessary consequence of Man's Fall, as told in the story of Adam and Eve in *Genesis*.[119] The modern Law of Torts borrows heavily from the scholastics and canonists of the medieval period, not just in its choice of words, but also when describing legal concepts of negligence. Legal terms of art in modern Tort Law, such as *negligence, proximate cause, prudence, due care, fault, reason, reasonable, foreseeability*, and of course the "*reasonable and prudent man*" remain consistent with and, I believe, are ultimately founded upon the "Law of Nature" tradition, which is to say, Natural Law. For this reason, Sir Frederick Pollock is, in the final analysis, quite correct in his claim that "natural law may fairly claim, in principle though not by name, the reasonable man of English and American law and all his works, which are many."[120]

119. *See* GENESIS, *supra* note 113.
120. POLLOCK, *supra* note 1.

Today, Would the Supreme Judicial Court of Massachusetts Have Granted Sacco and Vanzetti a New Trial Based on Current, Retroactively Applied Case Law?

JOHN CAVICCHI†

I. INTRODUCTION

It is easy, with the arrogance of a new generation, to exhibit disdain for the transgressions of the past. Does anyone today believe it possible for twenty people to have been executed for witchcraft, in Salem, in 1692? More than seventy years after the executions of two Italian anarchists, Nicola Sacco and Bartolomeo Vanzetti, on August 23, 1927, for the 1920 murder of a paymaster and his guard during a shoe factory robbery in South Braintree, Massachusetts, the debate continues over their guilt or innocence.

What is universally agreed by both those who believe the men guilty, and those who believe in their innocence, is that by today's standards, the two did not receive a fair trial.[1] This article will not attempt to propound guilt or innocence, but will attempt to demonstrate whether Sacco and Vanzetti would have been given a new trial by today's Supreme Judicial Court [hereinafter SJC] of Massachusetts applying case law retroactively to the judge's jury instructions on "reasonable doubt" and "moral certainty." Thus, two questions are posed: first, would Sacco and Vanzetti be entitled to a new trial on the grounds that the judge's charge to the jury improperly shifted the burden of proof in using the term moral certainty and in explaining the concept of reasonable doubt? Second, assuming the defendants would have been entitled to a new trial, would the SJC have granted them one?

II. BACKGROUND

On August 23, 1977, Governor Michael Dukakis proclaimed the fiftieth anniversary of the executions of Sacco and Vanzetti, Nicola Sacco and Bartolomeo Vanzetti Memorial Day. The proclamation stated, in part:

> The limited scope of appellate review then in effect did not allow a new trial to be ordered based on the prejudicial effect on the proceedings as a whole; and

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1. Commonwealth v. Sacco, 151 N.E. 839 (Mass. 1926).

> This situation was later rectified as a direct result of their case by the adoption of Chapter 341 of the acts of 1939, which permitted the Massachusetts Supreme Judicial Court to order a new trial not merely because the verdict was contrary to the law, but also if it was against the weight of the evidence, contradicted by newly discovered evidence, or, "for any other reason that justice may require."[2]

The statute to which the proclamation referred, MASS. GEN. LAWS ANN. ch. 278, § 33E (West 1977), was enacted to broaden the scope of appellate review in capital cases. Prior to the enactment of this statute, the SJC had no ability to correct manifest injustices, and could decide only issues of law or whether there had been an abuse of discretion by the judge. Questions regarding the conduct of judges were limited to whether the judge had acted "conscientiously, intelligently and honestly."[3]

Two issues regarding the charge to the jury in the Sacco-Vanzetti case, i.e., the reasonable doubt charge and the use of the term moral certainty, have for the past several years, been litigated in the courts of the Commonwealth. On July 14, 1921, Norfolk Superior Court Judge Webster Thayer charged the jury as follows:

> What is reasonable doubt? In the prosecution of criminal cases, the law requires that the burden of proof rests upon the Commonwealth to establish beyond reasonable doubt the guilt of every defendant. . . .
>
> . . .
>
> At the very beginning of this subject, you must thoroughly understand that it means the doubt of a reasonable man who is earnestly seeking the truth. It does not mean the doubt of a man who is earnestly looking for doubts. It means such a doubt that exists in the mind of a juror after there has been, on his part, an honest and conscientious effort to ascertain the truth. It does not mean a doubt beyond all peradventure. Neither does it mean beyond all imaginary or possible doubt, because everything relating to human affairs and human evidence is open to some possible or imaginary doubt.
>
> The law does not require proof so positive, so unerring and convincing that amounts to a mathematical or absolute certainty. You might obtain proof of that character in the exact sciences, but not in human investigations. For, you must remember, gentlemen, that we are involved in human investigations, in which all the evidence must be considered and weighed and determined by jurors who are human beings. You must, then, see that we are not dealing with absolute certainties, because God has never yet endowed men with sufficient power of intelligence and reason to reduce the results of human investi-

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2. UPTON SINCLAIR, BOSTON: A DOCUMENTARY NOVEL OF THE SACCO – VANZETTI CASE 797-799 (1979).

3. HERBERT B. EHRMANN, THE UNTRIED CASE, THE SACCO-VANZETTI CASE AND THE MORELLI GANG 179 (1960).

gations to absolute certainty. Crime could be proven with difficulty if the law required proof to this extent, and practically never in those cases that are dependent for their proof upon circumstantial evidence.

If, then, reasonable doubt does not require absolute proof, certainty of proof, it becomes my duty to explain to you as intelligently as I can what degree of certainty it requires. Inasmuch as I have told you we are dealing with human investigation, you must, then, see that it requires reasonable and moral certainty as distinguished from absolute certainty. Therefore, whenever the proof satisfies a jury to a reasonable and moral certainty, then proof beyond a reasonable doubt has been established. This is so because proof to a reasonable and moral certainty is, as a matter of law, proof beyond a reasonable doubt.

Now, perhaps I may be able to further assist you in understanding the meaning of reasonable and moral certainty, because, as I have told you, proof to a reasonable and moral certainty is, as a matter of law, proof beyond a reasonable doubt. Let me partially answer this question by asking one: What certainty of proof, as careful and cautious men, would you require before completing the most important affairs of your own life? You could not obtain absolute certainty because there is always some possible uncertainty in human transactions even among such transactions that require and receive most thorough, painstaking and conscientious investigation, but you could, however, satisfy your minds that such transactions were safe and wise to a reasonable and moral certainty before acting upon them.

If then you would be willing to act upon such a degree of proof in the most important affairs of your own life, then that is proof to a reasonable and moral certainty. If, therefore, having determined the degree of proof that exists in these cases on trial, would you be willing upon such degree of proof to act upon the most important affairs of your own life? If you would, then proof has been established to a reasonable and moral certainty, and therefore you should find, as a matter of law, proof beyond a reasonable doubt. If you would not be willing to so act, then proof beyond a reasonable doubt has not been established and, therefore, you should return a verdict of not guilty.[4]

. . .

. . . One piece of testimony standing alone by itself may be weak or strong. Another piece of testimony separated from all the rest may be weak or strong, but you must consider the evidence in its entirety, for the real test is this: *Whether or not you are satisfied to a reasonable and moral certainty from all the evidence introduced on both sides that the defendants, or either of them, were at South Braintree on the day in question. This evidence applies not only to the affirmative testimony of the Commonwealth which tended to prove the*

4. THE SACCO – VANZETTI CASE, TRANSCRIPT OF THE RECORD OF THE TRIAL OF NICOLA SACCO AND BARTOLOMEO VANZETTI IN THE COURTS OF MASSACHUSETTS AND SUBSEQUENT PROCEEDINGS 1920-7, AT 2243-2244 (Henry Holt & Company 1928) (emphasis added).

> *presence of the defendants at South Braintree at the time when said homicides were committed, but also to the negative testimony introduced by the defendants which tended to prove their absence.*[5]

In sum, the judge instructed the jury that the defendants' mere presence in South Braintree would be sufficient to convict. He shifted the burden on the defendants to prove reasonable doubt by calling upon the jurors to weigh the evidence on both sides of the case. The jurors were asked to weigh this evidence by equating their deliberations in a death penalty case with deciding important matters in their own lives. They were to reach such a conclusion based on feelings or moral convictions, rather than certainty based upon the evidence.

III. WOULD SACCO AND VANZETTI HAVE BEEN ENTITLED TO A NEW TRIAL UNDER CURRENT, RETROACTIVELY APPLIED STANDARDS REGARDING THE SHIFTING OF THE BURDEN OF PROVING GUILT BEYOND A REASONABLE DOUBT?

In January 1995, the SJC reversed a conviction for first degree murder and rape in *Commonwealth v. Pinckney.*[6] The defendant had been convicted and sentenced to death in 1971.[7] The judge had charged regarding the use of the term "moral certainty." In its decision, the SJC ruled that "a constitutionally deficient reasonable doubt instruction amounts to a structural error which defies analysis by harmless error standards."[8]

The court also applied the rule retroactively and found that because the law was not developed at the time of the defendant's original appeal, and because the defendant had not pursued any other postconviction claims, "we may properly consider this claim."[9] The SJC held that where the judge instructed, "what is required is not an absolute or mathematical certainty, but a moral certainty," the use of the term "moral certainty," rather than "evidentiary certainty" in explaining reasonable doubt, could be interpreted to allow a juror to convict based on a degree of proof below that required by the Due Process Clause.[10]

In what could be a virtual analysis of Judge Thayer's charge to the jury in the Sacco and Vanzetti case, the SJC examined the context in which the term moral certainty was used and found that phrases defining reasonable doubt as "such doubt as would give rise to grave uncertainty" and an "actual substantial doubt"

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5. *Id.* at 2254 (emphasis added).

6. *See* Commonwealth v. Pinckney, 644 N.E.2d 973 (Mass. 1995).

7. *See Pinckney*, 644 N.E.2d 974; *see also* Commonwealth v. A Juvenile, 300 N.E. 2d 439 (Mass. 1973) (vacated as to death penalty).

8. *Id.* at 975 (*citing* Sullivan v. Louisiana, 508 U.S. 275,279, 113 S.Ct. 2078, 1082-1083 (1993)).

9. *See id.* This reasoning seems to favor the guilty defendant who, after the conviction has been affirmed, usually accepts his fate. Contrarily, cases where there is a patent injustice continuously haunt the system. It also seems to conflict with the SJC's own stated duty in ample case law, discussed *infra.* Including supplemental motions, counsel for Sacco and Vanzetti filed eight motions for a new trial.

10. *See id.*

to be flawed.[11] The court found that equating reasonable doubt with "some doubt a juror can find if he goes looking for doubt . . . contributed to the potential confusion of the jurors."[12]

In addition, the court ruled that the judge's definition of reasonable doubt as a doubt which a juror "finds abiding in his mind at the end of a full consideration of the facts of the case" shifts the burden and requires the defendant "to establish doubt in the jurors' minds, thereby lowering the Commonwealth's burden of proof."[13] The SJC concluded that the jury instructions failed to convey accurately the definition of reasonable doubt because of the combination of the *"moral certainty language, which potentially understated the degree of certainty required to convict, in conjunction with conflicting reasonable doubt definitions."*[14]

The court's analysis in *Pinckney* is applicable to *Sacco.* In fact, the judge in *Pinckney* instructed the jury from the *Madeiros* charge, which was comparable to the charge given in *Sacco.*[15] In addition to using moral certainty in explaining the process by which the jurors could reach their decision, the court in *Sacco* defined reasonable doubt by using the personal affairs analogy. The use of the personal affairs analogy in defining reasonable doubt has been found to trivialize or lessen the burden of proof required under the Constitution. Anything that shifts the burden to the defendant or lessens the duty of the prosecutor is a violation of the defendant's constitutional rights. This is such a fundamentally important right, it has retroactive effect. No objection need to have been taken at trial. What this meant was that this reasoning, although not in effect at the time of Sacco and Vanzetti, would, because of its importance, have to be considered and applied on any Motion for New Trial by a defendant.

The SJC was in the forefront of judicial activism, and asserted and reasserted what it considered its obligation in reviewing first degree murder convictions:

> Our function. . .in reviewing a conviction of murder in the first degree is to consider, not only issues clearly preserved for appellate review, but also issues apparent on the record . . . to determine whether there is a substantial likelihood of a miscarriage of justice. For example, in Commonwealth v. Callahan, 380 Mass. 821, 822, 406 N.E.2d 385 (1980), this court rejected all arguments advanced on appeal by a defendant convicted of murder in the first

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11. *See id.*

12. *See* Pinckney, *supra* note 6, at 977.

13. *See id.*

14. *See id.* at 978 (emphasis added). The decision was written by Associate Justice Nolan. The panel included Chief Justice Liacos, Associate Justices Abrams, O'Connor and Greaney.

15. *See* Commonwealth v. Madeiros, 151 N.E. 297 (Mass. 1926). Celestino Madeiros was executed with Sacco and Vanzetti. He confessed to his own participation in the South Braintree robbery and murder and exonerated Sacco and Vanzetti. *See* OSMOND K. FRAENKEL, THE SACCO – VANZETTI CASE 125 (1931).

> degree, and then, based on its independent review of the record, identified an error, not argued below . . . that required the court to order a new trial."[16]

The SJC had taken it upon itself to reverse convictions where the personal decision making analogy was used to define reasonable doubt, even though counsel for the appellant "did not specifically except" to the charge. In a decision written by Chief Justice Hennessey, the court cited its statutory authority under the General Laws, MASS. GEN. LAWS ch. 278, § 33E, concluding there was "grave prejudice" to the defendant. The court stated:

> "We . . . consider that no part of the usual instructions to juries in criminal cases is of more significance than the discussion of reasonable doubt. The judge charged the jury that '[y]ou must be as sure as you would have been any time in your own lives that you had to make important decisions affecting your own economic or social lives. You know, any time that you had to make an important decision, you couldn't be absolutely, mathematically sure that you were doing the right thing — you weigh the pros and cons; and unless you were reasonably sure beyond a reasonable doubt . . . .' He went on to give examples of these 'important' decisions: '[W]hether to leave school or to get a job or to continue with your education, or to get married or stay single, or to stay married or get divorced, or to buy a house or continue to rent, or to pack up and leave the community where you were born and where your friends are, and go someplace else for what you hoped was a better job.' *We think these examples understated and tended to trivialize the awesome duty of the jury to determine whether the defendant's guilt was proved beyond a reasonable doubt.*"[17]

In cementing its position, the SJC, in a decision also written by Hennessey, reversed a murder conviction, stating:

> It would be inconsistent to hold on the one hand that a substantive rule of constitutional dimension is completely retroactive and to insist, on the other hand, that defense counsel must have anticipated the rule in the form of an objection or exception before it may be applied retroactively. Therefore, we conclude that . . . a specific objection to the judge's instructions on burden of proof need not be shown in order to secure appellate review."[18]

In applying the reasoning of the SJC in these cases, we must conclude that not only would Sacco and Vanzetti be entitled to a new trial under the current standards, but also that the court, in accordance with its own stated duty, would be *required* to grant a new trial, even if the issues were not raised below or raised on appeal.

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16. Commonwealth v. Ciampa, 547 N.E.2d 314, 321 (Mass. 1989).
17. Commonwealth v. Ferreira, 364 N.E.2d 1264, 1272-3 (Mass. 1977) (emphasis added).
18. Commonwealth v. Stokes, 374 N.E.2d 87, 92 (Mass. 1978).

IV. ALTHOUGH THE SJC WOULD HAVE BEEN REQUIRED TO GRANT SACCO AND VANZETTI A NEW TRIAL, WOULD IT HAVE DONE SO?

In order to answer this question, it is necessary to examine a notorious 1968 murder trial which has been litigated in the courts almost continuously in the thirty years since the original convictions.[19]

Because of the notorious McLean-McLaughlin gang war, Boston, during the 1960s, had become the murder capital of America.[20] During this same time, the Justice Department believed there was an organized crime cartel being run by Italians. Joseph "The Animal" Barboza had done most of the killing for the McLean faction and had become an enforcer for the local Mob.[21]

On March 12, 1965, Barboza and his gang left the Ebb Tide restaurant on Revere Beach and murdered a small-time thug, Teddy Deegan, in an alley in Chelsea. Deegan had robbed a Mafia-controlled card game. The participants in this murder were known the night of the murder, as the Ebb Tide was a known meeting place for gangsters and had been under surveillance from the outside. There had also been an "informant" who reported pertinent events to the police.[22] However, nothing occurred until late 1967, when Barboza, while leaving a Combat Zone strip joint, was arrested for unlawful possession of a firearm and was ultimately charged with being a "habitual criminal." Facing a lengthy prison sentence, he turned on his fellow mobsters, and became the first person in the newly created Witness Protection Program.

The Deegan Murder Trial was the last of the trials in which Barboza testified against reputed organized crime figures.[23] The trial began on May 27, 1968, and ended on July 31, 1968. Solely on the uncorroborated accomplice testimony of Barboza, four men were sentenced to death; two men were sentenced to life in prison.[24]

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19. *See* Commonwealth v. French, 259 N.E.2d 195 (Mass 1970) (Judgment vacated as to death penalty *sub nom* Limone v. Massachusetts, 408 U.S. 936 (1972)).

20. Interview with James Southwood, former Boston Herald Traveler reporter, in Boston, Mass. (May 17, 1996). *See also* VINCENT TERESA, MY LIFE IN THE MAFIA 169-181 (1973); GERARD O'NEILL/ DICK LEHR, THE UNDERBOSS 71-93 (1989); WILLIE FOPIANO, THE GODSON 78-102 (1993).

21. *See id.*

22. The information contained in the report as it pertains to the SJC will be discussed *infra*.

23. The first trial took place in January, 1968, in Suffolk Superior Court, Commonwealth v. Lepore, Indictment Nos. 31082-3. Gennaro Angiulo, Benny Zinna, Mario Lepore and Richard DeVincent were acquitted of the murder of Rocco DeSiglio. The second trial occurred in Federal District Court, Boston, in March 1968. Raymond Patriarca, Henry Tameleo and Ronald Cassesso were convicted of conspiring to use interstate commerce to commit a crime of violence, i.e., conspiracy to the murder of William Marfeo. The defendants were sentenced to five years in prison and received a ten thousand dollar fine. *See* Patriarca v. United States, 402 F.2d 314, *cert. denied*, 393 U.S. 1022, *rehearing denied*, 393 U.S. 1124 (1969).

24. Wilfred "Roy" French was found guilty of first degree murder and Joseph Salvati was convicted of being an accessory. The jury recommended that the death sentence not be imposed. Henry Tameleo, Ronald Cassesso, and Peter Limone were found guilty as accessories and sentenced to death. Louis Greco was found guilty of first degree murder and conspiracy and sentenced to death. Each

As in the Sacco-Vanzetti case, prejudice against those of Italian descent permeated the trial.[25] As in the Sacco-Vanzetti case, the prosecution conducted a "highly unscrupulous prosecution"[26] and indulged in an "outrageous breach of professional ethics."[27]

Having systematically excluded Italian-Americans from the jury, the prosecutor, in his opening statement before twelve of sixteen Irish-American jurors, directed the jurors to the physical appearance of the predominantly dark-haired, swarthy, olive-skinned, brown-eyed, aquiline-nosed defendants: ". . . I ask you very respectfully to look at the defendants during the course of the trial. I ask you to look at them for their physical characteristics; I ask you to look at them with regard to the story that is told about them."[28]

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defendant was convicted of conspiracy to murder one Stathopolous. Barboza pled guilty to two conspiracy indictments on the opening day of the trial. Tameleo died in prison in 1983, Cassesso in 1992, and Greco in 1995. In 1997, Salvati's sentence was commuted. After the convictions, Barboza was given probation and was relocated to California where he murdered again. He ultimately pled guilty, served a short period of time in prison, and was gunned down in San Francisco in 1976.

25. In *Sacco*, cross-examination of a witness who claimed to have seen Vanzetti was as follows:

> Q. Well, the day before, did you see any Italians get on the train?
> A. I didn't notice any.
> Q. Have you ever seen any Italians get on that train? Did you ever during that month of April?
> A. Yes.
> Q. When?
> A. I don't know the dates.
> Q. How frequently?
> A. Why, I couldn't say. Perhaps once or twice a week.
> Q. Not in the vernacular—You have heard the old saying, 'All coons look alike to me'—but most Italians look alike? Some Italians look a good deal alike?
> A. There is a difference. Some are big and some are small——
> Q. I know, a big Italian don't look like a small one, not as a rule, but two small Italians look a good deal alike?
> A. There is a difference in them. You might get two alike and two not alike.
> Q. Have you ever worked with Italians?
> A. No, sir."

See Transcipt of the Record, *supra* note 4, at 432. On cross-examination a defense witness was asked:

> Q. Do you know what nationality is meant by the term 'wop,' the colloquial term 'wop'?
> A. Certainly.
> Q. What nationality?
> A. Italian.

See id. at 1020. In summation, Vanzetti's lawyer told the jury: "Please don't construe the ordinary man by an Italian. If you go out and flock a dozen Italians together, the chances are that you will get a gun or two, anyway. You could handle one hundred—fifty other men and you won't find a revolver." *See id.* at 2170.

26. PAUL AVRICH, SACCO AND VANZETTI, THE ANARCHIST BACKGROUND 3 (1996).

27. *See* EHRMANN, *supra* note 10, at xix.

28. Prosecution's Opening Statement, Commonwealth v. Lewis Grieco, et al., No. 31601, at 2976 (Mass. July 31, 1968); *see also* Commonwealth v. French, 357 Mass. 356 (1970).

The prosecution further sought to inflame the jury by creating the impression that the killing had been based on an ethnic rivalry between Irish and Italians. On direct examination, the prosecutor unnecessarily elicited from Barboza ethnic slurs attributed to defendant Peter Limone, calling Deegan "an Irish motherfucker."[29] After the murder, Barboza claimed Limone said, "that Irish bastard won't bother me—anybody any more."[30]

After Limone testified and was subject to an ineffective cross-examination, the prosecutor turned the questioning to an appeal to prejudice based on national origin. Having inquired whether Limone knew other notorious gangsters with Italian surnames, he resorted to that overworn canard, when referring to a club that the men frequented: "Was it not true, sir, that in the year 1965, the Doghouse was a meeting place for the *Cosa Nostra*?"[31]

Reaction was swift. After vociferous objections, a recess was called. Subsequently, the court heard arguments demanding a mistrial because of the use of the term *Cosa Nostra*. Having raised the issue that there was nothing in the indictment which alleged that defendants were part of any criminal enterprise, or that such an enterprise was, in fact, criminal, prominent Boston Attorney Lawrence O'Donnell stated:

> The term is a hate term, designed to appeal to people's glands and not their reason. It is a class libel. It is the same as saying all Negroes are lazy. It is designed as hate literature, a hate-mongering phrase and propaganda against Italo-Americans. . . . I say to you, your Honor, Lewis Grieco could no more overcome the tide of propaganda on that phrase in this courtroom than—it would be the type of propaganda that is known as universally as sunrise. And he doesn't have to face the death sentence because of that hate-mongering phrase, class libel, designed to try to get this jury to despise every Italo-American that stands accused. That's why it's in this case, because they haven't got the evidence and they want to carry the day by hate propaganda and not by an analysis of the government's witness, Mr. Barboza, his evidence . . .[32]

The cross-examination of Louis Greco[33] was equally unprincipled. Over objection, the prosecutor was allowed to read the unproved inflammatory allegations of serious domestic abuse in a complaint for divorce. Greco and his wife had since reconciled.

Having successfully branded the defendants as members of the *Cosa Nostra*, and otherwise base characters and wife-beaters, all of which were unproved, the prosecutor sought to blame the defendants for unsolved murders and threats for

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29. Direct Examination, Commonwealth v. Lewis Grieco, et al., No. 31601, at 3222 (Mass. July 31, 1968); *see also* Commonwealth v. French, 357 Mass. 356 (1970).

30. *Id.* at 3453.

31. *Id.* at 6283.

32. *Id.* at 6290-92.

33. Born of immigrant parents, Luigi Greco was a highly decorated, severely disabled World War II veteran. Although he was well known as Louie Greco, he was indicted under the name Lewis Grieco.

which they had not been indicted. In summation, the prosecutor, referring to Barboza, stated:

> . . . *If there was a deal—and we do not suggest for one minute there was ever any deal with him—if there was a deal,* what does he have to do-keep on making up these stories for the rest of his life? The FBI told him that in return for his testimony, they will protect his wife and family and that they would call it to the attention of any judge[34] that tries his other cases. . . Now, why did he testify in this case? He gave you the reasons why. He says to you that Bratsos and DePriso were killed. And there you have the evidence that they were killed. He says that Chico Amico was killed, and we have the evidence that he was killed. He says to you that his wife and kid were threatened. That's his evidence."[35]

This argument was a serious breach of professional ethics[36] and was designed to inflame the jury against the defendants by bringing other irrelevant murders into the case and attributing them to the defendants. The prosecutor also implied that the defendants were behind threats to Barboza's family, also without proof.

The SJC addressed this very issue in *Commonwealth v. Ciampa*[37] in which it chided both trial and appellate counsel and once again restated its duty under MASS. GEN. LAWS ANN. ch. 278, § 33E, that "[w]e must disregard omissions of counsel if justice requires us to order a new trial."[38] The court, which cited cases regarding threats to witnesses and references to protective custody for witness's family, called such language "unfairly prejudicial."[39]

In the *Deegan* case, the prosecutor continued this barrage by telling the jury that the allegations against the *Cosa Nostra* have to be true because the government would not cooperate in fabricating these allegations or be involved in a criminal conspiracy:

> "Can you believe Joseph Baron? I suggest to you, ladies and gentlemen, Joseph Baron—and this would apply to anyone who took the stand—that in

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34. During the trial, Judge Forte instructed the jury that Barboza was serving a sentence of "four to five years to be served" at M.C.I. Walpole for unlawful possession of a firearm, stiletto, and conspiracy. *See* Direct Examination, *supra* note 29, at 3802. His record included twenty-one convictions for burglaries, three assaults and batteries by means of dangerous weapons, two armed robberies, and one kidnapping. He was facing sixteen habitual criminal indictments. On November 1, 1968, the judge sentenced Barboza to a one year sentence on the conspiracy to murder indictments to be served concurrently. On March 28, 1969, less than nine months after the trial, the judge, upon the prosecutor's recommendation, revoked and suspended the sentence. Barboza was relocated to California where he murdered Clayton Wilson. He pled guilty, served a short period of time, and was ultimately gunned down in San Francisco on February 11, 1976.

35. Prosecutor's Summation, Commonwealth v. Lewis Grieco, et al., No. 31601, at 7440 (Mass. July 31, 1968)(emphasis added); *see also* Commonwealth v. French, 357 Mass. 356 (1970).

36. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR-706(C)(1-4)(1981).

37. *See* Ciampa, *supra* note 16, at 322.

38. *See id.*

39. *See id.* at 318.

> order for that person to tell a story such as Joseph Baron told in this case, he would have to have the cooperation of the FBI, the Chelsea Police Department, the District Attorney's Office, the Federal Bureau of Investigation, the United States Attorney's Office; that in order for a man to make up a story, as counsel for the defendants suggest, the man would have to be literal genius. I suggest to you, ladies and gentlemen, that when you heard Joseph Baron tell this story, you heard the true story. And I ask you now only to make a decision that is in the best interests of your consciences. Thank you."[40]

The SJC found this type of argument improper because it was witness vouching, meaning the prosecutor could not state the witness was telling the truth or make other statements which implied that the government would not fabricate a case or suggest that "the government has special knowledge by which it can verify the witness's testimony. . . ."[41] It is also a serious breach of ethics.[42]

Suffolk Superior Court Judge Felix Forte, age 73, charged the jury:

> [T]he burden of proof is to convince you beyond a reasonable doubt. Now, that doesn't mean beyond any doubt. It means beyond a doubt with a reason behind that doubt. It does not mean beyond a doubt in the mind of someone who is looking for a doubt, and it does not mean to a mathematical certainty. . . .
>
> *Suppose you have an important question of your own, a real serious problem, one that means a great deal to your future-whether you should buy a business or not; shall you sell your house or not and buy another; shall you move your family to another state or not. Questions of serious import, and if you make a mistake, it will be a serious mistake. On the other hand, if you decide correctly, it will be an improvement in your future and that of your family.*
>
> Now, you received some information from a certain person. If he has related the truth, you should make the change. But if he is not telling you the truth, you will make a terrible mistake. Now, shall you believe him or not. You don't know whether he's telling you the truth or not. You were not present when this occurrence, this incident took place about which he talked. You don't know whether he's telling the truth or not. You just have to make up your own mind, and you meditate and you think of him, think of all you know about him, his past, his education, his intelligence, his reputation, anything you know about him you think about. And after serious thought and meditation you say to yourself, 'Well, I don't have enough confidence in him. He doesn't sound correct to me. I'm not convinced.' You have not been convinced beyond a reasonable doubt.
>
> On the other hand, suppose you say, "Well, I don't know whether he is telling the truth or not but I have confidence in him. He is in a position to know. I don't know why he shouldn't be telling me the truth. He made a sufficiently

40. *See* Summation, *supra* note 35, at 7456.
41. *See* Ciampa, *supra* note 16, at 320.
42. *See* MODEL CODE, *supra* note 36.

> good impression upon me for me to accept that story and I am going to make the change."
>
> *Now, that's the whole story. I could tell you about proving a case beyond virtual certainty and I could tell you that you have to believe it to a moral certainty, but then I would have to explain what is meant by moral certainty or other kinds of certainty.*[43]

It is clear, from the analysis of the *Sacco-Vanzetti* charge on moral certainty and reasonable doubt, and the cases cited subsequent to the trials of both Sacco and Vanzetti and the *Deegan* defendants, that both charges to the jury are, by present standards, constitutionally deficient. In the *Deegan* case, the judge used the personal decision-making analogy to define reasonable doubt, and then neglected to instruct the jury what type of certainty is required to sustain the burden of proof. There are additional issues regarding the charge in the *Deegan* case that were not present with regard to Sacco and Vanzetti: the alibi charge, the accomplice charge, and an attempt at the end of the charge by the prosecutor to clarify the judge's attributing the acts of one defendant to another which remained uncorrected.

In the *Sacco* case, Judge Thayer charged:

> For instance, the defendants claim you must consider with care the evidence tending to prove alibi, for the reason that, if they were elsewhere when the alleged homicides were committed, that is evidence which tends to corroborate the witnesses of the defendants to the effect that they were neither at the place when the alleged homicides were committed, nor were they in the bandit car. . . .[44]
>
> . . .
>
> [T]here remains for me to consider with you the defense of alibi that has been raised by these defendants. It is sometimes called a plea of not guilty, because as the defendants say in these cases that they were elsewhere at the time the alleged crimes were committed at South Braintree and therefore they could not have committed them. In other words, the defendants say it was physically impossible for them to have committed these crimes because at the very moment they were committed Vanzetti was in Plymouth and Sacco was in Boston—If you find such to be a fact, as it is purely a question of fact—then that would be a complete defense to these indictments and therefore you should return verdicts of not guilty. An alibi is always a question of fact. Therefore, all testimony which tends to show the defendants were in another place at the time the murders were committed tends also to rebut the evidence that they were present at the time and place the murders were committed. If the evidence of an alibi rebuts evidence of the Commonwealth to such an extent that it leaves reasonable doubt in your minds as to the commission of

43. *See* Jury Charge, Commonwealth v. Lewis Grieco, et al., No. 31601, at 7475-8 (Mass. July 31, 1968); *see also* Commonwealth v. French, 357 Mass. 356 (1970).

44. *See* Transcript of the Record, *supra* note 4, at 2253.

> the murders charged against these defendants, then you will return a verdict of not guilty.
>
> On the other hand, if you find that the defendants or either of them committed the murders and the Commonwealth has satisfied you of such fact beyond a reasonable doubt from all the evidence in these cases, including the evidence of an alibi, then you will return a verdict of guilty against both defendants or against such defendants as you may find guilty of such murders.[45]

Although this charge may be considered burden shifting by present standards, it pales in comparison to the alibi charge given by Judge Forte forty-seven years later in the *Deegan* trial:

> A little more than a hundred years ago-1850, to be exact-in the case of the *Commonwealth v. Webster*, we have this language regarding an alibi: *This is a defense often attempted by contrivance, subornation, and perjury. The proof, therefore, offered to sustain it, is to be subjected to a rigid scrutiny,* because, without attempting to control or rebut the evidence of facts sustaining the charge, it attempts to prove affirmatively another fact wholly inconsistent with it; and this defense is equally available, if satisfactorily established, to avoid the force of positive, as of circumstantial evidence. In considering the strength of the evidence necessary to sustain this defense, it is obvious, that all testimony, tending to show that the accused was in another place at the time of the offense, is in direct conflict with that which tends to prove that he was at the place where the crime was committed, and actually committed it. In this conflict of evidence, whatever tends to support the one, tends in the same degree to rebut and overthrow the other; and it is for the jury to decide where the truth lies.[46]

In reversing convictions using this language, which presumes the defense witnesses untruthful, the SJC called the *Webster* charge "clear error" because it put the burden of proof on the defendant to prove alibi. The court also called it "unwise" to refer to alibi as a "defense." The SJC further ruled that it was "not helpful to single out alibi evidence for subjection to 'rigid scrutiny.'" The jury should have been instructed that an alibi "may be the only refuge of the innocent."[47]

Judge Forte increased the burden of the ancient alibi charge by refusing to give a similar charge to the jury with regard to the testimony of the accomplice, Barboza. Forte told the jury:

> Well, of course, a person who admits himself to be an accomplice of a crime is a criminal himself, and that in itself raises a question, but that does not

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45. *See id.* at 2262-3.

46. *See* Jury Charge, *supra* note 43, at 7471-2 (emphasis added).

47. Commonwealth v. McLeod, 326 N.E.2d 905, 906 (Mass. 1975); *see also* Commonwealth v. Ramey, 330 N.E.2d 193 (Mass. 1975); Commonwealth v. Rodriguez, 352 N.E.2d 203 (Mass. 1976); Commonwealth v. Cobb, 363 N.E.2d 1123 (Mass. 1977); Commonwealth v. Bowden, 399 N.E.2d 482, 489 (Mass. 1980).

> mean that you cannot believe an accomplice. The evidence of an accomplice need not be corroborated by other witnesses. Whether you should believe it or not remains for you to say.
>
> . . .
>
> *Now, the fact that even if there is an accomplice and it is not corroborated does not mean that the defendant is necessarily innocent or that he is entitled to a verdict of not guilty; but if you are satisfied and convinced beyond a reasonable doubt that the defendant is guilty, you can find that defendant guilty even on the uncorroborated testimony of an accomplice or a participant who is not on trial. Incidentally, the indictments for conspiracy mention Baron as one of the conspirators, but he was not on trial before you because before you were empanelled as a jury he appeared before me and pleaded guilty to both indictments, so that you have just the other defendants to act upon."*[48]

The judge gave the impression that Barboza had no motive for his testimony. Because he had already pled guilty and was now testifying, the jury's role was simply to ratify the guilt of the other defendants.

As early as 1972, the United States Supreme Court recognized the problem with accomplice testimony and said in *Cool v. United States* that there was "[no] constitutional problem when the judge instructs a jury to receive the prosecution's accomplice testimony with 'care and caution.'"[49]

The Court recognized that this lessened the prosecution's burden of proof for proving guilt beyond a reasonable doubt. It further said that because the jury was instructed that it could convict solely on the basis of accomplice testimony, it was reversible error to fail to instruct the jury that it could acquit on that same basis.[50] Clearly, this error was identical to that made in the *Deegan* trial.

The SJC, also in *Commonwealth v. Ciampa,* recognized the substantive constitutional dimension of the effect of the failure to charge the jury regarding an accomplice.[51] Because the error was substantial, it had to be retroactively applied. The court's decision emphasized that "the judge must specifically and forcefully tell the jury to study the witness's credibility with particular care."[52] In addition, the SJC stated that "witnesses testimony 'must be considered with caution and great care. Moreover, their guilty plea is not to be considered as evidence against the defendants.'"[53] The court also said that the jury should have been instructed that the agreement to testify "does not mean that the government has a way of knowing that the testimony is truthful," and that the jury

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48. *See* Trial Transcript, *supra* note 25, at 7474 (emphasis added).
49. Cool v. United States, 409 U.S. 100, 103 (1972).
50. *See Cool,* 409 U.S. 100, 103 n. 4.
51. *See* Ciampa, *supra* note 16, at 320.
52. *See id.*
53. *See id.* (*citing* United States v. Mealy, 851 F2d 890, 900 (7th Cir. 1988)).

should "examine the benefited witness's testimony 'with greater caution than that of ordinary witnesses.'"[54]

It is clear that under current principles of law, the summation of the prosecutor and the charge to the jury had serious errors of constitutional dimension. As for the charge to the jury, the errors were so serious that they were either new and substantial or considered burden shifting and would have to be given retroactive effect on subsequent appeals.

On May 4, 1970, the SJC affirmed the convictions.[55] Thus began a twenty-five year odyssey through the state and federal judicial systems, culminating with the death of defendant Greco in December 1995.[56] There had been seven hundred and ninety two exceptions at trial and four hundred and sixty nine assignments of error.

The SJC overruled the objection to the naming of other notorious individuals with Italian surnames on the grounds that it was not seasonably brought.[57] The court allowed the questioning of Greco's domestic affairs on the grounds that it pertained to "matters conceivably bearing upon the truth of [his] alibi testimony. . . ."[58] The SJC also made the following *non sequitur* in justifying the inference that the defendants were members of a corrupt criminal enterprise, the *Cosa Nostra*, the existence of which was unproven:

> One could hardly say that reference the to F.B.I. or the Internal Revenue Service by itself refers to a particular employee of those agencies. If one joins, takes orders from, or works for an illdefined [sic] organization (e.g., the 'Mafia,' the 'Cosa Nostra') which may have incurred public disrepute, one voluntarily risks that some opprobrium from a general reference to the organization will rub off on him.[59]

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54. *See id.* at 320 (*citing* United States v. Shaw, 829 F2d 714, 718 (9th Cir. 1987), *cert. denied*, 485 U.S. 1022, 108 S.Ct. 1577, 99 L.Ed.2d 892 (1988)).

55. *See* French, *supra* note 19.

56. *See* Grieco v. Meachum, 533 F. 2d 713 (1976), *cert. denied*, 429 U.S. 858; *see also* Greco v. Workman, 481 F. Supp. 481(Mass. 1979), *cert. denied*, 100 S. Ct. 2992 (1980) (polygraph, known use of perjured testimony); Commonwealth v. Tameleo, 425 N.E.2d 287 (Mass. 1981); Commonwealth v. Greco, 425 N.E.2d 287 (Mass. 1981) (jury charge); Commonwealth v. Limone, 573 N.E.2d 1 (Mass. 1991) (jury charge); Commonwealth v. Salvati, 650 N.E.2d 782 (Mass, 1995) (suppression of police reports, perjured testimony). There are two unpublished memorandum decisions from the First Circuit Court of Appeals. *See generally* Greco v. Dickhaut, No. 83-8058 (1983); Greco v. Nelson, No. 93-1969, *cert. denied*, May 23, 1994 (citation omitted); A Motion for Leave to Appeal (jury charge, i.e., accomplice testimony, failure to charge regarding identification testimony, witness vouching summation of prosecutor) to the SJC, No. SJ-93-0014 was denied on February 2, 1993, by Associate Justice Lynch; *cert. denied*, May 17, 1993, Greco v. Massachusetts (citation omitted); An eighth motion for new trial (ineffective assistance of defense counsel because of conflict of interest) on behalf of Greco was denied on November 28, 1995, by Suffolk Superior Court Judge Banks.

57. *See* French, *supra* note 19, at 229.

58. *See id.*

59. *See id.* at 221 n.33.

Probably the most patently erroneous ruling was when the SJC tried to justify an error regarding the charge to the jury, which the prosecutor himself had sought to correct. The judge erroneously stated that Fitzgerald's testimony was to be considered against Cassesso and Tameleo, rather than Greco and Tameleo. Fitzgerald, an attorney, had testified regarding a conspiracy to obstruct justice and suborn perjury by bribing his client Barboza not to testify.[60] Fitzgerald, whose leg was blown off by a car bomb, is presently a judge.[61] He had implicated Tameleo and Greco in the conspiracy. Glavin, on the other hand, had been serving a life sentence for first degree murder and testified regarding an attempt to bribe him, attributed to Cassesso, to confess to Deegan's murder.[62] At the conclusion of his charge, the judge stated:

> When I said to you that once the conspiracy was over, what each person did or said would be used only against him, in reference to the testimony of Mr. Fitzgerald, he talked about Ronald Cassesso and Henry Tameleo—
>
> PROSECUTOR: I beg your pardon, That's not true, your Honor, It wasn't Cassesso. It was Lewis Grieco and Henry Tameleo, your Honor. . . .
>
> THE COURT: All right. The defendant Lewis Grieco and Henry Tameleo. I specifically instruct you then that the evidence was admitted solely against them-Grieco and Tameleo-and not against any one of the other defendants. I want to repeat that. That was in Mr. Glavin's testimony.[63]

Rather than acknowledge that this instruction totally confused the jury and was "Plain Error," requiring automatic reversal, because it was against Cassesso that Glavin had testified, not Greco or Tameleo, the SJC, in total disregard of the need for the jury to understand the judge's instructions in a death penalty case, or any other case, ruled that "it would seem that all counsel (if not the stenographer) understood what the judge said as not being confusing."[64]

With regard to the requested accomplice charge, the SJC stated that the "judge may tell the jury to scrutinize the testimony of an accomplice with care, *especially when the testimony is not corroborated.* He is not required to do so."[65] As for the allegations that the alibi charge shifted the burden of proof and the judge did not charge properly on the issue of reasonable doubt, these were identified by the court and described as "Various less significant issues raised by assignments of error. . . ."[66] On the issue concerning reasonable doubt, the court ruled that the judge "made it clear that the burden rests upon

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60. *See id.* at 221-2.

61. Hon. John Fitzgerald, 7th Judicial Circuit, PO Box 230, Rapid City, SD 57709. Francis P. Salemme was convicted in the bombing. *See* Commonwealth v. Salemme, 323 N.E.2d 922 (Mass. 1975); Commonwealth v. Salemme, 416 N.E.2d 205 (Mass. 1981).

62. *See* French, *supra* note 19, at 218-9.

63. *See* Jury Charge, *supra* note 43, at 7523.

64. *See* French, *supra* note 19, at 222.

65. *See id.* at 225 (emphasis added).

66. *See id.* at 227.

the Commonwealth and not upon a defendant. There was no error."[67] As for the ancient alibi charge, the SJC found "the rule of the *Webster* case does not shift to the defense the burden of proving alibi or lack of guilt.[68]

The next time the case was heard by the SJC regarding the charge to the jury was in 1981.[69] The appeal was from the denial of motions for new trial brought by Tameleo and Greco on the burden shifting effect of the judge's charge to the jury regarding the use of personal decision-making examples in defining reasonable doubt, the shifting of the burden of proof on the defendant to prove alibi, and the otherwise incorrect explanation of burden of proof. An additional murder case, raising the same issues, which had been reduced from first to second degree murder by the SJC, was briefed and argued at the same time.[70]

Single Justice Liacos allowed Applications for Leave to Appeal.[71] In a significant ruling the justice stated, "the defendants raise issues they could not have raised before, at least with regard to some of which the constitutional significance was not established until after the defendants' trial and subsequent actions for post conviction relief."[72]

Massachusetts General Law, ch. 278, § 33E, enabled a defendant convicted of first degree murder to appeal from the denial of a motion for a new trial after the case had already been decided by the SJC. Conversely, it also prevented frivolous appeals. The laws were enacted as a result of the *Sacco-Vanzetti* case. There was ostensibly no vehicle by which the SJC could correct a manifest injustice. As a result, the court had no jurisdiction to decide the appeals of Sacco and Vanzetti.

On May 5, 1981, the cases were argued before Chief Justice Hennessey, Associate Justices Wilkins,[73] Abrams, Nolan,[74] and Lynch. The issues before the court were the judge's charge regarding alibi, the standard of proof required of

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67. *See id.* at 232.

68. *See* French, *supra* note 19, at 232.

69. Barboza's recantation was the subject of a previous appeal. *See* Commonwealth v. Cassesso, 276 N.E.2d 698 (Mass. 1971). A motion for leave to appeal to the SJC from the denial of a 1978 motion for new trial was denied by Associate Justice Braucher which included the affidavits of Barboza's former attorney, F. Lee Bailey, Boston Herald reporter James Southwood, and two polygraphs of defendant Greco. The Miami Police polygraph had been in the possession of prosecuting authorities prior to the trial. *See also,* Greco v. Workman., 481 F.Supp. 481 (1979), *cert. denied* 100 S.Ct. 2992 (1980).

70. *See* Commonwealth v. Pisa, 363 N.E.2d 245 (Mass. 1977) *cert. denied*, 434 U.S. 869 (1977) 393 N.E. 2d 386 (1979); Pisa v. Streeter, 491 F.Supp. 530 (Mass. 1980).

71. *See* MASS. GEN. LAWS ANN. ch. 278, § 33E (West 1977). Referring to motions for new trials in capital cases, Massachusetts law states, in part: "[i]f any motion is filed in the superior court after rescript, no appeal shall lie from the decision of that court upon such motion unless the appeal is allowed by a single justice of the supreme judicial court on the ground that it presents a *new and substantial question* which ought to be determined by the full court." *See id.* (emphasis added).

72. Commonwealth v. Grieco, Nos. 80-389/80-427, slip op. at 1-2 (Mass. Dec. 31, 1980) (order granting applications for leave to appeal).

73. Justice Wilkins' father had been the chief justice on the original appeal.

the Commonwealth, and the use of personal decision-making analogies in explaining reasonable doubt.[75]

Because counsel for Tameleo had not raised the issue regarding the alibi charge, it was not addressed by the court, contrary to its earlier stated position.[76] As for the use of personal decision-making examples in explaining the burden of proof beyond a reasonable doubt, the SJC contradicted its earlier ruling in *Commonwealth v. Ferreira,* written by Hennessey,[77] and stated, "[w]e 'have never held . . . that the use of specific examples necessarily imports error, constitutional or otherwise. . . .' We decline to depart from that principle."[78]

The SJC further contradicted its earlier position stated in *Commonwealth v. Callahan*[79] and *Commonwealth v. Stokes,*[80] in which it espoused its statutory duty to correct substantive errors of constitutional dimension in order to avoid a miscarriage of justice. The court ruled that because "[t]he defendant did not object to the now challenged portion of the charge at trial . . . our consideration is limited to the impression made by the instruction as a whole."[81] Simply put, the SJC was now requiring the *Deegan* defendants to have objected at trial to the judge's charge even though the constitutional theory upon which the appeal had been based had not existed at the time of the defendants' trial. This statement completely contradicted its earlier position where it had stated the opposite,[82] and the ruling of Justice Liacos certifying the appeal.[83] Even more egregious was the court's statement, "[e]rror in a charge is determined by reading the charge as a whole, and not by scrutinizing bits and pieces removed from their context."[84] The SJC itself was scrutinizing "bits and pieces removed from their context."

In a separate rescript opinion, the court dismissed the issues raised by *Greco*, and claimed that because the issue of the burden shifting alibi charge had not been raised in his 1978 Motion for a New Trial, it was "not thought to be critical."[85] However, the court ignored the fact that it had been raised at trial

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74. Justice Joseph Nolan had been an assistant district attorney in the office that prosecuted the *Deegan* defendants from 1960-1971. A petition for rehearing alleging a conflict of interest was denied. Neither the grand jury testimony nor Barboza's reported polygraph have ever been made public.

75. All defendants raised the issue regarding the presumption of malice from the use of a dangerous weapon. *See* Sandstrom v. Montana, 442 U.S. 510 (1979).

76. *See* Commonwealth v. Callahan, 406 N.E.2d 385 (Mass. 1980).

77. *See* Commonwealth v. Fereirra, 364 N.E.2d 1264 (Mass. 1977).

78. Commonwealth v. Tameleo, 425 N.E.2d 287, 290 (Mass. 1981) (*citing* Commonwealth v. Smith, 407 N.E.2d 1291 (1980)).

79. *See* Callahan, 406 N.E.2d at 387-8.

80. *See* Commonwealth v. Stokes, 374 N.E.2d 87, 92 (Mass. 1978).

81. *Tameleo,* 425 N.E.2d at 290.

82. *See Stokes*, 374 N.E.2d at 92.

83. *See* Grieco, *supra* note 72 (order granting applications for leave to appeal).

84. *See* Tameleo, *supra* note 78 (*citing* Commonwealth v. Cundriff, 415 N.E.2d 172 (1980)).

85. *See* Commonwealth v. Greco 425 N.E.2d 287, 287 n.1 (Mass. 1981).

and preserved in the original appeal.[86] The court also ignored the fact that it had just stated that to determine error, the charge is to be read as a whole, and not by "scrutinizing bits and pieces."[87] The court continued to disregard its publicly stated duty under MASS. GEN. LAWS ANN. ch. 278, § 33E appeals. Instead, the court referred to the *Tameleo* decision, *supra*, and the case of *Pisa*, which was also decided that day.[88]

In what appears to have been a wanton disregard of the spirit of the *Sacco-Vanzetti* Proclamation made less than four years earlier, and a failure to understand the reason the cases were there in the first place, the court quoted from the Third Report of the Judicial Council of Massachusetts convened after the executions of Sacco and Vanzetti:

> There should be one appeal as of right in a capital case, but there need be no more. One convicted of murder must be given an opportunity to submit the record of the trial to the court of last resort and he is entitled to have that record scrutinized with the greatest of care. If as a result of such scrutiny the court finds no error in the conduct of the trial, it would seem that the defendant should not have an unqualified right thereafter to appeal from the decision on every eleventh hour application for a new trial. . . . In our opinion there should be no right of appeal at this juncture unless the appeal is allowed by a justice of the Supreme Judicial Court as presenting a new and substantial question which ought to be passed upon by the full court.[89]

In truth, the *Sacco-Vanzetti* case had caused such controversy that the Council was forced to recognize that there were "some serious defects in our methods of administering justice in murder cases."[90] As previously discussed, at the time of the appeals of Sacco and Vanzetti the SJC reviewed only issues of law. Consequently, there was no means by which the court could pass upon issues of justice, such as whether the verdict was contrary to the weight of the evidence, or was not justified by the facts. Although the court could reverse on an abuse of discretion theory, such an abuse was rare, requiring the appellate tribunal to find that "no conscientious judge acting intelligently could have honestly taken the view expressed by the trial judge."[91] Therefore, there was no real appeal from the conviction.

The Judicial Council felt the issue of an appeal on a capital murder case so important that it stated "[a]s the verdict on such an indictment involved the issue of life and death, we think the responsibility too great to be thrown upon

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86. *See* French, *supra* note 19, at 195.

87. *See* Tameleo, *supra* note 78.

88. *See* Commonwealth v. Pisa, 425 N.E.2d 290 (Mass. 1981).

89. *Pisa*, 425 N.E.2d at 292 n.4 (*citing* Third Report of the Judicial Council of Massachusetts, Pub. Doc. No. 144, 39-40 (1927)).

90. Third Report of the Judicial Council of Massachusetts, Pub. Doc. No. 144, at 37 (1927), reprinted in 13 Mass.L.Q. (No. 1, 1927).

91. Third Report at 41.

one man."[92] The Council recommended changes in the law which would *"broaden the function of the Supreme Judicial Court on appeal in that it will pass upon the whole case, and will have the power to order a new trial upon any ground if the interests of justice appear to require it."*[93]

The Council further recommended Massachusetts adopt the statutory law in New York and quoted from Section 528 of the Criminal Procedure Law referring to death penalty cases: "[T]he court of appeals may order a new trial if it be satisfied that the verdict was against the weight of evidence or against law, or that justice requires a new trial, *whether any exception shall have been taken or not in the court below.*"[94]

Abrams' unanimous decision had the effect of nullifying Justice Liacos' ruling which had recognized the seriousness of the burden shifting jury charge and signaled a return to pre-*Sacco-Vanzetti* legal reasoning. In fact, the court had contradicted its earlier decision in *Commonwealth v. Brown,*[95] specifically referring to the Sacco-Vanzetti case and the statutory amendment which was passed "to remedy the defects . . . which had been especially evident"[96] in that case. The court called the statute a "safety valve" which guaranteed "review as to all aspects of cases regardless of the absence of claim of error."[97]

In 1991, defendant Limone's case was certified for review by Associate Justice Wilkins. Once again, the issue revolved around the use of personal decision-making analogies to explain reasonable doubt. Limone's case was heard before Liacos, (now the chief justice), Wilkins, Abrams, Nolan, and Lynch (who wrote the opinion).

This time the court did not require an objection at trial "because the constitutional theory on which he relies was not sufficiently developed at the time of his trial and appeal."[98] However, the SJC edited the transcript of the charge to the jury and changed the issue before it although it stated, "[i]n *Commonwealth v. Tameleo,* (citation omitted), *we scrutinized this very charge.* . . . There, we held that the charge, read in its entirety, did not so trivialize the concept of proof beyond a reasonable doubt as to require reversal of the convictions."[99]

There had never been any claim by the prosecution that the jury charge on reasonable doubt was anything other than the standard of proof regarding guilt or innocence. The court was now saying that the charge was relative to whether a witness should be believed or disbelieved. The charge, as was now interpreted by the justices, left no instruction to the jury on what constitutes "proof

92. *Id.* at 40.
93. *Id.* at 42 (emphasis added).
94. CRIM. PROC. § 528 (emphasis added).
95. *See* Commonwealth v. Brown, 380 N.E.2d. 113, 120 (Mass. 1978).
96. *See id.*
97. *See id.*
98. Commonwealth v. Limone, 573 N.E.2d 1, 2 (Mass. 1991).
99. *Limone,* 573 N.E.2d at 2-3 (emphasis added).

beyond a reasonable doubt." Further, there was no explanation of what degree of certainty the jury should have in reaching a conclusion since the judge did not did not inform it about the kinds of certainty necessary for the Commonwealth to sustain its burden.

The SJC was now on the public record as changing the facts of a case. Unanimously, the court said, "[w]e recognize that there is a certain amount of tension between *Tameleo* and our later decision in *Rembiszewski.*"[100] In *Rembiszewski*, the SJC had reversed a first degree murder conviction because the charge regarding reasonable doubt "used specific examples of personal decisions in jurors' lives."[101] It found that the reasonable doubt charge "was not distinguishable in any significant way" from other erroneous charges and was, therefore, "constitutionally inadequate."[102]

The court claimed that it has never decided that the use of personal decision-making analogies in defining reasonable doubt "necessarily imports error, constitutional or otherwise."[103] It stated that "to determine whether a definition of reasonable doubt accurately conveys the meaning of the term, it is necessary to consider the charge as a whole."[104] Although the court had identified the charge as having used personal decision-making analogies to define reasonable doubt in the *Tameleo*[105] and *Greco*[106] decisions a decade earlier, it now claimed that the charge "did not compare the jurors' duty in rendering a verdict to weighing the wisdom of taking a future course of action in their personal lives."[107] The SJC claimed that the charge compared the jury's duty "to making a decision as to the truth of a factual proposition, based on the credibility of the person making it."[108] If we consider the charge as a whole, following the latest interpretation by the SJC, the only logical conclusion is that there was no charge to the jury whatsoever which defined reasonable doubt!

In 1995, the SJC ruled again on the case.[109] This time the allegations centered around the police reports that had never been given to the de-

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100. *Id.* at 3.
101. *Id.*
102. *Id.*
103. *See* Limone, *supra* note 98 at 3.
104. *See id.*
105. *See* Tameleo, *supra* note 78.
106. *See* Greco, *supra* note 85.
107. *See* Limone, *supra* note 98, at 3-4.
108. *See id.*
109. A Motion for Leave to Appeal from the denial of a motion for a new trial, brought by Greco, was denied by Justice Lynch on February 2, 1993. The issues presented were the charge regarding accomplice testimony, failure of the judge to charge regarding identification, and the prosecutor's witness vouching summation to the jury. Greco did not perfect an appeal regarding the systematic exclusion of Italian-Americans from the jury. *See generally* Teague v. Lane, 489 U.S. (1989). The judge who denied the motion, Judge Hamlin, had been a legal assistant in the office that prosecuted the defendants during the prosecution. She had also been an assistant district attorney in that office during subsequent appeals of the defendants.

fense.[110] By now, the record before the court included, in addition to the court's collective knowledge of a constitutionally flawed jury charge, the following:

The affidavit of the accomplice Barboza wherein he stated that:

> [H]e wishes "to recant certain portions of . . . (his) testimony during . . . trial insofar as . . . (his) testimony concerned the involvement of Henry Tameleo, Peter J. Limone, Joseph L. Salvati and Lewis Grieco [sic] in the killing of Teddy Deegan," and that the testimony (not described) which he now offers "to give concerning the killing of . . . Deegan and those individuals responsible for his death will be the whole truth known to" him.[111]

A four page affidavit of prominent attorney Francis Lee Bailey, whom Barboza had engaged to enable him to recant his testimony. According to the Bailey affidavit:

> He [Barboza] stated of the people against whom he had testified, Roy French and Ronnie Cassesso were in fact involved, French directly and Cassesso indirectly. He told me that Henry Tameleo and Peter Limone were not involved, but that he implicated them because was led to understand by various authorities that in order to escape punishment on charges pending against him, he would have to implicate someone of 'importance.' He told me that the story he had told to Judge Forte and the jury in the trial of Commonwealth vs. French was in very large measure a fabrication, and that he had in that story implicated Louie Greco because of a personal grudge arising from a disagreement between himself and Greco. He further said that he did not expect a conviction to result from his testimony and, indeed, that the authorities had generally assured him that a conviction was unlikely, but the mere fact of bringing such prominent people to public trial would accomplish its own purpose. He told me that he knew that Louie Greco was in Florida at the time of the murder and expected that fact to be so clearly shown by the evidence that his entire testimony would be cast in doubt and an acquittal — probably of all the defendants — would surely result. He stated that he wished to somehow cause at least those defendants who were in no way involved with the Deegan murder to be freed from prison.[112]

Two polygraph examinations of the defendant Greco, one taken by the Miami Police Department Polygraph Unit which showed him to be innocent of Deegan's murder and supported his statement that he was in Florida when Deegan

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110. In *Commonwealth v. French,* the SJC upheld the judge's refusal to give the grand jury testimony and police reports to the defense. *See* French, *supra* note 19, at 213, 227.

111. Commonwealth v. Cassesso, 276 N.E.2d 698, 701 (Mass. 1971).

112. Affidavit of Francis Lee Bailey at 2 (Oct. 26, 1978). The Bailey affidavit was obtained in connection with Greco's 1978 Motion for New Trial. *See* Commonwealth v. Lewis Grieco et al., Nos. 31601, 32369-70, slip op. at 1 (Mass. Nov. 3, 1978) (order denying defendant's motion for new trial); *see also* Greco v. Workman, 481 F.Supp. 481, *cert. denied,* 100 S.Ct. 2882 (1980). In the 1995 appeal, the affidavit was reproduced in the Record at Appendix 41.

was murdered. This polygraph was in the possession of prosecuting authorities prior to the trial. A second polygraph conducted by the American Polygraph Association also supported Greco's claims of innocence.[113]

A sworn statement of Barbara Dones-Brown who claimed that she had seen Greco and his wife at their Hollywood, Florida home and had given this information and a calendar indicating dates relevant to Greco's alibi to Massachusetts authorities. She was specific about the dates because Greco's wife, Roberta, had testified as a character reference in divorce court on her behalf. She bought a bouquet of flowers to reciprocate. When she went to their house to deliver the flowers, she spoke to Greco for "more than an hour." She had kept a receipt for the flowers which she had also given to Massachusetts authorities.[114]

An affidavit from Greco's Florida lawyer, Richard Barest, Esq. Barest had been a former judge in Opa Locka and a prosecuting attorney in Dade County. He arranged the Miami Police polygraph examination for Greco, and conducted the investigation which concluded that Greco was in Florida when the murder was committed. Barest petitioned the Governor to contest rendition and sought to compel a polygraph examination of Barboza. However, Massachusetts counsel[115] intervened, and Greco waived rendition.[116]

An affidavit/memorandum of United States Attorney Edward F. Harrington wherein Barboza admitted he would take a polygraph, which "lie detector would prove . . . the truth" with no polygraph results being produced.[117]

An affidavit of former Boston Herald Traveler reporter James Southwood who was brought in by the Justice Department to write a book about Barboza. Barboza told Southwood, "Louie Greco wasn't in the alley." This statement

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113. *See id.* at 1, 10. The Miami Police Department Polygraph was also referred to at Appendix 38 of the Record of the 1995 appeal. The American Polygraph Association Polygraph was also referred to at Appendix 40. In 1983, a third polygraph was administered by Ed Gelb, past president of the American Polygraph Association, on the nationally televised program, "Lie Detector," which supported Greco's claims of innocence. Neither the prosecutor nor the administrations of Governors Dukakis and Weld would arrange for an evaluation by the State Police Polygraph Unit. Both governors denied petitions for commutation despite two separate votes of the Advisory Board of Pardons.

114. *See id.* at 1; Appendix 38; *see also* Statement of Barbara Dones Brown at 3-7. (Dec. 19, 1977).

115. On February 17, 1994, it was learned that the" lead counsel" at the trial, Joseph J. Balliro, had represented both Barboza and Vincent Flemmi. According to an affidavit filed in Suffolk Superior Court, subsequent to the denial of Greco's 1995 appeal, Greco followed Balliro's advice and returned to Massachusetts to face trial. None of the evidence gathered by Barest was ever presented at trial. When questioned regarding Barboza and Flemmi, Balliro cited the "lawyer-client privilege." *See* Kenney, *Dan Rea's Mission Impossible,* BOSTON GLOBE, Feb. 17, 1994, 69 at 72.

116. *See* Affadavit of Richard Barest at 1-2 (Dec. 21, 1977); Commonwealth v. Grieco et al., Nos. 31601, 32369-70, slip op. at 1 (Mass. Nov. 3, 1978). The affidavit was filed in connection with the 1978 Motion for New Trial, but was not addressed by the judge. *See* Appendix 38 of the Record of the 1995 appeal.

117. *See id.* at 3. *See also* Aff. of Edward F. Harrington at 2 (Oct. 31, 1978); Commonwealth v. Grieco et al., Nos. 31601, 32369-70, slip op. at 1 (Mass. Nov. 3, 1978).

meant that Barboza had lied about Greco's involvement in the Deegan murder. Southwood had told FBI agents that Barboza was lying and decided not to write the book.[118]

An affidavit of convicted murderer Roy French stating, "Louis Greco and Henry Tameleo, Peter Limone were not in fact involved with me directly or indirectly in the shooting death of Teddy Deegan, on March 12, 1965."[119]

An affidavit of convicted murder William Geraway in whom Barboza confided that he murdered while in the Witness Protection Program, and that he had given perjured testimony in the Deegan and other trials. Geraway reported both incidents to prosecuting officials, and was responsible for Barboza's being tried for murder in California.[120] Barboza eventually pled guilty to second degree murder and received a short prison sentence.

V. CONCLUSION

The issue regarding the suppression of the police reports was the subject of a Motion for New Trial brought by defendants Salvati, Limone and Greco, in 1992. According to the trial testimony of Barboza,[121] he left the Ebb Tide restaurant with Martin, Amico, Salvati and Cassesso, to murder Deegan. Greco, who had left in a separate car with Martin, entered the alley in Chelsea where they waited for Deegan and one Stathopolous to arrive with French under the pretext of committing a burglary. Barboza also testified that Tameleo ordered the murder, and that he was paid by Limone.

The defense claimed that Barboza substituted members of his gang who were the real murderers for people against whom he bore grudges, namely: Tameleo, Limone, Greco and Salvati. Barboza was asked whether he left the Ebb Tide with his gang members, which, of course, he denied.

The newly discovered police reports proved that Barboza had lied at the trial, and he had, in fact, left with members of his gang that night to murder Deegan. A report made the night of the murder stated:

> I received information from Capt. Renfrew that a informant of his had contacted him and told him that French had received a telephone call at the Ebb Tide at 9 P.M. on 3-12-65 and after a short conversation had left with the

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118. *See id.* at Appendix A, at 3; Summary of Motions for New Trial; Appendix 38 of the Record of the 1995 Appeal; Aff. of James Southwood at 1 (June 6, 1971), Commonwealth v. Grieco et al., Nos. 31601, 32369-70, slip op. at 1 (Mass. Nov. 3, 1978).

119. Aff. of Wilfred Roy French (April 27, 1983). *See* Appendix 40 of the Record of the 1995 Appeal.

120. *See* Appendix 39 of the Record of the 1995 Appeal, *see also* Aff. of William R. Geraway at 2-4 (March 1, 1971). Curiously, Geraway's conviction of first degree murder was reversed by the SJC, even though the conviction had been affirmed by the same court in 1969. The appeal from the denial of a motion for new trial was not certified according to MASS. GEN. LAWS ANN. ch. 278, § 33E by a single justice. *See* Commonwealth v. Geraway, 301 N.E.2d 814 (1973).

121. *See* French, *supra* note 19.

> following men; Joseph Barboza, Ronald Cassesso, Vincent Flemmi, Francis Imbruglia, Romeo Martin, Nicky Femia and a man by the name of Freddi who is about 40 years old and said to be a 'Strongarm.' They are said to have returned at about 11:P.M. and Martin was alleged to have said to French, '[w]e nailed him.'[122]

The reports also showed that it was Cassesso, not Greco, who had entered the alley to commit the murder.[123]

Suffolk Superior Court Judge Robert Banks declined to order an evidentiary hearing and ruled that because the defense asked Barboza about each man mentioned in the report, it had the information contained in the report. The report did not aid Limone because Limone was not alleged to have been at the Ebb Tide. It did not address Limone's argument that Barboza lied about with whom he left the Ebb Tide; therefore, if his testimony was false in one aspect, it was false in every aspect (*falsus in uno, falsus in omnibus).* The court made no mention of a separate report showing that Barboza lied about Greco's entering the alley.

Further, the court, without the benefit of an evidentiary hearing, characterized the police "informant" as "tipster or citizen witness" who observed "otherwise normal legal activity."[124] Ignoring the fact that these were known gangland associates, who had been under surveillance, and who had been implicated by Martin's statement "[w]e nailed him," the court ruled that statement "vague."[125] In addition, the judge found that the informant had merely observed "innocuous and legal activity-namely the comings and goings of patrons in a nightclub."[126]

It was then necessary to seek leave to appeal from a Single Justice of the SJC. Salvati proceeded on his own. Justice Wilkins certified Salvati's appeal to proceed to the full court, but he minimized the information contained in the reports. Although the prosecutor in his summation told the jury that the defendants did not prove that Deegan had pulled a gun on Barboza at the Ebb Tide, a charge which Barboza had specifically denied, one of the reports showed that it had, in fact, happened. In his decision, Wilkins called the failure to disclose the report in this regard "not prejudicial" and was "already reflected at trial" where it was

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122. Commonwealth v. Salvati, Nos. 32368-70, slip op. at 6 (Superior Court Jan. 11, 1994) (order denying defendant's motion for a new trial).

123. A separate report shows that Salvati was identified from photos by an unidentified waitress at the Ebb Tide, who refused to testify. She claimed that he left and returned with the murderers. Salvati stated that he did not know where he was the night of Deegan's murder.

124. *Salvati*, Nos. 32368-70, slip op. at 8-9.

125. *Id.*

126. *Id.* at 8,18.

testified that "Deegan had caused trouble at the Ebb Tide Restaurant."[127] He also referred to the "informant" as a "tipster."[128]

Limone's and Greco's cases were heard solely by single Justice John Greaney. On June 22, 1994, a Memorandum and Order was issued which devastated the prosecution's position and focused on the issue before the court. For the first time in twenty-five years, a justice of the SJC appeared to recognize that the wrong people were unjustly convicted and sentenced in this case. Justice Greaney wrote:

> The information in the Evans report identifies an entirely different set of killers. If disclosed and properly developed, the information could have had considerable relevance to the credibility of Baron's[129] testimony which was at the core of the Commonwealth's case, and it would have supported the *defendants' alibi and other defenses.* Quite simply, the jury might have concluded that a reasonable doubt existed as to Baron's identification of the killers and their activities, which doubt necessarily would have included Limone and Grieco."[130]

Justice Greaney's decision meant that any discussion of the statements impeaching the credibility of Barboza in the police report which could give rise to the jury's concluding "reasonable doubt" would necessitate a discussion on reasonable doubt and the charge to the jury.

After the briefs were filed, and before the case was argued, Greco asked the court to take judicial notice of two federal circuit courts of appeals decisions regarding the use of the term moral certainty, decided subsequent to the filing of the briefs.[131] The court was also reminded of the "tension" between the *Tameleo* and *Limone* decisions, discussed *supra.* In addition, the SJC, on January 19, 1995, released its decision on the *Pinckney* case,[132] relative to the use of the term moral certainty in the explanation to the jury of proof beyond a reasonable doubt. The SJC's own stated duty in reviewing first degree murder cases would require it to reverse this case on the jury charge alone.[133]

On February 7, 1995, the case was argued before Chief Justice Liacos, Associate Justices Abrams, Lynch and Greaney. At oral argument, referring to the

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127. Salvati v. Commonwealth, No. 94-131, slip op. at 15 (Mass. May 4, 1994) (order granting leave to appeal *solely* with respect to the alleged failure of the Commonwealth to disclose the existence of the Evans report before trial) (emphasis added).

128. *Id.*

129. Joseph Barboza, a/k/a Joseph Baron, a/k/a Joseph Bentley, a/k/a Joseph Donati.

130. Limone et al. v. Commonwealth, Nos. 94-223-24, slip op. at 3 (Mass. June 22, 1994) (order granting limited application for leave to appeal and consolidating appeals of Limone, Grieco, and Salvati).

131. *See* Adams v. Aiken, 41 F.3d 175 (4th Cir. 1994), *cert denied* Adams v. Moore, 515 U.S. 1124 (1995); *see also* Nutter v. White, 39 F.3d 1154 (11th Cir. 1994), *appeal after remand* 109 F.3d 771 (11th Cir. 1997) a copy of which was sent to the court; *see* M.R.A.P. 16 (l).

132. *See* Pinckney, *supra* note 6.

133. *See* Ciampa, *supra* note 16.

Pinckney decision, counsel for Greco reminded the court of its own stated duty. Counsel for Limone specifically directed the court's attention to the Bailey affidavit, which had been appended to Limone's brief.

The justices decided the case June 12, 1995.[134] In an unanimous opinion written by Justice Lynch, the court upheld the convictions. Rather than apply current standards of law, the court stated, "[t]he defendants' trial took place in 1968, and therefore, we look to the law that existed at that time to assess the defendants' claims."[135]

The court ignored Justice Greaney's earlier ruling that the report[s] identify "an entirely different set of killers . . . which would have supported defendants' alibi and other defenses."[136] With regard to Salvati, the justices omitted Barboza's trial testimony that he left the Ebb Tide with Salvati to commit the murder. The court disregarded Limone's argument that if Barboza was shown to have been lying regarding the participants in the murder, his testimony implicating Limone in the conspiracy could not be believed. As for Greco, the court ignored the separate Cass report, which showed it was Cassesso, not Greco who had entered the alley to murder Deegan, despite having the entire record before it, supporting Greco's claims of innocence, and corroborating Barboza's numerous statements to various people that he had lied at the trial.

The court said that the information contained in the reports was not inconsistent with the accomplice's testimony, "[t]here was no evidence introduced that either Limone or Grieco were ever at the Ebb Tide on the night of the murder." Limone's primary criminal act was soliciting "the hit" on Deegan and Grieco was not at the Ebb Tide with Baron, rather in an alley waiting for Deegan. Moreover, Baron testified that when he left the Ebb Tide, Salvati was tending to an automobile in the Ebb Tide parking lot.[137]

The court also concluded that because Barboza was questioned by defense counsel regarding other men named in the report to impeach his credibility, the information was "available to trial counsel . . . and was merely cumulative evidence that did not materially aid the defendants on the issue of guilt or punishment."[138]

Moreover, the SJC sustained the judge's demotion of the police informer to the status of "tipster or citizen witness" without an evidentiary hearing stating that it agreed with the "characterization of the informant as a 'tipster or citizen witness' rather than a confidential informant'"[139] Therefore, the court said,

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134. *See* Commonwealth v. Salvati, 650 N.E. 2d 782 (1995).

135. *See id.* at 784.

136. *See* Tameleo, *supra* note 78.

137. *See Salvati,* 650 N.E. 2d at 785. The court does not take into account that Barboza was an admitted murderer and perjurer and was lying.

138. *See id.* at 786.

139. *See id.*

"nondisclosure of the tipster's identity or the contents of the tipster's statements did not constitute reversible error."[140]

The information contained in the police reports corroborated both Barboza's admission that he lied at trial and some defendants' claims of innocence. The judiciary's characterization of a police informant as a "tipster or citizen witness, rather than a confidential informant" without an evidentiary hearing is, at best, an unprincipled and disgraceful changing of the record in order to minimize the importance of the information in the possession of prosecuting authorities. In order to have made this finding, the court had to have found that the "informant did not participate in the crime charged."[141] There was nothing in the record by which the court could have made this determination.

However, upon reflection, such a characterization, if it were true, would have an even more compelling result. These were ruthless, notorious gangsters who generated fear in the law-abiding community. In addition to Barboza, Romeo Martin, Chico Amico and Nicky Femia died violent deaths.[142] Vincent Flemmi died in prison, in 1979. For a "citizen witness" to have come forward and incriminate these individuals in a gangland murder would have been a heroic act. Such testimony would have been unbiased and, therefore unimpeachable, unlike the testimony of an informant whose participation in criminal activity makes his testimony suspect and vulnerable to cross-examination.

Based upon the foregoing analysis of the SJC's reasoning as applied to the *Deegan* defendants, who were as unpopular as Sacco and Vanzetti, it is easy to conclude that if today, the Supreme Judicial Court of Massachusetts had to decide whether Sacco and Vanzetti should live or die, it would have demonstrated intellectual dishonesty in order to engage in result-oriented decision-making, ignoring the record, the spirit of the law, and the fundamental concept of logic as understood in Western Civilization, just as it did more than seventy years ago. Indeed, although the Sacco-Vanzetti Memorial Day Proclamation stated "[t]he people of Massachusetts today take pride in the strength and vitality of their governmental institutions, *particularly in the high quality of their legal system,*"[143] a more accurate assessment was made by renowned attorney F. Lee Bailey, regarding the *Deegan* case, in 1991:

> It's the most shameful case in the commonwealth. It's a disgrace. The commonwealth should hang its head in shame.[144]

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140. *See id.*

141. Commonwealth v. Brzezinski, 540 N.E.2d 1325 (1989), cited by the SJC in explaining the difference between an "informant" and "tipster."

142. Martin was murdered in 1965, Amico, in 1966. Femia was gunned down attempting a holdup in 1983.

143. *See* SINCLAIR, *supra* note 2.

144. Cullen, K., *To Die a Free Man,* BOSTON GLOBE, May 28, 1991, 13 at 14.

Litigating Air Crash Cases

MICHAEL J. PANGIA†

I. INTRODUCTION

For the most part, the structure of an aviation case is not unlike that of any product liability or other complex tort case. There are some differences, however, in the involvement of government agencies, the availability of certain documents and materials, and methods of presentation of certain evidence at trial that can lend a few unique aspects to this type of litigation that are essential to anyone tackling an aviation case. This presentation is intended to cover some of these unique points.

II. KEY GOVERNMENTAL AGENCIES AND CONTROLLING LAWS

Congress set up the Department of Transportation (DOT) in its present structure to promulgate policy for various forms of transportation, including railroads, highways, and, of course, aviation.[1] Within the DOT, the Federal Aviation Administration (FAA) is the controlling agency regulating and overseeing air travel, including both commercial and general aviation as well as many other facets of aviation.[2] Under the Federal Aviation Act of 1958,[3] the FAA regulates air carriers,[4] safety,[5] and the enforcement of aviation regulations.[6]

Nearly all aviation activities are regulated by the FAA through a set of Federal Aviation Regulations (FARs) contained throughout Title 14 of the Code of Federal Regulations. 14 CFR Part 91, for example, prescribes the rules governing the operation of all aircraft within the United States. Part 135 prescribes further rules governing the operation of air carriers operating the small aircraft, those under 12,500 pounds gross weight, and Part 121 for the air carrier operations involving the larger aircraft, such as American, United Airlines, and so

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1. 49 U.S.C. § 101 *et. seq.* (amended 1991).
2. 49 U.S.C. § 106 (amended 1997).
3. Revised and codified in 49 U.S.C. § 40101 (1996) *et. seq.*
4. 49 U.S.C. § 41101 (1994) *et. seq.*
5. 49 U.S.C. § 41101 (1994) *et. seq.*
6. 49 U.S.C. § 46101 (1994) *et. seq.*

forth. Recently, Part 135 was substantially revised to require air carriers operating the smaller aircraft (aircraft that can often carry ten or more occupants) to meet many of the more stringent requirements of Part 121. 14 CFR Part 1 provides a glossary of definitions and acronyms essential to the interpretation of many of the FARs.

In a civil action involving an aviation accident, the impact of the FARs can vary from state to state. Generally, they have been held to have the force and effect of law.[7] The finding of a violation of a FAR may create a presumption of negligence, some evidence of negligence, and/or negligence *per se*, depending, of course, on the state law applicable to a civil action.

The duty of investigating aviation accidents is one of the duties of the National Transportation Safety Board (NTSB) under the Independent Safety Board Act of 1974.[8] The NTSB has been established as an autonomous agency, the main purpose of which is to review, appraise, and assess continually the operating practices and regulations of agencies dealing with most phases of transportation, particularly aviation, highway, railroad, and even pipelines.[9] In the event of an aviation accident, the NTSB is charged with investigating it and determining the "probable cause." If the accident involves a smaller aircraft, the NTSB generally delegates the investigating duties to the FAA, but the findings of the investigation in that event are turned over to the NTSB for the probable cause determination. It should be kept in mind that while the NTSB report of an accident can be useful to a litigator, it has its limits that are discussed *infra*.

III. DEREGULATION AND PREEMPTION

An initial question commonly posed by litigators entering the aviation area is whether or not federal law, particularly under the structure of the Federal Aviation Regulations, preempts state law in application to air crash cases. The answer to that question can be involved, but basically, there is no preemption in most cases. The Airline Deregulation Act of 1978 (ADA),[10] does provide that no state shall enact or enforce any law, rule, regulation, standard or other provision having the force and effect of law relating to rates, routes, or services of any air carrier. Although the preemptive language deals with economic rather than safety regulation, some of the boundaries of its application remain the subject of some debate. Two recent Supreme Court cases addressed and resolved some, but not all, aspects of these issues.

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7. *See, e.g.*, Crossman v. United States, 378 F. Supp. 1312 (D. Or. 1974).

8. 49 U.S.C. § 1101 (1994) *et. seq.*

9. 49 U.S.C. § 1441 (1994).

10. 49 U.S.C. § 41713 (1994) *et. seq.*

In *Morales v. Trans World Airlines, Inc.*, the Court ruled that the ADA preempted state enforcement of Air Travel Industry Enforcement Guidelines, adopted by the National Association of Attorneys General.[11] That association had adopted these guidelines, among other things, to govern the content and format of airline advertising. The Court held that although some state actions may affect airline fares in too tenuous, remote or peripheral a manner to have preemptive effect, these guidelines, restricting advertising, clearly constituted state action within the preemption provision. In *American Airlines, Inc. v. Wolens*, the plaintiffs challenged the air carrier's retroactive changes to its frequent flier program on the ground that such changes violated the Illinois Consumer Fraud Act and constituted a breach of contract.[12] The Court held that the ADA preempted the consumer fraud claims, but did not preempt the breach of contract claims. The Court reasoned that the state consumer fraud claims were preempted because the claims were paradigmatic of the consumer protection legislation found preempted in *Morales*. However, the Court stated that it does not read the ADA preemption clause to shelter airlines from suits alleging no violation of state-imposed undertakings, but seeking recovery solely for the airlines' alleged breach of its own self-imposed undertaking.

Since the advent of *Morales* and *Wolens*, courts have had difficulty delineating the scope of preemption. In *Barbovok* v. *USAir, Inc.*, for example, a passenger was injured when a flight attendant dropped a soft drink on the passenger's foot.[13] The ADA did not preempt state common law for injuries caused by a carrier's breach of duty of reasonable care in providing cabin services. Likewise, in *Haavistola, v. Delta Airlines*, a passenger was injured when assaulted by another passenger.[14] The court held that the ADA did not preempt the air carrier's duty of reasonable care and allowed a suit for negligence under state law. In *Margolis v. United Airlines, Inc.*, a tort claim against an airline for injuries suffered from falling overhead luggage is not preempted.[15] On the other hand, in *Smith v. Comair, Inc.*, the Court held that contract and tort claims arising from an airline's refusal to permit a passenger to board, due to safety-related reasons, are preempted by the ADA because boarding procedures are "services" rendered by an airline.[16] Moreover, the involvement of Federal Aviation Regulations alone does not offer grounds for federal preemption.[17] Therefore, we can conclude generally that federal law does not preempt personal

11. *See* Morales v. Trans World Airlines, Inc., 112 S. Ct. 2031 (1992).

12. *See* American Airlines, Inc. v. Wolens, 513 U.S. 219 (1995).

13. *See* Barbovok v. USAir, Inc., 950 F. Supp. 1145 (S.D. Fla. 1996).

14. *See* Haavistola v. Delta Airlines, No. 96C-06-047, 1997 Del. LEXIS 63 (Del. Feb. 28, 1997).

15. *See* Margolis v. United Airlines, Inc., 811 F. Supp. 1352 (E.D. Mo. 1993).

16. *See* Smith v. Comair, Inc., 134 F.3d 254 (4th Cir. 1998).

17. *See, e.g.*, Elsworth v. Beech Aircraft Corporation, 208 Cal. Rptr. 874 (S.C. Cal. 1984), *cert. denied*, 471 U.S. 1110 (1985). (Holding defendant manufacturer's compliance with FARs was not a defense to a product liability action under state law).

injury and death cases, while those cases that fall within the provision of regulated services are preempted.

IV. RELIANCE ON GOVERNMENT REPORTS

There are many times attorneys attempt to over rely on the findings of the NTSB for the development of an air crash case. That can prove to be a mistake. That is not to say the NTSB report is of no help, but that the aviation litigator must know of the limitations of these reports. Like the proverbial hot dog ". . . if you knew what went into it you wouldn't eat it . . .," the content of an NTSB report, often embodying hearsay, *ex parte* statements, newspaper articles and many unsupported conclusions of fact, in whole or in part, may be unsuitable for litigation and inadmissible. An independent investigation by the litigating attorney is essential regardless of the existence of an NTSB report.

In the event of an aircraft accident, the NTSB has jurisdictional control over the wreckage site and the associated evidence. If the accident involves a large air carrier aircraft, an NTSB "go-team" is dispatched with an NTSB Investigation-in-Charge under whom are various specialty teams assigned to investigate weather avionics, communications, engines, controls, human factors and other such specialized areas of concern. The initial product of an NTSB investigation is the Preliminary Report which contains merely the place of the accident, the names of persons on board the aircraft, an investigation number designating the geographical region of the NTSB assigned to the accident, the names of the NTSB Investigator-in-Charge and FAA designee, if any. Each specialty group will author an individual report to be combined in one factual package. A public hearing may be held, followed by a meeting of the NTSB five board members who will discuss and vote on the probable cause, related factors and recommendations proposed by the NTSB staff. Within approximately four to eight months after the accident, depending upon the workload at the time, the NTSB will publish the final report. Most accidents, however, do not receive this much time and attention. A FAA designee will investigate the smaller accidents, sometimes with an NTSB investigator, depending upon work load, and turn over the findings to NTSB for a meeting and vote on probable cause and related factors. Public hearings are very rare in most cases. A final report is published in between four and twelve months, the time again depending upon work load.

Ironically, the testing of aircraft components is generally turned over by the NTSB to the component manufacturers to perform under the supposed supervision of the FAA or NTSB. The NTSB does have testing laboratories in Washington, D.C., but they are not often used in accidents involving smaller aircraft. Unfortunately, the attorney for a victim is restricted from being present at such

testing.[18] At the completion of the tests, the wreckage and the parts are then released to the owner (or owner's insurer) to be disposed of as the owner wishes. The manufacturer's test reports and conclusions, often self-serving, are turned over to the NTSB for inclusion in the official report, sometimes without any further comment or verification by the NTSB. If the attorney is retained early enough, notices to preserve wreckage and other evidence can be served on its custodians. It can be surprising what privately retained experts can find that may be completely overlooked or not even considered by the NTSB or the product manufacturer's investigators.

The budget and staffing limitations of the government can also affect adequate coverage of all essential evidence by the NTSB or FAA. Sometimes an investigator may develop a personal bias brought about by preconceptions of how the accident occurred. For example, the comment "it looks like pilot error to me" is one heard quite often as the investigator comes to the scene. When time and budget become considerations, there is a tendency to interview just a few who may support that preconception, often leaving uninterviewed many valuable witnesses who may be able to shed a different light on the situation. Early access to witnesses and the wreckage by an attorney, although limited during early stages of an investigation, can be productive. With some knowledge of the aviation system, an attorney can sometimes encourage emphasis on certain areas of inquiry, which, on occasion, can influence the outcome of the final accident report. Otherwise, the investigator may ignore witnesses germane to a lawsuit, but not necessarily to the NTSB accident report. Likewise, the NTSB investigator may overlook many other items of evidence useful in litigation.

In reviewing the NTSB report, it is also important to realize that one should never construe "probable cause" to mean "proximate cause" or attempt to substitute one for the other. As an example, an action may be brought against an engine manufacturer for injuries resulting from an engine failure. The pilot may have been negligent for not handling the engine failure properly. Although the NTSB will in all likelihood find the probable cause to be pilot error, this conclusion would be irrelevant in a products liability suit wherein the judge or jury may find a breach of warranty, strict liability, or negligence on the part of the manufacturer to be the proximate cause of the accident. Probable cause as used by the NTSB is that which is "likely to be, but not proven." In determining probable cause, the Board makes no attempt to review admissible evidence, deliberate or decide as does a judge or jury, or even to operate under any litigation safeguard. Embodied in the probable cause are "facts" which may include hearsay, double hearsay, statements not taken under oath, unsigned statements, newspaper articles, or information from almost any source which an investiga-

18. *See, e.g.*, Thomas Brooks Chartered v. Burnett, 920 F.2d 634, at 638 (10th Cir. 1990).

tor may have felt would be useful, all ultimately depending upon a vote by NTSB politically appointed board members, few of whom are experienced in aviation.

It is also important to realize that despite the appearance of common language used in the specification of probable cause and related factors in the NTSB report, the words may in fact have one or more specialized meanings within the NTSB computer system program. For example, in the report, a factor in an accident may be stated to be an "incorrect weather forecast." According to the program, this could mean, among other things, that either the pilot briefed himself on the wrong forecast, that the weather simply did not turn out as forecasted although the forecast was made by using proper procedure and care or that the forecast was improperly made. Without realizing the scope of specialized language, an attorney might mistakenly conclude that the forecast was "negligently made." Thus, in interpreting the Board report, the NTSB computer format is a necessary tool.

Moreover, the real cause of an accident may be totally unrelated to the factors listed even in a properly interpreted board report. It must be kept in mind that the purpose of the Board report is to provide statistical data for safety evaluation and not to spell out where the fault lies in a liability sense which is the purpose of litigation. Considering the above along with the limitations of the NTSB's efficiency imposed by the personnel and budgetary constraints, an attorney should never completely rely on the Board's findings and reports in evaluating a case or to provide a definitive analysis for case preparation. The NTSB report and findings should be considered merely as a good starting point on the path of discovery.[19]

One should also be aware that the Independent Safety Board Act of 1974 contains a prohibition of admissibility or use of an NTSB accident report in litigation involving the same accident.[20] However, there are times, particularly considering the restricted access to the wreckage site and other evidence, when the NTSB report is the only practical key to begin efficient discovery of evidence for a lawsuit. The all-encompassing prohibition embodied in the phrase "or use" contained in the statute, balanced against the need to give litigants access to information necessary for their day in court, made courts reluctant to construe the prohibition so strictly as to disallow the use of everything in the report. Complexity generated by various court rulings, therefore, led to a 1975

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19. For an example, *see generally In re* Air Crash disaster at Boston, Mass. On July 31, 1973, 412 F.Supp. 959 (D. Mass. 1976), *aff'd,* 561 F.2d 381 (1st Cir. 1977), *cert. denied,* 434 U.S. 1064 (1978). The NTSB stated that a nonstandard intercept of the localizer course given by air traffic controllers was a factor in the accident. The court, however, found that the sole proximate cause of the accident was pilot negligence. *See also,* Deal v. United States, 413 F.Supp. 630 (W.D. Ark. 1976), *aff'd,* 552 F.2d 255 (8th Cir. 1977). The NTSB found that there was an "incorrect weather forecast." Nevertheless, the court found the cause of the accident was solely due to pilot error.

20. 49 U.S.C. §§ 1441(e) and 1903(c).

change of the regulations to redefine the title, "The Board's Accident Report," as that which contains the board's determinations, including the probable cause of the accident. The "factual accident report" is not part of the board's report referred to under the statute but rather "an investigator's report of the investigation of the accident.[21] This factual accident report can be used in litigation, while the statute precludes such use of the board's report which is by definition now reduced to the probable cause finding, related factors, and recommendations. However, it should be remembered that as far as admissibility is concerned, this so called useable factual report may contain *ex parte* or hearsay statements, newspaper articles, and conclusory facts that may have been derived from sources a litigant may consider questionable. Therefore, while the factual accident reports are obtainable and usable in litigation, their content may be subject to traditional rules of evidence concerning admissibility.

Also, even in many of these "factual" reports, one can find some rather conclusory statements often bordering on opinion evidence. Depending upon which side you are on, the conclusory statements often contained in the factual report can be troublesome. But, according to *Beech Aircraft Corp. v. Rainey*, the admissibility of government reports is not restricted to those portions traditionally categorized as fact, factual findings or factual conclusions, but may also include opinions and conclusions in evaluative reports if those portions are held to be "trustworthy."[22] While they may be labeled "factual evaluations," they are often in essence conclusions on cause. Nevertheless, under *Rainey*, they are generally admissible and can be very persuasive despite all instructionary precautions given to the fact finders in a trial.

There appears to be a perception that the more liberal allowance of such evidence under *Rainey* favors the plaintiffs while defendants are generally opposed to the introduction of conclusions and opinions. There is no basis for that perception except, perhaps, that many plaintiff attorneys place heavy reliance on government accident reports and will not accept a case involving a transportation accident unless the government report contains conclusions favorable to that cause. Thus, we may expect the majority of motions for admissibility to come from the plaintiffs. Realistically, the relative positions are not plaintiff-defendant oriented, but are dependent upon what the report states. Indeed, *Rainey* involved the successful attempt of the defendant, Beech Aircraft Corporation, to introduce the official Judge Advocate General's report of the United States Navy, including the conclusion that the cause of the accident was the pilot's failure to maintain a proper interval with another aircraft. A verdict was returned in favor of Beech Aircraft, largely because of that evidence.

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21. 49 C.F.R. 835.2(a)(b) (1990).

22. *See* Beech Aircraft Corp. v. Rainey, 109 S.Ct. 439 (1988).

An illustration of the application of *Rainey* to a report of the NTSB is found in *In Re Air Crash Disaster at Stapleton Intern.* In that case, an executive summary, the probable cause findings and the recommendations of the NTSB along with a human factors subcommittee report concluded a lack of qualifications of the crew of the defendant airline, inferring that it was a cause of the accident.[23] The plaintiff's were not attempting to introduce the obviously prohibited executive summary, probable cause and recommendations, but rather the human factors subcommittee report. The court noted that *Rainey* did away with the necessity of making distinctions between facts and conclusions or opinions for the purpose of admissibility. Since the human factors report had been adopted in the Board's final report, taken as a whole, the report satisfied the trustworthiness rules applicable under *Rainey* and was admitted as evidence.

The *Rainey* case does not appear to indicate any exception for accident reports generated by foreign countries. In the pre-*Rainey* case of *Graiver v. Walkers Cay Air Terminal, Inc.*, the plaintiffs proffered an aviation accident report prepared by the Office of the Director General of Civil Aeronautic of the United States of Mexico, Department of Communications and Transportation.[24] The defendant objected on the grounds of hearsay. Unquestionably, it was hearsay, but admissible if it fell within the Federal Rules of Evidence FRE 803 exception for public records and reports. The court in *Graiver* held that admissibility, under FRE 803(8) in particular, would extend to the Mexican Report as long as it was made pursuant to lawful authority. That somehow makes it trustworthy. The court noted that the report was issued following a "timely investigation" by the agency of the Mexican government possessing the authority and expertise to study civil air disasters and that the defendant did not come forward with evidence to overcome "the presumptions of regularity and validity attaching to government acts." However, in the case of *In Re Air Crash Disaster at Sioux City, Iowa, July 19, 1989*, the court rejected an entire NTSB report, including a factual report, largely because of its overall hearsay quality, a ruling which may be is questionable under *Rainey*.[25] In summary, the wise litigator should focus on establishing the proper foundation wherever possible for all the evidence without taking a chance that any part of a government report will be admissible.

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23. *See In Re* Air Crash Disaster at Stapleton Intern, 720 F. Supp. 1493, at 1504 (D. Colo. 1989).

24. *See* Graiver v. Walkers Cay Air Terminal, Inc., 15 CCH Avi. Cases 18, 494 (S.D.N.Y. 1980) (not otherwise reported).

25. *See In Re* Air Crash Disaster at Sioux City, Iowa, July 19, 1989, 781 F. Supp. 1307 (N.D. Ill. 1991).

V. SUITS AGAINST THE UNITED STATES

Under the Federal Tort Claims Act,[26] the United States can be sued like a private party for negligent acts or omissions of its employees. In aviation, the air traffic control system within the United States falls within the functions of employees of the FAA. Flight Service Station personnel are responsible for weather reports and forecasts and for certain flight plans of aircraft. If these functions are performed negligently, thereby causing an accident, the government can be liable for compensatory damages in a civil action. The law applied to such suits is the law where the act or omission occurred, including that state's conflict of laws rules.[27]

An important exception to this liability is the so-called "discretionary function exception"[28] which provides that a government cannot be sued for the performance, lack of performance, or abuse of a discretionary function.[29] However, when the government negligently performs an "operational" function, such as operating a lighthouse, the exception does not apply.[30] Likewise, the government can be held liable for negligent air traffic control services,[31] or for the failure to provide the pilot with important information.[32] On the other hand, negligence in the performance of surveillance duties for the purpose of policing and overseeing regulatory compliance is not actionable.[33] Negligence in certification procedures is also a form of policing and has also been held to be within the discretionary function exception.[34] Compare *Berkovitz v. United States*, however, wherein the government was held liable for failure to follow a course of action specifically prescribed by a statute, regulation or policy.[35]

Before an action may be commenced under the Federal Tort Claims Act, a claim must be filed with the agency involved within two years of the accident.[36] One may obtain a claim "Form 95" either from one of the agencies or from the Justice Department. A proper claim must contain the name of the claimant, date of the accident, and a brief description of the alleged negligence. It calls for names and addresses of witnesses, but that is unnecessary at this stage. The claim must be signed and it must contain a "sum certain," like "ten million dollars." Statements like "a reasonable amount" or "ten million plus" renders

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26. 28 U.S.C. § 1346 (1948) *et. seq.*
27. *See* Richards v. United States, 369 U.S. 1 (1962).
28. 28 U.S.C. § 2680(a) (1948).
29. *See* Dalehite v. United States, 346 U.S. 15 (1953).
30. *See* Indian Towing Company v. United States, 350 U.S. 61 (1955).
31. *See* Eastern Air Lines v. Union Trust Co., 221 F.2d 62 (D.C. Cir. 1955), *aff'd. sub nom,* 350 U.S. 907 (1955).
32. *See* Dyer v. United States, 551 F. Supp. 1266 (W.O. Mich. 1982); *see also* Brooks v. United States, 695 F.2d 984 (5th Cir. 1983).
33. *See* Clemente v. United States, 567 F.2d 1140 (lst Cir.), *cert. denied,* 435 U.S. 1006 (1978).
34. *See* United States v. S.A. Empress de Viamao Area Rio Ghanese, 467 U.S. 797 (1984).
35. *See* Berkovitz v. United States, 108 S.Ct. 1954 (1988).
36. 28 U.S.C. § 2675 (1948).

the claim jurisdictionally defective. Be mindful that the amount stated in the claim limits the amount of the judgment in trial. So, the practice is to estimate on the high side of the claim. In an aviation case against the FAA, the claim should be mailed, certified return receipt, to the Chief Counsel, Assistant Chief Counsel for Litigation or the Administrator of the FAA, Washington, D.C.

If the claim is denied, you have six months to file the complaint even if that six-month period falls well within the two-year state limitation for the claim. If it is not denied (usually the FAA simply takes no action), you may file suit as long as six months have elapsed from the time the claim is filed. The action may then be brought either where the negligence occurred or where the plaintiff resides. In filing the action, be careful to follow Rule 4 of the Federal Rules of Civil Procedures. Failure in that regard can be jurisdictionally fatal as well.

VI. ACCIDENTS INVOLVING MILITARY AIRCRAFT

After an accident involving a military aircraft, the subject branch of the service investigates and reports facts upon which a military investigative board formulates conclusions, opinions, and recommendations, all of which are compiled in an Aircraft Accident Report ("AAR"). The military with some success has maintained confidentiality of the AAR under both executive privilege and exceptions contained in the Freedom of Information Act ("FOIA").[37]

Litigants should experience little difficulty in obtaining factual information concerning military aircraft accidents within the circumscription of the Federal Rules of Civil Procedure. Various departments of the military have been relatively successful in dealing with both discovery issues in litigation and requests under the FOIA by developing what is known as the "collateral report" which serves to provide the source of factual information to private parties. This procedure eliminates any prejudicial effect because the factual information voluntarily provided is usually sufficient to lead to the discovery of admissible evidence.

Before taking a case involving a military accident, caution is advised. The doctrine of *Feres v. United States*, precludes tort cases against the government for injuries and deaths to service people.[38] Also, if the accident is caused by a design defect, the "government contractor defense," espoused in *Boyle v. United Technology Corp.*, precludes tort suits against manufacturers of military equipment for which there are reasonably precise specifications designed or approved by the government.[39] On the other hand, a manufacturing defect where

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37. 5 U.S.C. § 552 (amended 1996) *et. seq. See also* United States v. Reynolds, 345 U.S. 1 (1953), 5 U.S.C. 552(b)(4)(5) (amended 1996).

38. *See* Feres v. United States, 340 U.S. 135, 146 (1950).

39. *See* Boyle v. United Technology Corp., 487 U.S. 500, 511 (1988).

specifications are not adhered to is not so protected.[40] A study of these cases and their progeny is essential in considering taking a case involving a military air crash. But, this defense which has been abrogating nearly all cases against manufacturers of military aircraft is beginning to be more defined.

Courts are beginning to realize that nearly everything the government purchases must have accompanying precise specifications, but often it is the manufacturer who designs and decides upon the feasibility, practicality and safety of those specifications, notwithstanding that the government signs off on all specifications as part of the purchase procedure. In *Trevino v. General Dynamics Corp.*, the standard applied by the court required the government contractor to show that the government actually participated in the discretionary design rather merely approving imprecise or general guidelines.[41] If the contractor retains discretion over the important design decisions, it should enjoy no immunity from liability under *Boyle*. The defendant-manufacturer should have to show that the government approval was more than a "rubber stamp," but tantamount to a "government made me do it" defense. The case of *Gray v. Lockheed Aeronautical Sys. Co.* followed *Travino* and held that the defendant failed to show that the specifications for a defectively designed aircraft aileron servo submitted to the government were precise.[42] If the specifications are general and merely descriptive in nature, they may not form a basis for a *Boyle* defense. While there is now some erosion of this almost summary defense, these cases are still very challenging for the plaintiff.

VII. CASES AGAINST MANUFACTURERS OF CIVILIAN AIRCRAFT

One of the most important questions to be initially resolved before considering a case against an aircraft or aircraft component manufacturer is whether the case is precluded under the General Aviation Revitalization Act of 1994 ("GARA").[43]

GARA sets up an eighteen-year statute of repose protecting manufacturers of general aviation aircraft and preempts state law, in so far a state law would otherwise permit such actions. If a state has a shorter statute of response, that state law will apply, and GARA does not lengthen it.[44] A general aviation aircraft is statutorily defined as an aircraft, certified by the FAA, that seats less than twenty passengers and that was not engaged in scheduled passenger opera-

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40. *See* Kleeman v. McDonnell Douglas Corp., 890 F.2d 698 (4th Cir. 1989), *cert. denied*, 495 U.S. 953 (1990).

41. *See* Trevino v. General Dynamics Corp., 865 F.2d 1474 (5th Cir), *cert. denied.* 493 U.S. 935 (1989).

42. *See* Gray v. Lockheed Aeronautical Systems Co., 125 F.3d 1371 (11th Cir. 1997).

43. 49 U.S.C. § 40101. (1994).

44. GARA will be applied in a state court as it does not confer federal jurisdiction. *See* Wright v. Bond-Air, Ltd., 930 F. Supp. 300 (E.D. Mich 1996).

tions at the time of the accident.[45] However, if a part was replaced on such an older aircraft, the repose period for that part begins to run on the date it was installed.[46] Whether dealers, distributors, or lessors fall within the definition of a manufacturer is unclear because GARA does not mention them and some states may have their own definition of the term manufacturer within their own product liability laws.

There are several exceptions to the statute of repose imposed by GARA on general aviation aircraft. If a plaintiff can prove that the manufacturer knowingly misrepresented or concealed material or relevant information from the FAA and that conduct is causally related to the harm, GARA will not be available as a defense. If a passenger is being transported for the purpose of medical treatment or other emergency and is injured or killed in a crash, GARA does not apply. Persons outside of the aircraft, for example, persons on the ground who are injured or killed, will not be subjected to the GARA defense.[47]

Manufacturers of aircraft and aircraft component certified in the United States exercise a continuing duty regarding the safety of the products they distribute to the aviation community. They can be held liable for defective or negligent design, negligent manufacturing, and failure to warn and for lack of crashworthiness in certain instances.[48] Often a manufacturer will attempt a defense of preemption, claiming that adherence to the minimum standards set forth in the FAR's exonerates any further duty. This defense is generally without merit.

When a manufacturer designs an aircraft or component part, it applies for a Type Certificate from the FAA. The FAA requires a rather extensive testing program to ensure the item complies with the regulations for strength, safety and so forth.[49] If the manufacturer can show that it has the facilities and a program to make conforming copies of the certified prototype, it is granted a Production Certificate.[50] Each manufactured copy shown to comply with the Type Certificate and is safe to fly, receives an Airworthiness Certificate that stays with that individual aircraft.[51] This regulatory system pertaining to aircraft and component manufacturing creates minimum standards and does not preclude findings of negligence and strict liability under state law.[52]

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45. H.R. REP. No. 103-525, pt. 2, at 2 (1994).

46. *See* Estate of Glover v. American Resource Corp., No. 160673, slip op. at 1 (Cal. Sup. Ct. Sept. 13,1996).

47. H.R. REP. No. 103-525, pt. 2, at 1-2 (1994).

48. *See, e.g.*, Cleveland v. Piper Aircraft Corp., 890 F.2d 1540 (10th Cir. 1989) (Applying the law of New Mexico).

49. 49 U.S.C. § 44704(a) (1994). Airworthiness standards for various categories of aircraft can be found in 14 C.F.R. Parts 23, 27, 33, 34, and 35. Certification procedures for products and parts may be found in 14 C.F.R. pt. 21.

50. 49 U.S.C. § 44704(b) (1994).

51. 49 U.S.C. § 44704(c) (1994).

52. *See* Elsworth, *supra* note 17.

It is also important to note that the presence of an Airworthiness Certificate on an aircraft does not mean that the aircraft is indeed airworthy. It means only that it met the Type Certificate requirement when it was originally manufactured. An aircraft can be beyond its required periodic inspections or even be in a state of disrepair and still retain its Airworthiness Certificate. An aircraft is considered by the FAA to be airworthy as long as "the maintenance, preventive maintenance and alterations are performed" in accordance with the FARs and the aircraft is registered in the United States.[53] Owners and operators of aircraft are responsible to see that proper maintenance is accomplished, so the responsibility for the failure of a component can, in some circumstances, fall upon the owner or operator as well as the entities that actually perform the maintenance.

Cases against manufactures can be difficult to prove in certain instances, particularly when the evidence is destroyed in a crash or the alleged problem is an intermittent one that is not always evident in a pre or post crash inspection. In that event, evidence of similar occurrences can be vital to a case. The first challenge in these situations is to obtain discovery of potentially relevant historical data from the defendant manufacturer. This can be difficult, particularly with the expected divergent points of view between plaintiffs and defendants on what is potentially relevant. Admission into evidence of historical data is another challenge since courts are given wide discretion in allowing the admission of evidence of similar accidents, particularly on the issue of causation.[54] Basically, if the plaintiff can show "substantial similarity" of the past events to the one at issue, a court may allow the admission of such evidence.[55] Because of the regulatory oversight in the aviation field, such evidence is usually quite available, if not from the defendant manufacturer then from government reports and records.[56]

VIII. SUITS INVOLVING MASS AIR DISASTERS

The occurrence of a mass disaster with its dramatic loss of life and suffering to a large number of people who reside in many different areas gives rise to the need for Multi District Litigation ("MDL") procedures[57] and guidelines contained in the Manual for Complex Litigation. The first step in the MDL process is for one or more of the interested parties to request the Judicial Panel on Multi

53. This provision is not found in the FARs or in the Federal Aviation Act, but rather on the face of the Airworthiness Certificate itself.

54. *See, e.g.*, Cooper v. Firestone Tire & Rubber Co., 945 F.2d 1103, 1105 (9th Cir. 1991); Rye v. Black & Decker Manufacturing Co., 899 F.2d 100, 102 (6th Cir. 1989).

55. *See* Four Corners Helicopters, Inc. v. Turbomeca, S.A., 979. F.2d 1434, 1440 (10th Cir. 1992).

56. NTSB Accident reports of similar occurrences are not statutorily proscribed by 49 U.S.C. § 1441 (e) because that statute prohibits the use thereof in litigation involving only that particular accident.

57. 28 U.S.C. §1407 (1968).

District Litigation to transfer all lawsuits filed, or to be filed, to a single transferee judge for "coordinated or consolidated pretrial proceedings."

The statutory requirements for transfer are relatively straightforward: (a) that there are civil activities pending involving "one or more common questions of fact" and (b) that actions are pending in "different districts." What is more difficult, however, is the determination of the proper transferee court based upon which will best "serve the convenience of the parties and witnesses and which will promote the just and efficient conduct" of the actions filed or likely to be filed. Substantial weight is given to the site of the accident.[58] Other factors, such as the location of witnesses, the location of records and documents, the domiciles of the interested parties, where most of the discovery will be conducted and the experience of the transferee court may also be considered.

Once the case is transferred, the transferee judge approves a "plaintiff's committee" to represent all plaintiffs on liability issues. The committee is usually comprised of three to seven attorneys, supposedly experienced in complex multi district litigation, but the selection sometimes improperly turns on who has managed to sign up the most cases. The development of a Practice and Procedure Order is a next step which sets forth the schedule for discovery. It should also include a mechanism for resolving discovery disputes. Usually, a magistrate judge takes a very active role in the entire process.

The common problem with the typical committee approach is the diverse views on how to proceed about decisions, whom to sue, what discovery is important, how the case should be tried, and so forth. The individual litigant too often loses control of a case to a committee that is not always as experienced in aviation litigation, as the committee members might like everyone to believe. A strong, creative transferee judge is usually a vital ingredient in the process in order to prevent wasted efforts and discord among committee members.

The place where the initial suit is filed is a vital consideration because the transfer will, for the most part, carry with it the law of the transferor court on many vital issues.[59] A plaintiff may also want to consider an individual action in a state court where the airline is domiciled or where there is a lack of diversity, which will prevent removal to the federal courts and thus involvement with the MDL process. It will involve venturing forth completely independently and is not recommended where resources or experience is limited, but it can often result in many tactical advantages leading to an early settlement if done properly.

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58. *See, e.g., In Re* Air Crash Disaster at Charlotte, N.C., September 11, 1974, 393 F. Supp. 1404 (Md. 1975). *See also* Lexicon v. Milberg, 118 S.Ct. 956 (1998) on limitations of the transferee court concerning the trial itself.

59. *See, e.g.*, Windbourne v. Eastern Air Lines, Inc., 479 F. Supp. 1130 (S.D.N.Y. 1979).

IX. CASES INVOLVING INTERNATIONAL AIR TRAVEL

Most aspects of international air travel, including accidents involving passenger deaths and personal injury, are governed by the "Warsaw Convention."[60] Although a complete history of the Warsaw Convention and its limitations are beyond the scope of this article, suffice it to say that the Convention was signed in 1929, with the United States becoming a party in 1934. Today, more than 120 countries are parties to the Convention.

Pursuant to the Convention, the signatory nations have accepted a set of uniform rules concerning the obligations and rights with respect to the potential liability of an air carrier to its passengers and shippers. In exchange for an air carrier's absolute limitation of liability, the Convention presumed air carrier liability for death or personal injuries to its passengers caused by an "accident" occurring either aboard the aircraft or while embarking or disembarking the aircraft. Consequently, under the Convention, once a passenger proves that an accident resulting in death or personal injury occurred aboard the aircraft or while he or she was embarking or disembarking, the burden of proof shifts to the air carrier. To avoid liability, the air carrier could then prove that it took "all necessary measures" to avoid the accident or that the passenger was contributorily negligent.

Originally, the limitation of liability for passenger death and personal injury was established in the Convention at 125,000 French gold francs, worth approximately $8,300 in 1934 and approximately $10,000 based upon the last official U.S. price of gold in 1976.[61] In 1966, however, through the "Montreal Agreement," the limitation was raised to $75,000 per passenger when the point of origin, point of destination or even a scheduled stopping point occurs in the United States. Significantly, the Montreal Agreement also eliminated the "no negligence" defense for air carriers, thus establishing "no-fault" or "absolute liability" on air carriers. Consequently, the mere proof that death or personal injury was caused by an accident aboard the aircraft or while embarking or disembarking the aircraft, necessarily will lead to a recovery up to $75,000. The Supreme Court has defined the term "accident" broadly to mean "if the passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger."[62]

As noted above, the Warsaw Convention applies to all international air travel. To form a contract for international air travel, and thus fall within the provisions of the Convention's limitations, the Convention requires that both parties (i.e., the passenger and the air carrier) contemplate international travel.[63] Thus,

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60. Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), *reprinted* in 49 U.S.C. § 1502 (40105), note (1976).

61. *See* Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243 (1984).

62. *See* Air France v. Saks, 470 U.S. 392, 405 (1985).

63. Warsaw Convention, Art. 1 *et seq.*, 49 U.S.C. App. (1988 Ed.) §1502 note.

although a passenger may be injured on a purely domestic portion of a flight, the Convention's limitation will apply if the flight *in toto* is considered international travel. For example, if a passenger purchases a ticket for a flight originating in Chicago, with a connecting flight in New York destined for Rome, the passenger will be bound by the Convention's limitation although he or she is injured aboard the leg from Chicago to New York.[64]

Perhaps the most publicized alternative around the Convention's $75,000 limitation is the "willful misconduct" exception. The Convention specifically provides for unlimited damages if the passenger can prove that his or her injuries are the result of the air carrier's willful misconduct.[65] This exception has been construed very narrowly, however, and it is indeed the rare exception, which withstands appellate review. For example, in *Ospina v. Trans World Airlines Inc.*, the jury determined that the air carrier engaged in willful misconduct for its failure to search the aircraft thoroughly, as required by specific procedures, and detect a terrorist's bomb although a specific threat existed at the time.[66] The jury found the airline to be liable for willful misconduct and judgement was entered accordingly. The Circuit Court subsequently reversed, holding that it did not believe that a reasonable juror could conclude that the air carrier's conduct rose to the level of "willful misconduct." In the case of *In re Air Disaster at Lockerbie, Scotland on December 21, 1988* Pan Am was held to be willfully negligent in failing to obey procedures requiring the matching of each passenger to the luggage.[67] As a result, a bomb was inadvertently let onto the aircraft, killing everyone aboard. The affirmance, however, was a two to one decision with a very strong dissent. Suffice it to say, proving willful misconduct to circumvent the Warsaw Convention is always a difficult challenge.

It should be kept in mind that many major air carriers have waived the Warsaw limits. Because the existence of the Warsaw Convention, plaintiffs are usually encouraged to "pull all stops" in trying to prove willful misconduct. The expense of defending such allegations can be costly. It also creates an incentive for plaintiffs to sue manufactures, the government or other entities not protected by the Convention. Often the same interests insuring the air carrier insure some of these other defendants in whole or part. Insurance companies find no problem in charging extra premiums for the added risk, so we are beginning to see

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64. *See* Lemly v. Trans World Airlines, Inc., 807 F.2d 26 (2d. Cir. 1986) (Wherein no contract for international travel was formed when air carrier was unaware that the passenger was scheduled to depart on a flight with a different airline to Saudi Arabia the day after the subject domestic flight).

65. *See also* Chan v. Korean Air Lines LTD., 490 U.S. 122 (1989); *In re* Air Disaster at Lockerbie, Scotland, 928 F.2d 1267 (2d Cir. 1991), *cert. denied*, 502 U.S. 920, 112 S. Ct. 331 (1991).

66. *See* Ospina v. Trans World Airlines Inc., 975 F.2d 35 (2d Cir.), *cert. denied*, 113 S.Ct. 1944 (1993).

67. *See In re* Air Disaster at Lockerbie, Scotland, 928 F.2d 1267. *cert. denied sub nom. See also* Rein v. Pan American World Airways, Inc., 502 U.S. 920 (1991).

the end of application of this treaty that was developed years ago to protect a then fledging air carrier industry.

X. WHERE TO FILE THE LAWSUIT

Where there is a choice between commencing an aviation accident case in a federal or state court, the decision turns on a variety of factors; there are too many, and some too obscure, to be discussed without a long dissertation. Therefore, just a few basic points are covered here.

It should be kept in mind that if there is diversity and the requisite dollar amount jurisdiction in the federal court, a defendant, within thirty days of receiving a copy of the complaint or a summons with the complaint filed in the state court, whichever is shorter, can remove the case to the federal court.[68] Actions against the United States must be brought in the federal court, without a jury, where either the plaintiff resides or where the act or omission occurred.[69]

If a defendant is a foreign airline owned or operated by a foreign country, the case must be brought under the Foreign Sovereign Immunities Act ("FSIA").[70] Essentially, the FSIA recognizes immunity for a sovereign's public acts, but it does not extend to cases arising out of a foreign state's strictly commercial acts or for torts occurring in the United States causing personal injury or death.[71] Such actions are within the exclusive jurisdiction of the federal courts.[72] It should also be kept in mind that simply because FARs may be involved in a case, that alone does not arise to a federal question to confer jurisdiction on federal courts.[73]

If the case is one under the Warsaw Convention, the action may be brought where the air carrier is domiciled or has its principal place of business, where the contract of transportation was made or where the transportation was to end.[74] Although there is some lingering controversy on the subject, because this treaty involves a federal question, it appears that most courts consider exclusive jurisdiction to be in the federal courts.[75]

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68. 28 U.S.C. § 1441 (1948) *et. seq.*

69. 28 U.S.C. § 1346(a) (1948), § 1402 (b), and § 2402.

70. 28 U.S.C. § 1604 (1948) *et. seq.*

71. 28 U.S.C. § 1605(a)(2) (1948)and 1603 (d) (1948). *See* Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 487 (1983); Transaero, Inc. v. La Fuerza Aera Bahviana, 30 F.3d 148, 151 (D.C. Cir. 1994), *cert. denied*, 115 S.Ct. 1101 (1995).

72. 28 U.S.C. § 1330 (1948).

73. 28 U.S.C. § 1331 (1948); *see, e.g.*, Trinidad v. American Airlines, Inc., 932 F. Supp. 521 (S.D.N.Y 1996).

74. Unification of Certain Rules Relating to International Transportation by Air, Oct.12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), *reprinted* in 49 U.S.C. § 1502 note (1976) Article 28 (1); *see* Klos v. Polskie Linie Lotnicze, 133 F.3d 164 (2d Cir. 1997).

75. *See In re* Air Disaster at Lockerbie, Scotland on December 21, 1988, 928 F.2d 1267 (2d Cir. 1991) *cert. denied* 112 S Ct. 331 (1991); Boehringer - Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc., 737 F. 2d. 456 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 951 (1985).

In addition to jurisdictional considerations, the place of the action may also be affected by the doctrine of *forum non conveniens.* A court may dismiss a case under this doctrine if the court determines that the plaintiff's chosen forum would prove a heavy burden on the defendant or the court.[76] In a leading case, *Piper Aircraft Co. v. Reyno,* the subject crash of an American manufactured aircraft occurred in Scotland killing Scottish passengers.[77] A wrongful death suit was brought in federal court against the American manufacturers of the aircraft and the propeller. On motion of defendants, the case was transferred to Scotland after the court determined there was an adequate remedy available there even though it was less favorable than one that could be acquired in the United States. Since the *Reyno* case, courts have shown little reluctance in dismissing a case on the doctrine of *forum non conveniens*, particularly when the plaintiff is a foreigner.[78] Therefore, in addition to jurisdictional questions, the law to be applied in conflicts of laws analyses, borrowing statute considerations, and several other aspects that are involved in determining venue strategies, this *forum non conveniens* doctrine provides yet another potential complexity. An attorney handling an air crash case must make a careful study of these factors before filing the action. Failure in this regard can be very costly.

XI. UNIQUE ITEMS OF DISCOVERY

Aviation is one of the most highly regulated activities, and the government publishes or maintains materials on a wide variety of subjects that can be very helpful in the preparation of an aviation case. The following are examples:

Airmen records, including violation histories and airmen medical records, are available from the FAA in Oklahoma City. They are usually received on microfiche, blue-ribboned as certified copies which allows them to be introduced into evidence without the need of supporting testimony under F.R.E. 803 (8). Using the airman's certificate number or date of birth facilitates access.

Aircraft records are also available from the FAA in Oklahoma City in microfiche form and can be certified as official government documents.

Government publications known as Advisory Circulars cover a wide variety of subjects ranging from repairs on certain aircraft components, wake turbulence precautions, icing, etc. A checklist of these publications is available from the U.S. Department of Transportation, Distribution Requirements Section, Washington, D.C. 20590. Directions for obtaining particular subjects are set forth in that checklist.

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76. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947).

77. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).

78. *See, e.g.*, Magnin v. Teledyne Continental Motors, 91 F.3d 1424 (11th Cir. 1996).

Publications of the FAA Accident Prevention Program on various subjects can be obtained from the FAA, General and Commercial Aviation Division, AFO-806, 800 Independence Avenue, Washington, D.C. 20591.

Procedures of air traffic control and flight service stations (providing weather and flight planning services by phone and aircraft radio) are contained in manuals, usually labeled by the government as "Orders." Air traffic control duties relating to the separation of aircraft, provision of weather service, etc., are examples of the items covered in these orders. They can be purchased from the government printing office, available under the Freedom of Information Act,[79] or by the discovery process when the government is a party to the suit.

The Airmen's Information Manual is published four times a year and contains important information on procedures to be followed by pilots. While these procedures are not regulatory in themselves, they do have the force and effect of law in certain situations.[80]

Mechanics and manufacturers file Service Difficulty Reports and Malfunction Defect reports mostly on a voluntary basis. Air carriers are required to file reports. Requests of the FAA should be made for the service history of a certain aircraft or components, which may be very revealing particularly in product liability actions.

The only documents required to be aboard an aircraft are the Airworthiness Certificate, Registration, and any operating limitations that are to be kept in a manual form. Copies of the aircraft Registration and Airworthiness Certificate are also available from the FAA in Oklahoma City, as stated above. The aircraft and power plant logs must be maintained by the owner/operator of the aircraft but are not required to be on board. These are usually obtained through subpoena; however, extracts of them may be contained in the NTSB report.

The FAA maintains aircraft certification documents. These documents relate to the original certification of the aircraft, the production certification and the airworthiness certificate for each individual aircraft. The type certification documents are maintained in the FAA region that was assigned the responsibility of regulatory oversight for a particular aircraft or component. The FAA keeps the airworthiness certificate for each individual aircraft and the ownership history in Oklahoma City, Oklahoma.

XII. REGULATORY INTERPRETATIONS

Federal Aviation Regulations often have attending interpretations authored by the FAA, Office of the Chief Counsel. These interpretations are available through the FOIA. Also, requests can be made for interpretations regarding particular applications of a rule to a specific set of facts. Unfortunately, the

79. 5 U.S.C. § 552 (amended 1996), *et. seq.*

80. *See* Crossman, *supra* note 7.

FAA may take approximately three or four months to produce an interpretation, and it is sometimes wrong. It should be remembered that an FAA attorney who may have a particular interest in winning a related administrative action against an airman may be making the interpretation. It has been observed that because these interpretations have been used successfully by litigants in actions involving the FAA, the agency has become seemingly reluctant in making interpretations even when requested by the aviation community in matters of safety.

The Commerce Clearing House publishes an Aviation Reporter System. Most of the cases can be found in the general court reporting systems; however, many aviation cases, not officially cited, are contained in the CCH Aviation cases, available at most larger libraries.

Air traffic control communications are continuously recorded on 20 to 150 channel tape recorders located at each air traffic control facility. The tape reels are saved for approximately 15 days before being returned to service unless an accident or incident occurs or a special request is made. In that event, the relevant portion of the tape, beginning five minutes before the first communication with the subject aircraft and continuing through five minutes after the last, is removed and retained for at least two years. Certified recordings are made on regular cassettes for use by the NTSB and to fulfill public requests. If parties desire the FAA to preserve more than the usual amount of tape or wish to copy any portion of the tape themselves, the request will be complied with if made before the time the tape is normally returned to service. The agency still appears to be charging a fee of $25.00 an hour for re-recordings, the rate set by this writer in 1980. Do not rely on the FAA transcript of the recording. Often, these recordings are made by the government for its own purposes, leaving out some back ground conversations and some communications with other aircraft which one may find quite relevant to the issues of one's lawsuit. Therefore, in many cases, you may want to have your own transcript made from the tape.

Transcripts of cockpit voice recorders ("CVR") are available from crashes of certain aircraft. Multi-engine, turbine powered aircraft with a seating capacity of twenty or more must have a CVR that records voices and other audible sounds in the cockpit. If the aircraft requires two cockpit crewmembers, a CVR is required if that aircraft can carry six or more passengers.[81] Any large turbine powered aircraft or large pressurized airplane with four reciprocating engines (like a DC-6 or DC-7) must have a CVR even if it only carries cargo.[82] While the NTSB releases transcripts of the recordings, sometimes with "expletives deleted," because of successful lobbying efforts by pilot labor unions, the NTSB cannot release a copy of the recording itself.[83] This often makes it difficult for a litigant because issues like crew awareness, attitude, attention to detail are often

81. 14 C.F.R. § 135.151 (1996).
82. 14 C.F.R. §§ 121.359 (1995), 125.227 (1988).
83. 49 U.S.C. § 1114(c) (1994).

indicated by the tone of the voices, extraneous conversation and even in the so called "expletives." The defendant air carriers usually have a representative hear the tape. Manufacturers do as well. Nevertheless, in most instances the attorneys for the families of the decedents and the injured cannot obtain the same access from the NTSB.

Information from Flight Data Recorders ("FDR") is available from certain types of aircraft. Multi-engine, turbine powered airplanes of ten passenger seats or more must have a FDR that records a variety of inputs such as attitude, airspeed, heading, vertical acceleration, and so forth, the number of parameters depending upon the available passenger seats and/or when the aircraft was certified.[84] Certain size aircraft that carry cargo are also required to carry FDRs, the type and complexity of the required parameters again depend upon the size and/or when the aircraft was certified.[85] The NTSB headquarters in Washington, D.C. has equipment to read the FDR information and transcribe it in the form of graphs. The CVR and FDR are contained in the so-called "black box" (which is really not black but Day-Glo orange) located in the tail section of the aircraft. This data, in most instances, unlocks many otherwise mysterious events leading to a tragedy.

Testimony of employees of the government can be obtained but on a very limited basis. When they are asked to render expert or opinion testimony, they are required by regulation to decline to answer unless ordered by a court.[86] If opinion testimony from a government witness is absolutely essential to the case, efforts to obtain the same should be made by seeking a court order. Depositions of NTSB personnel are governed by specific regulations[87]. They are not permitted to appear and testify in court in damage suits arising out of accidents.[88] Requests for their depositions testimony should be made through the NTSB General Counsel.

XIII. EFFECT OF ADMINISTRATIVE PROCEEDINGS

The FAA has authority to suspend, revoke or modify an airman's certificate, including those of pilots and mechanics, and operating certificates, such as air carrier operations, flight schools, repair shops and so forth.[89] The FAA can also impose civil penalties (fines) for violations of regulations.[90] The procedures for certificate actions and those for fines differ in some circumstances. Generally, they are governed by a body of administrative law, some of the procedures and

84. 14 C.F.R. §§ 121.343 (1994), 135.152 (1997).
85. 14 C.F.R. § 125.225 (1988).
86. *See* 49 C.F.R. Part 9.
87. 49 C.F.R. § 835 (1998).
88. 49 C.F.R. § 835.5(a) (1998).
89. 49 U.S.C. § 44709 (1994).
90. 49 U.S.C. § 46301 (1996).

rules of which often appearing quite strange to attorneys more accustomed to procedures of state and federal courts in civil actions. The intricacies of these proceedings are not intended to be covered by this article, but the attorney handling an aviation accident case for death or personal injury should be aware of the potential effect that some of these proceedings can have on civil litigation.

In *Bowen v. United States*, a pilot sued the government for personal injuries he received in a crash allegedly caused by air traffic control negligence.[91] A certificate action was brought against the pilot by the FAA, and a hearing was held by the NTSB, which is the hearing and appellate reviewing agency in airmen certificate suspensions and revocation cases. In that administrative proceeding, the pilot was found to have violated federal aviation regulations by flying into an area of known icing conditions. In the tort action, the government moved for summary judgment based upon the application of collateral estoppel to be accorded the NTSB decision, thus establishing contributory negligence and a bar to recovery under then prevailing state law. The appellate court affirmed the resulting judgment against the pilot-plaintiff.

The concept of *Bowen* is not a novel one as the court relied on the principle articulated in *United States v. Utah Construction & Mining Co.*,[92] in making its decision. Therein, the court held that when an administrative agency acting in a judicial capacity gives the parties an adequate opportunity to litigate an issue of fact properly before it, courts should not hesitate to apply *res judicata* to enforce repose in actions involving the same issues.[93] Such application may occur notwithstanding the fact discovery opportunities may be different and evidentiary rules are much more relaxed in administrative proceedings.[94] The *Bowen* case is simply the first case in which the concept was applied in an aviation case.

The effect of the *Utah Construction* concept, as applied in *Bowen*, will vary, of course, with state law. In *Bowen*, a violation of a safety regulation was negligence *per se* and the doctrine of contributory negligence was then a complete bar to recovery supporting the granting of a summary judgment under Indiana law.[95] In other states where violations of statutes or regulations present presumptions of negligence as the standard, the effect of administrative adjudication will vary accordingly. In any event, enforcement proceedings most certainly require close attention by the tort litigator. The decisions are also useful in persuading courts of how the FAA and NTSB are construing and applying certain federal aviation regulations.

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91. *See* Bowen v. United States, 570 F.2d 1311 (7th Cir. 1978).
92. *See* United States v. Utah Construction & Mining Co., 384 U.S. 394, 86 S.Ct. 1545 (1966).
93. *See id.* at 422, 86 S. Ct. 1545, 1560.
94. *Id.*
95. *See* Bowen, 570 F.2d at 1315, 1323.

XIV. CONVINCING THE JURY

In conclusion, all the discovery and preparatory efforts, as exhaustive and complex they may become in aviation cases, are all for naught unless one is able to try the case to the jury in a clear and concise manner. There is a temptation to construct elaborate exhibits in these cases, but it is often wiser to use very simple diagrams or analogies to items such as automobiles or kitchen appliances with which laymen are more familiar. Elaborate exhibits in the hands of an adversary experienced in aviation can be turned around against your side of the case.

A theory should be developed early in the case and then kept in focus during discovery. Despite the amount of pretrial preparation one is able to amass in these cases, the attorney most astute in the practice of aviation law generally needs a minimum of documentation and well-directed depositions to develop the essential issues of the case. Attorneys should certainly not take shortcuts when preparing these cases, but they should keep in mind that the hallmark of an accomplished trial attorney is simplicity and efficiency in all stages of preparation and presentation of aviation-related trials.

The Supreme Court's Retreat from Reconstruction: A Distortion of Constitutional Jurisprudence*

A Book Overview

FRANK J. SCATURRO†

I. INTRODUCTION

There is more overlap between history and law than initially meets the eye, but members of the legal profession, like practitioners in most fields, tend to focus less on seemingly secondary subjects than on their primary field. For many, history lies at most on the periphery of the world of law, so one can expect it to be at least as misunderstood by judges and lawyers as by historians. So what is a judge or lawyer to make of Reconstruction, a period that traditionally has been more misunderstood by historians than any other in American history? The period, after all, produced three constitutional amendments — the Thirteenth, Fourteenth, and Fifteenth — and confirmed the Civil War's status as the Second American Revolution. No amendments since the founding generation are more important to comprehend.

II. OVERVIEW

The Supreme Court's Retreat from Reconstruction: A Distortion of Constitutional Jurisprudence attempts to bring together the study of history and constitutional law, and it begins with an exploration of a historical dilemma. Since the late nineteenth century, Reconstruction has undergone a 180-degree turn, going from a widely condemned period in which former slaves were ridiculed for their supposed incapacity to govern themselves, to a celebrated effort to confer equality before the law on all Americans regardless of color. While political leaders and historians are occasionally capable of making such a dramatic turnaround, courts are by nature less likely to do so, for they understandably place great institutional reliance on precedent.

The bulk of this book's study explores how the Supreme Court dealt with issues relating to the Reconstruction Amendments, and the results are largely disappointing. While the Court consistently found a way during the 1860's to

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leave undisturbed every congressional Reconstruction measure that came before it, it gradually whittled away at civil and voting rights measures once the political mood shifted dramatically against Reconstruction during the 1870's. (Only the issue of racial discrimination in jury selection escaped this process.)

In the case of the Fourteenth Amendment, the most sweeping and elusive of the Reconstruction Amendments, this trend culminated in two 1883 Supreme Court decisions that struck down both an 1871 provision designed to enforce Fourteenth Amendment rights and an 1875 statute desegregating public accommodations and transportation. Congress, the Court reasoned, could address only state action pursuant to the Fourteenth Amendment, not the acts of private citizens. Thirteen years later after a state did act to compel the racial segregation of streetcars, the Court upheld the Jim Crow statute at issue under the now notorious doctrine that such a "separate but equal" arrangement does not offend the Fourteenth Amendment. Subsequent Supreme Court cases involving the Fifteenth Amendment, which prohibits racial discrimination in voting, would undergo a parallel process of tortured reasoning, leading one scholar to observe in 1910 that the Court had never once confirmed the affirmative meaning of the amendment; it simply had dictated that the amendment "does *not* do this and does *not* do the other."[1]

What is remarkable about this line of decisions is not only how it displays the Court's acquiescence to popular currents against Reconstruction, but also how the Court was willing to strike down laws passed so soon after the amendments that authorized them were ratified. Numerous framers of the Fourteenth and Fifteenth Amendments remained in Congress long enough to endorse the very statutes that the Court later would strike down, and several would go on record expressing their dismay at the Court's decisions of the late nineteenth century. Among the many decisions of the Court that retreated from Reconstruction, the book's study embarks on a holding-by-holding comparison of the Court's pronouncements and the recorded statements of contemporary members of Congress, all of whom lived through Reconstruction and many of whom were framers of the amendments of the period. The result is a disturbing portrait of a Court that often embraced the interpretation of the Reconstruction Amendments held predominantly by those who opposed their ratification.

The final section of the study in *The Supreme Court's Retreat from Reconstruction* explores how the Court revisited the issues of civil and political rights during the twentieth century, especially during the Civil Rights Movement, and how the Court both succeeded and failed in recapturing the original meaning of the Reconstruction Amendments. The Fourteenth Amendment enjoyed a partial revival when it was invoked to invalidate school segregation, but when it came time to uphold federal civil rights legislation, the Court turned to the Interstate

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1. Arthur W. Machen, Jr., *Is the Fifteenth Amendment Void?*, 23 HARV. L. REV. 169 (1910).

Commerce Clause and the Thirteenth Amendment for support instead of the amendment that was viewed by its framers as a more obvious source. While it appears that the Thirteenth Amendment has regained its full force in constitutional jurisprudence, the Fourteenth and Fifteenth Amendments remain subject to some of the earlier judicial misunderstandings that once aided Jim Crow.

Besides being of value to Supreme Court historians and scholars of the Civil War/Reconstruction era, the subject matter of this study — which covers both constitutional law and legal history — is of interest to lawyers, judges, and political scientists. The lessons taught by this chapter of Supreme Court jurisprudence offer insight into constitutional interpretation in general, and the conclusion develops this idea by looking at the problematical interaction between law and outside historical influences.

There is, I confess, a contemporary issue that makes this study more relevant. In recent years, the Court has begun to acknowledge for the first time in six decades the limits of congressional power under the Interstate Commerce Clause while showing little desire to restore the originally intended scope of power of Congress under the Fourteenth Amendment. Without challenging the Commerce Clause holdings, several valid questions can be raised about the consequences of continuing to overlook the Fourteenth Amendment. This issue is raised as food for further thought, though not as the defining issue. What matters to *The Supreme Court's Retreat from Reconstruction*'s study in the end is that a chapter of constitutional law can be recovered from the depths of historical misunderstanding and an important part of America's constitutional heritage finally appreciated on its own terms.