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Extending Opportunities to Junior Lawyers in the Courtroom

By Hon. Janet L. Sanders
Voice of the Judiciary

When I began sitting in the Business Litigation Session of the Superior Court in 2011, I was struck by two things. First, as many as three or four lawyers appeared in court on behalf of a single party. Second, the "speaking" part for that appearance invariably went to the oldest member of the legal team – and that person was usually a white male.

That person was often not the lawyer who wrote the brief on the legal issue before the court. That would become apparent when, in the course of the oral argument, the older partner would have to confer with the young (usually female) associate beside him in order to respond to a question from the court.

I was not alone in my observations. Federal district court judges across the country were noticing the same thing, and taking action. Many issued standing orders strongly suggesting – and sometimes requiring-- that attorneys newer to the bar be given a chance to question a trial witness or argue a motion. In Massachusetts for example, six district court judges have such standing orders.

Unlike the federal judiciary, Superior Court judges (like most Massachusetts trial court judges) do not operate on individual calendars, rotating as we do from session to session. A standing order by an individual judge would promote inconsistency among sessions and even lead to different practices within the same session. Still, there was a sense among many of us that we should do something to encourage the courtroom participation of less experienced lawyers, particularly on the civil side where the problem is more acute.

In December 2017, the Superior Court adopted a Policy Statement that gave voice to our concerns. That policy strongly encourages lawyers in civil litigation to take "affirmative steps" to extend courtroom opportunities to less senior lawyers in their law firms. As the policy states, those affirmative steps "could include, but are not limited to, encouraging participation of relatively inexperienced attorneys in initial scheduling conferences, status conferences, hearings on discovery motions and dispositive motions, and examination of witnesses at trial."

Because BLS cases are heavily staffed, opportunities to share the wealth abound. For dispositive motions, BLS judges are open to having lawyers for one side divide the argument among themselves. Discovery disputes and less substantive matters can be quite capably handled by a less seasoned lawyer.

Judges in regular civil sessions are also looking for ways to include more junior lawyers. Although litigation has become more complex, there are still plenty of cases which are relatively straightforward both legally and factually and which can be handed over to the more junior associate with confidence that the client will be well represented.

At trial, having an associate take responsibility for some witnesses is welcomed not only by us judges but by juries as well. Where an associate sits silently at counsel table, juries may wonder

why – and perhaps not in a way that is helpful to your side where that associate is a woman or a person of color. Hearing from different examiners can enhance jurors' attention spans. And because they are less experienced and consequently less polished, younger lawyers may come across as more genuine and more credible. Juries want them to succeed.

There are several good reasons for a policy that promotes courtroom participation by those newer to the bar. First, less experienced lawyers are able to hone their skills while they are still under the supervision of more seasoned litigators. Many of us cut our teeth in the civil motions sessions which predated the advent of Rule 9A. There were good reasons to eliminate those sessions. But it also means we have to find other ways for junior lawyers to get courtroom experience so that they can develop good habits early.

Second, the policy benefits clients. If a junior lawyer has researched the matter and written the brief, he or she is well positioned to argue that matter effectively before a judge or jury. Associates "hungry" for courtroom experience are often better prepared than their seniors. And their billing rates are lower than that of more senior lawyers.

Third, because senior lawyers tend to be a more homogeneous group, a policy that creates opportunities for younger lawyers will promote diversity in the profession.

That lack of diversity has been well documented. Although half of the law school graduates today are female, studies show that less than a quarter of equity partners in large firms are women. Among lawyers appearing as lead counsel in civil cases, only 24 percent in 2013 were women.

The gap between white partners and partners of color is even starker. According to one 2017 survey, more than 90 percent of equity partners in firms participating in the survey were white even though one in four law firm associates was a person of color. Attrition rates among minority lawyers have actually risen since 2008, with black lawyers leaving their firms at a higher rate than members of other minorities.

There may be many reasons for these disparities. Part of it could be unconscious bias on the part of those who make decisions critical to advancement, a subject beyond the purview of this article. But there is another possible explanation: the young lawyer who is given little responsibility and independence is usually not a happy lawyer. That attorney will look elsewhere, particularly in the public sector where opportunities for advancement are often better.

Regardless of why gaps persist among different groups of lawyers, however, diversity in the higher echelons of the legal profession should be a goal of both the bench and the bar. A policy that encourages greater courtroom participation by those still climbing the law firm ladder may help further that goal. And that is a good thing, not just for the young lawyer but for the legal profession generally.

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Grand Manor: Extending the Claims Period for Environmental Property Damage

By Dylan Sanders

Case Focus

In a significant development under the Commonwealth's hazardous waste cleanup law, Chapter 21E, the Supreme Judicial Court ruled that the statute of limitations for a claim of property damage under § 5 of Chapter 21E begins to run when a party learns that the property damage caused by contamination cannot be reasonably remediated. *Grand Manor Condominium Association v. City of Lowell*, 478 Mass. 682 (2018). This marks an extremely expansive limitations period during which such a claim can be brought. Before *Grand Manor*, most believed the limitations period began to run when the property owner learned of contamination and the identity of those responsible for it. Now, the running of the limitations period is only triggered when the property owner learns that the contamination will not be fully remediated.

Chapter 21E and its Statutes of Limitation

Chapter 21E permits a private party injured by a release of oil or hazardous materials to bring two types of claims. First, under §§ 4 and 4A, a party who has incurred costs from responding to a release may sue other statutorily responsible parties for reimbursement, contribution, or an equitable share of the response costs.

Second, under § 5(a)(iii), a party may recover economic damages to property interests beyond the party's response costs. Property damages recoverable under §5 may be *permanent* damages, such as the diminished market value of property that will not be fully remediated by a cleanup, or they may be *temporary* damages, such as the rent lost while the property underwent assessment and/or remediation.

Although it was well-established that § 5 property damages were recoverable separate and apart from response costs, it was not clear what statute of limitations applied. Chapter 21E initially had no independent statute of limitations; limitations periods were added in 1992 during a comprehensive overhaul of the law. Those periods require a private party seeking to recover response costs under §§ 4 and 4A to sue within three years of the latest of four events, the most generous of which typically is the date by which the party has incurred *all* of its response costs. *See* c. 21E, § 11A.

A private party seeking to recover damages under §5 must sue "within three years after the date that the person seeking recovery *first suffers the damage*," or within three years of learning the identity of the party responsible for the damage, whichever is later. *See* c. 21E, § 11A(4) (emphasis added).

But what does "first suffers the damage" mean? Before *Grand Manor*, many practitioners counseled their clients not to wait to understand the full extent of the property damage before bringing a § 5 claim. They based that advice cautiously applying the plain meaning of "first suffers the damage." *Grand Manor* may now cause many to change that advice.

The Grand Manor Condominium

At issue in *Grand Manor* was a condominium built on the site of a former landfill that had been owned and operated by the City of Lowell. In 1983, a developer purchased the site and later constructed the condominium.

In late 2008, the condominium association made underground repairs and encountered discolored soil. By early 2009, the association understood that at least a portion of the property was contaminated with hazardous materials from the site's prior use as a landfill. The City, assuming responsibility for the response action, further assessed the site and concluded in June 2012 that the entire site was contaminated and that full remediation would not be feasible.

In October 2012, the condominium association and 36 current and former unit owners filed suit against the City. Pursuant to § 5, the unit owners sought property damages measured by their units' diminished market value due to the contamination.

The City asserted that those claims were barred by the three-year statute of limitations. The unit owners moved for summary judgment, which the trial court denied. At trial, the jury was asked to decide whether the § 5 claims for property damage were time-barred, and, specifically, whether the claims were "brought within three years of the date they discovered, or should have discovered, both that they had suffered property damage and that the City of Lowell was legally responsible for the release of hazardous materials that caused the damage."

The jury found that the unit owners' property damage claims under § 5 were time-barred. The SJC accepted direct appellate review.

The Decision

On appeal, the unit owners argued that the trial court never should have submitted the statute of limitations issue to the jury. The owners contended that, since the SJC had previously held that § 5 property damages were damages for losses that a response action did not address, the response action had to be sufficiently advanced to put the owners on notice that they would, in fact, suffer such losses. The City, in turn, chiefly relied on the general principle that statutes of limitation ordinarily begin to run when a party has reason to know that they *may* have been harmed, not when a party knows the harm's full extent.

The SJC declined to apply that common law rule to property damage claims under Chapter 21E and instead adopted the owners' argument that, at least insofar as a property damage claim is one for *permanent* damage, the clock is not triggered until "the plaintiff learns whether or not remediation and response costs will fully compensate the plaintiff for the harm he or she has suffered. "478 Mass. at 683. Wrote the court, "This will not ordinarily occur until the plaintiff learns that the damage to his or her property is not reasonably curable by the remediation process."

The SJC's reasoning was threefold. First, the SJC concluded, the word "damage" in §11(4) does not mean contamination of the property, but rather only what the SJC characterized as "residual damage," *i.e.*, economic damage to property that cannot or will not be addressed by remediating the contamination, such as diminished property value.

Second, the SJC sought a bright-line rule to align the statute of limitations for a property damage claim with the Massachusetts Contingency Plan's Phase III stage, the point in the assessment process at which it is often determined whether remediating the contamination is feasible. Although not all Phase III reports provide such a clear conclusion, the SJC apparently believed that aligning the claims' timing with MCP reporting obligations would add some predictability.

Third, the SJC said that requiring a party to bring § 5 claims for permanent property damage before it was clear that the damage could not be cured by remediation would be "wasteful for both the parties and the court system." 478 Mass. at 695. In so holding, the SJC implicitly rejected the common-law discovery rule's balance between the competing interests of plaintiffs who might not know the basis of their claims and of defendants who might be disadvantaged with the passing of time.

The decision also implicitly reflects the SJC's preference for a standard that furthers and arguably maximizes one of Chapter 21E's core statutory purposes, which is "to ensure that costs and damages are borne by the appropriate responsible parties." 478 Mass. at 684 (quoting *Taygeta Corp. v. Varian Assocs., Inc.*, 436 Mass. 217, 223 (2002)).

Finally, the SJC addressed the statute of limitations for claims of temporary property damage under Chapter 21E, § 5(a)(iii), such as loss of rent. In an important if cryptic footnote, the SJC said that temporary damage claims are also "dependent on the remediation process" and "that the Phase II and Phase III reports required pursuant to the MCP therefore lend necessary clarity to such claims as well." 478 Mass. at 694 n.15.

*"*For this reason, and to avoid splitting claims under § 5, the statute of limitations for claims under § 5 should be uniformly defined." *Id.*

But it is not entirely clear what this means. *Grand Manor*'s central holding is that the limitations period for permanent property damage claims under § 5 does not start "until the plaintiff learns that the damage to his or her property is not reasonably curable by the remediation process." 468 Mass. at 683. By definition, *temporary* property damage is temporary and ends through the remediation process. How then could the statute of limitations for both permanent and temporary property damages claims be "uniformly defined?" The answer to this riddle will need to be flushed out in future cases.

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Caplan v. Acton: Three Pence is Too Much (Sometimes)

By Kate R. Cook
Viewpoint

The recent Supreme Judicial Court (SJC) decision *Caplan v. Acton*, 479 Mass. 69 (2018), addresses whether taxpayer dollars can be used to fund an active church. It's an important question, and one that attracts strong opinions, especially in a case like *Caplan*, where the facts center on a popular state grant program that provides funding for historic preservation—something Massachusetts needs a lot of. And for those of us that agree with James Madison, that even three pence in aid is too much when it comes to taxpayer dollars funding religious institutions, anything short of an outright prohibition is cause for concern. So it is easy to see why some might be disappointed that the SJC's answer is: Maybe. But the Court's decision is not surprising. Grounded in a textual analysis of the Massachusetts anti-aid amendment and SJC precedent, the decision appropriately leans into the principles animating the amendment, holding public aid to an active church "warrants careful scrutiny." *Id.* at 71. Though not unexpected, the decision is significant for two reasons. First, the decision confirms the force of the Massachusetts anti-aid amendment in the wake of the Supreme Court's decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), which held that a church could not be excluded from a government public grant program "solely because it is a church" as that would penalize the free exercise of religion. Second, as already mentioned, the decision reinforces why church-state separation is important to our democracy, delving deep into three major concerns that led to passage of the anti-aid amendment: infringement on taxpayers' liberty of conscience; government entanglement with religion; and civic disharmony.

In *Caplan*, taxpayers in the town of Acton challenged the town's decision to provide two Community Preservation Act grants to an active church under the anti-aid amendment. One grant was intended to fund the restoration of stained glass windows in the main church, including a window depicting Jesus and a kneeling woman and a window featuring a cross and the hymnal phrase, "Rock of Ages Cleft for Me." The other grant was intended to fund a master plan for historic preservation for three different buildings on the church grounds.

The plaintiff taxpayers argued that the Massachusetts constitution requires a categorical ban on providing any public funds to active churches. The town, on the other hand, argued that the purpose of the Community Preservation Act is constitutional and that, after the Supreme Court decision in *Trinity Lutheran*, denial of the grant to the church would violate the free exercise of religion under the First Amendment to the United States Constitution.

The SJC declined to adopt wholly either party's argument, but instead reached a pragmatic conclusion rooted in the constitution's text and prior court decisions interpreting the anti-aid amendment. The SJC held that whether a grant of public funds to active churches is permissible must be considered under the three-factor test first set forth in *Commonwealth v. School Comm. of Springfield*, 382 Mass. 665, 675 (1981), which considered whether public funding of special education placements of public school students in private schools was permissible. That test is: "whether a motivating purpose of each grant is to aid the church, whether the grant will have the effect of substantially aiding the church, and whether the grant avoids the risks of the political

and economic abuses that prompted the passage of the anti-aid amendment." *Caplan*, 479 Mass. at 71.

Applying this test, the *Caplan* majority found that the stained glass windows grant was most certainly unconstitutional, and remanded for further discovery the question of whether the "purpose" of the master plan grant was to aid the church in violation of the anti-aid amendment.

To be sure, the SJC's evidentiary focus on the purpose of a Community Preservation Act grant to an active church will be more difficult for municipalities to implement than either a categorical ban on aid or an approach that ignores the anti-aid amendment altogether. But *Caplan* is neither impossible for towns to implement nor a death knell for historic preservation. First, churches still may apply for Community Preservation Act grants, and towns cannot deny their application "solely because [the applicant] is a church." Quite the contrary, "[t]he fact that an applicant is an active church is a relevant but by no means disqualifying consideration." *Id*. at 85 n.18. The Court offered examples of permissible grants: grants to a church where historical events of great significance occurred in the church (*id*. at 94, 101 n.3 (describing the Old North Church)); grants to preserve church property with a primarily secular purpose (*id*. at 94); and of course, grants to a church preschool to provide a safer surface for its playground (*id*. at 85). Second, for historic churches seeking to make repairs that fail to meet the three part test, there are other constitutional ways to obtain funding. For instance, the National Fund for Sacred Places is a grantmaking nonprofit providing congregations with resources to support restoration of their historic facilities. Finally, the SJC's suggestion that the town be subject to limited discovery regarding the purpose of the master plan grant—something the plaintiffs had requested and been denied in the lower court—is not overly cumbersome. Municipalities routinely respond to discovery requests, including Rule 30(b)(6) depositions, in a variety of matters, and they are more than capable of doing so in this context as well.

Moreover, expediency is not a reason to abandon the sound reasons the framers sought to prohibit the expenditure of taxpayer dollars for the "purpose of founding, maintaining or aiding [a] church." Art. 18, § 2. The *Caplan* decision wisely places front and center three concerns that led to the anti-aid amendment, which are as real today as they were a century ago when the current Massachusetts anti-aid amendment was adopted and bear repeating. First, the grant of public funds to religious institutions risks infringing on taxpayers' liberty of conscience. Indeed, compelling individuals to financially support religion directly harms the fundamental right of freedom of conscience. Whether to follow a particular faith, or none at all, is a choice that every individual has the right to make, free of coercion.

Second, providing public funds directly to an active house of worship runs the risk of government becoming enmeshed with religion. This entanglement creates incentives that may not align with religious beliefs and may encourage religious institutions to curry favor with the government in hopes of receiving government grants. *See* David Saperstein, Public Accountability and Faith-Based Organizations: A Problem Best Avoided, 116 HARVARD LAW REV. 1367-68 (2003). "With government money come government rules, regulations, audits, monitoring, interference, and control—all of which inherently threaten religious autonomy." *Id*., at 1365.

Third, providing taxpayer dollars to religious institutions risks damaging civic harmony. "Town meeting members were being asked to vote on a grant to maintain religious aspects of the church of their neighbors and now they are suing each other." *Caplan*. at 103 (Kafker, J. concurring). For the State to subsidize religious institutions risks pitting faith against faith by creating competition for funds and conflict among religions as they vie for an ever-larger share of public funds. *See Everson v. Board of Ed. of Ewing Tp.*, 330 U.S. 1, 53-54 (1947) (Rutledge, J., dissenting).

In conclusion, *Caplan*'s amplification of the concerns that led to the anti-aid amendment will strengthen both the church and the State. Liberty of conscience, avoiding church state entanglement, and nurturing civic harmony—these concerns remain ever present today. To paraphrase former President Obama, here in Massachusetts, "[o]ur brand of democracy is hard." Our freedoms, including freedom of conscience and religious freedom, are well worth the effort.

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Caplan v. Town of Acton: The Supreme Judicial Court's Decision on Public Funding for Historic Preservation of Churches Deepens the Enigma of the Enigma of the Anti-Aid Amendment to the Massachusetts Constitution

By M. Patrick Moore

Viewpoint

At the heart of *Caplan v. Town of Acton* is the fascinating question of whether a municipality may use public funds for preservation of historic religious structures that are still in active use. *See* 479 Mass. 69 (2018). The guidance provided by a splintered SJC—a resounding "maybe"—raised more concerns than it addressed in three hot-button areas. First, though the Court traced the ugly history of the Anti-Aid Amendment to the state constitution, it chose to emphasize the intent of its drafters over its plain text. Second, the Court may have placed its Anti-Aid Amendment cases on a collision course with recent Supreme Court jurisprudence, most prominently the 2017 headline-grabbing decision of *Trinity Lutheran v. Comer*, 582 U.S. ---, 137 S. Ct. 2012 (2017). Third, in an aside that may prove to be *Caplan*'s most lasting mark, the Court opened the door to deposing a municipal government in search of the purportedly hidden motives of its policy-makers.

At issue in the case was whether two grants made by the Town of Acton to its Congregational Church under the Community Preservation Act were permitted under the Anti-Aid Amendment to the state constitution, where the Town asserted that the grants served the recognized public purpose of historical preservation. There was no dispute that the church was a central part of the Acton Centre Historic District, which is recognized as a historic place by agencies of the federal, state, and local governments. One grant would have supported the restoration of the stained glass windows of the Congregational Church; the other would have supported an architectural assessment of the structure of the church and two nearby buildings owned by it. Though the grants may have implicated the Establishment Clause of the United States Constitution, the taxpayers who challenged them relied exclusively on the Anti-Aid Amendment of the state constitution.

Over the past century, the Commonwealth's Anti-Aid Amendment has been notable both for its broad textual scope and the narrow construction given to the text by the courts. Unlike similar amendments passed in dozens of states that focus exclusively on religious organizations, our Anti-Aid Amendment prohibits the grant of public money "for the purpose of founding, maintaining or aiding any . . . *charitable or religious* undertaking." Mass. Const. Amend. art. 46, § 2, as amended by art. 103 (emphasis added). The plain text of the amendment indicates that an active charitable organization should face the same hurdles (if any) as an active church seeking public funds for the restoration of a historic building.

Alas, that is not how the amendment has been construed. In *Bloom v. School Committee of Springfield*, the SJC announced a three-factor test by which it would evaluate grants to charitable and religious organizations: (i) whether the grant serves a public purpose; (ii) whether the grant does, in fact, aid the organization; and (iii) "whether the [grant] avoids the political and economic [concerns] which prompted the passage" of the amendment. 382 Mass. 665, 675 (1981). *Accord* Helmes v. Commonwealth, 406 Mass. 873 (1990). As that test has been applied,

though, the third factor consistently has proven dispositive. Almost without exception, the purpose of the spending is to accomplish some public purpose. Likewise, almost without exception, a grant of public funds to a charitable or religious organization does, in fact, benefit that organization. So the only question that truly matters is whether the grant implicates the "political and economic [concerns] which prompted" the Anti-Aid Amendment. The *Caplan* Court expounded on the drafters' concerns, identifying them as the "the risks associated with the public financial support of *religious institutions*," specifically the risks that "liberty of conscience would be infringed" by public support of religious organizations, that government and religion would be improperly intertwined if such spending were allowed, and that civic harmony would be "threaten[ed]" by such spending. 479 Mass. at 90.

Because of the importance of the third *Springfield* factor and its focus on religious institutions, the Anti-Aid Amendment as interpreted in *Caplan*—and *Springfield* and *Helmes* before it—is stringent when applied to religious organizations and functionally nonexistent when applied to secular charitable organizations. Take the historic preservation funding at issue in *Caplan*. Were it granted to a secular nonprofit, the third *Springfield* factor would not have been implicated at all; but, because the funding was granted to a church, that factor was the foundation of the Court's conclusion that it was barred. This disparity is rooted in case law, which emphasizes the intent of the Amendment over its actual text.

The emphasis on intent over constitutional text is remarkable in any context, but all the more so in *Caplan* for two reasons. First, the decision reviews the history of the Anti-Aid Amendment at length, including its anti-Catholic, anti-immigrant, and Know Nothing Party roots. In light of that discriminatory history, it is troubling that the "concerns" of its framers are given any weight at all, let alone controlling weight. Second, in 2017, the Supreme Court of the United States held that a religious organization must not be disqualified from a public grant program, for which it otherwise would have been eligible, solely because it is a religious organization; such an exclusion is violative of the Free Exercise Clause of the First Amendment. *See* *Trinity Lutheran Church of Columbia, Inc. v. Comer*, -- U.S. --, 137 S. Ct. 2012, 2023 (2017). In that case, the grant at issue was for playground resurfacing; the Supreme Court concluded that a church preschool could not be disqualified from a grant that it would have been awarded were it secular. *Caplan*, however, seems to have allowed just such a disqualification. Were a secular nonprofit rather than a church to have been the applicant in *Caplan*, it is difficult to imagine the grant failing the SJC's three-factor *Springfield* test.

The SJC did, however, acknowledge the clear holding of *Trinity Lutheran* that the Anti-Aid Amendment cannot be interpreted to "impose a categorical ban on the grant of public funds to a church 'solely because it is a church.'" *Caplan*, 479 Mass. at 85. So, no municipality that makes grants for historic preservation can deny a religious organization simply because it is a religious organization; the Free Exercise Clause dictates that such grants must be available to religious organizations under certain circumstances. The question is when. And that is a question that the 173 municipalities in the Commonwealth that make historic preservation grants are asking in the wake of *Caplan*, with conflicting guidance from the Court.

Chief Justice Gants's plurality opinion, joined by Justices Budd and Lenk, states that grants to religious organizations will trigger "careful scrutiny" and suggests that they will be allowed only

in narrow circumstances, such as "where historical events of great significance occurred in the church, or where the grants are limited to preserving church property with a primarily secular purpose." 479 Mass. at 94. Justice Kafker's concurrence contemplates a broader range of allowable grants, perhaps all that do not "repair[] or maintain[] particular parts of the church that convey and express religious message." *Id.* at 105. There are three votes for that position, too, because the concurrence was joined by Justice Gaziano and Justice Cypher's dissent rejected the concept of "careful scrutiny" altogether. So, what is a town to do with the next grant application by a religious organization? No matter its decision, litigation risks abound. A church could challenge a denial under *Trinity Lutheran*, and concerned taxpayers may challenge a grant under *Caplan.*

Perhaps the most lasting element of the *Caplan* decision—in this and other contexts—will be a quandary for municipalities defending against such litigation. A clear majority of the Court held that the plaintiffs should have been entitled to a Mass. R. Civ. P. 30(b)(6) deposition to determine whether the Town had a "hidden purpose" when it awarded the grants. The plaintiffs were not required to come forward with any evidence of malfeasance to support such discovery; the Court recognized a general "entitle[ment] to pursue discovery to ascertain whether there is a hidden purpose that motivated the issuance of the grant." *Caplan*, 479 Mass. at 88. Such a blanket right to conduct depositions in search of a "hidden" governmental purpose is novel and could have significant effects for state and local policymakers if it is applied in other contexts. And, in practice, a Rule 30(b)(6) deposition begs the existential question of who speaks for the Town on political questions? Here, Acton's Community Preservation Commission recommended the grants to its Town Meeting, which approved them. Who can speak to the motives of those multimember bodies? Town Counsel and Assistant Attorneys General face an unenviable task in sorting out the answer.

The *Caplan* Court may have arrived at the correct destination: The only grant spending it expressly barred was the use of public funds to pay for a church's stained glass windows (which included an image of Jesus), about which there may be Establishment Clause concerns. But the path taken by the case, through the Anti-Aid Amendment and narrowly around *Trinity Lutheran*, is likely to yield more litigation and, perhaps, the attention of the Supreme Court of the United States.

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The Supreme Judicial Court Steps into the Complicated World of Student Mental Health

By Phil Catanzano

Legal Analysis

For several years, higher education institutions, both in Massachusetts and nationally, have faced student populations with increased mental and emotional health needs.[1] In response, many of these institutions have provided additional resources to their clinical and counseling services centers and encouraged novel approaches to assist students who may be in crisis, such as threat assessment teams and coordinated care across different health care providers on and off campus. While clinical and legal approaches to these issues vary between institutions, the worst imaginable scenario for a campus community arises when these mental and emotional health issues result in suicide.

Until recently, Massachusetts post-secondary institutions had relied primarily upon the legal principles set forth in *Mullins v. Pine Manor College*, a seminal legal opinion from the Massachusetts Supreme Judicial Court ("SJC") that laid the groundwork for the duties institutions owe their students given the unique aspects of an often all-encompassing campus life.[2] While *Mullins* arose in a context other than student suicide, lower courts frequently applied it in a range of cases focused on liability and institutional responsibility in other contexts. In May, the SJC placed itself squarely back in the discussion with its decision in *Nguyen v. MIT*, 479 Mass. 436, 96 N.E.3d 128 (2018), holding that a university may be liable in certain circumstances when a student commits suicide. The *Nguyen* case also spoke directly to the duty of non-clinicians, who often play critical roles in helping at-risk students navigate the higher education environment.

I. The University-Student Relationship

Absent a clear duty of care, the general rule is that there is no duty upon individuals to take affirmative steps to protect others. When colleges and universities are involved, however, there are certain circumstances where a "special relationship" has evolved with students that requires institutions to exercise reasonable care to keep students safe from foreseeable conduct that occurs while they are engaged in activities that are part of the institution's curriculum or related to its delivery of educational services or benefits.[3]

Massachusetts was critical in this jurisprudential evolution to a special relationship for higher education institutions, primarily through the SJC's holding in *Mullins v. Pine Manor College*. In *Mullins*, a student was abducted from her dorm in the middle of the night by an individual trespassing on the campus. She was then sexually assaulted on another part of campus over an extended period of time.[4] Following a review of the then-current state of the law, the SJC held that there existed a duty upon the institution to ensure student safety to a reasonable degree and that the institution had not satisfied that duty. The court reasoned that "[t]he threat of criminal acts of third parties to resident students is self-evident, and the college is the party which is in the position to take those steps which are necessary to ensure the safety of its students."[5] The SJC concluded that "[c]olleges must…act to use reasonable care to prevent injury to their students by third persons whether their acts were accidental, negligent, or intentional."[6] Importantly, *Mullins* only addressed harm by others and physical security measures.

While the doctrinal impact of *Mullins* was seismic on campus, it remained unclear how far the duty extended when institutions are confronted with different forms of dangerous behavior. Massachusetts courts subsequently struggled to define the extent to which colleges and universities were obligated to protect students from harm.[7] Given the individualized contexts in which these questions commonly arise – *e.g.*, violence on campus, student mental health issues, drug overdoses, or suicide – it has been difficult for courts to apply a consistent analytical framework to assess liability. Against this backdrop, the SJC granted review in *Nguyen* and considered the question of whether, and under what circumstances, a university could be liable when a student commits suicide.

II. *Nguyen v. Massachusetts Institute of Technology*

Han Duy Nguyen ("Nguyen") was a twenty-five year old graduate student at MIT when he committed suicide on June 2, 2009. *Nguyen*, 96 N.E.3d at 131-32. Nguyen had a history of mental health problems and two prior suicide attempts (in 2002 and 2005) when he was an undergraduate student at a different university. *Id.* at 146. He consulted with at least nine private mental health professionals, totaling more than ninety in-person visits from July 2006 through May 2009. *Id.* at 134. None of these professionals, including one who saw Nguyen forty-three times between 2006 and 2008, believed that he was at imminent risk of committing suicide. *Id.* Nguyen's last appointment with a professional care giver was just five days before he would tragically take his own life.[8] *Id.* at 135.

Nguyen's father sued MIT in 2011, alleging that MIT's negligence caused Nguyen's death. After reviewing cross-motions for summary judgment, the Superior Court held that MIT was not liable for Nguyen's negligence claim. Nguyen appealed, and the SJC heard the case on direct appellate review in 2017.

In its closely watched opinion, the SJC concluded that there are circumstances where a university has a duty of care to take reasonable measures to prevent a student's suicide. *Id.* at 142-143. The court first recognized that there is no general duty of care to prevent another from committing suicide. *Id.* at 139, 144. The court then examined whether the special relationship between a university and its students imposes additional duties regarding suicide prevention. In particular, the SJC discussed several factors that have traditionally been used to "delineate duties in tort law" to determine "whether a duty to prevent suicide falls within the scope of the complex relationship that universities have with their students[.]" *Id.* at 142. These factors include:

- Whether the institution could reasonably foresee being expected to take affirmative action to protect the student;
- Whether there was "reasonable reliance by the [student on the institution], impeding other persons who might seek to render aid;"
- The "degree of certainty of harm" to the student;
- The "burden upon the [institution] to take reasonable steps to prevent the injury;"
- Whether there is mutual dependence between the student and the institution "involving financial benefit to the [institution] arising from the relationship;"
- Whether there would be "moral blameworthiness" for the institution's failure to act; and

- The "social policy considerations involved in placing the economic burden of the loss on the [institution]."

Id. (internal citations omitted).

The SJC then applied these factors to the university-student relationship in the context of student suicide. The court reasoned that, in cases where the university has actual knowledge of prior suicide attempts or present suicidal ideations, many of these factors weigh in favor of creating a duty of care between the university and the student. In such cases, the student's suicide "is sufficiently foreseeable as the law has defined the term, even for university non-clinicians without medical training." *Id.* at 144. Moreover, students, particularly those living in dormitories, rely on universities for assistance and protection, and universities are "in the best, if not the only, position to assist." *Id.* The gravity of the resulting harm – the death of a student – must also be considered along with the probability of the harm. *Id.* And while the burden that such a duty would impose on universities may be substantial, "so is the financial benefit received from student tuition." *Id.* Finally, the SJC indicated that a university would be morally blameworthy for "failing to act to intervene to save a young person's life[] when it was within the university's knowledge and power to do so." *Id.* For these reasons, the SJC concluded, universities have a legal duty to take reasonable measures to prevent student suicide in certain circumstances.

The SJC next attempted to define the scope of that duty. According to the SJC, a university "has a duty to take reasonable measures under the circumstances to protect the student from self-harm." *Id.* at 143. "Reasonable measures" the court explained, "will include initiating its suicide prevention protocol." *Id.* at 145. Alternatively, if no such protocol exists, reasonable measures include "arranging for clinical care by trained medical professionals or, if such care is refused, alerting the student's emergency contact." *Id.* In emergency situations, reasonable measures may also include contacting police, fire, or emergency medical personnel. Importantly, and as discussed below, the SJC extended this duty to non-clinicians, but then limited that duty.

In sum, the standard that the SJC created in *Nguyen* involves two distinct inquiries: (1) whether the duty of care is triggered by actual knowledge of prior attempts or present suicidal ideation; and (2) where a duty is triggered, whether the university satisfied its duty by taking reasonable measures to prevent the student's suicide. The SJC concluded that MIT owed no such duty in the case at hand because "Nguyen never communicated by words or actions to any MIT employee that he had stated plans or intentions to commit suicide, and any prior suicide attempts occurred well over a year before matriculation." *Id.* at 146. Moreover, Nguyen was "a twenty-five year old adult graduate student living off campus, not a young student living in a campus dormitory under daily observation." *Id.* Even if the duty was triggered, the SJC added, MIT and the individual defendants did not breach this duty because Nguyen repeatedly rejected the services offered by the institution.[9] *See id.* at 146-47.

1. Implications of *Nguyen v. MIT*

Above all, the holding in *Nguyen* generally incentivizes proactive suicide prevention and intervention measures by increasing the risk of liability for institutions that fail to react appropriately to clear warning signs.[10] To minimize liability and protect students, institutions are well advised to develop robust suicide protocols in conjunction with health care professionals

and legal counsel.[11] In fact, the *Nguyen* decision suggests that one factor the courts will look to in assessing whether a duty of care was satisfied is whether the institution has a behavioral response protocol, *e.g.*, threat assessment teams or similar, and whether it was triggered by the underlying facts. The SJC also seemed to indicate that courts will defer to reasonable suicide prevention protocols adopted and implemented by institutions.

Another important implication of *Nguyen* is the SJC's expansion to non-clinicians of the duty to prevent suicide, but also the SJC's corresponding limitation on the reasonable expectations for such non-clinicians in these difficult scenarios.[12] As the SJC made clear, suicide is often unforeseeable and unpredictable.[13] Nguyen's history itself demonstrates this point: even with numerous visits right up until a week before his death, none of the medical professionals who treated Nguyen could foresee his suicide. While most institutions have some groups of trained clinicians on campus to assist with student suicide, the majority of individuals on campus who develop close relationships with students and may learn of troubling information are not clinicians, *e.g.*, faculty, administrators, graduate and undergraduate student-employees. The *Nguyen* decision is a clear reminder that all individuals who work with students should be trained to some extent regarding risk factors and appropriate responses to indications of serious mental health concerns that may lead to suicide, but it also indicated that such non-clinicians could often satisfy this duty by referring the concern to a trained clinician who could work with the student as part of a protocol or a unified care team. Again, colleges and universities will be best served to develop clear policies and roles, keeping in mind the different ways that people on campus interact with students and the different resources available in difficult situations. Institutions should assess their current staffing and ensure that their clinical resources are appropriate for their population, while also ensuring that their non-clinical staff are trained as well as possible with regard to potential indicators of challenging behaviors, when to report concerns, and to whom such concerns should be reported.

Finally, despite its careful and thorough approach, the *Nguyen* decision leaves open several important questions. For example, *Nguyen* indicated that the duty of care is triggered "[w]here a university has actual knowledge of a student's suicide attempt that occurred while enrolled at the university or recently before matriculation, or of a student's stated plans or intentions to commit suicide[.]" *Id.* at 142-143 (emphasis added). Through this lens, what suffices as a suicide attempt? Is it limited to failed efforts at suicide, or does it encompass past instances of ideation or planning or even behaviors like self-harm that, while serious, may not always evolve to a risk of suicide? Further, what constitutes "recently before matriculation," given that the SJC concluded that one year was too long in *Nguyen*? Do the plans have to be stated to an institutional official, or must the university act upon hearsay and other third-party reporting? If the latter, will this create additional reporting responsibilities, similar to what is in place when a report of a sexual assault is received by an institution? And what obligation do undergraduate or sending schools have when a student presents with concerning behavior on their campus but then matriculates to another school, either as the result of a transfer or a subsequent degree opportunity?

In conclusion, the SJC is again leading a national discussion with regard to the scope of institutional liability for student safety on campus. Given Massachusetts's status as a major center of higher education, other jurisdictions will likely be confronted with similar issues in the

near future.[14] While these issues will be debated, the SJC has provided an early salvo by creating a framework in *Nguyen*. It will not be the final word regarding institutional liability for suicide in higher education.

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[1] *See generally*, American College Health Assoc., National College Health Assessment II (Spring 2017) (in an extensive assessment surveying over 63,000 college students, it was found that, in the past 12 months, 51% of surveyed students felt that "things were hopeless," 61% of surveyed students felt "overwhelming anxiety," and 10% of surveyed students had "seriously considered suicide").

[2] 389 Mass. 47 (1983).

[3] While the notion of *in loco parentis* is commonly used in the primary and secondary education systems, that relationship has evolved in the post-secondary system. *See generally*, Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 40(a) (2012) ("Duty Based on a Special Relationship with Another"); Dall, J., "Determining Duty in Collegiate Tort Litigation: Shifting Paradigms of the College-Student Relationship," 29 Journal of College and University Law 485 (2003)

[4] *See Mullins*, 389 Mass. at 49-50.

[5] *Id.* at 51.

[6] *Id.* at 54 (internal citations omitted).

[7] *See, e.g., Bash v. Clark University*, No. 06745A, 2006 WL 4114297, 22 Mass. L. Rptr. 84 (Mass. Super. Ct. Nov. 20, 2006) (granting the University summary judgment while concluding that it did not have a duty to prevent a student from overdosing on illicit drugs in a university controlled dorm room); *Shin v. MIT*, No. 020403, 2005 WL 1869101, 19 Mass. L. Rptr. 570 (Mass. Super. Ct. June 27, 2005) (denying MIT summary judgment on grounds that several MIT officials had sufficient information about a student who committed suicide such that special relationship existed between the university and student).

[8] The doctor who met with Nguyen during his final meeting noted that Nguyen "did not say anything that sounded imminently suicidal or hopeless," discussing instead career options and a subsequent appointment. *Nguyen*, 96 N.E.3d at 135.

[9] The court's conclusion that there was no breach even if a duty existed appears inconsistent with its earlier holding that if a student refuses care and treatment, reasonable care requires the university to notify the student's emergency contact. *See id.* at 145.

[10] *See id.* at 143, *quoting* Pavela, Questions and Answers on College Student Suicide: A Law and Policy Perspective 8–9 (2006) ("The main obstacle to better suicide prevention on campus is underreaction…) (emphasis in original).

[11] *See also* Lannon et. al., "Students Who Pose a Risk of Self Harm: Individualized Assessments, Leave, and Conditions for Return," National Association of College and University Attorneys, Annual Conference materials (June 24-27, 2018) (discussing best practices in the context of recent policy statements and decisions issued by the U.S. Department of Education's Office for Civil Rights).

[12] *Compare Nguyen*, 96 N.E.3d at 144 ("[n]onclinicians are also not expected to discern suicidal tendencies where the student has not stated his or her plans or intentions to commit suicide"); *id.* at 146 ("[the limited duty] recognizes that nonclinicians cannot be expected to probe or discern suicidal intentions that are not expressly evident"), *with id.* at 145 n. 20 ("[f]or university-employed medical professionals, the duty and standards of care are those established by the profession itself").

[13] *See id.* at 147 n. 21 (discussing the difficulty, even among trained professionals, in assessing the imminence of the risk of suicide).

[14] California is already revisiting college and university liability. In *Regents of University of California v. Superior Court*, the California Supreme Court concluded that universities have the duty to "take reasonable steps to protect students when it becomes aware of a foreseeable threat to their safety … while they are engaged in activities that are part of the school's curriculum or closely related to its delivery of educational services." 413 P.3d 656, 673-74 (Cal. 2018). The plaintiff in *Regents* was a student that was stabbed several times during class by a student whom the

University knew to be potentially dangerous. *Id.* at 662. The court emphasized that the duty is "limited" because "it extends to activities that are tied to the school's curriculum *but not to student behavior over which the university has no significant degree of control.*" *Id.* at 669 (emphasis added).

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Education Reform: *Doe v. Secretary of Education*

By Ryan P. McManus

Case Focus

On April 24, 2018, the Supreme Judicial Court (SJC) upheld the constitutionality of a Massachusetts law regulating the number of Commonwealth charter schools that can been established in each school district. The case, *Doe v. Secretary of Education, 479 Mass. 375 (2018)*, marks the SJC's latest foray into the complex and often controversial subject of education reform.

Education Reform in Massachusetts and the Establishment of Charter Schools

Understanding the Court's decision in *Doe* requires some context on prior education reform litigation, legislative responses, and the current statutory limitations on charter schools. In *McDuffy v. Secretary of the Executive Office of Education, 415 Mass. 545 (1993)*, the SJC held that the Education Clause of the Massachusetts Constitution imposes an enforceable obligation on the Commonwealth to provide all students with a public education, and that individual students denied that right can sue to enforce it. *McDuffy* addressed the constitutionality of the public school financing system, which was then primarily dependent on local funding (and local property taxes).

In the wake of *McDuffy*, the Legislature enacted the sweeping Massachusetts Education Reform Act (MERA). MERA introduced a number of reforms, among them the establishment and funding of a "foundation budget" for each district, state oversight of school performance, examination-based assessments and data collection (the "MCAS" tests), and, for the first time, the authorization of charter schools. (This article uses the term "charter school" to refer to Commonwealth Charter Schools, which were primarily at issue in *Doe*. State law also authorizes the establishment of Horace Mann Charter Schools, which, unlike Commonwealth Charter Schools, require the approval of the local school district.)

From the beginning, charter schools have been subject to limitations. The current statutory framework (at issue in *Doe*) limits charter schools in two ways. First, the total number of charter schools that may operate in the state is capped at 120. Second, no more than 9% of total public-school spending in each district may be spent on charter schools. For school systems performing in the lowest decile statewide, that spending cap is increased to 18%.

The SJC's Decision in *Doe*

In *Doe*, five students in Boston public schools alleged, on behalf of themselves and a class, that the spending cap applicable to charter schools violates the Education and Equal Protection Clauses of the Massachusetts Constitution. Each of the students alleged that he or she was enrolled in a level three or level four school, meaning that under the Commonwealth's system of classification, their schools were performing in the bottom fifth of all schools in Massachusetts. Each of the students had applied to a charter school, but failed to secure a seat through the lottery used to determine admission. The students alleged that additional charter schools capable of providing a constitutionally sufficient education to them and other Boston

students were prevented from being established solely because Boston had reached its statutory spending cap for charter schools.

The Superior Court dismissed the students' Education Clause claims, holding that they do not have a constitutional "right to choose a particular flavor of education." The Superior Court likewise rejected the students' Equal Protection claim, holding that the cap on charter schools is rationally related to the Commonwealth's interest in allocating funding between charter schools and district schools. The students sought and obtained direct appellate review of the Superior Court's decision by the SJC. After affirming that the students had standing to bring their claims, the SJC addressed the merits under the Education Clause and Equal Protection Clause.

With respect to the Education Clause, the SJC agreed with the students that "the education clause imposes an affirmative duty on the Commonwealth to provide a level of education in the public schools for the children there enrolled that qualifies as constitutionally adequate." *Doe*, 479 Mass. at 387. The Court further agreed that the students had pled sufficiently that "they have been deprived of an adequate education" and that their "complaint supports the claim that the education provided in their schools is, at the moment, inadequate." *Id.* at 388–89. Nevertheless, the Court reasoned that the students failed to plead a violation of the Education Clause because they had not alleged facts suggesting that the "defendants have failed to fulfil their constitutionally prescribed duty to educate." *Id.* at 388. In particular, the students had "not alleged any facts to support a claim that the Commonwealth's public education plan does not provide reasonable assurance of improvements for their schools' performance over a reasonable period of time." *Id.* at 389. Put differently, because the Legislature had enacted measures aimed at remedying failing schools (including those contained in MERA), and because the students had not adequately alleged that those measures were ineffective, the SJC suggested that temporary deficiencies in the quality of a particular school or district, or in a particular student's educational opportunities, do not amount to a violation of the Commonwealth's constitutional duty to provide an education.

In affirming the dismissal of the students' Education Clause claim, the SJC also faulted the students' exclusive focus on the charter school cap, where charter schools are not "the Commonwealth's only plan for ensuring that the education provided in the plaintiffs' schools will be adequate." *Id.* at 390. Even if a violation of the Education Clause had been properly alleged, the Court emphasized that the "specific relief [plaintiffs] seek"—striking the statutory cap on charter schools—"would not be available" because "'[t]he education clause leaves the details of education policymaking to the Governor and the Legislature.'" *Id.* (quoting *Hancock v. Comm'r of Educ., 443 Mass 428, 454 (2005)* (Marshall, C.J., concurring)).

With respect to the students' Equal Protection claim, the SJC first concluded that the charter school spending cap was not subject to heightened scrutiny because it does not "significantly interfere" with any fundamental right to education. *Id.* at 392. The Court reasoned that charter schools were originally intended to serve as laboratories for the development of innovative approaches to public education, and as such there was no fundamental right to attend charter schools that that the cap could be deemed to interfere with. *Id.* at 392–93. The Court thus applied rational basis scrutiny to the charter school spending cap, concluding that it is rationally related to (among other things) the Commonwealth's legitimate "attempt to allocate resources

among all the Commonwealth's students" – both those who attend charter schools and those who do not. *Id.* at 394.

Implications of the *Doe* Decision for Education Reform Litigation

Although the SJC's decision in *Doe* surely was a disappointment to charter school advocates, its implications for further school reform litigation is less than clear.

Doe does clarify that, to state a claim under the Education Clause, it is not enough to allege that certain students are not currently receiving a constitutionally adequate education. Instead, a student must successfully plead, with supporting factual allegations, both (i) that he or she is not receiving a constitutionally required education and (ii) that state law "does not provide reasonable assurance of improvements for their schools' performance over a reasonable period of time." *Doe*, 479 Mass. at 389.

Doe also demonstrates the SJC's reluctance to mandate any particular policy reform to remedy a violation of the Education Clause. Plaintiffs pursuing Education Clause claims should therefore expect that Massachusetts courts will not order any particular policy reform as a remedy. Rather, the courts will at most – at least in the first instance – enter declaratory relief regarding the Commonwealth's fulfillment of its constitutional duty to educate, and leave the choice of policy reform to the political branches. Only if the political branches fail to respond might a court consider ordering specific reforms.

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SCVNGR, Inc. v. Punchh, Inc.: The SJC Instructs Trial Courts and Litigants on Analyzing Challenges to Personal Jurisdiction

By Evan Fray-Witzer

Case Focus

In *SCVNGR, Inc. v. Punchh, Inc.*, 478 Mass. 324 (2017), the Supreme Judicial Court reversed a Superior Court Business Litigation Session decision that had dismissed the plaintiff's complaint for lack of personal jurisdiction. Notably, the SJC's opinion prohibits the trial courts, when deciding a challenge to personal jurisdiction, from engaging in the frequently employed practice of skipping the analysis under the long-arm statute and jumping directly to the analysis under the Due Process Clause of the U.S. Constitution. In reaching this conclusion, the SJC "clarif[ied]" that "the long-arm statute's reach is not coextensive with what due process allows." *Id.* at 330 n.9.

Background

SCVNGR, Inc., a Massachusetts-based company doing business as LevelUp, sued Punchh, Inc., a California-based competitor, for defamation. Punchh moved to dismiss for lack of personal jurisdiction. *Id.* at 325. After allowing some limited jurisdictional discovery, Judge Kaplan of the Business Litigation Section allowed Punchh's motion to dismiss, finding that Punchh lacked the minimum contacts with Massachusetts necessary for an exercise of personal jurisdiction to comport with the Due Process requirements of the U. S. Constitution. *Id.* Although Judge Kaplan recognized that "typically a Superior Court judge presented with a Rule 12(b)(2) argument begins with an analysis of whether the requirements of the long-arm statute have been met," he nevertheless proceeded directly to the federal Due Process considerations, noting that this was where "both parties ha[d] focused their arguments." *Id.*

LevelUp appealed the dismissal to the Appeals Court. The SJC, of its own accord, took direct appellate review. *Id.*

Analysis

"Prior to exercising personal jurisdiction over a nonresident defendant, a judge must determine that doing so comports with both the forum's long-arm statute and the requirements of the United States Constitution." *Id.* at 325 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 290 (1980)). Massachusetts's long-arm statute, G.L. c. 223A, § 3, provides eight enumerated categories of actions which can give rise to personal jurisdiction over a foreign defendant. Two of those categories address claims arising out of domestic relationships (marriage, divorce, child custody, and the like); one from the ownership of real estate within Massachusetts; and one from offering insurance within the Commonwealth. The remaining four categories address claims that arise out of a defendant's: (a) transacting business within Massachusetts; (b) contracting for goods or services within Massachusetts; (c) committing a tort within Massachusetts; and (d) committing a tort outside of Massachusetts that causes injury within Massachusetts ***if*** the Defendant also does or solicits business within Massachusetts or derives substantial revenues from goods or services provided in Massachusetts.

Unlike a number of other states, Massachusetts's long-arm statute does not explicitly extend personal jurisdiction to the limits of the U. S. Constitution. Nevertheless, two seminal SJC cases had seemed to interpret the statute to have the same broad scope. In *"Automatic" Sprinkler Corp. v. Seneca Foods Corp.*, 361 Mass. 441, 443 (1972), the SJC held: "We see the function of the long arm statute as an assertion of jurisdiction over the person to the limits allowed by the Constitution of the United States." Likewise, in *Good Hope Indus., Inc. v. Ryder Scott Co.*, 378 Mass. 1, 5-6 (1979), the SJC held: "Since we have stated that our long arm statute, G. L. c. 223A, functions as 'an assertion of jurisdiction over the person to the limits allowed by the Constitution of the United States,' …the two questions tend to converge" (quoting *"Automatic" Sprinkler*). *Good Hope* also, however, contained the seeds of *SCVNGR*'s "clarif[ication]," stating that the long-arm statute "asserts jurisdiction over the person to the constitutional limit *only when some basis for jurisdiction enumerated in the statute has been established*." *Good Hope*, 378 Mass. at 1 (emphasis added).

Prior to *SCVNGR*, state and federal cases applying Massachusetts law frequently cited *"Automatic" Sprinkler* and/or *Good Hope* in support of the proposition that Massachusetts's long-arm statute extended to the outer reaches of the Due Process Clause and that, as a result, the two-step inquiry could be addressed in a single inquiry. *See, e.g., OpenRisk, LLC v. Roston*, 90 Mass. App. Ct. 1107 (2016) (Rule 1:28) ("The Massachusetts long-arm statute, G. L. c. 223A, § 3, however, allows for an assertion of jurisdiction over the person to the limits allowed by the Constitution of the United States. …It is appropriate, therefore, for the court to sidestep the statutory inquiry and proceed directly to the constitutional analysis") (citations omitted); *FTI, LLC v. Duffy*, 2017 Mass. Super. LEXIS 93, at *8 (Suffolk Super. Ct. 2017); *Let's Adopt! Glob., Inc. v. Macey*, 32 Mass. L. Rep. 573 (Worcester Super. Ct. 2015); *Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A.*, 290 F.3d 42, 52 (1st Cir. 2002).

In light of this precedent, the *SCVNGR* parties' decision to focus exclusively on the question of whether the Court could exercise jurisdiction consistent with Due Process made perfect sense. In baseball terms (this is, after all, summer in New England): since the runner cannot advance to third without touching both first and second bases, if the runner missed second, the question of whether he touched first is moot. Indeed, in at least two cases pre-dating *SCVNGR* the First Circuit noted that even if Massachusetts' long-arm statute might not extend to the limits of Due Process, examining the long-arm statute was not necessary if the claims clearly failed to meet the requirements of Due Process. *See A Corp. v. All Am. Plumbing, Inc.*, 812 F.3d 54, 58-59 (1st Cir. 2016); *Copia Communs., LLC v. AMResorts, L.P.*, 812 F.3d 1, 3-4 (1st Cir. 2016).

In *SCVNGR*, though, the SJC was having none of it. It first clarified that "*Automatic" Sprinkler*'s sweeping language was more limited than might first appear:

To the extent that *"Automatic" Sprinkler* …identifies "the function of the long arm statute as an assertion of jurisdiction over the person to the limits allowed by the Constitution of the United States," we take this opportunity to clarify that, in accordance with *Good Hope*. . . the long-arm statute's reach is not coextensive with what due process allows.

SCVNGR, 478 Mass. at 330 n.9.

The SJC then stated that the order in which a lower court examines the two prongs of personal jurisdiction does indeed matter:

Our jurisprudence since *Good Hope* also makes clear that courts should consider the long-arm statute first, before approaching the constitutional question. …In this regard, it is canonical that courts should, where possible, avoid unnecessary constitutional decisions. … Determining first whether the long-arm statute's requirements are satisfied is consonant with the "duty to avoid unnecessary decisions of serious constitutional issues. … [W]e cannot let the actions of private litigants force us to decide unnecessarily a serious question of constitutional law."

Id. at 330 (citations omitted).

As a result, the SJC remanded the case to the Superior Court for a determination, first, as to whether the long-arm statute's requirements were met and only then for a determination as to whether an exercise of jurisdiction comports with the requirements of Due Process. In doing so, the SJC noted that the subsequent re-examination of the constitutional due process question would likely take place "on a presumably fuller record," apparently assuming that the trial court would allow the parties some additional jurisdictional discovery before ruling on the remanded motion (*id.* at 330).

Another recent SJC opinion drives home the point that neither the parties nor the court can leapfrog over the long-arm statute and proceed directly to the constitutional question. In *Exxon Mobil Corp. v. Attorney General*, 479 Mass. 312, 317 n.3 (2018), citing *SCVNGR*, the SJC noted that although the parties' argument on the jurisdictional issues focused exclusively on the due process question, the Court would first analyze them under the long-arm statute, which it proceeded to do.

Takeaways

Two practical takeaways are clear:

1. Notwithstanding any suggestion to the contrary in prior precedent, "the long-arm statute's reach is not coextensive with what due process allows."
2. Neither practitioners nor the Court should address whether an assertion of personal jurisdiction comports with the requirements of the Due Process Clause without first addressing whether the plaintiff's claims assert a cause of action that brings the case within the parameters of the Massachusetts long-arm statute. In short, although the plaintiff may still get tagged-out for failing to touch second base, we will not know until a call is made at first.

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How to Hire a Domestic Worker and Stay Out of Trouble

by Andrea Peraner-Sweet

Practice Tips

The Massachusetts Domestic Workers' Bill of Rights ("DWBR"), G.L. c. 149, §§ 190-191, enacted in 2015, provided expansive new protections to domestic workers and imposed new obligations on their employers. Violation of the DWBR can result in substantial penalties, including mandatory treble damages, attorneys' fees and costs. Employers who fail to comply with the DWBR can face enforcement actions by the Attorney General ("AG"), the aggrieved worker, or the Massachusetts Commission Against Discrimination ("MCAD"). Yet, many remain unfamiliar with the DWBR and its implementing regulations. 940 CMR 32.00. This article reviews key provisions of the DWBR.

Who Is Covered?

The DWBR protects workers employed within a household, regardless of their immigration status, who perform domestic services, including housekeeping, house cleaning, nanny or home companion services, and in-home caretaking of sick or elderly individuals for "wage, remuneration or other compensation." G.L. c. 149, § 190(a); 940 CMR 32.02. The DWBR does not alter who is deemed an independent contractor (rather than domestic employee) under G.L. c. 149, § 148B.

The DWBR does not cover: (i) babysitters who work less than sixteen hours per week providing "casual, intermittent and "irregular" childcare, and whose primary job is not childcare; (ii) personal care attendants ("PCAs") who provide services under the MassHealth PCA program; and (iii) employees of a licensed or registered staffing, employment or placement agency. G.L. c. 149, § 190(a); 940 CMR 32.02.

Employment Agreement

The DBWR requires employers to provide domestic workers with "notice of all applicable state and federal laws." G.L. c. 149, § 190(m); 940 CMR 32.04(6). "Notice of Rights" and "Record of Information for Domestic Workers" forms can be found on the AG's website. Additionally, before work commences, employers must provide domestic workers who work sixteen or more hours a week a written employment agreement in a language the worker understands. The agreement should contain the terms and conditions of employment and specify any deductible fees or costs and worker's rights to grievance, privacy, and notice of termination. G.L. c. 149, § 190(l); 940 CMR 32.04(3).

Both employer and worker must sign the agreement, which must be kept on file for at least three years. A "Model Domestic Worker Employment Agreement" can be found on the AG's website.

Working Hours, Rest Periods

Domestic workers must be paid for all time they are required to be on the employer's premises, on duty, or any time worked before or beyond normally scheduled shifts to complete the work. G.L. c. 149, § 190(a); 940 CMR 32.02.

Workers on duty for less than twenty-four consecutive hours who do not reside on the employer's premises must be paid for all working time, including meal, rest or sleep periods, unless the worker is free to leave the premises and completely relieved of all work-related duties during that period. G.L. c. 149, § 190(a) and (c).

For workers on duty for twenty-four hours or more, all meal, rest and sleep periods constitute working time. However, the worker and employer can agree to exclude from working time a regularly scheduled sleeping period of not more than eight hours if there is advance written agreement in a language understood by the worker, signed by both the worker and employer. G.L. c. 149, § 190(d) and (e); 940 CMR 32.03(2).

Workers working forty or more hours per week must have at least twenty-four consecutive hours off each week and at least forty-eight hours off each month. A worker may volunteer to work on a day of rest but only if there is a written agreement made in advance, signed or acknowledged by both the worker and employer. The worker must be paid time and a half for all hours worked in excess of forty hours. G.L. c. 149, § 190(b); 940 CMR 32.03(3).

Wage Deductions

Under certain circumstances, an employer may deduct food, beverages and lodging costs from a worker's wages. G.L. c. 149, § 190(f) and (g); 940 CMR 32.03(5)(b) and (c). Such deductions are subject to the statutory maximums found in 454 CMR 27.05(3) pursuant to G.L. c. 151.

Food and beverage costs can be deducted only if they are voluntarily and freely chosen by the worker. If the worker cannot easily bring, prepare or consume meals on the premises, the employer cannot make such deductions. G.L. c. 149, § 190(f); 940 CMR 32.03(5)(b).

Lodging costs can be deducted only if the worker voluntarily and freely accepts and actually uses the lodging. An employer cannot deduct lodging costs if the employer requires the worker live in the employer's home or in a particular location. G.L. c. 149, § 190(g); 940 CMR 32.03(5)(c).

There must be a written agreement specifying the deductions, made in advance, in a language understood by the worker, signed or acknowledged by both the worker and employer. 940 CMR 32.03(5)(a).

Record Keeping, Times Sheets, Written Evaluations

Employers must keep records of domestic workers' wages and hours for three years. G.L. c. 149, § 190(l); 940 CMR 32.04(2). Employers must provide workers who work more than sixteen hours per week with a time sheet at least once every two weeks. 940 CMR 32.04(4). Both the

worker and employer must sign or acknowledge the time sheet. Signing or acknowledging a time sheet does not preclude a worker from claiming that additional wages are owed. *Id*. Likewise, a worker's refusal to sign or acknowledge a time sheet does not relieve the employer from paying wages owed. *Id.* A sample time sheet can be found on the AG's website.

After three months, a worker may request a written performance evaluation and, thereafter, annually. G.L. c. 149, § 190(j). The worker can inspect and dispute the evaluation under G.L. c. 149, § 52C, the Massachusetts Personnel Records law. *Id.*

Right to Privacy

The DWBR prohibits employers from restricting, interfering with or monitoring a worker's private communications and from taking a worker's documents or other personal effects. G.L. c. 149, § 190(i); 940 CMR 32.03(6). Additionally, employers are barred from monitoring a worker's use of bathrooms and sleeping and dressing quarters. *Id*.

A worker who resides in the employer's home must be given access to telephone and internet services, including text messaging, social media and e-mail, without the employer's interference. 940 CMR 32.03(8).

Prohibition Against Trafficking, Harassment and Retaliation

It is a violation of the DWBR (and a crime) for employers to engage in any conduct that constitutes forced services or trafficking of a person for sexual servitude or forced services under G.L. c. 265, §§ 49-51. G.L. c. 149, § 190(i); 940 CMR 32.03(7).

The DWBR protects both domestic workers, as well as PCAs, from discrimination and harassment based on sex, sexual orientation, gender identity, race, color, age, religion, national origin or disability and from retaliation for exercising their rights. G.L. c. 191; 940 CMR 35.05(2).

Domestic workers are entitled to job-protected leave for the birth or adoption of a child under the Massachusetts Parental Leave Act, G.L. c. 149, § 105D. *Id.*

Termination

Employers who terminate live-in workers "for cause" must provide the worker with advance written notice and at least 48 hours to leave. G.L. c. 149, § 190(k); 940 CMR 32.03(9)(c).

Employers who terminate live-in workers "without cause" must provide the worker with written notice and at least thirty days of lodging or two weeks severance pay. G.L. c. 149, § 190(k); 940 CMR 32.03(9)(a).

Neither notice nor severance is required where good faith allegations are made in writing that the worker abused, neglected or caused any other harmful conduct against the employer or members

of the employer's family or individuals residing in the employer's home. G.L. c. 149, § 190(k); 940 CMR 32.03(9)(b).

No termination notice or severance is required for workers who do not reside in the employer's home.

Enforcement

Violations of the DWBR are enforced by the AG or by the aggrieved worker pursuant to the Massachusetts Wage Act, G.L. c. 149, § 150. Workers who prevail in court are awarded treble damages, the costs of litigation and attorneys' fees. Violations of the DWBR's anti-discrimination and anti-harassment provisions are enforced by the MCAD.

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Distinguishing Employees' "General Skill or Knowledge" From Protectable Trade Secrets Under Massachusetts Law

By Gregory S. Bombard and Adam M. Santeusanio

Legal Analysis

Trade secret claims often arise when a highly skilled employee leaves to work for a competitor. Under Massachusetts trade secret law, this fact pattern creates a tension between the employer's interest in protecting its trade secrets and the employee's competing interest in using his or her own general experience and abilities to foster a successful career. Though Massachusetts courts have long recognized this tension, the line between what constitutes a protectable trade secret as compared to an employee's "general skill or knowledge" is not explicitly defined in Massachusetts case law. The inquiry is highly fact-based and does not easily lend itself to bright lines. This article examines the leading cases addressing the distinction between trade secrets and general skill or knowledge, and identifies the four factors courts most commonly use to draw the line.

I. The Legal Framework

Massachusetts law protects trade secret information, which is defined by statute as "a formula, pattern, compilation, program, device, method, technique, process, business strategy, customer list, invention, or scientific, technical, financial or customer data that (i) at the time of the alleged misappropriation, provided economic advantage, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, others who might obtain economic advantage from its acquisition, disclosure or use; and (ii) at the time of the alleged misappropriation was the subject of efforts that were reasonable under the circumstances . . . to protect against it being acquired, disclosed or used."[1]

Although a company must safeguard the secrecy of purported trade secrets in order to seek legal protection for them, the company must, of course, disclose such secrets to at least some of its employees for use in the company's business. That disclosure creates a legally-implied duty by the employee to maintain the confidentiality of the trade secrets. In addition, employees are often subject to contractual nondisclosure covenants, which survive the termination of employment.

However, Massachusetts courts recognize an important limitation on trade secret protection: a departing employee may continue to use his "general skill or knowledge acquired during the course of the employment" following his departure.[2] This doctrine, which has been the law in Massachusetts since at least 1912,[3] provides that an employer may not claim trade secret protection over an employee's general skill or knowledge regardless of whether the employee developed it prior to or during his employment. By limiting the types of information that an employer can protect as trade secrets, the general skill or knowledge rule "effectuates the public interest in labor mobility, promotes the employee's freedom to practice a profession, and [promotes] freedom of competition."[4] The rule applies both when a former employer sues a former employee for misappropriation of the former employer's trade secrets,[5] and when an employer seeks to enforce post-employment restrictive covenants, like noncompetition agreements.[6]

The facts of *Intertek Testing Servs. NA, Inc. v. Curtis-Strauss LLC* provides an example of how the doctrine plays out in practice. Intertek was a product inspection, testing and certification company that sued several of its former salespeople for having misappropriated "secret" information about "the quality of the relationship that certain customers had with Intertek," including whether those relationships were "good," "bad," or "in-between." Judge Gants, then sitting in the Business Litigation Session, granted summary judgment in favor of the salespeople, ruling that the strength of an employer's relationship with a particular customer "certainly falls into the category of general knowledge acquired during the course of employment." Speaking to the rule's policy goal of promoting labor mobility, Judge Gants observed that "if this general information were deemed secret or confidential, then no salesman could ever work for a competitor, because every salesman inevitably knows this information and could not help but use it in some fashion."[7]

II. Distinguishing Trade Secrets from General Skill or Knowledge

Although the general skill or knowledge doctrine is widely cited in Massachusetts case law, no court has articulated a test for distinguishing between protectable trade secrets and nonprotectable general skill or knowledge. In the cases applying the doctrine, however, the courts most commonly consider the following four factors: (1) whether an employee had significant experience or expertise prior to starting their employment; (2) whether an employee assisted in the development of the alleged trade secret; (3) whether the alleged trade secrets were actually put to use or were merely inchoate "concepts" or "goals"; and (4) whether the alleged misappropriation involved the removal of documents or merely the contents of the employee's memory. None of the four factors standing alone is dispositive.

A. The Employee's Prior Experience or Expertise

Massachusetts courts are more likely to find that an alleged secret falls within an employee's general skill and knowledge if the employee had significant experience, expertise, or education in the field before starting his employment. This factor is based on the policy that "the loss to the individual and the economic loss to society are both greatest when a highly trained and specialized person is prevented from employing his special abilities."[8]

For example, in *Dynamics Research Corp v. Analytic Sciences Corp.*, an employer claimed its former employee misappropriated a system for managing data and providing feedback during the development of weapons systems for government contracts. Prior to his employment, the employee had been decorated by the Air Force for his management ability and had worked as a manager of an MIT laboratory. In fact, the employer hired him "in part because he [already] understood its management system concept." The Appeals Court ruled that the alleged secret fell within the employee's general skill and knowledge, observing he had come to the job "with knowledge and skill in the plaintiff's area of operation" and "much of the [alleged trade secret] was known to the defendant prior to his employment."[9] Conversely, in *Junker v. Plummer*, the employer's claimed secret was a novel machine for "combining shoe cloth," and the former employees "had never seen a combining machine" before their employment.[10] There, the SJC ruled that the machine's functionality was not part of the employees' general skill or knowledge

and was instead a protectable trade secret of their former employer.

B. The Employee's Personal Participation in Developing the Secret

Massachusetts courts are more likely to find that an alleged secret falls within an employee's general skill and knowledge if the employee directly participated in developing the alleged secret. The rationale behind this factor is that if the employee personally contributed towards the alleged secret's creation or development, then the alleged secret may consist, at least in part, of the skill, knowledge, and experience that the employee brought to bear on the project.

Thus, in *Chomerics, Inc. v. Ehrreich*, the employee had been "personally actively involved in all of the inventions and discoveries made" by the employer in developing the alleged secret.[11] Indeed, the employer's "effort in this field was pioneered largely through [the defendant employee's] inventions and research," and the research into conductive plastics was "peculiarly his . . . almost private domain." The Appeals Court ruled that the information fell within the employee's general skill or knowledge as a scientist, despite the fact that the employer took reasonable measures to safeguard the information as a trade secret, including requiring the defendant to keep his laboratory notebooks locked up. Similarly, in *New Method Die & Cut-Out Co. v. Milton Bradley Co.*, the employee "took part to a substantial extent in developing the [allegedly secret] process" for manufacturing cardboard toys, bringing to bear "his faculties, skill and experience."[12] The SJC held that the process for manufacturing cardboard toys did not constitute a protectable trade secret, but rather was "the product of [the employee's] knowledge," which he developed in the course of his work for his former employer.

C. The Employer's Unfinished Concepts and Goals

Massachusetts courts are more likely to find that information is within an employee's general skill or knowledge where the alleged secret is merely an unfinished "concept" or "goal," as opposed to information that has been reduced to practice in the form of a functioning devise, machine, or system. For example, in *Chomerics, Inc. v. Ehrreich*, the employer sought to develop electrically conductive plastics using "metal particles embedded in a plastic matrix."[13] During his employment, the employee worked on a project to develop an electrically conductive gasket that contained less than 10 percent silver particles. The employee eventually quit and began working for a competitor, which soon thereafter patented an electrically conductive gasket that used less than 10 percent silver. The Appeals Court ruled that the use of a certain amount of silver represented only a "concept," and that "when [the defendant] left [the plaintiff's employ] he took with him nothing but possibilities and goals which had hitherto proved impossible to bring to fruition." The Appeals Court ruled those "possibilities and goals" were part of the employee's general skill or knowledge, not a protectable trade secret of the former employer.

By comparison, in *Junker*, the machine for combining shoe cloth was fully operational, in use in the employer's manufacturing facility in "actual and substantial production."[14] Several of the plaintiff's employees quit, started working for a competitor, and duplicated the machine, up to which point "there was none other faintly resembling it in use anywhere." The SJC ruled that the machine was a protectable trade secret belonging to the employer.

D. Employees' Memory and Nondocumentary Information

Massachusetts courts are more likely to find that an alleged trade secret falls within an employee's general skill and knowledge if the employee allegedly used information from his memory, without taking away documents or electronically stored information. The SJC has, in several cases, "considered it significant that the former employee did or did not take actual lists or papers belonging to his former employer."[15] For example, in *American Window Cleaning Co. of Springfield v. Cohen*, the plaintiff alleged that its former employees had misappropriated secret information regarding its customers. The SJC ruled the former employees had not breached their duty of confidentiality to their former employer because "[r]emembered information" regarding certain of the employer's customers was "not confidential" and "a discharged employee, without the use of a list belonging to his former employer, may solicit the latter's customers."[16]

Similarly, in *New Method Die & Cut-Out Co.*, the SJC ruled that an allegedly secret method for manufacturing cardboard toys was within the defendant employee's general skill or knowledge, noting that "the defendant . . . when he left the employment of the plaintiff . . . took no documentary manufacturing data, cost figures, or customers' lists and no drawing which were a part of the plaintiff's files or were final drawings which had been used by the [plaintiff] for the manufacture of toys."[17]

By contrast, in *Pacific Packaging Products v. Barenboim*, the plaintiff employer alleged that five of its former employees removed, among other things, sales history reports, cost books, invoices, and spreadsheets containing the employer's information about particular customer accounts, all in order to form a competing company using the plaintiff's customer base. In granting the plaintiff's request for a preliminary injunction against the defendants' use of the information, Judge Billings ruled "[m]y focus herein is almost exclusively on documentary information" alleged to have been misappropriated because "while it is theoretically possible to make the showing that a former employee used his memory to compete unfairly with the former employer, it is not—particularly where business, not technical, information is concerned—an easy task."[18]

III. Conclusion

Distinguishing trade secrets from general skill and knowledge is not a precise science and requires a fact-specific analysis. While Massachusetts courts have not articulated a specific set of rules to apply in making the distinction, the four factors discussed above provide an outline of the key considerations Massachusetts courts have used to decide whether certain information was within a departing employee's general skill or knowledge.

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[1] Massachusetts adopted a version of the Uniform Trade Secrets Act ("UTSA"), effective October 1, 2018. See Mass. Gen. Laws ch. 93, §§ 42-42G. Other UTSA jurisdictions distinguish trade secrets from general skill or knowledge. *See, e.g.*, American Red Cross v. Palm Beach Blood Bank, Inc., 143 F.3d 1407, 1410 (11th Cir. 1998) (applying Florida law).

[2] *Junker v. Plummer*, 320 Mass. 76, 79 (1946).

[3] *American Stay Co. v. Delaney*, 211 Mass. 229, 231-32 (1912).

[4] *CVD, Inc. v. Raytheon Co.*, 769 F.2d 842, 852 (1st Cir. 1985) (applying Mass. law).

[5] *See, e.g.*, *Dynamics Research Corp. v. Analytic Sciences Corp.*, 9 Mass. App. Ct. 254, 267 (1980).

[6] *See, e.g.*, *EMC Corp. v. Loafman*, No. 2012-3115-F, 2012 WL 3620374 (Mass. Super. Ct. 2012) (Wilkins, J.) ("Nor does general knowledge acquired on the job justify a non-compete.") (citing *Dynamics Research Corp. v. Analytic Sciences Corp.*, 9 Mass. App. Ct. 254, 267 (1980)).
[7] *Intertek Testing Servs. NA, Inc. v. Curtis-Strauss LLC*, No. 98903F, 2000 WL 1473126, at *8 (Mass. Super. Ct. Aug. 8, 2000) (Gants, J.).
[8] *Dynamics Research Corp.*, 9 Mass. App. Ct. at 268 (quoting Harlan M. Blake, *Employee Agreements Not to Compete*, 73 Harv. L. Rev. 625, 684-85 (1960)); *see also Harvard Apparatus, Inc. v. Cowen*, 130 F. Supp. 2d 161, 175 n.31 (D. Mass. 2001) (applying Mass. law) ("The issue of whether the information lies within the employee's general skill or knowledge depends, in part, upon the amount of knowledge and skill the employee had in the relevant area at the start of his employment.").
[9] *Dynamics Research Corp.*, 9 Mass. App. Ct. at 268; *see also New Method Die & Cut-Out Co. v. Milton Bradley Co.*, 289 Mass. 277, 281-82 (1935) (finding no protectable secret where "much of the [allegedly secret] process was familiar to [the employee] from his [prior] experience").
[10] *Junker v. Plummer*, 320 Mass. 76, 79 (1946).
[11] *Chomerics, Inc. v. Ehrreich*, 12 Mass. App. Ct. 1, 4 (1981).
[12] *New Method Die & Cut-Out Co.*, 289 Mass. at 282.
[13] *Chomerics*, 12 Mass. App. Ct. at 4.
[14] *Junker*, 320 Mass. at 77.
[15] *Jet Spray Cooler, Inc. v. Crampton*, 361 Mass. 835, 840 (1972) (citing cases). Like the other factors, however, this factor is not dispositive. The SJC ruled in *Jet Spray Cooler, Inc. v. Crampton* that "the fact that no list or paper was taken does not prevent the former employee from being enjoined if the information which he gained through his employment and retained in his memory is confidential in nature." *Id.*
[16] *Am. Window Cleaning Co. of Springfield v. Cohen*, 343 Mass. 195, 199 (1961).
[17] *New Method Die & Cut-Out Co.*, 289 Mass. at 280.
[18] *Pac. Packaging Prod., Inc. v. Barenboim*, No. MICV2009-04320, 2010 WL 11068538, at *1 (Mass. Super. Ct. Apr. 20, 2010) (Billings, J.). To avoid an injunction on that basis, the defendants represented to the court they had completely divested themselves of the paper and electronic versions of the plaintiff's information. The court later found that representation to be a fraud on the court because the defendants had not in fact turned over the information; the court entered a default on the defendants' counterclaims and awarded fees and costs in excess of $1 million to the plaintiff.

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