DOHERTY, WALLACE, PILLSBURY AND MURPHY, P.C.

PREMISES LIABILITY

Doherty, Wallace, Pillsbury
and Murphy, P.C.
One Monarch Place
1414 Main Street
Springfield, MA 01144
(413) 733-3111
(413) 734-3910 (fax)

TABLE OF CONTENTS

SNOW AND ICE REMOVAL

Christopher W. Ruscio
Doherty, Wallace, Pillsbury
and Murphy, P.C.
One Monarch Place
1414 Main Street
Springfield, MA 01144
Telephone: (413) 733-3111
Telecopier: (413) 734-3910

SNOW AND ICE REMOVAL

Legal Standard

In 2010, the Massachusetts Supreme Judicial Court ("SJC") adopted a new standard as "to hazards arising from snow and ice [where now] a property owner owes to lawful visitors . . . a duty to 'act as a reasonable person under all of the circumstances including the likelihood of injury to others, the probable seriousness of such injuries, and the burden of reducing or avoiding the risk.'" Emphasis added. Papadopoulos v. Target Corp., 457 Mass. 368, 383 (2010), citing Young v. Garwacki, 38 Mass. 162, 169 (1980). The SJC qualified this new standard stating "[t]his introduces no special burden on property owners." Id. "If a property owner knows or should know of a dangerous condition on its property . . . from an accumulation of snow or ice . . . the property owner owes a duty to lawful visitors to make reasonable efforts to protect lawful visitors against the danger." Emphasis added. Id.

The SJC did not address when this duty of reasonableness exists. In negligence actions a duty must exist in order for the plaintiff to be entitled to relief. The SJC has determined that landowners must make reasonable efforts to remove snow and ice. Therefore, it logically follows that no duty exists when it would be unreasonable for a landlord to remove snow and ice. In the summary judgment context the question before the court becomes, what constitutes an unreasonable burden on the defendant (landowner), so that the plaintiff (person injured due to snow or ice) is not entitled to relief as a matter of law because no such duty (to remove snow or ice) existed.

The SJC recognized that a landlord will not have a duty in every circumstance by stating, "the duty of reasonable care does not make a property owner an insurer of its property; nor does it impose unreasonable maintenance burdens." Internal quotations omitted. Papadopoulos, 457 Mass. at 384. "The snow removal reasonably expected ["the duty"] of a property owner will depend

on the [three (3) Papadopoulos factors:] [1] amount of foot traffic to be anticipated on the property; [2] the magnitude of the risk reasonably feared; and [3] the burden and expense of snow and ice removal." Id. Therefore, a judge has the unenviable task of determining what is reasonable and whether a duty exists based on these three (3) Papadopoulos factors.

Other jurisdictions in the Northeast have made this analysis much less burdensome on judges when determining if a duty exists in any particular circumstance. Many jurisdictions have adopted the storm-in-progress rule which takes into account the same policy concerns the SJC enumerated in its Papadopoulos factors. The storm-in-progress rule provides a bright line to aid courts in making a duty determination that would otherwise be complex and burdensome. The storm-in-progress rule simply stands for the proposition that a landowner does not have a duty when a storm is in progress. In essence, it is unreasonable as a matter of law for a landowner to remediate a dangerous condition while a storm is ongoing. The Northeast jurisdictions that have explicitly adopted this rule are Connecticut, Rhode Island and New York. Kraus v. Newton, 558 A.2d 240, 243 (Conn. 1989); Munsil v. United States, 14 F. Supp. 2d 214, 220-21 (D.R.I. 1998); Olejniczak v. E.I. DuPont de Nemours & Co., 998 F.Supp. 274, 280 (W.D.N.Y. 1998).Vermont has adopted the storm-in-progress rule at the trial court level with no explicit rejection or adoption at the appellate levels. Turmel v. UVM, No. S0980-01 Cncv (Katz, J., Apr. 20, 2004).

In Connecticut, "the rule of law is that an owner may await the end of a freezing rain or sleet storm and a reasonable time thereafter before removing ice and snow from its outside entrance walks, platforms and steps." Kraus v. Newton, 211 Conn. 191, 193 (1989). The Connecticut Supreme Court affirmed this rule in the Kraus case, by stating "absen[t] unusual circumstances, a property owner, in fulfilling the duty owed to invitees upon his property to exercise reasonable diligence in removing dangerous accumulations of snow and ice, may await the end of a storm and a reasonable time thereafter before removing ice and snow from outside walks and steps." Id. at 197-98. The logic

behind ratifying this rule was that "[t]o require a landlord or other inviter to keep walks and steps clear of dangerous accumulations of ice, sleet or snow or to spread sand or ashes while a storm continues is inexpedient and impractical." Id. at 198. This reasoning is consistent with the third Papadopoulos factor of "burden and expense of snow or ice removal." Papadopoulos, 457 Mass. at 384. Connecticut has determined that snow or ice removal during a storm-in-progress is presumed to be burdensome and expensive.

In Rhode Island, the storm-in-progress rule is that "an accumulation of snow and ice . . . may make the landlord liable for injuries sustained . . . provided the landlord knows, or should have known of the condition and failed to act reasonably within a reasonable time thereafter to protect against injuries caused thereby." Emphasis added. Fuller v. Housing Authority of Prov., 279 A.2d 438, 441 (R.I. 1971). Furthermore, "[t]he mere accumulation of snow or ice does not ipso facto make the landlord liable; he must be given a reasonable time after the storm has ceased to remove the accumulation of snow or ice." Id. In support of its reasoning to adopt such a rule, the Rhode Island Supreme Court stated "a landlord is not a guarantor for the safety of his tenants." Id. In Papadopoulos, the SJC also stated that a landowner is not "an insurer of its property." Papadopoulos, 457 Mass. at 384. By not having adopted the storm-in-progress rule, a Massachusetts landowner takes the risk of potential jury scrutiny for not engaging in snow and ice remediation efforts during a storm.

There are exceptions to the storm-in-progress rule as Connecticut announced that the rule does not apply in "unusual circumstances." Kraus, 211 Conn. at 197. Rhode Island courts have further defined what constitutes unusual circumstances. Typically unusual circumstances is defined as a positive act by the defendant (landowner) which "actively increased the risk" of injury to the plaintiff (person harmed by snow or ice). See generally Terry v. Central Auto Radiators, Inc., 732 A.2d 713, 718 (1999).

In New York, it is well settled law that "a landowners duty to remedy a dangerous condition caused by a storm is suspended while the storm is in progress and for a reasonable time after it has ceased, even if there is a lull in the course of the storm." Martin v. Wagner, 30 A.D.3d 733, 734 (2006), quoting Sanders v. Wal-Mart Stores, 9 A.D.3d 595. 595 (2004).

The underlying theme in the jurisdictions that have adopted the storm-in-progress rule is the same theme that drives the Papadopoulos (3) three factor test. The courts are attempting to prevent landowners or business owners from being held as insurers of their invitees' safety. To require "a business owner to remove snow or ice before a storm has ended would hold him or her to a standard of care that is not reasonable or ordinary." Kraus v. Newton, 558 A.2d 240, 243 (Conn. 1989); Munsil v. United States, 14 F. Supp. 2d 214, 220-21 (D.R.I. 1998). Ultimately, the storm-in-progress doctrine is congruous with the Papadopoulos doctrine which is to provide "a legal mechanism to counterbalance an owner's standing duty of reasonable care when weather events would otherwise distort it into a costly and extraordinary burden." Turmel v. UVM, No. S0980-01 Cncv (Katz, J., Apr. 20, 2004) quoting McCormack v. State, 150 Vt. 443, 446 (1988).

ANALYSIS

In determining whether a duty exists a Massachusetts court must determine whether ice or snow remediation actions were unreasonable utilizing the Papadopoulos factors. The (3) three factors being 1) "amount of foot traffic to be anticipated on the property"; 2) "magnitude of the risk reasonably feared" and 3) "the burden and expense of snow and ice removal." Papadopoulos, 457 Mass at 384. The court will need to make limited factual findings to make determinations on these factors for purposes of summary judgment. Therefore the summary judgment argument on behalf of the landowner will be strengthened by affidavits of witnesses to the weather conditions, witnesses to the parking lot

conditions, statements from management concerning the frequency of ice remediation and trustworthy reports concerning the weather conditions that day (i.e., color copies of regional radar imagery and local climatological data published by the National Oceanic and Atmospheric Administration (NOAA).

The weather conditions on the day of the incident is crucial to the analysis. Although Massachusetts has not adopted the bright-line storm-in-progress rule, there is a possibility summary judgment will be awarded in a landowner's favor due to the unreasonableness of taking snow and ice remediation measures before a storm has concluded. A duty to conduct snow and ice removal could be deemed unreasonable in the following factual scenario. On a day where the minimum temperature was 14 degrees Fahrenheit with a high temperature of 32 degrees. The average temperature is below freezing at 24 degrees and throughout the day it never reached above freezing. The temperature on this day is evidence that ice melting remediation procedures would most likely be futile, as the temperature must rise above freezing for ice melt products to take effect. Furthermore, on this day a total of 0.62 inches of mixed precipitation fell throughout the course of the day. Freezing rain started at 8:00a.m. and continued over the course of the next eight hours until 4:00p.m. This fact is significant because the freezing conditions along with the steady freezing rain would have undoubtedly created extremely slippery conditions.

The Papadopoulos court ensured property owners would not be held "an insurer of its property; nor . . . impose unreasonable maintenance burdens." Emphasis added. Papadopoulos, 457 Mass. At 384. If it has been precipitating freezing rain for 8 hours, it would arguably be unreasonable to attempt to remediate this condition until the precipitation stops for several reasons. First, any efforts at ice removal would be futile. Any ice removed would almost immediately be replaced with new ice continuing to form from the freezing rain. Second, any attempt at laying traction type materials (i.e., sand) would be burdensome from a maintenance perspective. The cost alone and the constant

time required to spread the sand over eight hours would be burdensome. The only way to keep the surface free of ice for the eight hours prior to the precipitation stopping would be to constantly shovel, plow, salt or sand. This illustrates the type of unreasonable maintenance burden that the SJC did not want to impose on landowners.

Using the above weather conditions let's assume a tenant returns home from work at approximately 4:00 p.m. and steps on ice and falls sustaining an injury in the parking lot while walking to the entrance of their apartment. Arguably this tenant went to work knowing the weather conditions and therefore assumed the risk of venturing out on such a day. This fact is important because the storm-in-progress rule provides that a landowner may wait until the conclusion of the storm "absent unusual circumstances." Kraus, 211 Conn. at 197. Unusual circumstances occurs when some affirmative act of the defendant attributes to the injury of the plaintiff. As an example, if the landowner required the tenant to move their car in order to plow or other reasons this may be an unusual circumstance that will prevent the landowner from claiming the storm-in-progress rule as a defense. It is similar to an assumption of the risk analysis. The fact that a tenant ventured out on their own volition during such wintry condition makes it more unreasonable to impose liability on the defendants.

This analysis is similar to the first Papadopoulos factor where the landowner's duty may change depending on how much "foot traffic [is] anticipated on the property." Papadopoulos, 457 Mass. at 384. An apartment complex is distinguishable in this regard from a hospital emergency room entrance. In an apartment complex the reasonable expectation of tenants is that a parking lot will be cleared after the conclusion of a storm. If a tenant ventures out of an apartment complex during a storm it is done at the tenants own peril, unlike an emergency room entrance. An emergency room entrance may have an ongoing duty to remediate snow and ice based on this first Papadopoulos factor.

Typically individuals are not making the conscious decision to frequent an emergency room during wintry conditions.

Additionally, under the second Papadopolous factor it cannot be said that a great "magnitude of risk would have been reasonably feared" in the apartment complex scenario. Id. It would have been obvious to anyone venturing outside on a day like the one in the above example that it was going to be icy and slippery and therefore caution needed to be exercised when traveling. It is reasonable for the landowner to rely on individuals staying inside during the storm or to walk carefully if they assume the risk of venturing out. In essence, because individuals should know about the icy conditions and know to walk carefully on the ice, no "magnitude of risk" is to be "reasonably feared" by the landowner waiting to remediate until the freezing rain stopped. Id. Contrast this with a scenario where ice is forming on the roof of a building and may not be visible to the tenants. Here, where a landowner is aware of the ice on the roof, the magnitude of risk is much greater and therefore a duty to remediate most likely exists. Assuming the landowner (in the original scenario) should have "reasonably feared a magnitude of risk" (a tenant would fall and injure themselves in the icy parking lot), there was no viable (non-burdensome) option to reduce this risk during the continuous eight hours of freezing rain.

Considering the totality of the circumstances: 1) continuous freezing rain throughout the day 2) less foot traffic due to people staying home 3) futility of remediation efforts 4) the extreme burden and cost to make safe and 5) the fact that individuals assume the risk of travel and should know to be cautious due to the slippery nature make it unreasonable for the landowner to have engaged in remediation efforts. It would be more reasonable to wait until the storm had subsided.

The burden on the landowner in the above example would be so great it cannot be reasonably expected that actions should be taken continuously for

eight hours to attempt to make the parking lot safe. Arguably it would have been impossible to do so. However, the standard is not one of impossibility, only one of reasonableness. What is reasonable using our example is to wait until the storm concludes and then remove or remediate the slipperiness of the ice. To require remediation during the storm would be unreasonable, burdensome and would have the unintended effect of making landowners insurers of their property.

CONCLUSION

By expressly adopting the storm-in-progress rule in Connecticut, New York and Rhode Island, courts have a tangible standard to use and definitively know when to impose a duty on landowners to remove or remediate snow and ice in negligence cases. Furthermore, landowners in these jurisdictions fully know and understand what their obligations under the law are. In Massachusetts, the law does not *carte blanche* allow landowners to wait until the storm is over. The standard is reasonableness and therefore whether it is reasonable to wait until a storm concludes to start ice or snow removal/remediation is a judgment call each landowner must make in every storm taking into account the three Papadopoulos factors.

ATTRACTIVE NUISANCE

Erin J. Meehan
Doherty, Wallace, Pillsbury
and Murphy, P.C.
1414 Main Street, Suite 1900
Springfield, MA 01144-1900
Telephone: (413) 733-3111
Telecopier: (413) 734-3910

ATTRACTIVE NUISANCE

I. Massachusetts Child Trespasser Statute

Massachusetts premises liability law imposes a higher duty of care on landowners with regard to child trespassers. Liability will be imposed for injuries to a child trespasser if the landowner acted negligently. The standard of care owed to adult trespassers only requires that a landowner refrain from willful, wanton and reckless conduct. Schofield v. Merrill, 383 Mass. 244 (1982). A duty owed by a premises owner to a child will depend on the child's capacity to appreciate the risk. The "Attractive Nuisance Doctrine" is now formally known by its statutory name, " Child Trespasser Statute". [1] The Statute reads as follows:

> "Any person who maintains an artificial condition upon his own land shall be liable for physical harm to children trespassing thereon if (a) the place where the condition exists is one upon which the land owner knows or has reason to know that children are likely to trespass, (b) the condition is one of which the land owner knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, (d) the utility to the land owner of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and (e) the land owner fails

[1] In Massachusetts the Child Trespasser Statute, M. G. L. c. 231 §85Q and the Attractive Nuisance Doctrine at common law as provided in the Restatement (Second) of Torts §339 (1965) are conterminous legal theories and referred to interchangeably.

to exercise reasonable care to eliminate the danger or otherwise to protect the children."

The Statute contains five elements all of which a plaintiff is required to prove in order to succeed on negligence claim. In evaluating the proof of each element the court must balance certain factors based upon the facts of the case. Despite the case-by-case application the precedent provides important guidance to clients and their attorneys.

II. Requirements for Application

Under Massachusetts law the Attractive Nuisance Doctrine is only applicable to **artificial conditions** maintained on a property and **trespassing children**. Mathis v. Massachusetts Electric Company, 409 Mass. 256, 260-261 (1991). In Oldham v. Nerolich, 389 Mass. 1005 (1983) the Supreme Court distinguished the case at bar from the Child Trespasser Statute because the child was not trespassing on the defendant's property.

While the statute itself and case law do not explicitly define an "artificial condition" it is generally considered anything on one's property that is not a form of natural landscaping such as a tree, bush, rocks and the like. The most common artificial conditions giving rise to actions involving attractive nuisance include: swimming pools, utility poles, electric stations, construction sites, farming equipment, construction equipment such as ladders, railroad tracks, manmade holes such as wells, or fire pits. Additionally, an item which is traditionally intended for children to play on may also constitute an attractive nuisance such as a playground, trampoline or skateboarding ramp.

III. Landowner's Knowledge

a. Likelihood of Trespass

If the attractive nuisance doctrine is deemed applicable to the case at bar, the plaintiff will bear the burden of satisfying the five elements listed in G. L. c. 231 §85Q. The first two elements outlined in subsections (a) and (b) focus on the landowner's knowledge to determine whether or not a child's injury was foreseeable. First a plaintiff must establish that the landowner knew or should have known that a child was likely to trespass on the property where the condition existed. G. L. c. 231 §85 subsection (a).

In the watershed case, Soule v. Massachusetts Electric Company, 37 Mass. 177 (1979) the Supreme Court found the defendant electric company liable for injuries sustained by the plaintiff, an eight year old boy, who was electrocuted while climbing the defendant's utility pole. The utility pole was part of a switching station located on municipal land, "which was open, was commonly used by the townspeople for hunting and recreation, and was frequented by children." Id. at 179. Thus, the Court reasoned that because of the public's "common" use of the property the electric company knew or should have known that children would be trespassing in the "place where the condition exists." Id. at 179-182.

b. Likelihood of Injury

Secondly, the plaintiff must establish that the landowner knew or should have known that the artificial condition posed an unreasonable risk of death or serious bodily harm to children. G. L. c. 231 §85Q subsection (b). In Phachansiri v. Lowell, 35 Mass. App. Ct. 576, 577 (1993) the court considered whether the defendant should be liable for the death of one child and injury to another, ages five and seven, who dug a hole under a chain a link fence and climbed over another shorter fence that enclosed the swimming pool. In finding for the defendant the court declared that, "[t]he mere fact that the place where the condition is found is a place which the owner knows or should know that children are likely to trespass

does not mean that the condition is one which involves an unreasonable risk of harm or death." Phachansiri, 35 Mass. App. Ct. at 578-579.

It is important to note that in considering the conduct of the landowner, that the first two elements in subsections (a) and (b) are balanced in accordance with the last two elements in subsections (d) and (e). Although a plaintiff has established that the injury to a trespassing child was or should have been foreseeable the plaintiff is still required to prove (d) and (e) concerning the landowner's conduct as discussed below.

IV. Child's Age and Appreciation of Risk

A child's youth must be the reason that he or she did not discover the condition or appreciate its risk. "Under Massachusetts law, no duty of reasonable care is owed to a foreseeable child trespasser unless they are shown to have been persons who because of their youth do not discover the condition or realize the risk involved." Beausoleil v. Massachusetts Bay Transp. Authority, 138 F.Supp.2d 189, 203 (D. Mass. 2001) quoting McDonald v. Consolidated Rail Corp., 399 Mass. 25, 29 (1987). In Beausoleil v. Massachusetts Bay Transp. Authority, the U.S. District Court applying Massachusetts law found that pursuant to the Child Trespasser Statue a thirteen-year-old girl was not owed a greater duty of care by the railroad because there was sufficient evidence for the court to conclude the plaintiff "generally realized the risk involved in crossing the train tracks." Beausoleil, 138 F.Supp.2d at 203. There was evidence, including her mother's testimony, that the plaintiff appreciated the danger of walking across the railroad tracks. The plaintiff also had recently attended a presentation at her school conducted by the Amtrak police about the "hazards of trespassing at commuter rail stations." Id.

Under the statute a child's age is considered in assessing whether a minor could appreciate the dangerous condition or the risk in meddling

with the condition. The analysis is scale in which, “the status of child for purposes of the rule will vary with the nature of the hazard [and] [i]t may range as high as sixteen or seventeen years of age.” Puskey v. Western Massachusetts Electric Co., 21 Mass. App. Ct. 972, 973-74 (1986)(rescript). Massachusetts case law acknowledges that a child’s status as a “teenager” alone does not remove a minor from the scope of G. L. c. 231 §85(c).

However, courts have decided cases involving children who are too young to appreciate the dangerous condition regardless of how apparent the hazard. In Kalinowski v. Smith, 6 Mass. App. Ct. 769 (1978) a four-year-old child was injured when she stood too close to a moving train. The Appeals Court of Massachusetts reasoned, “that this child, in placing herself in a position of danger, lacked the understanding to evaluate her peril and that her predicament was manifest to the [railroad which was] therefore, under a duty to sound a warning and slow the train in an effort to avoid injury to her.” Id. at 772.

V. Comparative Negligence

It follows that where a child appreciates the risk of contact with a dangerous condition, but intermeddles with the condition anyway, the child should be accountable for his or her comparative negligence. In Mathis v. Massachusetts Electric Company, 409 Mass. 256 (1991), the Supreme Court held that a child’s comparative negligence was a valid defense under G. L. c. 231, §85Q. The Court reasoned that, “[s]ince the child trespasser statute, G. L. c. 231, §85Q, imposes on landowners a duty of reasonable care, and creates liability based on negligence principles, the comparative negligence defense is available to defendants.” Id. at 261. However, under the statute a child’s negligence will only be considered upon a finding that the landlord breached the duty of care. The negligence of a child “is judged by the standard of behavior expected from a child of

like age, intelligence and experience." Id. at 263 quoting Mann v. Cook, 346 Mass. 174, 178 (1963). The Court noted that the landowner's liability under G. L. c. 231, §85Q and the plaintiff's contributory negligence were "two separate issues but not irreconcilable" and the Court would not "impose a judicially-created rule which would immunize child trespassers from their own negligence." Mathis, 409 Mass. at 263.

VI. Burden to Eliminate and Failure to Exercise Reasonable Care

The final two elements of the Child Trespasser Statute focus on the landowner's conduct, as opposed to the landowner's knowledge, which was discussed above. The plaintiff must establish all four elements to prove the landowner failed to act with reasonable care as required under G. L. c. 231 §85. The fourth element outlined in subsection (d) requires the plaintiff to establish the utility of the condition and the burden of eliminating the danger are slight as compared to the risk of harm to child trespassers. There is no bright line rule to establish the element, but rather a scale "balancing the hardship to the land occupier in requiring him to provide protection on one side, against the magnitude of the risk on the other." Soule 378 Mass. at 183. In Soule that court noted that a jury may find the electric company liable under the Child Trespasser Statute for failing to eliminate the danger by erecting a "fence around the station, post[ing] a warning sign or elevat[ing] the high-voltage wires above the floor of the station." Soule, 378 Mass. at 183.

By contrast in Puskey v. Western Massachusetts Electric, 21 Mass. App. Ct. 972, 973-974(1986)(rescript) the court found that the landowner's failure to erect fences around utility towers was not negligent where the towers were located in a remote swamp land inaccessible by vehicles. The court concluded that the burden of eliminating the danger would "unreasonably encumber repairs and that the signs and education campaign, together with the publicity surrounding [a prior electric shock accident]…. had diminished the risk." Id. at 974.

Additionally, where the defendant, electric company had erected barbed wire barriers around the more accessible utility towers, posted warning signs on all the towers and established a cautionary education program in the schools the defendant had demonstrated reasonable care to eliminate the danger. Id. at 973 (preventing the plaintiff from establishing the fifth element, G. L. c. 231 §85Q subsection (e)). Thus, where the electric company had affirmatively made an effort to decrease the risk by creating barred wire barriers around the hazard, posting warning signs and educating the public about the dangerous condition the court found the defendant's conduct reasonable. The plaintiff was unable to establish both the fourth and fifth elements under the Child Trespasser Statute. G. L. c. 231 §85Q subsections (d)-(e).

In closing it is important to also note that while each element must be established by the plaintiff to recover under the Child Trespasser Statute the statute originated from the notion that children are predictably unpredictable and thus it is the landowner's duty to protect minors from dangerous artificial conditions maintained on his or her property.

RESIDENTIAL RENTAL
PREMISES LIABILITY

José A. Aguiar
Doherty, Wallace, Pillsbury
and Murphy, P.C.
One Monarch Place
1414 Main Street
Springfield, MA 01144
Telephone: (413) 733-3111
Telecopier: (413) 734-3910

RESIDENTIAL RENTAL PREMISES LIABILITY

DEFINITION

Premises liability is not a cause of action, but rather, a theory of liability. In nearly every case, liability for the condition of the defendant's premises is based on negligence. Negligence is a breach of a duty owed by the defendant to the plaintiff.

ELEMENTS

Premises liability is a version of negligence. The required elements for a cause of action are as follows:

- Duty;
- Breach of that duty;
- Injury or damage; and
- Causation.

DUTY OF CARE

At common law, a landowner's duty of care was defined by the status of the person entering upon the property as a trespasser, licensee, or invitee. A landowner owed only a duty to refrain from willful and wanton conduct with respect to licensees, those who came onto the property for their own benefit or convenience. A duty of reasonable care was owed to invitees, those who were invited onto the premises or who came onto the land for the benefit of the owner. No duty was owed to trespassers.

Over time it became difficult to determine who was a licensee and who was an invitee resulting in confusion, conflict and inconsistencies. Massachusetts Courts began to abandon the common law distinction. In its decision in Mounsey v. Ellard, 363 Mass. 693, 706-08 (1973), the Supreme

Judicial Court said that it would no longer follow the common law distinction between licensees and invitees and, instead, created a common duty of reasonable care which the occupier owes to all lawful visitors. The only designation the court left intact was that of trespasser. What constitutes reasonable care involves a balancing of the likelihood of injuries to others, the seriousness of injury, and the burden of avoiding the risk. Id. at 708. However, landowners and occupiers are not the insurers of the safety of all lawful visitors to their property. Nor does the law impose unreasonable maintenance burdens upon a landowner. Id. at 709. The duty of care is one of reasonableness under all the circumstances balancing the relative expense and difficulty with safety measures against the probability and seriousness of foreseeable harm to others. Id. 709. The duty of care by which a landowner's performance "is measured is the conduct expected of an ordinarily prudent person in similar circumstances. The standard is not established by the most prudent person conceivable, nor by the least prudent, but by the person who is thought to be ordinarily prudent." Toubiana v. Priestley, 402 Mass. 84, 88 (1988).

LANDLORD-TENANT

There are numerous statutory and regulatory enactments governing the relationship between a residential landlord and a tenant. There is no substitute for a reading of those portions of the State Sanitary Code, the State Building Code, and pertinent statutes such as that governing liability for lead poisoning. G.L. c.111, §198 et. seq. (This article does not address the issues raised by statutes and cases pertaining to lead poisoning.) The following is meant to highlight significant judicial interpretations of prominent concepts, both decisional and statutory, which come into play in the landlord/tenant relationship.

CODES

The predominant codes affecting liability for hazards on and about residential premises are the Massachusetts Building Code, 780 CMR 1 et. seq. and the Massachusetts Department of Public Health's Minimum Standards of Fitness for Human Habitation ("State Sanitary Code"), 105 CMR 400.00 et. seq. There are also federal codes and industry standards which may come into an evaluation of a premises liability claim. A violation of a safety code, standard, regulation, ordinance, or statute is evidence of the negligence of the violator as to all consequences which the code was designed to prevent. Fox v. Little People's School, Inc., 54 Mass.App.Ct. 578 (2000). Yet, a violation of a safety statute or code does not in and of itself constitute a basis for a cause of action. St. Germaine v. Pendergast, 416 Mass. 698 (1993). There is no substitute for a careful reading of these codes by a residential premises owner.

COMMON LAW

Under common law, the landlord was responsible for any negligent maintenance of common areas but was generally not liable for the negligent maintenance of the premises themselves. The landlord was "under a separate and limited duty toward each tenant and that tenant's visitors to exercise reasonable care to maintain common areas in a condition not less safe than they were, or appear to be in, at the time of the letting to the particular tenant." King v. G & M Realty Corp., 373 Mass. 658, 660 (1977). The tenant was solely responsible for any accident that occurred on the rented premises, and the only liability of the landlord was for defects in the premises existing at the time of the letting if those defects were hidden and the landlord was aware and failed to warn the tenant. Ackarey v. Carbonaro, 320 Mass. 537, 539 (1946).

Over the years, ancient landlord- tenant rules have been discarded both legislatively and judicially. The SJC in following the decision of Mounsey altered

the common law and held that a landlord will be liable for defects of which the landlord has notice, even though the defect occurs on the rented premises of residential properties. If the landlord fails to correct the condition within a reasonable time, the tenant or any person rightfully on the premises has a tort action against the landlord for injuries sustained. Young v. Garwacki, 380 Mass. 162, 171 (1980).

WARRANTY OF HABITABILITY

In the seminal decision of Boston Housing Authority v. Hemingway, 363 Mass. 184 (1973), the SJC held that a warranty of habitability is implied in every residential lease. This implied warranty of habitability is extended by the landlord to the tenant with respect to the provision and maintenance of physical facilities "vital to the use" of the leased dwelling. The Court remarked upon the transformation of American society from an agricultural population to an urban work force. The SJC reasoned that, because of the complexity of modern, multi-family dwellings, and the transitory nature of the occupants, that the landlord was in the best position to provide and maintain habitable living quarters. The Court held that each residential landlord warranted to the tenant that the premises would be delivered and kept in a habitable status. At a minimum, this warranty created by the Hemingway decision, imposed on a landlord a duty to keep the dwelling in conformity with the provisions of the State Sanitary Code. Id at 200 n. 16.

Hemingway did not involve a claim of personal injury. The calculation of damages for a breach of the warranty of habitability was "to be measured by the difference between the value of the dwelling as warranted (the agreed rent may be used as some evidence of this value) and the value of the dwelling unit as it existed in its defective condition." Haddad v. Gonzalez, 410 Mass. 855, 872 (1991). However, if the breach of the warranty of habitability was a cause of physical harm to a tenant, the measure of damages was the value a jury ascribed

to that injury. Crowell v. McCaffrey, 377 Mass. 443, 451 (1979). "Not every breach of the State Sanitary Code supports a claim under the implied warranty of habitability. Rather, the implied warranty of habitability apples to significant defects in the property itself." McAllister v. Boston Housing Authority, 429 Mass. 300, 305 (1999). A building afflicted with a substantial Sanitary Code violation is uninhabitable. See, e.g. Cruz Management Co. v. Thomas, 417 Mass. 782, 787 (1994) (Apartment lacked adequate heat, hot water, and fire escape; was infested with cockroaches, mice, and rats; had unsanitary common areas; and had a defective smoke detector, windows, and wiring.) In Simon v. Solomon, 385 Mass. 91 (1982), the Court sustained a finding of a violation of the warranty of habitability where the tenant's apartment was repeatedly flooded by sewage. However, the warranty pertains only to physical defects with respect to the demised premises. In Doe v. New Bedford Housing Authority, 417 Mass. 273 (1994), it was decided that a failure on the part of a landlord to provide security for tenants against criminal elements in the apartment complex did not constitute a breach of the warranty of habitability. The Court concluded that the warranty extended only to "physical maintenance and repair of a dwelling unit". Id at 281. A tenant who fell from an exterior porch due to a broken railing was permitted to recover against the landlord on a breach of warranty of habitability theory; although the porch was not annexed to his apartment and was across the hall, it was considered part of the demised premises. Crowell, supra at 450-452. The Court in Crowell held that a landlord could be held liable in tort arising out of the breach of the implied warranty of habitability.

The courts have required a material and substantial breach of the warranty of habitability, representing a significant defect in the property itself. The existence of a material or substantial breach is a question of fact and must be determined in the circumstances and facts of each case. Factors that may aid the factfinder's determination of the materiality of an alleged breach include the following:

- The seriousness of the claimed defects and their effect on the dwelling's habitability,
- The length of time the defects persist,
- Whether the landlord received written or oral notice of the defects,
- Whether the residence could be made habitable within a reasonable time, and
- Whether the defects resulted abnormal conduct or use by the tenant.

Hemingway, at 200-01. The minimum standards of warranty of habitability are measured by applicable state building and sanitary cords. Doe at 281.

Recently, the SJC has concluded that a tenant's lawful visitors may recover for personal injuries caused by breach of the implied warranty of habitability. Scott v. Garfield, 454 Mass. 790, 798 (2009). In Scott, the Supreme Judicial Court addressed a premises condition similar to those in Crowell and Garwacki, considering whether a lawful visitor's claims for personal injuries suffered when the tenant's porch rail collapsed were actionable. Scott at 792. Reasoning that keeping a tenant's home safe for guests to visit goes "to the very heart of the landlord's contractual obligation to deliver and maintain habitable premises that comply with the building and sanitary codes," The Scott court emphasized that such codes were intended to protect both tenants and the general public. Scott at 794-95. However, Scott still left open the question of the standard applicable to breach of implied warranty of habitability claims – negligence, which requires notice, or strict liability, which does not. Scott at 794-95. As the jury in Scott returned special verdicts in favor of the visitor on both his common law negligence and breach of warranty of habitability claims, the court avoided articulating a clear standard because the jury had necessarily found that the landlord had notice of the defect but nonetheless had failed to repair it. Scott at 796.

The advantage of proceeding with a claim for breach of implied warranty of habitability in a personal injury action would be the ability to also bring a claim under G.L. c. 93A, with the potential for multiple damages and attorney fees. Generally, a breach of warranty constitutes a violation of G.L. c. 93A. Maillet v. ATF-Davidson Co., 407 Mass. 185 (1990); Brown v. LeClair, 20 Mass. App. Ct. 976 (1985).

The Massachusetts Attorney General's regulations provide, in part, with respect to the landlord-tenant relationship:

- "It shall be an unfair and deceptive act or practice to fail to perform or fulfill any promises or obligations arising under a warranty." 940 C.M.R. § 3.08(2).

- It shall be an unfair and deceptive act to fail "to comply with existing statutes, rules, regulations or laws, meant for the protection of the public's health, safety or welfare." 940 C.M.R. § 3.16.

A breach of the warranty of habitability relieves the tenant of an obligation to pay rent, even though the breach is not the fault of the landlord, and the landlord has not had an opportunity to make repairs. Berman & Sons v. Jefferson, 379 Mass. 176 (1979). The Court in Berman held that the warranty of habitability requires, at the very least, that the landlord comply with the minimum standards prescribed by the state building and sanitary codes; whether the scope of the warranty would be extended further was a question left open. In Doe, supra, the Supreme Judicial Court refused to extend the scope of the warranty to include a landlord's failure to prevent unlawful drug activity in an apartment complex. The SJC held as follows:

> the implied warranty of habitability is concerned with the provision, maintenance, and repair of the physical facilities vital to the use of the leased premises, and is not breached solely by the presence on the premises of uninvited persons engaged in unlawful activities or by the failure to provide security services.

Doe at 282.

COVENANT OF QUIET ENJOYMENT

G.L. c.186, §14 provides, in essence, that the landlord of a structure leased for dwelling purposes is obligated to furnish basic services by the express or implied terms of a lease such as water, heat, etc. It further provides that a landlord who violates the statute, or interferes with the provision of such services or utilities, or "who directly or indirectly interferes with the quiet enjoyment of any residential premises by an occupant shall be liable, both criminally and/or civilly". Specifically, the statute provides that a landlord shall be liable for actual and consequential damages or three months rent, whichever is greater; the cost of the prosecution of a violation of this statute, including reasonable attorney's fees, shall be awarded against the landlord as well. The tenant must prove that the landlord was negligent in order to make recovery under the statute. Al-Ziab v. Mourgis, 424 Mass. 847, 850 (1997). A tenant may bring an action for damages under G.L. c.186, §14 without first seeking a complaint for criminal charges. Simon v. Solomon, supra at 100. The tenant need not prove that the landlord had a specific intent to disturb the tenant's quiet enjoyment. Id. at 102. A violation of the covenant of quiet enjoyment must be of a substantial nature, such as "would impair the character and value of the leased premises." Winchester v. O'Brien, 266 Mass. 33, 36 (1929).

When the tenant remains in possession, the measure of damages for a breach of the covenant of quiet enjoyment is the "difference between the value of what the lessee should have received, and the value of what he did receive." Curtis v. Surrette, 49 Mass.App.Ct. 99, 104 (2000) quoting Darmetko v. Boston Housing Authority, 378 Mass. 758, 761 n.4 (1979). However, a violation resulting in personal injuries will result in an award of damages as well.

PUNITIVE DAMAGES, ATTORNEY'S FEES AND INTERPLAY OF THE CODES

As discussed above, a violation of G.L. c.186, §14 (Covenant of Quiet Enjoyment) provides for recovery of attorney's fees in addition to compensatory damages. The Massachusetts Attorney General's regulations provide, in part, with respect to the landlord-tenant relationship:

> *(1) Conditions and maintenance of a dwelling unit. It shall be an unfair or deceptive act or practice for an owner to:*
>
> *(a) rent a dwelling unit which, at the inception of the tenancy*
>
> *1. Contains a condition which amounts to a violation of law which may endanger or materially impair the health, safety, or well-being of the occupants; or*
>
> *2. Is unfit for human habitation. 940 CMR 3:17*

This provision has been interpreted as standing for the proposition that a violation of the State Sanitary Code constitutes a violation of Massachusetts Consumer Protection Statute, G.L. c.93A, §2. Dorgan v. Lukas, 19 Mass.App.Ct. 959 (1985). A violation of the Consumer Protection Statute entitles the prevailing complainant to recover attorney's fees as in G.L. c.186, §14. However, if in response to a written demand for relief by the tenant, the landlord fails to make what the Court ultimately deems as a reasonable offer in settlement, and if the violation was a willful one, the trial judge is entitled to award punitive damages, a multiple by two or three times the compensatory damages awarded by the judge or jury.

Thus, in the event of a valid breach of the warranty of habitability, and the receipt of a demand for settlement on behalf of the tenant, a landlord would be well advised to make a reasonable monetary offer of settlement so as to avoid the possible imposition of punitive damages. An attempt by a residential landlord

to shift the provision of essential services, such as heat, water, and light, to the tenant, is fraught with potential liability. In the decision of Dorgan v. Lukas, supra, the landlord's effort to shift to the tenant the obligation to arrange and pay for the delivery of heating fuel, and furnace maintenance was found to violate the Attorney General's Regulations and, thus, G.L. c.93A. Similarly, an arrangement wherein a tenant is allowed specific monetary reduction from his or her rental obligation for performing maintenance functions is a problematic practice, as ultimate responsibility for the provision of a safe, clean, dwelling unit ultimately remains with the landlord.

LIGHTING

The Sanitary Code provides, in part, that the owner of a multiple unit residential premises is obligated to provide a specific measurable amount of light "in every part of all interior passageways, hallways, foyers, and stairways used, or intended for the use, by the occupants of more than one dwelling unit, or rooming unit" twenty-four hours a day. 105 CMR 410.254. Apart from regulatory requirements, whether a landowner has failed in her duty of care with respect to the provision of artificial lighting at the location of the Plaintiff's accident is a decision of fact for the jury based upon the reasonably prudent person standard. It is a question of fact to be decided by a jury, and not a question of law to be decided by the court on a dispositive motion. Wilson v. Copen, 244 F. 3d, 178 (1st Cir 2001). In Bohenko v. Grzyb, 21 Mass.App.Ct. 961 (1986), the Appeals Court reversed a finding in favor of a plaintiff who had fallen down an unlocked rear stairway to the defendant's home on the basis that the homeowner should not be obligated to prevent injury, which is obvious to a guest electing to make a visit at 1:00 a.m. to the defendant's home.

DEFENSES

Premises liability is a tort action – negligence – and, therefore, the statute of limitation is three years. One of the most common defenses to any negligence action, including premises liability, is the negligence of the plaintiff.

REMEDIES

The remedy in a premises liability action is damages, and generally in negligence actions the damages may include conscious pain and suffering loss of earning capacity, loss of enjoyment of life, loss of consortium, scarring and disfigurement, and medical expenses.

MOLD AND ASBESTOS
IN COMMERCIAL PROPERTY

Michele A. Rooke
Rebecca M. Thibault
Doherty, Wallace, Pillsbury
and Murphy, P.C.
One Monarch Place
1414 Main Street
Springfield, MA 01144
Telephone: (413) 733-3111
Telecopier: (413) 734-3910

MOLD AND ASBESTOS IN COMMERCIAL PROPERTY

Two of the most common and troublesome environmental issues for a commercial property owner are mold and asbestos. The following is a summary of issues related to each and number of resources to the agency charged with their enforcement.

Asbestos in Commercial Property

Knowledge of the adverse health effects of exposure to asbestos-containing materials has caused an increase in personal injury and property damage litigation. Asbestos is of significant concern in real estate transactions and commercial development and renovation.

Under federal law, asbestos is regulated as a "hazardous air pollutant," a "pollutant" subject to limitations when discharged into waters of the United States, 40 C.F.R. § § 427.10-.116; a "toxic and hazardous substance" and a "hazardous chemical" in workplaces subject to the jurisdiction of the Occupational Safety and Health Administration (OSHA)a "hazardous material" when transported in commerce, 49 C.F.R. § 172.101; a "hazardous substance" subject to release-reporting requirements under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § § 9601. In Massachusetts, asbestos is subject to regulations of the DEP, 310 C.M.R. § § 7.09 and 7.15; the Department of Public Health (DPH), 105 C.M.R. § § 410.353 and 470.410; and the Department of Labor Standards (DLS), 453 C.M.R. § § 6.01-.93. *See* Massachusetts Environmental Law, A comprehensive guide to state and federal environmental regulation, *Chapter 21, Hazardous Materials Law,* Christopher B. Myhrum, Esq., Law Office of Christopher B. Myhrum (MCLE 3rd edition, July 9, 2014).

Offenders may be subject to severe civil and criminal sanctions are. As of June 20, 2014, the Massachusetts Department of Environmental Protection (Mass DEP) has amended the Massachusetts air pollution control regulations

(310 CMR 7.00 and 310 CMR 7.15) to update the environmental rules for managing asbestos in Massachusetts demolition and renovation projects. The amendments include changes to reporting and notification requirements and create some exemptions for small projects.
See: http://www.mass.gov/eea/agencies/massdep/service/regulations/

In *Franklin Office Park Realty Corp. v. Commissioner of the Department of Environmental Protection*, 995 N.E.2d 785 (2013) a sole shareholder, Kevin Meehan, owned Franklin Office Park Realty Corp. ("Franklin"). Franklin was the owner of a three family home and a commercial garage. Through various other entities, Meehan owned over 30 other properties. Most of these were commercial properties. He also owned a property management company, which maintained the properties and several automotive dealerships.

A leak was discovered in the roof of the three-family home owned by Franklin. An employee of the management company ("Orton"), at Meehan's direction, arranged to have the *asphalt shingles* on the roof replaced. Orton contacted a former employee, who, in turn, contacted and arranged for a company to be hired to do the roofing work.

A building permit from the town was secured by the management company. The permit stated that the work had to comply with the State building code, and any requirements of DEP and the United States Environmental Protection Agency.

The shingles from the roof were removed and replaced. The debris, including the old asphalt shingles, was disposed of in a roll-off container provided by a disposal company. When the roll-off container was received by the disposal company, those employees suspected the debris contained asbestos, and the company, which was not certified to dispose of asbestos containing material ("ASM"), returned the container to Franklin. DEP found out about the ASM and

inspected the container. It determined that there was friable asbestos in the container, which was not sealed or contained. (*Friable asbestos can be easily crushed or pulverized, which makes it especially vulnerable to becoming airborne, thereby making it more likely to cause environmental and human health impacts.)*

DEP issued a penalty assessment notice to Franklin under M.G.L. c. 21A, § 16, which, in relevant part, states:

> The department may assess a civil administrative penalty on a person who fails to comply with any provision of any regulation, order, license or approval issued or adopted by the department, or of any law which the department has the authority or responsibility to enforce…and provided, further, that the department may assess such penalty without providing such written notice if such failure to comply: was willful and not the result of error….

The penalty was $18,225.00. Franklin disputed the penalty through the administrative process. The hearing officer found that (1) the knowledge of Orton was imputed to Meehan, and the knowledge of both Orton and Meehan was imputed to Franklin; and (2) Franklin exercised control over the roof replacement project, thus setting the stage for Franklin's liability. The hearing officer also found that Orton and Meehan "knew or should have known that the roofing shingles and other roofing materials could contain asbestos". He based this finding on their "industry knowledge and experience," the fact that the building permit alerted Franklin of the need to comply with DEP and EPA requirements, and their professional backgrounds and experiences. Therefore, their knowing behavior was a willful act and not the result of error, making Franklin liable for the penalty, without the opportunity to cure the problem.

Franklin appealed this decision to the Mass. Supreme Judicial Court which ultimately agreed with the hearing officer's finding that the

agents of Franklin knew or should have known that the shingles contained asbestos was supported by substantial evidence. As such, Franklin was found to have willfully, and not as the result of error, violated the laws and regulations governing asbestos and the penalty was upheld.

Liability of Commercial Property Owners for Mold.

Mold is a fungus that reproduces making spores that usually cannot be seen without magnification. They can produce allergens that can trigger allergic reactions or even asthma attacks in people allergic to mold. *See:* http://www.cdc.gov/mold/faqs.html;http://www.epa.gov/mold/moldremediation.html.

In the case *of Peter Kuong et al. v. David G. Wong aka David Thin Wong et al.* (Ma.Super. Jun. 13, 2013), decided June 13, 2013, the Court decided the issues of mold and M.G.L. c. 93A claims favorably for the Plaintiffs against the owner of and manager of the commercial bulling. Plaintiffs were commercial tenants in the Chinatown neighborhood of Boston, each of whom rented small shop spaces owned or managed by the Defendants. The building, was over 100 years old, and contained 10-20 commercial units total, and 19 residential apartments. Plaintiffs pursued a variety of business tort and contract claims against all of the Defendants based on the allegedly unsanitary and unsafe conditions under which Plaintiffs' businesses operated for a decade. Subsequently, the Court found favor of each Plaintiff and against Defendants for their liability pursuant to G.L.c. 93A, and "for doubling of the damages awarded by the jury on the common-law claims, for these Defendants' knowing and willful violation of the statute."

Sometime in 1999, one of the business tenants began to notice "trickles" of water down the wall in his hair salon on the premises. The locations and amount of water increased over time, to the point where he had to use numerous

buckets to collect the dripping water. Plaintiff Kuong described the water as smelling “like a sewer,” or “gutted fish.” Plaintiff Pham described the water entering her shop as smelling “moldy.” The tenancies ended in April 2009, when ceilings in two of the three units, literally came crashing down, bringing with them dead rats, food debris, and moldy plaster and other building materials, whereupon the City closed the shops.

As of April 3, 2009, inspectors for the Boston Public Health Commission determined violations of 105 CMR section 410.602A (sanitation) and G.L.c. lll, section 122 (nuisance and health hazards) stating water damage had compromised the structural integrity of the kitchen floor of restaurant on 2nd floor and ceiling of occupancies at 8-12 Kneeland St. causing unsafe and dangerous conditions; and "maintenance including water damage, rodent infestation, mold visibility, saturation of the ceilings, saturation of the Empire Garden floor, and two active leaks from flow drains and a plumbing chase within Empire Garden

“To meet the willful or knowing components of the statute G.L.c. 93A, § 8, for purposes of multiple damages, a Plaintiff has the burden of proving defendants held a subjectively culpable state of mind, which requires more than mere negligence. It contemplates a more purposeful level of culpability, that is, a conscious disregard for the likely results, and the intentional employment of sharp practices.” Id *citing* Whelihan v. Markowski, 37 Mass.App.Ct. 209, 212 (1994); Squeri v. McCarrick, 32 Mass.App.Ct. 203, 208 (1992) “Ultimately, c. 93A ties liability for multiple damages to the degree of the defendant's culpability.” Kattar v. Demoulas, 433 Mass. 1, 15-16 (2000); Gore v. Arbella Mut Ins. Co., 77 Mass. App. Ct. 518, 532-33 and n. 14 (“A person acts ‘knowingly’ with respect to a result if ‘he is aware that it is practically certain that his conduct will cause such a result’”). The cumulative effect of multiple, long-term violations may be considered by the trial judge on the question of willfulness. Brown v. LeClair, 20 Mass. App. Ct. 976, 980 (1985) (rescript).

Here the court found for the Plaintiff's stating:

"K&W Realty and David Wong committed unfair acts in their business relationship with the Plaintiffs. The evidence of these acts in the trial record is legion. It was unfair for these Defendants to engage in a course of conduct over a ten-year period including: 1) to fail to respond to complaints of leaks, odors, and rats by visiting the shops in a timely manner when a complaint was made; 2) to visit a shop randomly when some complaint was made, nod, state that a complaint would be addressed, and then do nothing about that complaint; 3) to permit employees of Empire Garden to throw buckets of water on the floor of the restaurant for a period of years before prohibiting that conduct; 4) to investigate recurring complaints, on the same topics (leaks, rank odors, rats, and maggots), from three different tenancies, only in the most cursory and isolated fashion over a ten-year period, all the while failing to address one or more obvious, building-wide problems; 5) to fault the tenants themselves variously for choice of lighting, air conditioning units, ceiling tiles, protective plastic, or maintenance, when these fixtures had nothing to do with the complaints, because the water, the odors, and the pests were entering the units from outside those units through the ceilings above; and 6) to walk away from the tenants and their customers when they attempted to speak about complaints, and/or to insinuate that the landlord was somehow protected by City officials.

Wong's testimony and demeanor at trial fully support a finding of reckless indifference to and disregard for his obligations to his commercial tenants…. Wong acknowledged awareness of all of his legal obligations, but then denied the building had systemic problems with water, pests, or mold. He denied receiving regular complaints from all three units. He again blamed the tenants for their problems….For all of these reasons, each Plaintiff is entitled to double the total amount of damages assessed by the jury on the common-law claims, as the fair and appropriate penalty for this finding of a willful and knowing violation of Chapter 93A. Plaintiffs are also entitled to recover statutory attorney's fees and costs."

Contrast AvalonBay Cmtys., Inc. v. Hamilton, 26 Mass. L. Rptr. 436 (Super. Ct. 2010) (one-time, isolated occurrence of mold insufficient).

HANDICAP ACCESSIBILITY OBLIGATIONS LIABILITY

Jesse Belcher-Timme
Doherty, Wallace, Pillsbury
and Murphy, P.C.
1414 Main Street
Springfield, MA 01144
Telephone: (413) 733-3111
Telecopier: (413) 734-3910

PROPERTY OWNERS' OBLIGATIONS TO ENSURE ACCESSIBILITY FOR INDIVIDUALS WITH DISABILITIES

At least since the implementation of the Americans with Disabilities Act of 1990 ("ADA"), private property owners have become subject to numerous obligations at the federal, state and local level to ensure that persons with disabilities are not unreasonable impeded in their ability to access buildings and other structures – even where such structures are privately-owned and not necessarily accessible by the greater public at large.

At a minimum, a property owner must be aware of the various obligations that can be imposed by federal, state and municipal laws and regulations, as well as heightened standards imposed on projects using public funds or for buildings designed for public use. This article will explain the various levels of oversight from governmental agencies, as well as some of the risks of noncompliance.

While the Americans with Disabilities Act, and state equivalents, impose a broad level of obligations on property owners regarding employment, discrimination, transportation, housing, and accessibility, this article will focus on the physical accessibility obligations imposed under these statutes.

It is important to remember that these statutes are not applied uniformly from one property owner, structure or use to another. There are numerous variables that impact what a property owner's obligations are, including the size and type of the structure, the activities that occur in the structure, the entity that

owns the structure, the sources of funding for the building or entity operating the structure, the age of the building, and whether the building is registered as a historical building. In light of this, it is important to analyze each situation carefully to ensure proper compliance with applicable statutes.

I. FEDERALLY-IMPOSED OBLIGATIONS

The most comprehensive statute governing accessibility on private property is the **Americans with Disabilities Act** (42 U.S.C. § 12131, *et seq.*), which requires, among many other obligations, that public accommodations (such as restaurants, retail stores, parks, day care centers, homeless shelters, etc…) enable a person with a disability to full and equal access to the facility, as well as its programs and services.

This obligation not only requires that the property owner refrain from discriminating based on disability and to alter or modify its policies, practices and procedures (such as strictly-enforced "no pet" policies that do not permit service animals) to facilitate such access, but also requires that the property owner remove any physical barriers in existing facilities to the extent that such changes may be made without excessive difficulty or expense. Pursuant to the ADA, the **Federal Access Board** has promulgated regulations – called the **Americans with Disabilities Act Accessibility Guidelines** – establishing uniform building standards for new construction and renovations under the ADA. Enforcement of

these obligations is overseen by the United States Department of Justice and failure to comply can result in significant penalties for a property owner.

In addition to the ADA, federal law places similar – and in some cases more stringent – requirements on buildings that are designed, constructed or altered using federal funds of any kind or are leased by a federal agency, pursuant to the **Federal Architectural Barriers Act** (42 U.S.C. § 4151, *et seq.*). These obligations are similarly enforced by the Department of Justice.

In addition, any entity that receives or benefits from federal funding in any way must provide equal opportunity for people with disabilities in their programs and activities, including a review of physical accessibility within the building, pursuant to the Federal Rehabilitation Act (29 U.S.C. § 794, *et seq.*). Such entities include many hospitals, schools, museums, libraries or other uses that benefit from federal funding. The obligations enforced under the Federal Rehabilitation Act are enforced by divisions within the funding agency, such as the Department of Education or the Department of Housing and Urban Development.

Finally, the **Federal Fair Housing Act** (42 U.S.C. §§ 3535 & 3601-3620) imposes certain obligations that may require structural improvements with respect to accessibility of a building. Depending on the exact circumstances of the building and tenant, a property owner may be required to allow a tenant to

make reasonable modifications to an existing unit to allow full use of the unit by a disabled tenant. Property owners may only avoid this obligation if it would create an "undue hardship," although a tenant may be required in some instances to remove the modifications and return the unit to the original condition at the end of the tenancy.

New structures with four or more rental units generally must be made "adaptable," which requires wide doorways, low outlets, grab bars, and accessible kitchens and bathrooms. Where a building lacks an elevator, only those units on the first floor need to be built "adaptable." Enforcement of these obligations is overseen by the Department of Housing and Urban Development.

Violations of the ADA, the Federal Rehabilitation Act, or the Fair Housing Act may also be enforced through private lawsuits. Notably, federal law provides for an award of attorney's fees to a prevailing party asserting rights under these statutes in the same manner that fees are awarded under the **Civil Rights Attorney's Fees Awards Act of 1976**, 42 U.S.C. § 1988.

In fact, case law interpreting the award of fees in these instances has made clear that "the prevailing party may not ordinarily be denied fees except in special circumstances making the award unjust." *Williams v. Hanover*, 113 F.3d 1294, 1300 (1st Cir. 1997). The burden to show that such "special circumstances" exist – and that fees should not be awarded – is particularly

difficult to meet and attorneys' fees are routinely granted to successful plaintiffs in these actions.

II. STATE-IMPOSED OBLIGATIONS

In addition to the obligations imposed by the federal government, Massachusetts imposes its own standards to ensure that people with disabilities are not denied access to buildings and programs in places of public accommodation.

Most notably, the **Massachusetts Architectural Access Board** is empowered by statute to develop regulations designed to make public buildings accessible to persons with disabilities under the **Architectural Access Act** (G.L. c. 22, § 13A). The construction, reconstruction, remodeling, alteration, or change of use of a building or facility that is open to the public mandates compliance with the regulations of the Architectural Access Board.

All new buildings must comply with the regulations, which are incorporated into the Massachusetts Building Code. For renovations to existing structures, all new work must comply with the regulations. In addition, if the work being performed exceeds $100,000 in a 36-month period, then the building must also be modified to include an accessible restroom, telephone and drinking fountain (to the extent restrooms, telephones and drinking fountains are included). Finally, if the value of the work being performed exceeds 30% of the "full and fair cash

value" of the building, the entire building must be brought into compliance with the Architectural Access Board regulations.

In addition, these regulations govern the provision of accessible parking spaces within a parking lot and their location within the lot.

Enforcement is performed by the Board, which has the authority to impose fines of up to $1,000 per violation per day for non compliance with an order. Investigations can be triggered by complaints from the public.

As with the Federal Fair Housing Act, the **Massachusetts Housing Bill of Rights** (G. L. c. 151B, §4) governs modifications to rental units to ensure accessibility and authorizes a tenant with a disability to make reasonable modifications to the premises – although typically at the tenant's expense. In buildings with 10 or more units – or any building offering publicly-assisted housing, the landlord is generally responsible for making modifications to a unit to provide suitable accessibility for a disabled tenant. New buildings must comply with the construction requirements of the Architectural Access Board, as discussed above.

Violations of the Architectural Access Act may be pursued by the Attorney General's Office or private citizens. Recent plaintiffs have argued that failure to satisfy the requirements of the Architectural Access Board should be treated as a

violation of the Consumer Protection Statutes (G. L. c. 93A) which permits the trebling of damages and an award of attorney's fees in certain circumstances. Those efforts have not been squarely addressed by the appellate courts in Massachusetts to date, but remain a very real risk going forward. *Patterson v. Christ Church in the City of Boston*, 85 Mass. App. Ct. 157 (2014) Violations of the Housing Bill of Rights can be pursued by private complaints and, as with the federal statutes, the Housing Bill of Rights provides for an award of attorney's fees – in addition to other penalties – for a prevailing party. See G. L. c. 151B, § 5.

III. INTERPLAY WITH LOCAL REGULATIONS

While almost all of the affirmative obligations relating to accessibility are imposed on the state and federal level, there can be some interactions between these statutes and local ordinances that are worth consideration. For example, Massachusetts law prohibits the consideration of handicapped access ramps in computing dimensional lot requirements under local zoning by-laws (G. L. c. 40A, §3, ¶8). In addition, municipalities are explicitly forbidden from using regulations, ordinances or by-laws in any way that discriminates against a disabled person (G. L. c. 40A, §3, ¶4). While not directly impacting a property owner's obligations to make a building accessible, these statutes may in fact provide support for an argument for leniency from local zoning regulations where they impede a property owners' ability to make necessary changes or modifications to an existing structure.

In addition, some municipalities have enacted ordinances that provide enforceable rights to people with disabilities – although these have largely revolved around active discrimination rather than provision of access to buildings. See Cambridge Human Rights Ordinance, § 2.76.120(M). In any event, it is important to review all local ordinances to see if there may be additional obligations for accessibility imposed at the local level.

IV. CONCLUSION

As set forth above, there are numerous federal, state, and local statutes that can have an impact on a property owner's obligations to ensure that disabled individuals are able to access their property. Whether a specific statute applies to you, as well as the obligations required to satisfy your statutory obligations (if any), vary widely based on numerous factors, including the age and historical significance of the building, the owner/occupant of the building, the level of reconstruction or repair being undertaken, the purpose or use of the structure, the source of funding for the property construction or renovation, as well as the source of funding for the programs or services offered on the premises.

It is crucial that all property owners confer with an attorney or other trained professional prior to commencing any construction or renovation of a structure to ensure that they satisfy any obligations regarding access for disabled individuals. In light of the penalties that can be imposed upon owners who fail to meet their

obligations under these statutes, special attention must be paid to these statutes and how they may apply based on your specific situation.

LIQUOR LIABILITY

L. Jeffrey Meehan
Doherty, Wallace, Pillsbury
and Murphy, P.C.
1414 Main Street
Springfield, MA 01144
Telephone: (413) 733-3111
Telecopier: (413) 734-3910

I. STATUTES PERTINENT TO LIQUOR LIABILITY

Massachusetts General Laws Chapter 138 Section 34:

This statute prohibits a licensed purveyor of alcoholic beverages from furnishing alcoholic beverages to an individual less than 21 years of age. It also prohibits one who is not a commercial purveyor of alcoholic beverages from procuring alcoholic beverages for a person under 21 years of age in any licensed establishment. A violation of this statute provides for both monetary fines and imprisonment. There is an exception for the procurement of alcoholic beverages on licensed premises for a person under the age of 21 years who is the child, ward or spouse of the person procuring the beverages. There is no liability for one who procures alcoholic beverages for a person under the age of 21 years who is the child or grandchild of the person providing the beverages and where it occurs on premises or property owned by that person.

Massachusetts General Laws Chapter 138 Section 34A

This statute provides criminal sanction for anyone under the age of 21 years who attempts to purchase alcoholic beverages, whether directly or through a third party or by means of falsification of identification as to his age.

Massachusetts General Laws Chapter 138 Section 34B

This statute provides for a system for the issuance of liquor purchase identification cards for individuals who have attained the age of 21 years and who do not hold a valid driver's license.

Massachusetts General Laws Chapter 138 Section 34D

This statute requires that a commercial distributor of alcoholic beverages post on the premises a notice describing the penalties for operation of a motor vehicle while under the influence. Those establishments which sell alcoholic

beverages to be consumed off the premises must also post a notice describing the penalties for operating a motor vehicle with an open container of alcohol.

Massachusetts General Laws Chapter 138 Section 41

This statute provides that the delivery of alcoholic beverages to certain premises, excepting a private dwelling, shall be presumed to be a sale of said beverages.

Massachusetts General Laws Chapter 138 Section 64

This statute provides for the suspension or revocation of a license to sell alcoholic beverages upon satisfactory proof that the licensee, among other causes, has sold beverages to an individual under the age of 21 years.

Massachusetts General Laws Chapter 138 Section 64A

A licensing authority, upon a finding that the licensee has served alcoholic beverages to a person less than 21 years of age or to an intoxicated person on multiple occasions may impose sanctions, including a requirement that the licensee provide a certificate of insurance for liquor liability for the licensee to monetary limits of not less than $100,000 per person and $200,000 to all persons.

Massachusetts General Laws Chapter 138 Section 64B

In the case that liquor liability insurance is required precedent to the modification, reinstatement or renewal of a license, the licensee must disclose to the insurer that the policy of insurance is required by the licensing authorities and provide the liquor liability insurer with the mailing address of the licensing authority. It shall direct the insurer to include said authorities as recipients of any notice of termination or alteration of the policy of insurance as required by Massachusetts General Laws Chapter 175.

Massachusetts General Laws Chapter 138 Section 68

The mayor of a city or selectmen of a town may, in cases of a riot or great public excitement, order licensees not to sell or otherwise distribute alcoholic beverages on the licensed premises for a period not exceeding three days.

Massachusetts General Laws Chapter 138 Section 69

This statute prohibits the sale or delivery of alcoholic beverages on licensed premises to an intoxicated person.

Massachusetts General Laws Chapter 231 Section 60J

This statute requires any action asserting liability on the basis of the provision of alcoholic beverages must be commenced in the superior court. The plaintiff must file with his complaint, or not more than ninety days thereafter, an affidavit setting forth sufficient facts to raise a legitimate question of liability appropriate for judicial determination. The parties are permitted to make motions for summary judgment. If summary judgment is decided adversely to the plaintiff and he elects to appeal, he must file a bond of $2,000 for each defendant with the clerk of the appellate court. If the appellant does not prevail, that bond will be payable to the appellee/defendant for costs assessed and attorneys' fees.

The ninety day period for the filing of the affidavit may be extended by the court even after expiration of the period. Croteau v. Swansea Lounge, Inc., 402 Mass. 419 (1988). Failure to file the statutory affidavit subjects the complaint to dismissal. Pucci v. Amherst Restaurant Enterprises, Inc., 33 Mass. App. Ct. 779 (1992).

Massachusetts General Laws Chapter 231 Section 85T

This statute provides in essence that the commercial distributor of alcoholic beverages shall not be liable for personal injuries, property damage or consequential damages caused by the service of alcoholic beverages to an intoxicated person who injures himself, unless the injured party is able to demonstrate that the provider of alcoholic beverages acted in a willful, wanton or reckless manner. It was the legislature's intent to protect commercial vendors from suits by patrons who injure themselves through voluntary intoxication. Manning v. Nobile, 411 Mass. 382, 387 (1991). (Note: This statute protects the provider of alcoholic beverages with respect to claims made by the individual whose consumption of those beverages is causally related to his injuries or harm, and will not protect the provider of alcoholic beverages for injuries or damages inflicted by the consumer of those beverages upon third parties.)

Massachusetts General Laws Chapter 90 Section 24

This is the drunken driving statute and provides, in part, that a driver operating a motor vehicle on a public way with a blood alcohol content of .08 or greater (if there is a breathalyzer or blood test) or operates a motor vehicle on a public way while under the influence of intoxicating liquor (no evidence by blood test or breathalyzer) or marijuana (and/or other controlled substances), shall be punished…

A violation of a statute regulating the use of alcoholic beverages, even one providing for criminal penalties, does not constitute an independent grounds for civil liability and does not constitute negligence per se. Instead, a violation of such a statute may be construed as evidence of the defendant's negligence as to all consequences for which the statute was intended to prevent. Bennett v. Eaglebrook Country Store, 408 Mass. 355, 358-359 (1990).

This statute, requiring proof of willful, wanton or reckless misconduct against a commercial distributor of alcoholic beverages wherein the consumer of those beverages voluntarily becomes intoxicated and injures himself is inapplicable to wrongful death cases. A commercial distributor of alcoholic beverages may be held liable to the estate of an individual who becomes voluntarily intoxicated and whose intoxication results in his death on a showing of ordinary negligence. Also, a commercial vendor of alcoholic beverages to a minor may not assert General Laws Chapter 231 Section 85T as a defense. Tobin v. Norwood Country Club, Inc., 422 Mass. 126, 136 (1996).

Sections 24 and 69 of General Laws Chapter 138 are intended to protect the general public as well as the purchaser of the forbidden alcoholic beverages. Michnik-Zilberman v. Gordon Liquors, Inc., 14 Mass. App. Ct. 1533, 1538 (1982).

Chapter 204 of the Code of Massachusetts Regulations regulates licensed commercial vendors of alcoholic beverages and proscribes certain practices in the dispensation of these beverages.

II. LIABILITY OF A COMMERCIAL DISTRIBUTOR OF ALCOHOLIC BEVERAGES

In many complaints seeking monetary compensation for injury or death caused, at least in part, by the distribution of alcoholic beverages, reference is made to Massachusetts General Laws Chapter 138 Section 69. This makes it unlawful to distribute alcoholic beverages to a person who is intoxicated. The statute has been amended to delete some archaic language with respect to a "known drunkard". It still has the same force and effect. The commercial provider of alcoholic beverages to a person who is intoxicated can be held liable by way of monetary damages for all injuries and harm resulting from the service of intoxicated beverages. It has been observed that the courts of Massachusetts have found it easier to impose a duty of care upon a licensed purveyor of

alcoholic beverages than upon a social host. McGuiggan v. N.E. Telephone & Telegraph Co., 398 Mass. 152, 157 (1986).

The negligent provision of alcoholic beverages to an intoxicated individual may result in liability whether the injury is sustained on the premises of the defendant or on the public way. Adamian v. Three Sons, Inc., 353 Mass. 498 (1968). (Service of excessive amounts of alcoholic beverages to a patron who became intoxicated and was involved in a fatal collision shortly after departing the defendant's tavern.) In that decision, the SJC remarked that the statute was for the purpose of safeguarding not only the intoxicated person but also members of the general public.

Given the prevalence of the use of motor vehicles in modern society, even without evidence of such things as a parking lot on a premises or proximity to a highway, a jury may infer that a tavern keeper of ordinary caution would recognize that an intoxicated person may drive an automobile and thus create a risk of injury to highway travelers. Cimino v. Milford Keg, Inc., 385 Mass. 323, 331 (1982). (The defendant served alcoholic beverages to a patron who was intoxicated and who subsequently struck and killed a child/pedestrian after leaving the defendant's café.) A tavern keeper does not owe a duty to decline to serve alcoholic beverages to an intoxicated person unless the tavern keeper knows, or reasonably should have known, that the patron is intoxicated. Id. at 327.

A jury is ultimately asked to decide whether the service of alcoholic beverages by the tavern keeper to an intoxicated patron was a failure to use that degree of care which a tavern keeper of ordinary prudence would have used under the same or similar circumstances. Id. at 331. The plaintiff is not obligated to establish by special evidence any circumstances which would notify the tavern that an intoxicated customer would be driving. This can be inferred from the realities of modern life. Id. at 332.

Recovery can also be had by a tavern patron who voluntarily consumes excessive amounts of alcoholic beverages and injures himself. O'Hanley v. Ninety-Nine, Inc., 12 Mass. App. Ct. 64 (1981). In the O'Hanley case, the plaintiff, after consuming 15 bottles of beer and six martinis, fell while attempting to dance on the bar, sustaining an injury to his leg. The Appeals Court reversed the decision for summary judgment in favor of the tavern, and observed that serving liquor to one who is already drunk may enhance the possibility of irrational behavior, and that it is well known that the consumption of liquor impairs an individual's sense of balance. The jury would be able to infer that after the consumption of that amount of alcoholic beverages, the plaintiff would have displayed outward manifestations of intoxication. The Appeals Court decided that the plaintiff was entitled to have his case decided by a jury.

Presently, as a practical matter, a plaintiff in this posture faces the significant hurdle pursuant to Massachusetts General Laws Chapter 231 Section 85T (enacted after the O'Hanley decision) of proving that the distributor of alcoholic beverages was, not merely negligent, but engaged in willful, wanton or reckless conduct. Should the intoxicated person, however, injure a third party, such a claimant would only have to prove negligence on the part of the tavern keeper and not willful, wanton and reckless conduct. Indeed, a tavern keeper who sells alcoholic beverages to an intoxicated person or to a minor, may be held civilly liable to a third party who is injured as a result of the customer's operation of a motor vehicle while intoxicated. Wiska v. St. Stanislaus Social Club, Inc., 7 Mass. App. Ct. 813, 816 (1979). The plaintiff must show a causal relationship between the intoxication and the accident. Id. at 817. G.L.c. 231 §85T is not applicable to wrongful death actions only personal injury suits. Zeroulias v. Hamilton American Legion, 46 Mass. App. Ct. 912 (1999).

Liability of the commercial vendor of alcoholic beverages for injuries caused by an intoxicated customer is not confined to a tavern or restaurant, but may be asserted against a retail liquor store. Michnik-Zilberman v. Gordon

Liquors, Inc., 14 Mass. App. Ct. 533, 539 (1982). (The case involved the sale of beer to a youthful-appearing minor without checking his identification card, who subsequently became intoxicated and struck and killed a bicyclist while driving an automobile.) The statutes prohibiting the distribution of alcoholic beverages to an intoxicated person (G.L. c. 138 § 69) and to a minor under the age of 21 years (G.L. c. 138 § 34) were "intended to preclude persons known to be incapable of responsible judgment from further impairment of their limited abilities by preventing their consumption of alcoholic beverages." Id. at 138. The courts have long recognized "the special susceptibilities of minors, and the intensification of otherwise inherent dangers when persons lacking in maturity and responsibility partake of alcoholic beverages." Id. at 538. Thus, the operator of a retail liquor store, as a tavern keeper, has a duty to refuse to sell, or otherwise distribute, alcoholic beverages to people who they know, or reasonably should know, are intoxicated or minors, or both. Id. The sale of alcoholic beverages to a sober minor violates the statute and is evidence of the vendor's negligence. It is the "sale rather than the consumption which may be found to constitute the negligent act." Id. at 539.

Indeed the legislature has approved two cards, a motor vehicle operator's license and a liquor identification card, upon which vendors of alcoholic beverages may reasonably rely to ascertain the age of youthful appearing customers. G.L. c. 138 §34B and Michnik-Zilberman v. Gordon's Liquor, Inc., 390 Mass. 6, 11 (1983). Thus, a vendor who fails to exercise due care and sells alcoholic beverages to a minor will be held accountable for all proximately caused injuries. Id. at 11. Evidence of the minor purchaser's appearance is relevant and admissible. It is unnecessary that the vendor of alcoholic beverages foresee the actual manner in which the harm will occur. The vendor may protect itself by maintaining a record of the identification card numbers as well as the name, address and age of any person with a youthful appearance to whom it distributes alcoholic beverages. Id. at 11.

Apart from the sale of alcoholic beverages to a minor, the liability of a commercial distributor of alcoholic beverages to an intoxicated person turns on the appearance of the person with reference to sobriety at the time of the sale. The tavern keeper will not be held liable for the sale of liquor to an intoxicated patron unless the tavern keeper knew or reasonably should have known that at the time of the sale the patron was intoxicated. Vickowski v. Polish American Citizens Club of the Town of Deerfield, Inc., 422 Mass. 606, 609 (1996). (The sale of 4 or 5 beers to a regular customer with a stolid affect who was found to exhibit signs of intoxication at the scene of an accident where his vehicle struck a pedestrian 30 minutes later.) In other words, there must be some evidence offered by the plaintiff to demonstrate that at the time of the service of alcoholic beverages the patron was obviously intoxicated. Evidence of this may be exhibited by the classical symptoms of imbalance, bloodshot eyes, difficulty in speaking, overly affectionate or combative behavior, or a loss of rationality. To support a finding of liability, the service of alcoholic beverages must be made after the patron began exhibiting obvious signs of intoxication. Id. at 610-611. There is no liability unless the tavern keeper knew or reasonably should have known that the patron was intoxicated. The courts have been "reluctant to accept evidence of subsequent, obvious intoxication as a surrogate for evidence of the patron's demeanor at the relevant time." Id. at 612. Thus, a display of signs of intoxication at an accident scene, after the sale of alcoholic beverages and the departure of the patron, is not necessarily sufficient to support the conclusion that the patron appeared intoxicated at the time of the last sale of a beverage.

In Kirby v. Le Disco, Inc., 34 Mass. App. Ct. 630 (1993), a large patron assaulted and inflicted serious injury upon two fellow patrons in a parking lot after all had left the defendant's tavern. Despite the assailant's admitted consumption of eight containers of beer, the plaintiffs failed in their proof that he displayed signs of intoxication at the time of the last sale. The allowance of a motion for summary judgment for the tavern keeper was sustained on appeal. The courts have recognized the possible delay in the impact of the consumption of alcohol,

and the "unknown effect on a patron of the last drink served to him by [a tavern keeper]". Vickowski, supra at 612.

However, in the case of Gottlin v. Graves, 40 Mass. App. Ct. 155 (1996), the court permitted evidence of obvious intoxication by a patron of a tavern displayed at the scene of a motor vehicle accident only 20 minutes after departure from the tavern to support a finding that at the time of the last sale of an alcoholic beverage to the driver, he would have displayed obvious signs of intoxication. Under certain circumstances, juries are allowed, usually with the assistance of expert testimony, to consider evidence of the blood alcohol level of the tavern patron in making a determination as to whether he would have displayed signs of obvious intoxication when last served alcoholic beverages. Commonwealth v. Capalbo, 308 Mass. 376, 380 (1941).

Yet, on occasion, in the sound discretion of the trial judge, An expert such as a toxicologist has been precluded from testifying as to the probable manifestations of intoxication as exhibited by a tavern patron whose blood was tested for alcohol after the subject accident. Kirby v. Morales, 50 Mass. App. Ct. 786, 792 (2001). In that particular case, the drunken driver had visited a number of taverns and had consumed alcoholic beverages in parking lots as well, making his itinerary vague and clouding the issue of where, and at what point, he exhibited signs of obvious intoxication and was still provided with alcoholic beverages during a long evening of drinking.

Liability for service of alcoholic beverages to a minor does not require hand-to-hand service. In the decision of Tobin v. Norwood Country Club, Inc., 422 Mass. 126 (1996), a commercial vendor of alcoholic beverages was held responsible for the death of a minor who attended a birthday party to which both adults and adolescents were invited. The mere consumption of alcoholic beverages on the premises of a tavern does not create a duty to that minor, or to those harmed by the results of the minor's consumption of alcoholic beverages.

However, where the commercial establishment sold alcohol to a minor, liability will be imposed, even absent actual "hand to hand" service. In the Tobin case, the bartender served multiple drinks simultaneously to adults which were obviously to be consumed by others, beside the purchaser. Also, an adult purchaser, on occasion, engaged the assistance of minors to carry the drinks from the bar to the tables.

It was decided that the vendor of alcoholic beverages, being in the business of supplying a substance which creates a well-established risk, has the experience and the ability to take steps to minimize that risk. Id. at 135. Here, the minor, after becoming intoxicated and argumentative, wandered onto the highway and was struck and killed. The court again recognized that Massachusetts General Laws Chapter 138 Section 34 forbids the service of alcoholic beverages to minors because they are particularly susceptible to the effects of alcohol, and less able to cope with those effects, and to make decisions concerning safety in a variety of scenarios. Id. at 136. Thus, even though there was no direct service of alcoholic beverages to the minor decedent, the SJC concluded that there was sufficient evidence so that the employees of the country club should have appreciated that the alcohol being furnished was being consumed by minors, and because they had the financial incentive to sell the alcoholic beverages; the experience to monitor consumption closely; and the ability to procure liability insurance in the event of an injury, the defendant would be held accountable for the minor's death. Similarly an adult, but underage driver (between the ages of 18 and 21 years) who voluntarily becomes intoxicated and injures himself need only prove that the commercial vendor was negligent to recover damages. Nunez v. Carrabba's Italian Grill, 448 Mass. 170 (2007).

However, if the commercial defendant did not provide alcoholic beverages, then it cannot be held accountable for the untoward results of intoxication. See Dhimos v. Cormier, 400 Mass. 504, 506 (1987) (convenience store operator held not responsible for stabbing arguably as a result of the

intoxication of the assailant in the parking lot where teenagers customarily gathered as the defendant had no role in the acquisition or consumption of alcoholic beverages). In the case of O'Gorman v. Antonio Rubinaccio & Sons, Inc., 408 Mass. 768 (1990), a driver entered the defendant's tavern obviously drunk. The proprietor took it upon himself to take the driver's keys and declined to serve him alcoholic beverages, serving him food instead. After two hours, the proprietor felt he could no longer hold the operator's keys and released them. Shortly after departing the defendant's tavern, the operator was involved in a fatal motor vehicle accident. The SJC concluded that because the defendant tavern had not supplied the alcoholic beverages leading to the motorist's intoxication, it had no duty to prevent him from harming other travelers using the highway.

In the decision of Douillard v. L.M.R., Inc., 433 Mass. 162 (2001), summary judgment in favor of a tavern operator was affirmed. The court restated the rule that a commercial vendor of alcoholic beverages is not required to refuse to serve liquor to an intoxicated patron unless the tavern keeper knows or reasonably should have known that the patron was intoxicated. It remains the plaintiff's burden to demonstrate by evidence that the patron's intoxication was apparent at the time of the service of alcoholic beverages. Id. at 164-165. (In Douillard, the companions of the motor vehicle operator who caused serious injury while operating his vehicle after leaving the defendant's tavern testified that he did not appear intoxicated.)

Evidence of intoxication at a later point in time with elevated blood alcohol levels does not support a finding that the consumer of alcoholic beverages displayed signs of intoxication when those beverages were served to him. The court remarked that the impact of the consumption of alcohol is often delayed, and that the effect of alcohol on the population varies considerably from one person to the next. The Douillard decision reinforces the proposition that the ability of an expert, such as a toxicologist, to describe the expected manifestations of intoxication based upon subsequent blood alcohol levels is only

admissible in the sound discretion of the trial judge, and cannot be relied upon exclusively to support a claim for negligent dispensation of alcoholic beverages.

In the case of Christopher v. Fathers' Huddle Café, Inc., 57 Mass. App. Ct. 217 (2003), a tavern was held responsible for the death of a patron who was pursued onto public way in an altercation with other patrons. Some of the pursuers who chased the decedent into the street were minors and had been served alcoholic beverages in violation of G.L.c. 138 § 34. The court pointed out that the duty to refrain from providing alcoholic beverages to minors is not dependent on whether they have the appearance of being intoxicated. The susceptibility of minors to the effects of alcohol and the lack of maturity in making decisions under the influence of alcohol is an established fact. Liability in that case was also grounded upon the fact that the defendant's doorkeeper observed the escalation of hostilities and the beginning of the combative behavior without attempting to notify the police. The hostilities made infliction of harm foreseeable and in failing to summon the police, the doorkeeper violated the tavern's own written and oral policies which required the doorman to call for assistance in that situation. Here, a commercial vendor of alcoholic beverages was held accountable for the death of a patron on the adjacent public way because of the service of alcoholic beverages to underage assailants, and also for failing to take appropriate steps to protect patrons from a foreseeable assault.

III. SECURITY CLAIMS AGAINST COMMERCIAL VENDORS OF ALCOHOLIC BEVERAGES

The duty of a purveyor of alcoholic beverages to protect patrons does not require notice of intoxication, but may arise when the conduct of a antisocial or boisterous patron alerts the tavern keeper, or its employees, that combat and resultant harm is imminent. Kane v. Fields' Corner Grille, Inc., 341 Mass. 640, 641 (1961). In the landmark decision of Carey v. New Yorker of Worcester, Inc., 355 Mass. 450 (1969), a tavern was held accountable for one patron fatally shooting another on the premises. In that instance, the shooter was under age and had displayed for a significant period of time signs of obvious intoxication. The shooter had behaved boisterously in the tavern on prior occasions, and that evening was described as "absolutely drunk". The SJC remarked that it was not required that the plaintiff prove that the defendant tavern anticipate the precise method of the assault. It noted that the service of liquor to an individual who was already drunk may enhance that person's aggressive demeanor to make "any irrational act foreseeable". Id. at 453. Thus, recovery against commercial vendors of alcoholic beverages because of assaultive behavior by an intoxicated patron on a customer is a familiar situation. Wood v. Ray-Al Café, Inc., 349 Mass. 760, 766 (1965).

Liability is not dependent upon an antagonistic motivation on the part of the intoxicated patron. In the case of Sweenor v. 162 State Street, Inc., 261 Mass. 524 (1972), a boisterous patron was continued service of alcoholic beverages after it became obvious that he was thoroughly intoxicated. Another patron attempted to prevent the drinker from falling from a barstool, and the good samaritan sustained a fractured leg when the drunk fell on him. The court said, quoting from the Restatement of Torts Second:

> The defendant, as the operator of a restaurant and bar, was in possession of real estate open to the public for business purposes. It owed a duty to a paying patron to use reasonable care to prevent injury to him by third persons, whether their acts were accidental, negligent or intentional. Id. at 527.

The court noted that in addition to increasing aggressive behavior, the service of alcoholic beverages has a tendency to impair the consumer's sense of balance.

Not all service of alcoholic beverages to intoxicated persons requires a finding of liability. In the matter of Westerback v. Harold F. LeClair Co., Inc., 50 Mass. App. Ct. 144 (2000), the Appeals Court segregated the two major areas of liquor liability into those scenarios wherein a drunken customer on the premises inflicts injuries on others or on himself; and the other where a drunken patron inflicts injuries on others by negligent operation of a motor vehicle after leaving the tavern. In this case, the plaintiff became intoxicated, arguably at the defendant's tavern, and was subsequently raped while off the tavern premises by third parties who had no connection to the tavern. Recognizing that liability had been found for a owner of commercial premises for injuries sustained by patrons on those premises, or just outside the premises, the courts have remarked that in those instances, the injury to the patron took place in proximity to the premises so that there were circumstances calling for the provision of security by the premises owner. The court in Westerback recognized that the consumption of excessive alcoholic beverages makes a person more vulnerable to assaultive behavior, but the intervening acts of criminals who had no association with the defendant premises owner broke the chain of causation, and prevented recovery against the tavern keeper.

IV. LIABILITY OF AN EMPLOYER WHO ELECTS TO ACT AS A HOST OR SPONSOR

The prototypical claim against an employer for negligent dispensation of alcoholic beverages arises when an employee consumes excessive amounts of alcoholic beverages at the company Christmas party and injures a third party on the public way. The case of Mosko v. Raytheon Co., 416 Mass. 395 (1993) involves the defendant's sponsorship of a Christmas party for employees at a restaurant. While Raytheon partially sponsored the event by paying to reserve the banquet room and to defray the costs of food, the employees purchased their own alcoholic beverages from servers of the concessionaire. One of the employees became intoxicated at the party and later struck the plaintiff, attempting to change a tire in a highway breakdown lane. The plaintiffs claim that Raytheon should be held vicariously liable for the negligence of its employee who was acting within the scope of his employment while attending the Christmas party. The SJC denied the plaintiff's contentions, citing that the employee was not engaged in work at the time of the occurrence and observing that the party was not conducted on the defendant's premises or during working hours. It also dismissed the plaintiff's contentions with respect to an alleged duty on the part of the employer to prevent its employees from becoming intoxicated at the party and thereby endangering the public. The SJC reemphasized that there is no duty of care imposed when the defendant did not furnish the alcohol to an obviously intoxicated person. But see Commerce Ins.Co. v. Ultimate Livery Service, Inc., 452 Mass. 639 (2008) *infra.*

In the case of Kelly v. Avon Tape, Inc., 417 Mass. 587 (1994), the defendant provided a refrigerator for the use of employees, and was aware that on occasion employees stored beer in the same. One of the employees consumed beer during the course of the work day and became intoxicated. Following the end of his shift, that employee drove in a negligent fashion, injuring the plaintiffs. The SJC concluded with respect to the plaintiffs' contentions regarding a "employee-host liability claim" that there would be no liability with

respect to a private defendant who did not actually furnish the alcoholic beverages.

The case of Burroughs v. The Commonwealth, 423 Mass. 874 (1996) arose from the consumption of excessive amounts of alcoholic beverages by a 19-year-old member of the Massachusetts National Guard at a noncommissioned officer's club located in a state armory. The National Guard permitted servicemen to use a portion of the armory building for a club containing a bar, dartboard and pool tables. The platoon sergeant, while off-duty, acted as the bartender for no compensation. The alcohol was provided by the individual Guard members and not by the National Guard itself. The teenage drinker was involved in a fatal automobile accident shortly after his departure from the NCO club. The Court found that the bartender was not carrying on any employment duty associated with his status in the National Guard and because the National Guard had not furnished the alcoholic beverages leading to the teenager's intoxication, there would be no liability.

Recently the Appeals Court affirmed summary judgment in favor of an employer whose employee, while operating a motor vehicle in an intoxicated state, struck and injured the plaintiff. Lev v. Beverly Enterprises -Massachusetts, Inc., 74 Mass. App. Ct. 413 (2009). The employee had met with a supervisor at a tavern, after completing their shift to discuss work matters. Despite the fact that the employment manual prohibited the consumption of alcoholic beverages on the employer's premises or while conducting business off-site, there was no liability as the employer did not provide the beverages consumed.

V. MISCELLANEOUS ISSUES RELATING TO THE LIABILITY OF A COMMERCIAL VENDOR OF ALCOHOLIC BEVERAGES

The courts of Massachusetts have recognized the theory of recovery against an employer for the negligent hiring of an individual predisposed to combative behavior and querulousness whom the employer can reasonably

anticipate will have contact with its customers. In the case of Foster v. The Loft, Inc., 26 Mass. App. Ct. 289 (1988), the defendant, a large entertainment center featuring five bars and catering to young people, retained a bartender who had a criminal record. While the defendant was aware of the employees criminal record, no effort was made to check references or otherwise investigate his background. The bar, in view of its size and clientele, took relatively elaborate measures for safety, including the hiring of two part-time police officers, a number of doorkeepers and other staff. During a late evening, heated confrontation, the employee struck a patron in the face, shattering his orbit and cheekbone. A jury finding in favor of the patron on the basis of a negligent hiring of a dangerous individual was affirmed.

While the creation of written policies by a commercial vendor of alcoholic beverages to be observed employees in the dispensation of those beverages is a commendable measure, it should be kept in mind that the conduct of the employees who dispense alcoholic beverages in a later liability claim will be measured against those policies. In Michnik-Zilberman v. Gordon's Liquor, Inc., Supra at 13, the failure of a package store clerk to check the identification of a youthful purchaser in violation of the store policy was probative of the defendant's negligence. The establishment of written policies which cannot be realistically adhered to, can undermine the defense of a case.

VI. SOCIAL HOST LIABILITY

In Massachusetts, the landmark case recognizing the tort of social host liability for service of alcoholic beverages is McGuiggan v. New England Telephone and Telegraph Co., 398 Mass. 152 (1986). This action arose out of a high school graduation party in which an 18-year-old was served an initial drink and apparently served himself additional drinks during the course of the evening. Subsequent to his departure from the host's premises, he operated a motor vehicle involved in a fatal accident. The courts said "the risk created by serving

liquor to an intoxicated person who is about to operate a motor vehicle is far too apparent to permit the conclusion that a social host's act could not have been the proximate cause of a third person's injury." Id. at 160. In this case, however, the plaintiffs were unable to show evidence of obvious intoxication at the time that the social host served the driver an alcoholic drink. While the court has declined to reverse summary judgment for the social host in this case, it indicated a willingness to impose liability under the appropriate circumstances against social hosts in future actions involving the distribution of alcoholic beverages to an intoxicated guest.

In another claim arising out of a teenage party wherein the homeowner permitted the celebration, but did not provide alcoholic beverages, it was decided that the parent who permits his home to be used for a party but who does not provide alcoholic beverages does not owe a duty to travelers on the highway to supervise a party given by her minor child. Langemann v. Davis, 398 Mass. 166 (1986). In Alioto v. Marnell, 402 Mass. 36 (1988), the parents of a teenage son with a history of alcohol abuse permitted him to host a party in their home while they were present knowing that alcoholic beverages would be consumed, but on their son's promise that he would not operate a motor vehicle. Predictably, the son broke the promise and was involved in a motor vehicle accident. The court declined to impose liability on the parents as they did not furnish the alcoholic beverages.

In Ulwick v. DeChristopher, 411 Mass. 401 (1991), a teenage in the absence of his parents hosted a "B.Y.O.B." party at the family home. Despite the host's observation of the intoxicated guest continuing to consume alcoholic beverages, who did nothing to prevent that consumption, the court, emphasizing the absence of liability unless the host can control and regulate the supply of liquor, said: "These principles, and the consideration that a duty of care follows from control over the liquor supply, furnish practical limits of potential liability." Recently in the decision of Juliano v. Simpson, 461 Mass. 527 (2012), the S.J.C.

revisited the question of a social host's liability for injuries sustained because of the intoxication of an underaged guest when the host did not actually provide the alcoholic beverages, but permitted them to be consumed at her residence by the guest. Despite the language in G.L. c.138 §34 which proscribes furnishing alcohol to a person under the age of 21 years, or allowing an underaged driver to possess alcoholic beverages on premises owned or controlled by the person in Charge; in the context of social host liability a plaintiff is required to prove that the defendant provided the intoxicating beverages.

Even where an adult remains to chaperone a party and establishes a policy of no alcoholic beverages which is later violated by her daughter's guests, the adult was not held liable as, having not provided the intoxicants, she owed no duty to travelers on the highways to supervise a party given by her minor child. Wallace v. Wilson, 411 Mass. 8 (1991). In Manning v. Nobile, 411 Mass. 382 (1991), the plaintiff's employment supervisor hosted a party at a Marriot hotel following a company function at another location. The plaintiff over-imbibed and, while waiting for the driver, elected to drive himself at the conclusion of the evening, suffering an accident which left him in a permanent vegetative state. The claim against Marriot was turned away on the basis that it did not provide the alcoholic beverages consumed at the party and that pursuant to Massachusetts General Laws Chapter 231 Section 85T, the plaintiff could recover against a commercial vendor for injuries inflicted upon himself as a result of intoxication only if he could show that the commercial vendor was "willful, wanton or reckless". More importantly, the SJC announced that recovery could not be had against a social host who had no duty to prevent an intoxicated guest from injuring himself.

In Cremins v. Clancy, 415 Mass. 289 (1993), a teenage drinking celebration evolved from the defendant's home to his car. However, the underage guest provided his own beer and the host was deemed not responsible to individuals injured in a collision later that evening when the intoxicated guest

was operating his own motor vehicle. The mere provision of a setting or atmosphere for the consumption of alcoholic beverages and inebriation, but without the actual provision of those beverages does not give rise to liability.

The distinction between status as an adult and status as an underage drinker was explored in the case of Hamilton v. Ganias, 417 Mass. 666 (1994). Here, the plaintiff, a 19-year-old who was legally an adult, but not legally able to purchase alcoholic beverages, became intoxicated by the voluntary consumption of alcohol and was subsequently injured while operating a motor vehicle. The court noted that while a social host may be liable to a third person injured by the negligence of an intoxicated guest, the host is not liable for an intoxicated guest who injures himself. In Makynen v. Mustakangas, 39 Mass. App. Ct. 309 (1995), a finding of liability on the part of a social host for service of extensive alcoholic beverages to his nephew who later operated a motor vehicle and injured the plaintiff, was upheld. Here, the nephew had consumed several beers at the defendant uncle's home before they went to obtain some take-out food. While waiting for the food, the uncle purchased additional beer from the commercial vendor for his nephew. However, the nephew was not displaying signs of obvious intoxication at the premises of the commercial vendor. The defendant, having been in the company of his nephew for several hours and observing him consuming a considerable number of beers, should have realized it was inappropriate for the nephew to operate a motor vehicle and was held responsible to the parties injured as a result of the collision. The commercial vendor was found not liable.

In the case of Pollard v. Powers, 50 Mass. App. Ct. 151 (2000), involved a claim against an 18-year-old who hosted a birthday party at the house where she and her mother resided. While the initial guest list was small, predictably hordes of teenagers gathered and there was excessive drinking. The defendant also made arrangements for the availability of kegs of beer. Hostilities ensued and one of the guests assaulted another. The court pointed out that in many social

host liability cases involving service of alcoholic beverages, harm arises out of a criminal act, be it driving under the influence or an assault. Here, because the teenage host provided the alcoholic beverages, liability was found.

Of interest is the case of Panagakos v. Walsh, 434 Mass. 353 (2001). This was an action for contribution by a tavern owner against the companions of an 18-year-old decedent who after becoming intoxicated was struck and killed walking on a roadway. The defendant companions, also teenagers, furnished the decedent with falsified identification and also purchased from the commercial vendor alcohol for the decedent's consumption. The tavern operator, having been sued by the decedent's estate claimed that the companions were equally culpable for his death. They were enablers in the decedent becoming intoxicated. Because the decedent, while an underage drinker, was 18 years of age and thus an adult, the companions could not be held liable for injuries which he inflicted upon himself as a result of voluntary intoxication. Despite the devious manner in which they assisted the decedent in becoming intoxicated, the companions could not be held liable to his estate and therefore could not be compelled to contribute to any judgment or settlement with respect to the claim against the tavern.

In the decision of Samson v. MacDougall, 60 Mass. App. Ct. 394 (2004), the defendants hosted a graduation party attracting a mix of teenagers and adults. Kegs of beer were provided. The plaintiff was rendered quadriplegic as a result of jumping from a wall after he became intoxicated. Having attained his 18th birthday, he was an adult but was not by law able to purchase alcoholic beverages. Recovery was denied on the basis that a "social host has no duty to a guest who becomes intoxicated and injures himself where the guest, although under the minimum drinking age, was not a minor." Id. at 398. Reference is made to the Panagakos decision which stood for the proposition that social companions who provide alcoholic beverages directly, or enable a person to become voluntarily intoxicated, do not owe the drinker an ongoing duty of care. However, had the drinker injured a third party, liability would be feasible.

It is apparent from a review of the decisions involving social host liability that they are held to a lesser standard of care than a commercial vendor. Unless the drinker is a minor, the social host owes not duty of care to one who become voluntarily intoxicated and injures himself. A social host owes no duty of care to an adult, but underage, drinker (18 to 21 years) who voluntarily becomes intoxicated and injuries himself. Nunez v. Carrabba, 448 Mass. 170 (2007). The social host would only be liable in the situation of an adult drinker if he furnished alcoholic beverages to a guest who in turn caused foreseeable injury to a third party. Paying for alcoholic beverages consumed by another and dispensed by a commercial vendor does not make the payor a social host and responsible for injuries caused others by the drinker's intoxication and operation of an automobile. Dube v. Lamphear, 69 Mass. App. Ct. 386 (2007). While the defendant paid for the alcoholic beverages, he did not regulate the liquor supply.

VII. LIABILITY OF A PARTY WHO ENABLES THE EXCESSIVE CONSUMPTION OF ALCOHOLIC BEVERAGES BUT DOES NOT PROVIDE THEM

In the landmark decision of Commerce Insurance Company v. Ultimate Livery Service, Inc., 452 Mass. 639 (2008) the SJC affirmed a decision against a limousine service for injuries and death caused to third parties by its customer. The defendant transported a group of men who initially gathered at a bar for a bachelor's party at a strip club where additional alcoholic beverages were consumed. The livery driver permitted the consumption of alcoholic beverages purchased by the customers in the vehicle. At the conclusion of the festivities, the defendant deposited its customers back at the bar where they had originally gathered, long after closing, with only the customers personal vehicles available to transport them to their respective homes. Despite the fact that the limousine service had not provided the alcoholic beverages, the court affirmed liability.

VIII. OBSERVATIONS

1. Liability most often pivots on whether there has been an actual distribution, by sale or gratuitously, of an alcoholic beverage. Mere ownership of the premises when the liquor is consumed and/or the accident occurs will usually not support a finding of liability

2. Distribution of alcoholic beverages to a minor who hurts himself or others will almost certainly result in a finding of liability even in the absence of "hand to hand" service.

3. The only protection available to a commercial vendor accused of distributing alcoholic beverages to a minor is to record the name, address and driver's license number or liquor identification card number upon a sale to a youthful customer.

4. If an employer elects to host or sponsor a social gathering of employees, it is prudent to engage an independent concessionaire to handle distribution of alcoholic beverages and, if possible, segregate the employer's financial support to non-alcoholic items such as food or awards, etc.

5. A commercial vendor is held to a higher standard of care with respect to distribution of alcoholic beverages because it has the experience, ability to control and the wherewithal to procure liquor liability insurance.

6. The key to liability with respect to service of alcoholic beverages to an adult who is harmed, or who harms others, is whether the consumer appeared intoxicated at the time of the sale with an acknowledgement that people react differently to alcoholic beverages; time is required for the beverages to have their effect; and the atmosphere or environment may or may not be conducive to a detection of intoxication. Liability is a "crap shoot", often dependent on the

testimony of bystanders, friends of the plaintiff, friends of the drinker, all of which is obviously subjective.

7. Expert evidence, given a proper factual foundation, involving the interpretation of the drinker's blood alcohol as to what manifestations of intoxication the drinker would have made at the time of service may be admissible, but will not be dispositive of liability.

8. Liquor servers should never consume alcoholic beverages while on duty, and should be subject to background checks prior to hiring.

9. While in a relatively sedate, uncrowded environment, a liquor server may elect to count the number of drinks served to a customer. This method of attempting to gauge the state of a drinker's intoxication in a loud, crowded environment with multiple servers is wholly impractical.

10. If a purveyor of alcoholic beverages decides to adopt a formal policy authored by himself or adopted from a third party (i.e., industry group guidelines), he should be sure not to set the bar too high. A violation of one's own written policies for distribution of alcoholic beverages is strong evidence of negligence and is likely to result in a liability finding. The same caution should apply to compelling servers to take instruction for a third party whose materials may hold a server to impossibly high standards of vigilance.

11. Servers should be instructed that a refusal to sell because of a drinker's perceived intoxication may result in a modest loss of revenue, but will certainly aid in avoiding liability claims and enhance the tavern's reputation in the community.

12. In both a commercial setting and a private home where alcoholic beverages are being served, a call to 911 on evidence of escalating hostilities is seldom unwarranted.

SECURITY LIABILITY

L. Jeffrey Meehan
Doherty, Wallace, Pillsbury
and Murphy, P.C.
1414 Main Street
Springfield, MA 01144
Telephone: (413) 733-3111
Telecopier: (413) 734-3910

MASSACHUSETTS SECURITY LIABILITY

DUTY OF CARE

In Massachusetts, generally speaking, there is no duty to control the conduct of another person so as to prevent that person from causing harm to a third party. Lev v. Beverly Enterprises-Massachusetts, 457 Mass. 234, 245-246 (2010). Whether there exists a duty to protect others is a question of law, not one of fact, to be determined by the courts with reference to "social values and customs and the appropriate social policy". Yakubowizc v. Paramount Pictures Corp., 404 Mass. 624, 629(1989). However, the courts of Massachusetts have recognized the existence of a potential for a "special relationship", which may create a duty to protect others from the misconduct of third parties in certain situations based upon responsibilities imposed by statute or common law.

The existence of a special relationship when derived from common will depend on the plaintiff's reasonable expectations and reliance that Defendant will anticipate harmful acts by third persons and take appropriate measures to protect the plaintiff from that harm. Irwin v. Ware, 292 Mass. 745, 756-757 (1984) [A police officer held accountable for injuries and death caused by a drunken driver after the officer had stopped the driver.] Similarly an educational institution was held responsible for the rape of a student in a dormitory because of an alleged failure to take appropriate measures to provide security for the occupants of the building on the basis of the relationship between the student, who paid for room and board, and the college. Mullins v. Pine Manor College, 389 Mass. 47, 56 (1983).

Whether there exists a special relationship is dependent on a set of factors. "…among these is whether a defendant reasonably could foresee that he would be expected to take affirmative action to protect the plaintiff and could anticipate harm to the plaintiff from a failure to do so." Id at 756. The mere fact that the parking lot of a convenience store was a popular gathering place for teenagers to engage in illicit activity, including consumption of alcoholic beverages and narcotics, did not serve as the basis for the existence of a special relationship between the store and the plaintiff's decedent who was struck by an automobile operated by a teenager who had become impaired from consumption of illicit substances in the store parking lot. Dhimos v. Cormier, 400 Mass. 504 (1987). However, in the case of Fund v. Hotel Lenox of Boston, Inc., 418 Mass. 191 (1994) where a defendant hotel was situated in a "moderately high crime area" with a history of unauthorized access via a fire escape and/or an unsecured stairwell, not monitored by security measures, summary judgment in favor of the hotel was reversed on a finding by the SJC that the rape and stabbing of the plaintiff's decedent was reasonably foreseeable. In another case involving a convenience store liability for alleged inadequate security where the store's employee knew that some teenage boys gathered in the parking lot were intoxicated, and that one of them had a knife, was reasonably foreseeable and the matter should be remanded for retrial and decision by a jury. Flood v. Southland Corp., 416 Mass.62 (1993).

In Sharpe v. Peter Pan Bus Lines, Inc., 401 Mass. 788 (1988) the Supreme Court concluded, because of a extensive history of criminal activity in the vicinity of a bus terminal, an unprovoked attack by a stranger who stabbed a teenage girl waiting for a bus was reasonably foreseeable, it was noted that, despite a history of criminal activity, the defendants had no security plan and did not retain security officers or police to patrol the premises.

COMMERCIAL PREMISES

In the case of Burgess v. Chicopee Savings Bank, 336 Mass. 331 (1957) a bank customer was shot while pursuing a robber who had just shot a bank employee. The court acknowledged that, like other commercial institutions, banks are required to exercise "reasonable care to protect those who are upon their premises to transact business. They are not insurers. And they cannot be held accountable for the criminal acts of third persons under any and all circumstances." Id at 333. In the Burgess case, because the "assault was swift and without warning", the court decided that it was speculative as to whether the premises owner could have undertaken additional measures to discourage the likelihood of such misconduct by a third person.

In circumstances where the plaintiff, on a Sunday, went to an office park where her employer rented space to perform additional work, and was attacked and raped, a verdict in favor of the plaintiff against the office park owner was reversed ." The SJC noted "[t]here was no evidence of previous crimes within

the office portion of the building in which the plaintiff was attacked and certainly none of which the landlord was aware." Whittaker v. Saraceno, 418 Mass. 196, 200 (1994).

Further:…….

> A landlord, commercial or residential, is not a guarantor of the safety of persons in the building's common area. A landlord is not free, however, to ignore reasonably foreseeable risks of harm to tenants and others lawfully on the premises, that could result from unlawful intrusions into the common areas of leased premises. Id at 192.

The court concluded that, "the common law imposes on a commercial landowner a duty to take reasonable precautions to protect persons lawfully in common areas of rental property against reasonably foreseeable risks." Id 198.

It is clear that the owner of commercial premises owes a duty to visitors to take reasonable precaution to protect those visitors from criminal acts by third parties. See: Parslow v. Pilgrim Parking, Inc., 5 Mass. App. Ct. 822 (1977) [parking garage]; Fund v. Hotel Lenox of Boston, Inc., Supra; Addis v. Steele, 38 Mass. App. Ct. 433 (1995) [hotels]; Mullins v. Pine Manor College, Supra [college dormitory]; and Sharp v. Peter Pan Bus Lines, Inc., Supra [bus station].

Yet in the case of Feinstein v. Beers, 60 Mass. App. Ct. 908 (2004) a condominium association and property management company was absolved of

liability for the stabbing a unit owner where an assailant gained access through the sliding door on a fourth floor balcony. The owner left the door partially open, but secured it by placing a wooden dowel in the track. Recovery was sought on a theory that the defendants violated a duty to warn the unit owner of the fallibility of such a security measure. Recovery was denied because the Appeals Court found that there was no duty to warn of an obvious hazard. Further the court declined to find a special relationship between the plaintiff and the condominium association and property manager imposing duty to warn. It specifically concluded that the facts of the Feinstein case were not analogous to the relationship between a dormitory resident and the college. See: Mullins v. Price Manor College, Supra.

As was alluded to in Sharpe v. Peter Pan Bus Lines, Inc., a common carrier which transports passengers for compensation, owes a high duty of care to its passenger in contrast to the ordinary duty of care owed by premises owners to lawful visitors. Supra at 791-792. The Appeals Court found that the Massachusetts Bay Transportation Authority owed its patrons utmost care and diligence in Magaw v. MBTA, 21 Mass. App. Ct. 29 (1985). The plaintiff, a patron of the subway, was beaten and robbed in a tunnel leading to the toll booths. Evidence disclosed that there were records of substantial, serious crime of all varieties at that station. A number of the lights in the tunnel had been broken for a length of time. The Appeals Court quoted the decision of the Federal Circuit

Court of Appeals, Kenney v. Southeastern Penn. Transp. Authority, 581 F.2d. 351, 355 (3rd Cir. 1978):

> The presence of adequate lighting is recognized as a discouragement to violent criminal activity, particularly in an area where members of the public may be expected. Traditionally, adequate street lighting has been advocated as an effective means of reducing crimes against the person, such as robbery, assault and rape. Magaw v. MBTA, supra at 133.

In the case of Gidwani v. Wasserman, 373 Mass. 162 (1977) the commercial landlord and tenant were in the midst of a dispute regarding the payment of rent. The landlord improperly entered the premises, disarmed the burglar alarm and failed to reset it. The landlord was found accountable for the loss of the tenant's merchandise which was stolen by a third party.

TAVERNS

It was observed in the 1961 decision of Kane v. Fields Corner Grille, Inc., that the business of a tavern keeper involves "the serving of intoxicants known to make persons unreasonably aggressive", 341 Mass. 640, 643 (1961). The court reasoned that it was foreseeable that a tavern keeper faced with escalating hostilities between patrons could anticipate physical combat, and had an obligation to attempt to prevent the same. In the landmark decision of Carey v. New Yorker of Worcester, Inc., 355 Mass. 450 (1969) an underage drinker who was displaying signs of obvious intoxication together with loud and obnoxious

behavior. On two prior occasions he had been refused service of alcoholic beverages because of his misconduct. He pulled a gun and shot another patron. The court found that because of his combative language and demeanor had persisted for sufficiently long period of time, liability could be affixed to the tavern owner even though the method of assault was not precisely foreseeable. The SJC found that, because of the previous experience with the disruptive patron and his antisocial behavior prior to the shooting, it was for the jury to decide whether the tavern keeper had an obligation to repress the disruptive patron.

The SJC said:

> The defendant, as an operator of a restaurant and bar, was in possession of real estate open to the public for business purposes. It owed a duty to the paying patron to use reasonable care to prevent injury to him by third persons whether their acts were accidental, negligent, or intentional. Id 452.

It went on to state:

> Serving hard liquor, particularly to one already drunk, has a consequence which is not open to successful dispute. Such action may well make the individual unreasonably aggressive, and enhance a condition in which it is foreseeable that almost any irrational act is foreseeable. Moreover, the service of alcoholic beverages to one already intoxicated, or to a person less than 21 years of age, are statutory violations and evidence of the negligence of the tavern keeper. Id at 453.

Similarly, in the case of Christopher v. Father's Huddle, 57 Mass. App. Ct. 217 (2003) a tavern keeper served alcoholic beverages to two groups of men;

one group was underage, but regular patrons. The groups exchanged visual and verbal hostilities, putting the doorman on notice that "a fight was brewing". When the two groups of men exited the tavern, the doorman went outside to see what would transpire. Predictably a fight ensued and ultimately the plaintiff's decedent, in an effort to escape harm, dashed into a road and was struck and killed by a passing vehicle. The Appeals Court determined that, whether the doorman's failure to call the police when the hostilities first began was negligence, was a question for the jury. An award for the decedent's estate was affirmed. In fact, the jury's decision to award punitive damages on a finding of gross negligence was also affirmed. Thus, a tavern keeper has an obligation to take appropriate measures to prevent physical violence upon reasonable notice of escalating hostilities either by the intercession of its own employees, and/or summonsing police assistance. If the tavern has a history of previous assaults on, or near, the premises, such evidence is admissible and likely to support a finding against the tavern.

WORKPLACE VIOLENCE/NEGLIGENT HIRING/EMPLOYER LIABILITY

An employer, like any owner of premises, has an obligation to prevent harm to its employees, inflicted either by third parties or fellow employees. If there is a "showing that the risk of criminal assault is foreseeable, the exact nature and source of the assault need not be shown in order for liability to attach". Foley v. The Boston Housing Authority, 407 Mass. 640, 645 (1990) In the Foley decision the wife and children of the property manager employed by

the BHA was frequently the subject of threats and occasional assaults by the tenants of the housing projects which he managed, to such an extent that he would often have a security guard accompany him on site. However, the assault for which the lawsuit was brought was by a disgruntled employee with respect to an error on a paycheck. Summary judgment for the BHA was sustained on appeal because the assault by the fellow employee was not reasonably foreseeable.

The employer of a paroled felon with a history of violent crime and assaultive behavior towards women, and who had been at one point adjudicated a sexually dangerous person, was sued when the employee murdered a teenage girl whom he had enticed into a warehouse where he had working unsupervised. Coughlin v. Titus & Bean Graphics, 54 Mass. App. Ct. 633 (2002). The Appeals Court said that the hiring of a paroled felon with a history of violent behavior did not establish as a matter of law negligence on the part of the employer. The court reasoned that professional evaluators had decided that parole was appropriate, and the employer was entitled to rely on the judgment of those professionals with the greatest knowledge of the employee's proclivities. It declared that the employer could not have reasonably foreseen that the employee posed a threat to members of the public, and observed that his assignment was such that he was working alone, and not expected to have contact with the public in the normal course of business.

Yet an employer of an individual with a history of violent or anti-social behavior with anticipated exposure to others may be liable for negligent hiring.

> 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. Foster v. The Loft, Inc., 26 Mass. App. Ct. 289, 290 (1988).

Thus, in The Loft case the proprietor of a busy nightclub was found liable for an assault and battery by one of his bartenders upon a patron when the employer was aware of the employee's prior criminal record. While the Appeals Court took pains to observe that the mere existence of an employee's criminal record did not require a finding of liability, the jury could reasonably conclude that the atmosphere of the nightclub was volatile and "that there was a high potential for violence". Id at 294.

In the case of Heng Or v. Edwards, 62 Mass. App. Ct. 475 (2004) the defendant, an owner of a twelve unit apartment building, would occasionally, on a casual basis pay an apparently homeless individual who loitered about the building to perform odd jobs and custodial work. There was no formal or documentary employment process. No inquiry was made by the defendant regarding the individual's ability, character, behavior or criminal record. While the defendant was vaguely aware that the individual had an ill-defined criminal history, and perhaps problems with alcohol and drugs, further inquiry would have

revealed a pending charge of kidnapping and rape of a girl. [He was acquitted of those charges]. The defendant entrusted the casual laborer with keys to some of the vacant apartments in the building. The laborer raped and murdered the young daughter of tenants in the building. In its decision the Appeals Court remarked that a residential landlord was "under a duty – higher than that of a commercial landlord [citation omitted] to protect tenants from reasonably foreseeable risks of harm, including foreseeable risks of criminal acts". Id at 484. The court affirmed the judgment in the plaintiff's favor, indicating the landlord was negligent and the result of that negligence was foreseeable.

PLACES OF PUBLIC AMUSEMENT

Like a tavern, parking lot, or office building, the operator of a place of public amusement has an obligation to prevent foreseeable harm to its patrons due to criminal, or simply irresponsible, conduct. Thus, the operator of a public roller skating rink had an obligation to prevent patrons from engaging in reckless behavior resulting in harm to fellow skaters. Farinelli v. Laventure, 424 Mass. 157 (1961). In the case of Goggin v. New State Ballroom, 355 Mass. 718 (1969) the operator of a place for public dancing had a duty to prevent injury to a patron by "accidental, negligent, or intentional" conduct of other patrons. Still, the operator was not the insurer of the safety of patrons, and was not required to warn of the dangers of the presence of "disorderly or rowdy actions by third persons which might lead to injury" to other patrons as the same was obvious where a large crowd was gathered.

OBLIGATION OF A RESIDENTIAL LANDLORD TO PROTECT INHABITANTS FROM INJURY DUE TO CRIMINAL CONDUCT BY THIRD PARTY

The modern trend has been to hold residential landlords accountable for failure to take adequate precautions to protect tenants from criminal assault by intruders. The rationale for imposing such a duty lies with the superior ability of a landlord to provide reasonable safeguards against criminal activity. There are a number of statutes and regulations in Massachusetts designed, in whole or in part, to deter crime upon residential property. These precautions include adequate locks, lighting, video monitoring, security patrols, and, if necessary, police presence to deter crime. Yet, in the case of Choy v. First Columbia Management, Inc., 676 F. Supp. 28 (D.Mass. 1987) the occupant of an apartment who was beaten and raped by an assailant posing as a repair person had the burden of proving that a failure on the part of the landlord to provide security guards was unreasonable under the circumstances. Such proof would typically provide historical evidence of criminal activity in the building or the neighborhood. With regard to an allegation of defective locks, the plaintiff's claim was turned away because it was speculative as to how the assailant had actually gained access to the plaintiff's door.

A 1970 decision emanating from the United States Court of Appeals for the District of Columbia Circuit probably best describes the current obligation of a Massachusetts landlord for the provision of security to residential tenants. The court acknowledged the conventional rule that a "private person does not have a

duty to protect another from a criminal attack by a third person". Kline v. 1500 Massachusetts Avenue Apartment Corp., 439 F. 2d 477, 481 (1970) This was based on the notion that the act of a criminal is an intentional one and a superceding cause of the resultant harm. The court remarked:

> But the rationale of this very broad general rule falters when it is applied to the conditions of modern day urban apartment living, particularly in the circumstances of this case. The rationale of the general rule exonerating a [premises owner] from any duty to protect another from a criminal attack has no applicability to the landlord-tenant relationship in multiple dwelling houses. The landlord is no insurer of his tenants' safety, but he is certainly no bystander… Where a landlord has notice of repeated criminal assaults and robberies [it] has every reason to expect like crimes to happen again, and has the exclusive power to take preventative action, it does not seem unfair to place upon the landlord a duty to take those steps which are within his power to minimize the predictable risk to his tenants. Id at 481.

Again, liability appears to hinge on the issue of foreseeability, which is typically a question of fact decided by a jury. The more prevalent the history of criminal activity, the more foreseeable its reoccurrence and therefore the greater obligation on the part of the landlord to take appropriate measures to secure the premises and its inhabitants from the criminal misconduct by third parties.

The judicially created "warranty of habitability" has now for decades served as a cudgel to be wielded by tenants' attorneys to exact the provision of habitable living quarters from landlords. It compels residential landlords to provide a dwelling which meets minimum standards for human occupancy as

defined by the Massachusetts State Sanitary Code. The violation of the warranty makes the landlord strictly liable for all damages sustained as a result of the same. Some states have held that the warranty of habitability obligates a landlord to provide safeguards to protect tenants from foreseeable criminal activity on the premises. See: Trentacost v. Brussel, 412 A.2d 436, 443 (N.J. 1980). Yet in the decision of Doe v. New Bedford Housing Authority, 417 Mass. 273 (1994) the Massachusetts SJC specifically differentiated its reasoning from that employed in the Trentacost decision by the Supreme Court of New Jersey. The SJC said "[t]hat the implied warranty of habitability is concerned with the provision, maintenance, and repair of the physical facilities vital to the use of the leased premises, and is not breached solely by the presence on the premises of uninvited persons engaged in unlawful activities, or by a failure to provide security services". Id at 282.

A residential landlord is not obligated to protect against all possible misfeasance or, more specifically, criminal misconduct. However, it does appear that the Massachusetts courts will hold a landlord who fails to provide adequate security services accountable for injuries sustained by residential tenants and their guests which are reasonably foreseeable. Foreseeability would depend upon the adequacy of physical barriers, lighting, video monitoring, physical patrol and, most importantly, whether there existed a history of criminal activity of which the landlord knew or should have been aware.

DOMESTIC SECURITY

In the decision of Apple v. Tracey, the Appeals Court declared that a "social host does not have a duty to protect third persons from criminal acts of a social guest in the absence of events which would lead a reasonable host to anticipate danger". 34 Mass. App. Ct. 56, 562 (1993). In the Apple case the defendants had taken a parolee into their home on weekends to help him reacclimate to society. They were aware that he had been convicted of sexually assaulting a child. The guest then assaulted a minor child who was riding his bicycle through the woods near the defendant's home. The plaintiffs theorized that the defendants should be held accountable for bringing a parolee, with an acknowledged history of sexual abuse of children, into a neighborhood where the defendants knew children lived. The court indicated that a lay person acting reasonably was not required to anticipate danger of recidivism by a parolee and could rely to some degree on the fact that professional judgment of penal personnel that the parolee was safe for purposes of re-entering society.

Nor can a social host be held accountable for injuries sustained by one guest as a result of an assault by another guest. The Appeals Court specifically found in Husband v. Dubose that the combat between two social guests who had stopped by the defendant's home for unexpected visits did not establish a "special relationship" in the sense as described in other situations such as the relationship between a police officer and the motoring public when he stops an intoxicated driver, or the relationship between a college and a student residing in

a dormitory, 26 Mass. App. Ct 667 (1988). There did not exist such a relationship compelling the host to protect one guest from an assault by another. The court found that "social hosts" ordinarily would not be expected to anticipate that a guest in their home or apartment would be violently attacked with a deadly weapon by another guest." Id at 670. It found that there was insufficient evidence by which the homeowner could have anticipated that one guest would attack another.

Social hosts of a Fourth of July party were absolved of liability to a guest who suffered an eye injury because of a firecracker explosion. Luoni v. Berube, 431 Mass. 729 (2000). The hosts did not provide fireworks or authorize their use on the property. The court reasoned that the premises owners "did not create the situation which caused the danger". Id at 733. It declared it "reject[s] claims of liability against social hosts in negligence, in the absence of a recognized legal basis requiring them to protect guests". Id at 735. The result may have been different if the activity had taken place over a greater length of time affording them the opportunity to intervene.

The case of Anthony H. v. John G., 415 Mass. 196 (1993) was an action brought by the plaintiff who, as a child, had been sexually abused on numerous occasions while spending the night at a home owned and kept by the assailant's mother and aunt. The assailant was adjudicated responsible both criminally and civilly. The court reversed a verdict against the assailant's mother and aunt. It

acknowledged that ownership and control of premises may serve as a basis for the imposition of liability for injuries sustained as a result of a physical defect on the premises, but did not extend to criminal conduct of third persons, specifically the rapist. There was no evidence that the premises owners were aware of the sexual misconduct.

The owners of a residence occupied by their adult son with a predilection toward alcohol abuse, and access to firearms resulting in the shooting of the plaintiff were not held accountable for the plaintiff's damages. McDonald v. Lavery, 27 Mass.App.Ct. 1108 (1989) The court reasoned that the mere happenstance of the assailant's residence in his parent's home did not create a duty on the part of the parents to supervise and control the conduct of their adult son. In the decision of Andre v. Baptiste, 411 Mass. 560 (1992) a homeowner was absolved of liability when her husband, the owner of an assault rifle with a penchant for alcohol abuse, shot the plaintiff who was working as a clerk in a liquor store near the defendant's home. There was evidence that the husband had a history of violent behavior and that he had physically abused the defendant spouse on occasion. The plaintiff premised liability on the fact that defendant permitted her husband to keep the assault rifle in her home without any locked weapon storage facility or other measures to control her husband's use of the deadly weapon. The court found that the defendant homeowner had not entrusted the weapon to her husband, who was its actual owner, and had no legal obligation to control the erratic behavior of her husband.

More recently the SJC held a homeowner responsible for the attack by the son of her live-in companion upon police officers, using a firearm owned by her live-in companion and poorly secured in her home. The assailant, a young adult with a history of violence and mental illness, was given access to the defendant's home where her live-in partner kept a sizeable collection of firearms. Notwithstanding the precedent in the Baptiste decision described above, the SJC concluded that the violent misconduct of her companion's son was foreseeable. It said:

> The imposition of a duty in the instant case is predicated on the affirmative permission the [homeowner] gave [the live-in companion] to store firearms on her property for an extended period of time, knowing that an unstable and violent person had regular and unsupervised access to the property. Jupin v. Kask, 447 Mass. 141, 152 (2006).

The court implied that public policy dictated a higher responsibility on the part of a premises owner when firearms are kept onsite.

PERTINENT STATUTES AND REGULATIONS

While a violation of a statute, regulation or safety rule is not dispositive of liability, it is evidence of the negligence of the violator as to all consequences with it was designed to prevent. Scott v. Thompson, 5 Mass. App. Ct. 372 (1977).

Massachusetts General Laws Chapter 143: Section 3R.
Apartment houses; exterior doors and locks

"Section 3R. At least one of the doors of the main common entryway into every apartment house having more than three apartments shall be so designed or equipped as to close and lock automatically with a lock, including a lock with an electrically-operated striker mechanism, a self-closing door and associated equipment, and such lock, door or equipment shall be of a type approved by the state board of building regulations and standards. Every door of the main common entryway and every exterior door into every such apartment house, other than the door of such main common entryway which is equipped as provided in the preceding sentence, shall be equipped with a lock of a type approved by said state board of building regulations and standards; provided, however, that the said board may, in writing, waive any of the requirements of this section in appropriate cases in which, in its opinion, other security measures are in force which adequately protect the residents of such apartment house. Whoever, being in control of such premises, willfully and knowingly violates the provisions of this section shall be punished by a fine of not more than five hundred dollars.

This section shall not apply to lodging houses, as defined in section twenty-two of chapter one hundred and forty, dormitories of charitable, educational or philanthropic institutions, or projects of housing authorities, as defined in chapter one hundred and twenty-one B".

105 CMR 410.480: Locks

"The owner shall provide, install and maintain locks so that:

(A) Every dwelling unit shall be capable of being secured against unlawful entry.

(B) Every door of a dwelling unit shall be capable of being secured from unlawful entry.

(C) The main entry door of a dwelling containing more than three dwelling units shall be so designed or equipped so as to close and lock automatically with a lock, including a lock with an electrically-operated striker mechanism, a self-closing door and associated equipment. Every door of the main common entryway and every exterior door into said dwelling, other than the door of such main common entryway, which is equipped as provided in the proceeding sentence shall be equipped with an operating lock. (M.G.L.c. 143 §3R.)

(D) Every entry door of a dwelling unit or rooming unit shall be capable of being secured from unlawful entry.

(E) Every openable exterior window shall be capable of being secured.

(F) Locking devices shall comply with the requirements of 78- CMR 1-17.4.1 to avoid entrapment in the building".

105 CMR 440.254: Lights in Passageways, Hallways and Stairways

"(A) Except as allowed in 105 CMR 410.254(b), the owner shall provide light 24 hours per day so that illumination alone or in conjunction with natural lighting shall be at least one foot candle as measured at floor level, in every part of all interior passageways, hallways, foyers and stairways used or intended for use by the occupants of more than one dwelling unit or rooming unit.

(B) In a dwelling containing three or fewer dwelling units, the light fixtures used to illuminate a common hallway, passageway, foyer and/or stairway may be wired to the electric service serving an adjacent dwelling unit provided that if the occupant of such dwelling unit is responsible for paying for the electrical service to such dwelling unit:

(1) a written agreement shall state that the occupant is responsible for paying for light in the common hallway, passageway, foyer and/or stairway; and

(2) the owner shall notify the occupants of the other dwelling units".

Massachusetts General Laws Chapter 140 Section 131L

"Weapons stored or kept by owners; inoperable by any other person other than owner or lawfully authorized use; punishment

(a) It shall be unlawful to store or keep any firearm, rifle or shotgun including, but not limited to, large capacity weapons, or machine guns in any place unless such weapon is secured in a locked container or equipped with a tamper-resistant mechanical lock or other safety device, properly engaged so as to render such weapon inoperable by any person other than the owner or other lawfully authorized user. For purposes of this section, such weapon shall not be deemed stored or kept if carried by or under the control of the owner or other lawfully authorized user.

(e) A violation of the provisions of this section shall be evidence of wanton or reckless conduct in any criminal or civil proceeding if a person under the age of 18 who was not a trespasser or was a foreseeable trespasser acquired access to a weapon, unless such person possessed a valid firearm identification card issued under section 129B and was permitted by law to possess such weapon, and such access results in the personal injury to or the death of any person.

(f) This section shall not apply to the storage or keeping of any firearm, rifle or shotgun with matchlock, flintlock, percussion cap or similar type of ignition system manufactured in or prior to the year 1899, or to any replica of any such firearm, rifle or shotgun if such replica is not designed or redesigned for using rimfire or conventional centerfire fixed ammunition".

OBSERVATIONS

- Are doors and barriers of sufficient strength and integrity to withstand anticipated abuse?

- Is there is a video system? Is it properly set up? Operable and information retrievable? Is it monitored?

- Are the locks sufficiently strong? Proper for application? Maintained? Keys/key system storage custody system secure? Will locks permit unimpeded egress in case of fire or other emergency?

- Are there physical features about the premises that encourage criminal activity, (e.g. dangling fire escape, barrierless rear porch access, inadequate lighting, clutter or objects providing cover for intruders?

- Security patrols, rounds recorded? Adequate intervals?

- Are there sufficient numbers of employees to monitor anticipated number of patrons or visitors?

- Considerations of location – too remote where crime could go undetected for excessive length of time? Or high traffic to embolden those intent on criminal activity?

- Are premises used for activity that makes a location prone to violence, boisterous behavior or enhanced danger? (e.g. service of alcoholic beverages, presence of firearms, sporting event or music concert likely to excite emotional behavior?

- Have employees been treated and given a clear protocol to react to escalating behavior or emergencies?

- A police contact and medical contact information posted for quick reference and is there a functional communication device to obtain help?

WAIVERS AND EXCULPATORY LANGUAGE

Michael K. Callan
Doherty, Wallace, Pillsbury
and Murphy, P.C.
1414 Main Street, Suite 1900
Springfield, MA 01144-1900
Telephone: (413) 733-3111
Telecopier: (413) 734-3910

WAIVERS AND EXCULPATORY LANGUAGE

Many types of property owners and businesses will try to limit their liability for injuries to their customers or guests by including waivers or disclaimers in their contracts. These "exculpatory clauses" come in different forms, including the back of a ticket at a ski resort or language buried in a form signed when renting a car. Some waivers of liability do not even require the customer's acknowledgment or signature. Although common, not all of these types of clauses will actually protect a property owner from claims of negligence by an injured customer or visitor.

Common Exculpatory Clauses

Rental Agreements: Forms with broad exculpatory clauses are typically found in consumer rental agreements such as for instance ski and bike/moped rentals; equipment leases and automobile rentals.

Recreational Areas: A commonly seen waiver or release of liability clause is seen in the context of recreational areas. Oftentimes, in order for a customer or visitor to participate in a sporting event, the property owner will require the customer to sign a release, acknowledging that the particular type of event is inherently risky and relieving the owner of liability.

Gyms: Many contracts for membership at an exercise facility contain releases or waivers of liability. These exculpatory clauses generally act to relieve the property owner of liability if the customer is injured while using exercise equipment on the property.

Do These Clauses Really Protect the Property Owner?

Generally speaking, property owners and businesses may effectively rely upon these types of waivers. "In Massachusetts a right which has not yet arisen may be made the subject of a covenant not to sue or may be released." Cormier v. Central Massachusetts Chapter of National Safety Council, 416 Mass. 286, 288 (1993), quoting MacFarlane's Case, 330 Mass. 573, 576 (1953). Even when a party does not read the protective exculpatory clause, courts will generally protect the contract. "It is the rule in Massachusetts that the failure to read or to understand the contents of a release, in the absence of fraud or duress, does not avoid its effects." Lee v. Allied Sports Assoc., 349 Mass. 544, 550 (1965). Further, in the case of Vallone v. Donna, 49 Mass. App. Ct. 330, the court reiterated that "we have repeatedly recognized that, at least in the case of ordinary negligence, the 'allocation [of] risk by agreement is not contrary to public policy,'" citing Cormier 416 Mass. 289 & n. 1; Zavras v. Capeway Rovers Motorcycle Club, Inc., 44 Mass. App. Ct. 17, 18 (1997). In fact, "Massachusetts law favors the enforcement of releases." Sharon v. City of Newton, 437 Mass. 99, 105 (2002) (citations omitted). The "context in which such agreements have been upheld range beyond.., purely commercial" disputes. Sharon, 437 Mass. at 106. Such releases are clearly enforceable even when signed by a parent on behalf of their child. Id. at 107-12. However, "any doubts about the interpretation of [a] release must be resolved in the plaintiffs favor." Cormier, 416 Mass. 288, citing Lechmere Tire & Sales Co. v. Burwick, 360 Mass. 718, 721 (1972). DeWolfe v. Hingham Centre, LTD, 464 Mass. 795 (2013).

Exceptions

The general protections are not ironclad. "It is settled that [a release is] voidable if obtained by a fraudulent misrepresentation as to its contents, in circumstances where the party signing it did so without reading it, relying on that misrepresentation." King v. Motor Mart Garage Co., 336 Mass. 422, 426 (1957). "The question whether there is fraud in obtaining a release is generally one of

fact." Lee, 349 Mass. at 551. "In the absence of any concealment of or false representations as to the contents of the release it could be ruled as matter of law that the release was not procured by fraud." Id.

Massachusetts law does, however, place some further limits on releases. For example, a party cannot use a release to avoid liability for injuries caused by gross negligence or reckless conduct. Zavras v. Capeway Rovers Motorcycle Club, Inc., 44 Mass. App. Ct. 17, 19 (1997). While proving gross negligence or recklessness can be substantially more difficult than proving simple negligence, it may offer an avenue of recovery.

Further, a good argument can be made that a party cannot obtain a release of liability for a violation of a statute. Henry v. Mansfield Beauty Academy, 353 Mass. 507, 510-511 (1968); Zavras v. Capeway Rovers Motorcycle Club, Inc., 44 Mass. App. Ct. 17, 19 (1997); Vallone v. Donna, 49 Mass. App Ct. 330, 331 (2000); Gonsalves v. Commonwealth, 27 Mass. App. Ct. 606, 608 n. 2 (1989). Therefore, if it can be shown that a person who caused an injury violated a statute, the release may not apply to that liability claim.

RECREATIONAL LIABILITY

Barry M. Ryan
Doherty, Wallace, Pillsbury
and Murphy, P.C.
1414 Main Street, Suite 1900
Springfield, MA 01144-1900
Telephone: (413) 733-3111
Telecopier: (413) 734-3910

RECREATIONAL LIABILITY

In Massachusetts, landowners, (including municipalities), who make their land available to the public for recreational use cannot face negligence claims from visitors who are injured on their property with one caveat. The statutory protection is inapplicable if the landowner is charging a user or entry fee and making money off the people who use the land. This protection derives from Massachusetts General Laws Chapter 21 § 17C, commonly referred to as the Recreational Use Statute. A voluntary contribution or payment does not count as an entry fee and does not prevent the landowner from using the statute as a defense. The underlying purpose of the statute is to encourage free access to the public for broad recreational purposes. Dimello v. Gray Lines of Boston, Inc., 836 F.2d 718, 720 (1st Cir. 1988).

The statute provides landowners a defense to claims of negligence, but does not protect landowners for actions deemed to be "willful, wanton, or reckless." As a permissive, non-paying, recreational user, an individual is owed the same duty of care which would be owed if he or she were a trespasser: the duty of the landowner is to refrain from wanton or reckless conduct. The property can include "structures, buildings and equipment attached to the land, including, without limitation, railroad and utility corridors, easements and rights of way, wetlands, rivers, streams, ponds, lakes, and other bodies of water …."

"Recreation" as referenced in the statute has been broadly defined to "…include not only active pursuits (playing basketball and the like)… but also passive pursuits, such as watching baseball, strolling in the park to see animals, flowers, the landscape, architecture, or other sites, picnicking, and so forth…." Cantanzarite v. City of Springfield, 32 Mass.App.Ct. 967 (1992). Quoting from Webster's Dictionary, the Cantazarite court further noted that "Recreation 'in its most natural signification means' refreshment of strength and spirits after work; … a means of refreshment or diversion."

In addition, the use of land or property also extends beyond recreation to include use for "conservation, scientific, educational, environmental, ecological, research, religious, or charitable purposes …."

While negligence generally results from "inadvertence, incompetence, unskillfulness or a failure to take [adequate] precautions," reckless conduct "requires a choice of a course of action, either with knowledge of the serious danger to others involved … or with knowledge of facts which would disclose [the] danger to any reasonable man." Boyd v. National R.R. Passenger Corp., 446 Mass. 540 (2006). Conduct considered "willful, wanton, or reckless" generally has two components. The first is disregard of a known risk: a person must be aware of a potential risk and not do anything about it. Secondly, the ignored risk must be very dangerous. There must be a very high probability that grave bodily injury or death would happen to someone because of the ignored condition. Sandler v. Comm., 419 Mass. 334 (1995).

Willfulness has been defined as "an intention to cause harm; wanton conduct may suggest arrogance, insolence, or heartlessness that reckless conduct lacks [and] … reckless 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 at 337.

Generally, the failure to make repairs to property is not considered to be willful, wanton, or reckless. Often, situations involving willful, wanton, or reckless conduct are found in cases involving children and the lack of repairs in places known to be frequented by children. Dean v. City of Fitchburg, 19 Mass.L.Rptr. No. 14, 315 (June 13, 2005) (involving child hurt while playing on a field with a broken fence). Such conduct is also found in cases involving motor vehicles, see Sheehan v. Goriansky, 317 Mass. 10, 15 (1944) (where a person did not stop their vehicle when they knew someone was holding onto the outside of it), or where someone has done something very obviously dangerous such as throwing

a heavy object from a great height and hitting someone beneath, Freeman v. United Fruit Co., 223 Mass. 300, 302 (1916), or setting a dog loose on someone Zink v. Foss, 221 Mass. 73, 73-74 (1915).

Also, the Massachusetts Comparative Negligence Statute does not apply to intentional or willful, wanton or reckless conduct. Zeroulias v. Hamilton American Legion, Assoc., 46 Mass.App.Ct. 912 (1999), citing Lane v. Meserve, 20 Mass.App.Ct. 659, 663 & n.6 (1985), and Flood v. Southland Corp., 416, 62, 65 (1993). If conduct is negligent, it cannot also be intentional, willful, wanton or reckless. Similarly, a finding of intentional, willful, wanton or reckless conduct precludes a finding that the same conduct was negligent. Savatinelli v. Butler, 362 Mass. 565, 567 (1973).

Moreover, a violation of a statute, rule, or regulation, standing alone, is generally the best evidence of negligence and does not warrant a finding of wanton or reckless conduct. Montes v. MBTA, *63* Mass.App.Ct.1112 (2005), citing Boyd v. National R.R. Passenger Corp., 62 Mass.App.Ct. 783, 797-798 (2005).

The Recreational Use Statute can be a doubled edged sword at times. While it opens up property for use by the public, it also absolves landowners of responsibility for obvious negligence. Poorly maintained playground equipment in a public park or a poorly maintained public bike path in a public park, absent willful, wanton or reckless conduct would not give rise to liability. Sandler v. Comm., 419 Mass. 334 (1995). (Bicyclist injured while riding through an unlit tunnel when bike hit uncovered drainage hole. Court found no evidence of wanton or reckless conduct even though municipal property owner knew tunnel lights vandalized and knew drain cover was missing and took no remedial action, even though preventative actions were feasible.)

ATHLETIC/SPORTING EVENTS

When someone is injured by another while participating in a sporting event, the general rule is that the ordinary standard of negligence does not apply. For someone to be held liable, their actions must be deemed to have been willful, wanton or reckless. Gauvin v. Clark, 404 Mass. 450 (1989). In Gauvin, a college hockey player was injured when an opposing player struck him with his hockey stick in violation of a particular rule of the game. The injured player then brought suit against the opposing player, opposing coach, and their college for the injuries he sustained, (i.e. spleen removal). His theory was that since the opposing player had violated a safety rule when he stuck him with the stick, the opposing player should be liable for the injuries. The court disagreed and expressed its concern with the underlying rationale behind sport and athletic participation. Athletic competition is viewed as a positive thing and the court worried that making people liable for injuries that occurred during the course of an athletic event would have a chilling effect on the desire to participate in athletic competition. The court in Gauvin set forth the standard of requiring willful, wanton, or reckless conduct in order for there to be liability, and found that the opposing player's behavior did not rise to this level of reckless misconduct.

This liability standard was further clarified in the case of Gray v. Giroux, 49 Mass. App. Ct. 436 (2000). While the Gauvin case arose during the course of a contact sport, where physical contact with other players is deemed to be a part of the game, the Gray case was at the other end of the spectrum. In Gray, a person was injured when she was struck in the head while playing golf. The Plaintiff sued the individual who had hit the golf ball alleging negligence for not taking proper care when they struck the ball. The court declined to draw a distinction between contact and non-contact athletic events and followed the rule set forth in Gauvin: a person is only liable if their behavior amounts to willful, wanton, or reckless conduct.

In Judge v. Carrai, 77 Mass.App.Ct. 803 (2010), a different type of recreational type injury occurred. In that case, an informal softball game took place on the residential premises of the parents of child celebrating their son's confirmation. During the game, one of the guests, and a non-participant, was struck in the back of the head sustaining serious injury. The Appeals Court overturned the lower court's granting of summary judgment in favor of the homeowner and distinguished the case from other cases which have held that absent a special legal relationship between the landowner and a guest no liability attaches for injuries caused by a third party. Because the homeowner provided the equipment and bats, the court found the scenario more analogous to an injured spectator at a professional sporting event. Because they owned the softball equipment, they held the right to control its use; the guests were entitled to use it only with the host's permission (either direct or tacit).

In the dissent of one of the judges on the Appeals Court it was noted:

> "The reality is that baseball, the quintessential American game, is in constant play at countless gatherings and back yards across the Commonwealth …. [T]he majority opinion may be read so sweepingly as to impose potential homeowner liability where other backyard games are in play: would not a game of horseshoes pose a risk of liability … if the heavy pieces were pitched awry and hit a guest; would there not be potential liability looming … in a backyard volleyball game, where a tipped ball may go astray and… hit a guest in the face; would not bocce be a liability risk … if a guest were to be struck by a hand-thrown ball?"

SPORTS PROGRAMS VOLUNTEER LIABILITY

Some immunity is provided to those who volunteer their time to be a manager, coach, umpire, referee or assistant to athletic activities as long as they are not compensated for their participation. This immunity is provided for in *M.G.L. c. 231 § 85V*, often referred to as the "sports program volunteers" statute. Where a volunteer donates their time to participate in this capacity in an athletic event involving children, they will be provided immunity from negligence and must perform an act constituting willful, wanton, or reckless behavior in order to be held liable for injuries to another.

In Goodwin v. Youth Sports Ass'n, 12 Mass.L.Rptr. 655 (2001), a coach of a girls' softball team was hurt while participating in a coach's softball game and sued the association. The defendant argued that since their association was involved in a non-profit sports program for children, they should be protected with immunity. The plaintiff argued that since he was an adult and was participating in a softball game against other adults, the statutory requirements were not met. The court agreed with the plaintiff. Limiting language in the statute meant that the defendant was not covered by immunity in this capacity since the coaches' game was different from the normal games played by the children. The court went on, however, to hold that the duty still remained the same, namely that the association must refrain from willful, wanton, or reckless conduct. The failure to properly maintain the softball field, which led to the accident, did not meet this standard and summary judgment was granted for the defendant.

In Torres v. University of Massachusetts, 20 Mass.L.Rptr. 310 (2005), the Plaintiff was injured during cheerleading practice, rather than in formal competition. Based on this distinction, the Court ruled that the applicable standard was negligence and not willful, wanton, or reckless conduct. There, the cheerleader had requested certain supervision which was not provided. The court deemed that this request would not chill the spirit of competition and that the appropriate standard should be negligence. The court went on to discuss

how the requested supervision would not have chilled the spirit of competition even if the injury had taken place during a competition. This decision seems to suggest that the presence of this "chilling effect" might be a more important determinant in making a decision on the appropriate standard, rather than a technical reliance on the type of activity taking place when the accident occurred.

A different type of sports related scenario arose in Kavanagh v. Trustee of Boston University, 440 Mass. 195 (2003). In this case a basketball player was punched in the face by an opposing player during a game and brought suit against the opposing coach and University (which was sponsoring the event). The court ultimately ruled in favor of the University on the grounds that the opposing player who punched him was not working for the University and there was no vicarious liability. Even though the opposing player did not "work for" the University the basketball team generated revenue for the University. The Court's rationale was that although the school may obtain benefits from the student, a student attends school for their own betterment, not that of the school. There was no "special relationship" between the opposing player and the University in this type of situation and it was not foreseeable that the opposing player would assault someone this during the game.

In a more recent case, Moore v. Town of Billerica, 83 Mass.App.Ct. 729 (2013), a child was injured when a baseball struck the child in a public playground picnic area on town property. Several teenage boys were playing "home run derby" on an adjacent field with the goal being to hit the baseballs over the protective fencing. Because it was undisputed that the child and the boys were engaged in recreation and were not charged a fee to use the playground, the Recreational Use Standard of Liability applied. The court ruled as a matter of law that the town's actions (or inactions) regarding the playground were not wanton or reckless.

INHERENTLY DANGEROUS ACTIVITIES

Although the Assumption of a Risk Doctrine was abolished in Massachusetts several years ago, it is still evident in certain riskier recreational activities. A prime example is the statute governing the duties of ski area operators, M.G.L. c. 143, §71O. The statute provides in pertinent part that "[a] skier shall be presumed to know of the existence of certain unavoidable risks inherent in the sport of skiing, which shall include, but not be limited to, variations in terrain, surface or sub-surface snow, ice conditions or bare spots, and shall assume the risk of injury or loss caused by such inherent risks." The general duties of ski area operators include maintaining ski areas, slopes and trails under its control in a reasonably safe condition… however… ski area operators shall not be liable for damages to persons or property, while skiing, which arise out of the risks inherent in the sport of skiing." See Section 71N (6).

Also, Section 71P provides, with limited exceptions, the prerequisites to asserting a cause of action against ski areas. Ski areas are also required to conspicuously place within the ski area and on the back of any lift ticket notice, in plain language, the statute of limitations, (i.e. one year), and requirement of a presentment letter (i.e. within ninety (90) days). Failure to give appropriate notice pursuant to the statute shall bar recovery unless a Court decides, under the circumstances of the particular case, that such ski area operator had actual knowledge of the injury or had a reasonable opportunity to learn of the injury within the ninety (90) day time period, or was not otherwise substantially prejudiced by the lack of written notice. Section 71O also sets forth various affirmative obligations on the part of skiers, including maintaining control of the speed on the course at all times, avoiding collisions with other skiers, and any obstructions properly marked.

Also, no member of any registered ski patrol who in good faith renders emergency care or treatment to a person injured or incapacitated on a ski area shall be held accountable or liable for damages as a result of any acts or

omissions for care and treatment or transportation to a place of safety. See M.G.L. c. 231, § 85I.

M.G.L. c. 128, §2D governs liability for equine activities (i.e. horse riding schools, shows, competitions, parades, dressage, etc.). The statute is similar, in part, to the ski liability statute in that it incorporates the term "inherent risks." The statute provides, in pertinent part, that an "activity sponsor, an equine professional, or any other person … shall not be liable for an injury to or the death of a participant resulting from the inherent risks of equine activities…." Section 2D(b). The statute specifically notes that the term "engage in an equine activity" shall not include being a spectator at an equine activity, except in cases where the spectator places himself in an unauthorized area or in the immediate proximity to the equine activity. Liability is not limited, however, where the equine professional knowingly provides faulty tack or equipment, and fails to make a reasonable efforts to determine the ability of the participant to engage safely in the equine activity, owns is otherwise in lawful possession of the land or facilities upon which the participants sustained injuries because of a known, dangerous latent condition or if he or she commits an act of omission that constitutes willful or wanton disregard for the safety of a participant or intentionally injures the participant. The statute further provides that every equine professional shall post and maintain signs and have participants sign contracts for professional services, instruction, or rental of equipment, to include specific warning language, noting that: "Under Massachusetts law, an equine professional is not liable for injury to, or the death of, a participant in equine activities, resulting from the inherent risks of equine activities, pursuant to Section 2D of Chapter 128 of the General Laws."

With respect to liability associated with boat races or regattas, M.G.L.c. 231, §85R provides that "[n]o member of a Sail Boat Racing Committee, club or association or of any non-club association, which conducts a race or regatta shall be liable for injuries to persons or property arising out of the conduct of such race or regatta in the absence of willful, wanton or reckless conduct."

CHARITABLE IMMUNITY

Angelina P. Stafford
Doherty, Wallace, Pillsbury
and Murphy, P.C.
1414 Main Street, Suite 1900
Springfield, MA 01144-1900
Telephone: (413) 733-3111

Telecopier: (413) 734-3910

CHARITABLE IMMUNITY
STATUTORY LIABILITY LIMITATIONS FOR
CHARITABLE OBLIGATIONS

I. General Background

Charitable immunity provides a defense to charitable organizations so that these entities are liable only to a limited extent for their torts. Since its inception, the charitable immunity doctrine has been applied to variety of nonprofit institutions to insulate them from tort liability, including hospitals, religious organizations, universities, homes for working girls or indigent boys, YMCA's, and orchestras.[2] The primary justification for limiting a charitable institution's liability was that funds had been entrusted to the organization for the benefit of the public, which should not later be diverted to the payment of damages. In its earlier form, charitable immunity provided charitable organizations with complete immunity from tort liability, thus leaving plaintiffs without a remedy. McDonald v. Massachusetts General Hospital, 120 Mass. 432, 436 (1876). Eventually, however, the Massachusetts legislature partially abolished the doctrine of charitable immunity by enacting a statute that makes charities liable in tort, but only to a limited extent. G.L. c. 231, § 85K.

The first clause of Section 85K abrogates the doctrine of absolute immunity for charitable organizations in tort actions. The second clause provides for limited liability by capping damages at $20,000,[3] so long as the tort was committed during an activity carried on to directly accomplish the charitable purpose. See, Conners v. Northeast Hospital Corp., 439 Mass. 469, 470 (2003); Goldberg v. Northeastern University, 60 Mass. App. Ct. 662, 668 (2004). Thus, to qualify for limited tort liability, a charitable

[2] See, e.g., Boxer v. Boston Symphony Orchestra, Inc., 342 Mass. 537 (1961); Carpenter v. Young Men's Christian, Ass'n, 324 Mass. 365 (1949); Enman v. Trustees of Boston Univ., 270 Mass 299 (1930); Glaser v. Congregation Kehillath Israel, 263 Mass. 435 (1928); Roosen v. Peter Ben Brigham Hospital, 235 Mass. 66 (1920); Thornton v. Franklin Square House, 200 Mass. 299 (1909); Farrigan v. Pevear, 193 Mass. 147 (1906).

[3] Damages for medical malpractice claims against nonprofits providing health care are capped at a higher amount of $100,000.

organization must establish that: (1) it is a charity, and (2) that the injury for which it is allegedly responsible occurred in the direct pursuit of its charitable purpose.

II. Charitable Status of an Organization

It is axiomatic that an organization, in raising the defense of charitable immunity, must prove that it is, in fact, a charity. Generally, the charitable status of an organization presents a factual question, which may be resolved only after analysis of the relevant facts and circumstances. Notwithstanding, the organization's documents may establish a charitable purpose and operation as a matter of law, so long as there is no evidence to the contrary. Language in the corporate charter, articles of organization, constitution, or bylaws, and the purposes declared and work performed are all integral to determining the organization's charitable purpose. In re Troy, 364 Mass. 15, 57 (1978).

In Justice-Hughes v. Quaside, Inc., for example, the court reviewed the relevant organizational documents. Justice-Hughes v. Quaside, Inc., CV200901231 (Mass. Super. Ct. Sept. 27, 2011). The articles of organization, which were filed in Georgia, set forth a charitable purpose, but neither the entity's foreign corporation certificate nor its certificate of existence identified the entity as charitable or identified any charitable purposes to be pursued in Massachusetts. Due to these discrepancies, charitable status was not established as a matter of law—thus, a question of fact remained as to whether the foreign corporation's activities within Massachusetts were charitable.

III. Activity Directly Related to Charitable Purpose

After meeting the statute's threshold requirement of establishing charitable status, the organization must next demonstrate that the tort occurred during activity directly related to its charitable purpose. This inquiry also presents a question of fact, which requires review of the attendant circumstances. Generally, courts view the charitable purposes of an organization broadly when determining the scope of related activities. In one such case, snow removal undertaken by a hospital in an adjacent

parking lot—which could be used by employees, patients, and visitors— directly accomplished the hospital's charitable purpose in facilitating the care and treatment of the sick by providing a convenient means of access. Conners v. Northeast Hospital Corp., 439 Mass. at 477. Likewise, a charitable organization that operated a private religious school acted in conformity with its charitable purposes (of diffusing moral and religious knowledge, among other things) by lending the building to one of the charity's members on one occasion for a private party. Mason v. Southern new England Conference Ass'n of Seventh-Day Adventists, 696 F.2d 135 (1st Cir. 1982).

If the tort occurs during revenue generating activities, then the court must also determine whether the organization's activities were "primarily commercial in character." If the activities are primarily commercial in character, then the charitable organization is subject to full liability, even if those activities were carried on to obtain revenue for a charitable purpose. G.L. c. 231, § 85K. Significantly, engaging in revenue generating activities and accomplishing the charitable purpose are not necessarily mutually exclusive objectives. In fact, revenue generating enterprises are not "primarily commercial in nature" if they are related to, and in conformity with, the charitable purpose of the organization. In re Boston Region Medical Center, Inc., 328 F. Supp 2d 130 (D. Mass. 2004). Conversely, the liability limitation will not apply to "a money-making enterprise merely designed to keep the charity afloat." Conners v. Northeast Hospital Corp., 439 Mass. at 479.

For instance, in Missett v. Cardinal Cushing High School, the defendant high school was negligent in supervising a dance, which resulted in a student being stabbed while in attendance. Missett v. Cardinal Cushing High School, 43 Mass. App. Ct. 5, 11-12 (1997). Even though the school dance generated $300 in revenue, the Massachusetts Appeals Court held that the dance itself was not "primarily commercial" because the activity was directly related to the charitable purpose of conducting a school "for learning," by providing the students with educational benefits from advertising, running, and participating in the dance.

In sum, a charitable organization may be entitled to limited liability for its torts. The burden, however, falls on the charity to raise the defense and prove that it satisfies each of the statutory prerequisites—namely, that the organization is a charity and that the tort occurred in the course of activities directly related to the organization's charitable purposes.