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Overview of State of Massachusetts Court System

A. Trial Courts

The Massachusetts District Court (also known as the District Court Department of the Trial Court) is a trial court in Massachusetts that hears a wide range of criminal, civil, housing, juvenile, mental health, and other types of cases. District Court criminal jurisdiction extends to all felonies punishable by a sentence up to five years, and many other specific felonies with greater potential penalties; all misdemeanors; and all violations of city and town ordinances and by-laws. In felonies not within District Court final jurisdiction, the District Court conducts probable cause hearings to determine if a defendant should be bound over to the Superior Court. District Court magistrates conduct hearings to issue criminal complaints and arrest warrants, and to determine whether there is probable cause to detain persons arrested without a warrant. Both judges and magistrates issue criminal and administrative search warrants. In civil matters, District Court judges conduct both jury and jury-waived trials, and determine with finality any matter in which the likelihood of recovery does not exceed $25,000. The District Court also tries small claims involving up to $7,000 (initially tried to a magistrate, with a defense right of appeal either to a judge or to a jury).

The Massachusetts Superior Court (also known as the Superior Court Department of the Trial Court) is a trial court department in Massachusetts. The Superior Court has original jurisdiction in civil actions over $25,000, and in matters where equitable relief is sought. It also has original jurisdiction in actions involving labor disputes where injunctive relief is sought, and has exclusive authority to convene medical malpractice tribunals. There is a Superior Court department located in each of Massachusetts' fourteen counties.

B. Appellate Courts

The Massachusetts Appeals Court is the intermediate appellate court of Massachusetts. The court hears most appeals from the departments of the Trial Courts of Massachusetts, including the

Massachusetts Land Court, the Department of Industrial Accidents, the Appellate Tax Board, and the Massachusetts Labor Relations Commission.

Some types of appeals are not heard before the Appeals Court. For example, an appeal from a conviction of first degree murder goes directly to the Supreme Judicial Court. The Supreme Judicial Court can also elect to bypass review by the Appeals Court and hear a case on "direct appellate review." In the District Court Department, appeals in certain civil cases are made first to the Appellate Division of the District Court before being eligible for appeal to the Appeals Court. After a decision by the Appeals Court, parties may seek "further appellate review" by requesting review by the Supreme Judicial Court. The Appeals Court usually hears cases in three-judge panels, which rotate so that every judge has an opportunity to sit with every other judge. However, single judges will often hear interlocutory appeals from such things as court orders, stays of civil proceedings, and awards of attorney's fees. The Appeals Court consists of twenty-five active justices as well as several recall justices who despite having retired continue to assist the Court with its case load. Appeals are heard from September through June. The current Chief Justice of the Appeals Court is Phillip Rapoza.

The Massachusetts Supreme Judicial Court (SJC) is the highest court in the Commonwealth of Massachusetts.

Procedural

A. Venue

Massachusetts General Law Chapter 223 § 1-2: An action shall, except as otherwise provided, if any one of the parties thereto lives in the commonwealth, be brought in the county where one of them lives or has his usual place of business. If neither party lives in the commonwealth, the action may be brought in any county. If an action is dismissed because the defendant has raised timely objection to venue, the defendant shall be allowed double costs. Except as provided in section twenty-one of chapter two hundred and eighteen, a transitory action in a district court shall be brought in a court in the judicial district where one of the parties lives or has his usual place of business or in a court, the judicial district of which is adjacent to the judicial district where one of the parties lives or has his usual place of

business or, if in connection with the commencement of such an action the approval of trustee process is sought, that action shall be brought in a court in the judicial district where one of the parties or any person alleged to be trustee lives or has a usual place of business, or in a court the judicial district of which adjoins the judicial district where one of the parties or one of the alleged trustees lives or has a usual place of business.

B. Statute of Limitations

Personal injury: 3 years from date of reasonable discovery of injury; property damage: 3 years; written contract: 6 years; oral contract: 6 years; contract under seal: 20 years; product liability: 3 years; sexual molestation of a minor: 3 years from date victim turns 18, or when the victim reasonably discovers injury; wrongful death: 3 years from date of death; breach of warranty: 3 years; fraud: 3 years; libel/slander: 3 years; Workers' Compensation: 4 years; asbestos: 3 years from date of diagnosis with asbestos-related disease; unfair trade practices: 4 years

C. Time for Filing an Answer

20 days from service of process

D. Dismissal Re-Filing of Suit

Massachusetts Civil Procedure Rule 41(b)(1): Dismissal for Lack of Prosecution:

The court may on notice as hereinafter provided at any time, in its discretion, dismiss for lack of prosecution any action which has remained upon the docket for three years preceding said notice without activity shown other than placing upon the trial list, marking for trial, being set down for trial, the filing or withdrawal of an appearance, or the filing of any paper pertaining to discovery. The notice shall state that the action will be dismissed on a day certain, (not less than one year from the date of the notice) unless before that day the case has been tried, heard on the merits, otherwise disposed of, or unless the court on motion with or without notice shall otherwise order. The notice shall be mailed to the plaintiff's attorney of record, or, if there be none, to the plaintiff if his address be known. Otherwise such notice shall be published as directed by the court. Dismissal under this paragraph shall be without prejudice.

As a minimal requirement for dismissal of action for failure to prosecute, there must be convincing evidence of unreasonable

conduct or delay, and the judge should also give sufficient consideration to prejudice that a movant would incur if the motion were denied, and whether there are more suitable, alternative penalties. Massachusetts Broken Stone Co. v. Planning Bd. of Weston, 45 Mass.App.Ct. 738 (1998).

Dismissal for failure to prosecute is committed to sound discretion of trial judge and can be reversed only in rare instance that it is so arbitrary, capricious, whimsical or idiosyncratic that it constitutes abuse of discretion amounting to error of law. Dewing v. J.B. Driscoll Ins. Agency, 30 Mass.App.Ct. 467 (1991).

Liability

A. Negligence

Comparative Negligence: “51%” Rule

Mass. Gen. Laws c.231, Section 85:

Contributory negligence shall not bar recovery in any action by any person or legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not greater than the total amount of negligence attributable to the person or persons against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person for whose injury, damage or death recovery is made. In determining by what amount the plaintiff's damages shall be diminished in such a case, the negligence of each plaintiff shall be compared to the total negligence of all persons against whom recovery is sought. The combined total of the plaintiff's negligence taken together with all of the negligence of all defendants shall equal one hundred per cent.

Contribution:

Mass. Gen. Laws c.231b, Section 1:

(a) Except as otherwise provided in this chapter, where two or more persons become jointly liable in tort for the same injury to person or property, there shall be a right of contribution among them even though judgment has not been recovered against all or any of them.
(b) The right of contribution shall exist only in favor of a joint

tortfeasor, hereinafter called tortfeasor, who has paid more than his pro rata share of the common liability, and his total recovery shall be limited to the amount paid by him in excess of his pro rata share. No tortfeasor shall be compelled to make contribution beyond his own pro rata share of the entire liability.
(c) A tortfeasor who enters into a settlement with a claimant shall not be entitled to recover contribution from another tortfeasor in respect to any amount paid in a settlement which is in excess of what was reasonable.

B. Negligence Defenses

Contributory negligence is a recognized defense in MA. Mass. Gen. Laws c.231, Section 85: Contributory negligence shall not bar recovery in any action by any person or legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not greater than the total amount of negligence attributable to the person or persons against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person for whose injury, damage or death recovery is made.

Recognized affirmative defenses also include accord and satisfaction, arbitration and award, assumption of risk, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense.

In the context of premise liability claims, notice (either actual or constructive) is a defense. However, Massachusetts Courts have recently recognized the “mode of operation” liability standard. Generally, "[t]he obligation of one who controls business premises is to use due care to keep the premises provided for the use of its patrons in a reasonably safe condition, or at least to warn them of any dangers that might arise from such use, which are not likely to be known to them, and of which the defendant knows or ought to know." Oliveri v. M.B.T.A., 363 Mass. 165, 167 (1973). However, in the recent case of Sheehan v. Roche Brothers Supermarkets, Inc., 448 Mass. 780, 863 (2007), the Supreme Judicial Court adopted the "mode of operation" approach to determine premises liability. The “mode of operation” rule relieves the plaintiff from having to prove

notice. In the Sheehan case, a plaintiff was injured after slipping on a grape at a grocery store. The trial court granted the store's motion for summary judgment and held that there was insufficient evidence that the defendant was on notice of the hazardous condition. The Supreme Judicial Court reversed the trial court's decision and noted that Massachusetts historically has followed the traditional approach governing premises liability, requiring that a plaintiff show that the defendant had actual or constructive notice of the hazardous condition. In light of the trend away from clerk-assisted grocers to modern self-serve grocery stores, the Court held that the plaintiff can satisfy the notice requirement by demonstrating that an injury was attributable to a reasonably foreseeable dangerous condition that is related to the owner's self-service business or "mode of operation." Plaintiff's attorneys repeatedly try to extend this new liability standard to all premise liability case, though to date the Courts have only recognized it in the context of self service grocery and retail businesses.

C. Gross Negligence, Recklessness, Willful and Wanton Conduct

Under Massachusetts law, although merely a form of higher culpability negligence, gross negligence or recklessness may be filed as an independent claim. Gross negligence is substantially and appreciably higher in magnitude than ordinary negligence; for example, negligent acts that are long continued, serious, deliberate and persistent may constitute gross negligence:

"Although merely a form of higher culpability negligence, gross negligence or recklessness may be filed as an independent claim. See e.g., Matsuyama v. Birnbaum, 452 Mass. 1, 36, 890 N.E.2d 819 (2008). 'Gross negligence is substantially and appreciably higher in magnitude than ordinary negligence.' Altman v. Aronson, 231 Mass. 588, 591–92, 121 N.E. 505 (1919) ('Ordinary and gross negligence differ in degree of inattention, while both differ in kind from willful and intentional conduct which is or ought to be known to have a tendency to injure.'). For example, negligent acts that are 'long continued, serious, deliberate and persistent' may constitute gross negligence. Shepard v. Roussel, 341 Mass. 730, 730, 170 N.E.2d 317 (1960)." Weinberg v. Grand Circle Travel, LCC, 891 F. Supp. 2d 228, 251 (D. Mass. 2012).

"'The essence of wanton or reckless conduct is intentional conduct, by way either of commission or of omission where there is a duty to act, which conduct involves a high degree of likelihood that substantial harm will result to another.' Commonwealth v. Catalina, 407 Mass. 779, 789, 556 N.E.2d 973 (1990). The imposition of tort liability for wilful and wanton conduct can be based on 'either a subjective or an objective standard for evaluating knowledge of the risk of harm.' Boyd v. National R.R. Passenger Corp., 446 Mass. 540, 546, 845 N.E.2d 356 (2006). Under a subjective standard, the actor knows, or has reason to know, of facts creating a high degree of risk of physical harm to another, and deliberately proceeds to act, or fails to act, with conscious disregard for or indifference to that risk. See id. at 546–47, 845 N.E.2d 356. Under an objective standard, the actor knows, or has reason to know, of facts creating a high degree of risk of physical harm to another, but unreasonably fails to realize the high degree of risk involved. Id. at 547, 845 N.E.2d 356. Under either standard, the risk must be an unreasonable one, and the actor's conduct must involve a risk of harm to others substantially exceeding that necessary to make the conduct negligent. Id. Therefore, wilful and wanton conduct 'involves a degree of risk and a voluntary taking of that risk so marked that, compared to negligence, there is not just a difference in degree but also a difference in kind.' Sandler v. Commonwealth, 419 Mass. 334, 337, 644 N.E.2d 641 (1995); see also Manning v. Nobile, 411 Mass. 382, 387–88, 582 N.E.2d 942 (1991)." Sarro v. Philip Morris USA Inc., 857 F. Supp. 2d 182, 185-86 (D. Mass. 2012).

D. Negligent Hiring and Retention

"The plaintiff's theories of liability-negligent hiring or negligent retention of an employee by an employer-have been recognized by a number of jurisdictions, including Massachusetts." Foster v. Loft, Inc., 26 Mass. App. Ct. 289, 290, 526 N.E.2d 1309, 1310 (1988).

"The doctrine states that an employer whose employees are brought in contact with members of the public in the course of the employer's business has a duty to exercise reasonable care in the selection and retention of his employees. These principles have been explained in the following manner: 'An employer must use due care to avoid the selection or retention of an employee whom he knows or should know is a person unworthy, by habits, temperament, or nature, to deal with the persons invited to the premises by the employer. The employer's

knowledge of past acts of impropriety, violence, or disorder on the part of the employee is generally considered sufficient to forewarn the employer who selects or retains such employee in his service that he may eventually commit an assault, although not every infirmity of character, such, for example, as dishonesty or querulousness, will lead to such result.'" Foster v. Loft, Inc., 26 Mass. App. Ct. 289, 290-91, 526 N.E.2d 1309, 1310-11 (1988).

E. Negligent Entrustment

"In order to prevail on a claim for negligent entrustment in the Commonwealth, the plaintiff must show that '(1) the defendant entrusted a vehicle to an incompetent or unfit person whose incompetence or unfitness was the cause of the [victim's] injuries; (2) [the defendant] gave specific or general permission to the operator to drive the [vehicle]; and (3) the defendant had actual knowledge of the incompetence or unfitness of the operator to drive the vehicle. Nunez v. A & M Rentals, Inc., 63 Mass. App. Ct. 20, 22, 822 N.E.2d 743, 746 (2005).

"'[N]egligent entrustment' as a distinct and specific cause of action is not exclusive of, but, rather, is derived from the more general concepts of ownership, operation, and use of a motor vehicle." Barnstable Cnty. Mut. Fire Ins. Co. v. Lally, 374 Mass. 602, 606, 373 N.E.2d 966, 969 (1978).

F. Dram Shop

To prevail in a dram shop case, a plaintiff must prove by a preponderance of the evidence that the patron in question was exhibiting outward signs of intoxication by the time he was served his last alcoholic drink. Vickowski v. Polish Am. Citizens Club of Deerfield, Inc., 422 Mass. 606, 610 (1996). However, a plaintiff can establish this with circumstantial proof. "In other words, a jury confronted with evidence of a patron's excessive consumption of alcohol, properly could infer, on the basis of common sense and experience, that the patron would have displayed obvious outward signs of intoxication while continuing to receive service from the licensee." Id. at 611.

G. Joint and Several Liability

Mass. Gen. Laws c.231B:

Establishes joint and several liability among tortfeasors, but allows for contribution according to each tortfeasor's pro-rata share.

Entities From Whom Contribution Cannot be Sought

A claim for contribution cannot be made against an employer pursuant to the exclusivity provision of the Workers' Compensation Act. Liberty Mutual Ins. Co. v. Westerlind, 374 Mass. 524, 526 (1978).

Contribution cannot be sought against a parent for a child's tort, unless that parent has breached his duty "to exercise reasonable care to prevent his minor child from inflicting injury, intentionally or negligently, on others. Caldwell v. Zaher, 344 Mass. 590, 592 (1962).

H. Wrongful Death and/or Survival Actions

Mass. Gen. Laws c.229, Section 2:

A person who (1) by his negligence causes the death of a person, or (2) by willful, wanton or reckless act causes the death of a person under such circumstances that the deceased could have recovered damages for personal injuries if his death had not resulted, or (3) operates a common carrier of passengers and by his negligence causes the death of a passenger, or (4) operates a common carrier of passengers and by his willful, wanton or reckless act causes the death of a passenger under such circumstances that the deceased could have recovered damages for personal injuries if his death had not resulted, or (5) is responsible for a breach of warranty arising under Article 2 of chapter one hundred and six which results in injury to a person that causes death, shall be liable in damages in the amount of: (1) the fair monetary value of the decedent to the persons entitled to receive the damages recovered, as provided in section one, including but not limited to compensation for the loss of the reasonably expected net income, services, protection, care, assistance, society, companionship, comfort, guidance, counsel, and advice of the decedent to the persons entitled to the damages recovered; (2) the reasonable funeral and burial expenses of the decedent; (3) punitive damages in an amount of not less than five thousand dollars in such case as the decedent's death was caused by the malicious, willful, wanton or reckless conduct of the defendant or by the gross negligence of the defendant

I. Vicarious Liability

Vicarious liability based on a claimed agency relationship permits an

injured party to recover against a principal if the injury occurs as a result of the negligence of its agent acting within the scope of his agency. Abraham v. E.H. Porter Constr. Co., 354 Mass. 757 (1968) (finding that any carelessness of the defendant builder's employees in the course of their lunchtime activities on their own time away from the construction site was not chargeable to the builder); Worcester Ins. Co. v. Fells Acres Day School, Inc., 408 Mass. 393 (1990) (finding that corporation was not vicariously liable for assaults and batteries committed by staff members).

J. Exclusivity of Workers' Compensation

The exclusivity provision in the workers' compensation statute ordinarily bars a third party sued by the employee from recovering against the negligent employer who has paid workers' compensation. M.G.L. c. 152, § 23.

However, a contract-based right to indemnification may stem from a binding express or implied contract of indemnity or from an obligation implied from the parties' relationship, and which will override the immunity protection given the employer by the compensation act. Larkin v. Ralph o. Porter, Inc., 405 Mass. 179, 181 (1989), quoting Decker v. Black & Decker Mfg. Co., 389 Mass. 35, 37 (1983). See, Kelly v. DiMeo, Inc., 31 Mass.App.Ct. 626, 628, 581 N.E.2d 1316 (1991), citing H.P. Hood & Sons, Inc. v. Ford Motor Co., 370 Mass. 69, 77, 345 N.E.2d 683 (1976). See, also Whittle v. Pagani Bros. Constr. Co., 383 Mass. 796, 799–800 (1981)

Damages

A. Statutory Caps on Damages

M.G.L.A. 231 § 60H: In any action for malpractice, negligence, error, omission, mistake or the unauthorized rendering of professional services against a provider of health care, the court shall instruct the jury that in the event they find the defendant liable, they shall not award the plaintiff more than five hundred thousand dollars for pain and suffering, loss of companionship, embarrassment and other items of general damages unless the jury determines that there is a substantial or permanent loss or impairment of a bodily function or substantial disfigurement, or other special circumstances in the case which warrant a finding that imposition of such a limitation would deprive the plaintiff of just compensation for the injuries sustained.

M.G.L.A. 231 § 85K: It shall not constitute a defense to any cause of action based on tort brought against a corporation, trustees of a trust,

or members of an association that said corporation, trust, or association is or at the time the cause of action arose was a charity; provided, that if the tort was committed in the course of any activity carried on to accomplish directly the charitable purposes of such corporation, trust, or association, liability in any such cause of action shall not exceed the sum of twenty thousand dollars exclusive of interest and costs; and provided further, that in the context of medical malpractice claims against a nonprofit organization providing health care, such cause of action shall not exceed the sum of $100,000, exclusive of interest and costs. Notwithstanding any other provision of this section, the liability of charitable corporations, the trustees of charitable trusts, and the members of charitable associations shall not be subject to the limitations set forth in this section if the tort was committed in the course of activities primarily commercial in character even though carried on to obtain revenue to be used for charitable purposes. (note for incidents occurring before 11/4/12, the charitable cap on damages is $20,000).

B. Compensatory Damages for Bodily Injury

The standard MA jury instruction as to damages is as follows: "If you find for the plaintiff, the damages which you award must be reasonable. You may award only the amount of damages as will reasonably compensate the plaintiff for her injuries. In this regard, the plaintiff has the burden of proving, by the evidence in the case, that the damages alleged were sustained as a direct result fo the accident.

C. Collateral Source

"A plaintiff who has suffered physical injury through the fault of a defendant is entitled to recover for ... reasonable expenses incurred by him for medical care and nursing in the treatment and cure of his injury .... The measure of damages is fair compensation for the injury sustained." Rodgers v. Boynton, 315 Mass. 279, 280 (1943). Mass. Gen. Laws c. 233, § 79G, provides that bills for medical services "shall be admissible as evidence of the fair and reasonable charge for such services." Section 79G further provides that it does not, by its own provisions, limit the right of a party to summon a provider of medical services for the purpose of cross-examination with respect to the bill.

However, a court may exclude certain records on the grounds that they are misleading because the amount reflected in the invoices

includes charges that have been written off by the medical service providers and for which the plaintiff nor his insurer was never obligated to pay. Law v. Griffith, 73 Mass.App.Ct. 1127, 1128 (2009).

Collateral Sources

Under the "collateral source rule," the Massachusetts Supreme Court has held that a defendant may not show that a plaintiff has received other compensation for his injury from some other source. Corsetti v. Stone Co., 396 Mass. 1, 16–17 (1985). "The rationale behind this so-called 'collateral source rule' is that the receipt of such income does not lawfully reduce the plaintiffs' damages, yet jurors might be led by the irrelevancy to consider plaintiffs' claims unimportant or trivial or to refuse plaintiffs' verdicts or reduce them, believing that otherwise there would be unjust double recovery." Id. at 17.

Medicare/Medicaid

Mass. Gen. Laws c.231, Section 60G:

In a malpractice case, "if the plaintiff has received compensation or indemnification from any collateral source whose right of subrogation is based in any federal law, the court shall not reduce the award by the amounts received prior to judgment from such collateral source and such amounts may be recovered in accordance with such federal law."

D. Pre-Judgment/Post-Judgment Interest

Pre-Judgment Interest: M.G.L.A. 231 § 6B : In any action in which a verdict is rendered or a finding made or an order for judgment made for pecuniary damages for personal injuries to the plaintiff or for consequential damages, or for damage to property, there shall be added by the clerk of court to the amount of damages interest thereon at the rate of twelve per cent per annum from the date of commencement of the action even though such interest brings the amount of the verdict or finding beyond the maximum liability imposed by law.

Post-Judgment Interest: M.G.L.A. 235 § 8: When judgment is rendered upon an award or verdict of a jury or the finding of a justice, interest shall be computed upon the amount of the award, report,

verdict or finding from the time when made to the time the judgment is entered. Every judgment for the payment of money shall bear interest from the day of its entry at the same rate per annum (12% per annum) as provided for prejudgment interest in such award, report, verdict or finding.

E. Damages for Emotional Distress

To prevail on a claim of negligent infliction of emotional distress, a plaintiff must establish: (1) negligence; (2) emotional distress; (3) causation; (4) physical harm; and (5) that a reasonable person would have suffered emotional distress under the circumstances. Rodriguez v. Cambridge Hous. Auth., 443 Mass. 697, 701, 823 N.E.2d 1249 (2005). Moreover, the plaintiff is required to substantiate the physical harm with expert medical testimony. Id. It should be noted that "physica harm" is widely construed to include many physical and mental ailments. In addition, "[a] successful negligent infliction of emotional distress claim ... must do more than allege 'mere upset, dismay, humiliation, grief and anger.' " Sullivan v. Boston Gas Co., at 137, 605 N.E.2d 805, quoting Corso v. Merrill, 119 N.H. 647, 653, 406 A.2d 300 (1979)

To recover upon a claim of intentional infliction of emotional distress, a plaintiff must prove that: (1) the defendant intended to inflict emotional distress or knew or should have known that emotional distress would likely result from his conduct; (2) the defendant's conduct was extreme and outrageous, was beyond all bounds of decency, and was utterly intolerable in a civilized society; (3) the defendant's conduct caused the plaintiff's emotional distress; and (4) the emotional distress suffered by the plaintiff was severe and of a nature that no reasonable person could be expected to endure it. Massachusetts Superior Court Civil Practice Jury Instructions, Second Edition, § 8.1 (2008), citing Tetrault v. Mahoney, Hawkes & Goldings, 425 Mass. 456, 465–66 (1997).

F. Wrongful Death and/or Survival Action Damages

Mass. Gen. Laws c.229, Section 2:

A person who (1) by his negligence causes the death of a person, or (2) by willful, wanton or reckless act causes the death of a person under such circumstances that the deceased could have recovered damages for personal injuries if his death had not resulted, or (3)

operates a common carrier of passengers and by his negligence causes the death of a passenger, or (4) operates a common carrier of passengers and by his willful, wanton or reckless act causes the death of a passenger under such circumstances that the deceased could have recovered damages for personal injuries if his death had not resulted, or (5) is responsible for a breach of warranty arising under Article 2 of chapter one hundred and six which results in injury to a person that causes death, shall be liable in damages in the amount of: (1) the fair monetary value of the decedent to the persons entitled to receive the damages recovered, as provided in section one, including but not limited to compensation for the loss of the reasonably expected net income, services, protection, care, assistance, society, companionship, comfort, guidance, counsel, and advice of the decedent to the persons entitled to the damages recovered; (2) the reasonable funeral and burial expenses of the decedent; (3) punitive damages in an amount of not less than five thousand dollars in such case as the decedent's death was caused by the malicious, willful, wanton or reckless conduct of the defendant or by the gross negligence of the defendant.

G. Punitive Damages

Massachusetts does not allow a common law recovery of punitive damages. However, the following Massachusetts statutes provide for punitive damages:

1. Massachusetts Declaration of Rights and Articles 1, 10, 15, 26 (civil rights violations).

2. Massachusetts Rules of Appellate Procedure 25 (double or single costs may be awarded for filing of frivolous appeals).

3. Mass. Gen. Laws c.21E, §5 (treble damages for the release or threat of release of hazardous materials).

4. Mass. Gen. Laws c.93 §102(b) (punitive damages for the violation of civil rights and equal protection laws).

5. Mass. Gen. Laws c.93A, §§9 and 11 (provides for multiple damages for unfair and deceptive trade practices that are knowing and willful, plus the recovery of costs and attorneys fees). Section 9 is for the protection of consumers and Section 11 is for the protection of

business and commercial entities and individuals.

6. Mass. Gen. Laws c.152, §28 (double damages for employer's willful misconduct).

7. Mass. Gen. Laws c. 176D, §3-6 and 4 (recovery of punitive damages for unfair insurance practices).

8. Mass. Gen. Laws c.231, §6F (the recovery of costs, expenses, interest and attorneys fees for the making of an insubstantial, frivolous or bad faith claim or defense).

9. Mass. Gen. Laws c.229, §2 (wrongful death statute provides for punitive damages of not less than $5,000, where the death was caused by the malicious, willful, wanton or reckless conduct or gross negligence of the defendant).

H. Diminution in Value of Damaged Vehicle

A plaintiff can recover for diminution in value of damaged vehicle, even if no repairs are ultimately repaired.

I. Loss of Use of Motor Vehicle

Can only recover for loss of use in terms of cost for rental replacement.

Evidentiary Issues

A. Preventability Determination

The Massachusetts Rules of evidence generally allows the admission of any evidence that is “relevant.” §401.01. “Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. §401.01. In Rhode Island, the definition on “relevant” implies liberal admissibility. §401.02. To be admissible, evidence need only pass a low threshold of relevancy: there is no requirement of absolute proof. However, although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence. §403.01.

“A judge has discretion to decide whether evidence is relevant and

admissible at trial. Anthony's Pier Four, Inc. v. HBC Assocs., 411 Mass. 451, 477 (1991). The judge must decide whether the probative value of the proffered evidence outweighs its prejudicial effect and whether it might mislead the jury. Zabin v. Picciotto, 73 Mass.App.Ct. 141, 150 (2008).
B. Traffic Citation from Accident
Citation is admissible. However, plea and/or payment of fine is not admissible as a party admission.
C. Failure to Wear a Seat Belt
All evidence relating to safety belt use or nonuse is irrelevant in products liability action against automobile manufacturer, and inadmissible on issues of comparative fault and proximate cause.
D. Failure of Motorcyclist to Wear a Helmet
M.G.L. 90 § 7: Every person operating a motorcycle or riding as a passenger on a motorcycle or in a sidecar attached to a motorcycle shall wear protective head gear conforming with such minimum standards of construction and performance as the registrar may prescribe, and no person operating a motorcycle shall permit any other person to ride as a passenger on such motorcycle or in a sidecar attached to such motorcycle unless such passenger is wearing such protective head gear, except that no protective head gear shall be required if the motorcyclist is participating in a properly permitted public parade and is 18 years of age or older.
E. Evidence of Alcohol or Drug Intoxication
Admissible, subject to discretionary determination by the trial judge as to relevance and unfair prejudice.
F. Testimony of Investigating Police Officer
Admissible, but subject to hearsay limitations.
G. Expert Testimony
MA has adopted the ruling in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 585–595 (1993) (recognizing alternative method for demonstrating reliability of report by expert which takes into account ability to test theory, existence of supporting peer-reviewed publications, data as to error rates, and standards for controlling and maintaining theory), and Commowealth v. Lanigan, 419 Mass. 15, 24–26 (1994) (adopting Daubert principles as an alternative to general acceptance in the relevant scientific community). General acceptance in the relevant scientific or professional community continues to be enough to establish reliability

of the method used by an expert. Commonwealth v. Powell, 450 Mass. 229, 238 (2007); Commonwealth v. Patterson, 445 Mass 626, 640 (2005). All expert opinion testimony, even that relying on an expert's personal observations or clinical experience, is subject to the Daubert–Lanigan analysis. See Canavan's Case, 432 Mass. 304, 312–313 (2000

H. Collateral Source

Collateral Sources

Under the "collateral source rule," the Massachusetts Supreme Court has held that a defendant may not show that a plaintiff has received other compensation for his injury from some other source. Corsetti v. Stone Co., 396 Mass. 1, 16–17 (1985). "The rationale behind this so-called 'collateral source rule' is that the receipt of such income does not lawfully reduce the plaintiffs' damages, yet jurors might be led by the irrelevancy to consider plaintiffs' claims unimportant or trivial or to refuse plaintiffs' verdicts or reduce them, believing that otherwise there would be unjust double recovery." Id. at 17.

I. Recorded Statements

Recorded statements are only admissible, and only pursuant to the Court's discretion, for the purposes of impeachment, to evidence a statement against interest, to evidence past inconsistent statements, evidence a party admission, or for a witness otherwise unavailable or deceased.

J. Prior Convictions

M.G.L. 233 § 21: The conviction of a witness of a crime may be shown to affect his credibility, except as follows:

First, The record of his conviction of a misdemeanor shall not be shown for such purpose after five years from the date on which sentence on said conviction was imposed, unless he has subsequently been convicted of a crime within five years of the time of his testifying.

Second, The record of his conviction of a felony upon which no sentence was imposed or a sentence was imposed and the execution thereof suspended, or upon which a fine only was imposed, or a sentence to a reformatory prison, jail, or house of correction, shall not

be shown for such purpose after ten years from the date of conviction, if no sentence was imposed, or from the date on which sentence on said conviction was imposed, whether the execution thereof was suspended or not, unless he has subsequently been convicted of a crime within ten years of the time of his testifying. For the purpose of this paragraph, a plea of guilty or a finding or verdict of guilty shall constitute a conviction within the meaning of this section.

Third, The record of his conviction of a felony upon which a state prison sentence was imposed shall not be shown for such purpose after ten years from the date of expiration of the minimum term of imprisonment imposed by the court, unless he has subsequently been convicted of a crime within ten years of the time of his testifying.

Fourth, the record of his conviction for a traffic violation upon which a fine only was imposed shall not be shown for such purpose unless he has been convicted of another crime or crimes within five years of the time of his testifying.

K. Driving History

Admissible, subject to discretionary determination by the trial judge as to relevance and unfair prejudice.

L. Fatigue

Admissible, subject to discretionary determination by the trial judge as to relevance and unfair prejudice.

M. Spoliation

Sanctions for spoliation include exclusion of evidence, admission of evidence of the circumstances under which the spoliation occurred, Gath v. M/A-Com, Inc., 440 Mass. 482, 488, 802 N.E.2d 521 (2003); instruction to the jury on its ability to draw a negative inference from the spoliation of the evidence, id; and, in cases of intentional spoliation of evidence, the imposition of default judgment or dismissal. See Gos v. Brownstein, 403 Mass. 252, 257, 526 N.E.2d 1267 (1988)

Settlement

A. Offer of Judgment

Massachusetts Civil Procedure Rule 68: Offer of Judgment:

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment exclusive of interest from the date of offer finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

B. Liens

Private insurance provider has a lien as against third-party tortfeasor and will ordinarily look to the entirety of the settlement proceeds for the purpose of enforcing its lien or right to reimbursement.

Plaintiff's are entitled to complete recovery of full amount of medical bills without setoff. No evidence of liens or insurance payments are admissible at the time of trial.

Under statute governing evidence of medical and hospital services, evidence of amounts actually paid to the plaintiff's medical provider was not admissible to show the fair and reasonable charge for provider's services to plaintiff for her personal injuries in negligence action, but evidence could be introduced by defendant concerning the range of payments that the provider accepted for the types of medical services that the plaintiff received. M.G.L.A. c. 233, § 79G. Law v. Griffith, 457 Mass. 349, 930 N.E.2d 126, Mass.,2010

C. Minor Settlement

A parent can sign a pre-accident release on behalf of a minor child. It

may be enforceable even if, upon reaching the age of majority, the child attempts to void the contract.

Statute of limitations is tolled in the case of a minor until the minor reaches the age of majority. M.G.L.A. 260 § 7.

D. Negotiating Directly with Attorneys

Permitted.

E. Confidentiality Agreements

Confidentiality agreements are permitted.

F. Releases

A parent may execute an enforceable release on behalf of a minor child.

Pre-accident waivers and releases may be enforceable.

An unambiguous and comprehensive release will be enforced as drafted.

Massachusetts law favors the enforcement of releases. *Lee v. Allied Sports Assocs., Inc.,* 349 Mass. 544, 550, 209 N.E.2d 329 (1965), citing *MacFarlane's Case,* 330 Mass. 573, 576, 115 N.E.2d 925 (1953); *Clarke v. Ames,* 267 Mass. 44, 47, 165 N.E. 696 (1929). A party may, by agreement, allocate risk and exempt itself from liability that it might subsequently incur as a result of its own negligence. See, e.g., *Lee v. Allied Sports Assocs., Inc., supra* at 550, 209 N.E.2d 329; *Barrett v. Conragan,* 302 Mass. 33, 18 N.E.2d 369 (1938); *Ortolano v. U–Dryvit Auto Rental Co.,* 296 Mass. 439, 6 N.E.2d 346 (1937). See also J.W. Smith & H.B. Zobel, Rules Practice § 8.18 (1974). "There can be no doubt ... that under the law of Massachusetts ... in the absence of fraud a person may make a valid contract exempting himself from any liability to another which he may in the future incur as a result of his negligence or that of his agents or employees acting on his behalf." *Schell v. Ford,* 270 F.2d 384, 386 (1st Cir.1959). Whether such contracts be called releases, covenants not to sue, or indemnification agreements, they represent "a practice our courts have long found acceptable." *Minassian v. Ogden Suffolk Downs, Inc., supra* at 493, 509 N.E.2d 1190. See *Shea v. Bay State Gas Co.,* 383 Mass. 218, 223–224, 418 N.E.2d 597 (1981); *Clarke v. Ames, supra* at 47, 165 N.E. 696. Sharon v. City of Newton, 437 Mass. 99, 105, 769 N.E.2d 738, 744 (2002).

G. Voidable Releases
Unrepresented plaintiff cannot void a release for lack of legal representation/advice.
Transportation Law
A. State DOT Regulatory Requirements
G.L. c 90 § 19L(a) provides for the adoption of regulations to insure compliance by interstate and intrastate motor carriers with state and federal laws, including regulations of the U.S. DOT, FMCSA.
B. State Speed Limits
The speed limit is 65 m.p.h.
C. Overview of State CDL Requirements
If you are at least 21 years of age and have not had your driver's license or right to operate taken away by the Registrar, you may apply for an interstate (all states) transport CDL permit at any RMV full-service office. If you are at least 18 years of age and have not had your driver's license or right to operate taken away by the Registrar, you may apply for an intrastate (Massachusetts only) transport CDL permit at any RMV full-service office.
Insurance Issues
A. State Minimum Limits of Financial Responsibility
$20,000/$40,000/$5,000 pd
B. Uninsured Motorist Coverage
Not compulsory in MA.
C. No Fault Insurance
Yes. Every driver must carry Personal Injury Protection insurance (“PIP”) (minimum $8,000).
D. Disclosure of Limits and Layers of Coverage
Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed can be a violation of MGL c. 176D and c. 93A.
E. Unfair Claims Practices
Massachusetts has an unfair claims practices statute. However, the insured has no right of action. Violation of statute may give rise to deceptive business practices claim by the insured. Failure to effectuate prompt, fair and equitable settlements of claims in which liability is clear is violated.
F. Bad Faith Claims
Unfair settlement practices (i.e., failing to settle claims promptly) under

G.L. 93A can result in treble damages award. Massachusetts General Laws Chapter 93A (the Consumer Protection Statute) claims allow the Court to award double or treble damages if the claimant can prove that unfair and deceptive business practices to the detriment of a consumer.
G. Coverage – Duty of Insured
An insurer must exercise diligence and good faith in obtaining the insured's cooperation. The duty to cooperate arises out of the terms of the insurance contract. As a general rule, the insured's breach of the duty does not permit the insurer to disclaim coverage absent a showing of prejudice.
H. Fellow Employee Exclusions
The exclusivity provision in the workers' compensation statute, whichbars a third party sued by the employee from recovering against the negligent employer who has paid workers' compensation, also bars claims against fellow employees. M.G.L. c. 152, § 23.