

DIGEST OF INSURANCE LAW

MASSACHUSETTS

Courtesy of
Lyne, Woodworth & Evarts LLP
Boston, Massachusetts

CIVIL JUDICIAL SYSTEM

Rules of Civil and Appellate Procedure are patterned after Federal Rules. Rules of Civil Procedure govern procedure before a single justice of the Supreme Judicial Court or Appeals Court, and in the following departments of the Trial Court: Superior Court, District Court, Housing Court, Probate and Family Court in proceedings seeking equitable relief, and in some Land Court matters. The rules do not apply to certain proceedings, including dissolution of corporations, divorces, small claims and supplementary process.

Courts of Original Jurisdiction

Trial Court of Commonwealth consists of following departments.

District Courts. These are lowest civil courts. They have original jurisdiction at law in most civil actions. This jurisdiction is unlimited in amount but there are venue requirements depending principally upon residence of defendant. There are several district courts in each county. Municipal Court of City of Boston is district court for Boston. All other jury trials are in Superior Court. Defendant in civil case may remove to Superior Court if judgment demand exceeds \$25,000; if less, trial must be held in District Court before removal is permitted. District Court has no general equitable jurisdiction except that defendant may plead equitable defense to action at law and there are certain statutory equitable powers, *e.g.*, G.L. ch. 93A, 111, §§127A-K; 186, §14; 209A, §§3-5; 218, §§19,19c 59.

Superior Court. This is court of general jurisdiction and generally only court in which civil jury trials are had. Jury issues which are framed in Land Court are tried here. It is composed of chief justice and eighty associate justices. This court has statewide jurisdiction but it sits in several counties. It has unlimited original jurisdiction both at law and in equity. G.L. ch. 212.

Probate and Family Courts. Each county has one. These courts have jurisdiction of all matters relating to estates of deceased persons and wards, adoptions, name changes, divorces and other domestic relation matters,

health care proxies, and numerous actions related to minor children. These courts also have equitable jurisdiction in matters relating to decedents' estates, wills, trusts, guardianships, conservatorships, and post-divorce property disputes. They also have general equity jurisdiction. Occasionally matters relating to insurance will arise on equity side of these courts. G.L. ch. 215.

Land Court. This has jurisdiction of petitions for registration of title to land, foreclosure of tax titles and numerous other matters dealing with real estate. G.L. ch. 185.

Housing Court. This has concurrent jurisdiction with District and Superior Courts of all civil and criminal actions related to the health, welfare and safety of the general public in the use of any real estate subject to regulation. G.L. ch. 185C.

Juvenile Court. This has jurisdiction over criminal, delinquency and public welfare cases involving juveniles. G.L. ch. 119, §39 E, 55.

Appellate Courts

Appellate Divisions of District Courts. There are three for the district courts composed of three district court justices, and one for the Boston Municipal Court composed of three justices of that court, which hear all appeals from district courts. These appellate divisions are not separate courts but constitute sitting "en banc" of district courts. Their decisions may be appealed to the Appeals Court. G.L. ch. 231, §108.

Appeals Court. Has concurrent appellate jurisdiction with Supreme Judicial court with respect to all cases except review of certain first degree murder convictions. Appeals within its jurisdiction are ordinarily heard by Appeals Court in first instance. Court sits in panels of three or more justices. G.L. ch. 211A.

Supreme Judicial Court. This is highest court of Commonwealth. It has general superintendence over all other courts. Cases may be taken by it sitting as "Full Bench" composed of chief justice and four of six associate justices, from Superior Court on appeal, or report, from appellate divisions of district courts by appeal,



from probate and land courts by appeal, and from nisi prius sittings of single Justice of Supreme Judicial Court. G.L. ch. 211.

Cases within jurisdiction of Appeals Court may be heard by Supreme Judicial court in first instance whenever two justices of Supreme Judicial Court so order or Appeals Court certifies that direct review is in public interest. Appeals Court decision may be reviewed by Supreme Judicial Court where Appeals Court certifies that public interest or interests of justice make desirable further appellate review or three justices of Supreme Judicial Court so certify. G.L. ch. 211A, §§10-12. No further appeal may be had except in cases within jurisdiction of Supreme Court of United States.

LAW

Abbreviations

C.M.R. – Code of Massachusetts Regulations.
 Commissioner – Commissioner of Insurance.
 F.2d – Federal Reporter, Second Series.
 G.L. – Massachusetts General Laws.
 Mass. – Massachusetts Reports.
 Mass. App. – Massachusetts Appeals Court Reports.
 N.E. – North Eastern Reporter.
 N.E.2d – North Eastern Reporter, Second Series.
 U.S. – United States Reports (Supreme Court).
 Unless otherwise indicated, all statutory citations refer to chapters and sections of Massachusetts General Laws.

ACCIDENT AND HEALTH INSURANCE

See “ACCIDENTAL MEANS” and “DISABILITY.”

Cancellation. *See* G.L. ch. 175, §§110B, 110H. Renewal. *See* G.L. ch. 175, §§108, 108 (3) (b)1/2).

Genetic Testing is not authorized. Mass. G.L. ch. 175, §§108H, 120E.

Disease induced by accident. Disability due to disease induced by accident will entitle insured to indemnity under accident policy. *Freeman v. Mercantile*, 156 Mass. 351 (1892). *Cf. Brown v. USF&G*, 336 Mass. 609, 147 N.E.2d 160 (1958).

Policy excluded liability for death caused wholly or partially by disease. Recovery permitted for death from infection of heart and brain produced by pneumonia resulting from injuries sustained in accident. *Barnett v. John Hancock*, 304 Mass. 564, 24 N.E.2d 662 (1939).

Excepted Risks. Injuries occasioned through aviation, military risks, voluntary exposure to danger, fighting, certain dangerous sports, and similar activities are customarily excepted from coverage in accident and health policies. It is also customary to except disability from causes originating prior to date of policy or specified time thereafter. Words “no indemnity shall be paid for any illness which is contracted and begins, before this policy has been in force for thirty days” have been construed to require that disability itself commence within thirty days, that it is immaterial that a disability commencing thereafter may have developed from disease existing prior thereto. *Bovedeau v. Boston Cas.*, 273 Mass. 156, 173 N.E. 425 (1930). Term “illness” if not otherwise defined by policy includes mental illness. *Gangell v. New York State Teamsters*, 6 Mass. App. 631, 381 N.E.2d 1308 (1978). Accidental death clause in life policy does not cover when death occurs while stealing automobile. Contrary to public policy. *Rousseau v. Metropolitan*, 299 Mass. 91, 11 N.E.2d 921 (1937). And it is immaterial that this risk is not expressly excepted by policy. *Lubianez v. Metropolitan*, 323 Mass. 16, 79 N.E.2d 876 (1948).

However, innocent beneficiary may now recover ordinary benefit under straight life insurance policy where death of insured is result of his own criminal conduct. *Davis v. Boston Mut. Life Ins. Co.*, 370 Mass. 602, 351 N.E.2d 207 (1976).

Exclusion clause for gas inhalation applicable to unintentional as well as intentional inhalation. *Estabrook v. Eastern*, 308 Mass. 439, 32 N.E.2d 250 (1941). Fumes of carbon tetrachloride come within meaning of word “gas.” *McHugh v. New England*, 317 Mass. 498, 58 N.E.2d 843 (1945).

No policy shall exclude coverage for pregnancy and childbirth expenses, 211 C.M.R. 48.04, unless conception occurred prior to effective date of policy and other pre-existing illnesses are so limited or excluded. But Commissioner lacks authority to issue regulations affecting AIDS underwriting. *L.I.A.M. v. Commissioner*, 403 Mass. 410, 530 N.E.2d 168 (1988). *But see* 211 C.M.R. 36.00 *et seq.*

Group Health Insurance. Public policy permits insurer to exclude catastrophic hospital expense coverage for insured’s injury resulting from intoxication. *Sutherland v. NN Investors Life*, 897 F.2d 593 (1st Cir. 1990). G.L. c. 175, §110I (a)’s mandate that group health insurer continue coverage to divorced spouse applies only if spouse is a resident of Massachusetts. *Foster v. Group Health Inc.*, 444 Mass. 668, 830 N.E.2d 1061 (2005).

Exclusion from double indemnity coverage of death resulting directly or indirectly from war was interpreted

to bar such recovery where insured was killed in torpedoing of U.S. Destroyer engaged in convoy duty prior to declaration of war by United States. *Stankus v. New York*, 312 Mass. 366, 44 N.E.2d 687 (1942). Exclusion of death as result of travel in any aircraft of which insured was aboard to perform specific duties applies to death by drowning of insured crew member, *Howard v. Equitable Life*, 360 Mass. 424, 274 N.E.2d 819 (1971), but not to pilot of private craft. *Bates v. John Hancock*, 6 Mass. App. 823, 370 N.E.2d 1386 (1978).

Death by one in Naval service, as result of automobile accident which occurred during period of Korean war, is death "in...service in time of war," so there can be no recovery under accidental death benefit provision. *Gudewicz v. John Hancock*, 331 Mass. 752, 122 N.E.2d 900 (1954).

Where excepted risks are part of insuring clause, plaintiff has burden of proving that loss is within coverage as limited. *Lubianez v. Metropolitan*, 323 Mass. 16, 79 N.E.2d 876 (1948).

Excepted risk (suicide) under policy subject to ER-ISA is determined by federal substantive law. *Wickman v. Northwestern*, 908 F.2d 1077 (1st Cir. 1991).

Notice and Proof of Loss. With respect to non-cancelable policies and policies premiums for which are payable in greater than monthly intervals, must give notice of amount and due date of premium between 10 and 45 days before due date or insured may pay premium within three months after premium due, ch. 175, §110 B. Insurer sought to obtain lapse by failing to send customary premium notice of guaranteed renewable policy so equity court reinstated policy. *Pierce v. Massachusetts Acc.*, 303 Mass. 506, 22 N.E.2d 78 (1939).

Notice of accidental death permitted under ch. 175, §108 which court assumed, without deciding, could be either oral or written, must convey information that death was accidental; notice of death alone is not enough. *Thompson v. United*, 296 Mass. 507, 6 N.E.2d 769 (1937).

Where question is raised to timeliness of notice required by policy, it is jury question where it is arguable that delay was due to fact of injury itself. *Everson v. General*, 202 Mass. 169, 88 N.E. 658 (1909), or to ascertaining facts. *Mandel v. Fidelity*, 170 Mass. 173, 49 N.E. 110 (1898). Otherwise whether notice is in time is question of law for court. *Segal v. Aetna*, 337 Mass. 185, 148 N.E.2d 659 (1958). Where policy required "immediate notice" of death, oral notice one week after death followed by written notice was found sufficient as given with reasonable diligence under all circumstances. *Sheehan v. Aetna*, 296 Mass. 535, 6 N.E.2d 777 (1937).

Notice given more than two months after injury where insured was told by physician month after injury that it was serious, was not given "as soon as was reasonably possible." *Wilcox v. Metropolitan*, 304 Mass. 441, 23 N.E.2d 1002 (1939). Cf. *Coleman v. American Casualty*, 354 Mass. 762, 237 N.E.2d 22 (1968).

Within 15 days after receipt of notice of claim, insurer must furnish forms; within 45 days after receipt of notice, insurer must either make payment or give reasons for non-payment. G.L. ch. 175, §§108, 110.

ACCIDENTAL MEANS

Where policy insures against injuries or death effected through accidental means before there can be recovery it must appear that act of insured was unexpected happening without intent or design on his part. Where insured is engaged in violation of law which involves risk of injury or death and is killed his death is not due to accidental means even in absence of "violation of law" provision in policy. *DeMello v. John Hancock*, 281 Mass. 190, 183 N.E. 255 (1932). It is not enough that intended action was attended by unforeseen results, cause itself must also be accidental. *Reeves v. Hancock*, 333 Mass. 314, 130 N.E.2d 541 (1955). Thus where insured took nasal douche, snuffed in liquid into his nose more violently than usual, and thereby caused introduction of germs into his middle ear as result of which he died, it was held not to be death by accidental means. *Smith v. Travelers*, 219 Mass. 147, 106 N.E. 607 (1914). So also where insured dived awkwardly into pool and as result took water into his nose and ears and became infected it was held that infection was not occasioned by accidental means. *Henderson v. Travelers*, 262 Mass. 522, 160 N.E. 415 (1928). In both these cases it was suggested that if some shock or surprise had caused the insured to perform his act in fashion different from what he intended result might be otherwise. Where insured by reason of his physical condition is peculiarly susceptible to ailment, suffers accident such as fall, and as result is stricken with ailment and dies, death may be found to be effected by accidental means. *Freeman v. Mercantile*, 156 Mass. 351, 30 N.E. 1013 (1890). So also disease may be attendant circumstance and yet have death result from accidental means. *Barnett v. John Hancock*, 304 Mass. 564, 24 N.E.2d 662 (1939). Thus where one delirious with typhoid fever fell over railing and was killed, the death was caused by accidental means although it presumably would not have occurred but for fever. *Bohaker v. Travelers*, 215 Mass. 32, 102 N.E. 342 (1913). Where insured suffering from arteriosclerosis was killed as his car inexplicably shot across road and struck tree, death was caused by "accidental means." *Sheehan v. Aetna*, 296 Mass. 535, 6 N.E.2d 777 (1937). *Compare Vahey v. John Hancock*, 355 Mass. 421, 245

N.E.2d 251 (1969), in which recovery was denied where insured died from fractured skull suffered in fall during epileptic seizure.

Distinction is made between (a) death caused by disease induced by injury, where recovery is allowed, and (b) aggravation of existing disease by accident so that death is caused by joint operation of disease and accident, in which case there is no recovery under policy. *Brown v. USF&G*, 336 Mass. 609, 147 N.E.2d 160 (1958); *Leland v. United*, 233 Mass. 558, 124 N.E. 517 (1919); *Howe v. National*, 321 Mass. 283, 72 N.E.2d 425 (1947). Germs normally present in system were caused to flare up by fall causing death, held "accidental means." *Kramer v. New York Life*, 293 Mass. 440, 200 N.E. 390 (1936). For definitions of "accident" see *Sontag v. Galer*, 279 Mass. 309, 181 N.E. 182 (1932). But where infection follows operation, due to "accidental" introduction of germs into system during operation, death not covered, because of exclusion of injuries caused by surgical or medical treatment. *Pitman v. Commercial*, 284 Mass. 467, 188 N.E. 241 (1933). Insured burned by scalding water in bath tub so that he died. No evidence how he got in tub. Held entitled to recover under accident policy. *Dow v. U.S. Fidelity*, 297 Mass. 34, 7 N.E.2d 426 (1937). Insured started trip down dangerous rapids alone in kayak loaded with supplies. Part of kayak found later but not body. Held enough to warrant finding of death by drowning permitting recovery under policy. *Sargent v. Massachusetts*, 307 Mass. 246, 29 N.E.2d 825 (1940).

Death from embolism suffered in operation necessitated by hernia sustained in accident, held "accidental means" despite clause excepting from coverage death caused by hernia. *Ballam v. Metropolitan*, 295 Mass. 411, 3 N.E.2d 1012 (1936). Similarly, death resulting from ether poisoning incurred in similar operation. *Collins v. Casualty*, 224 Mass. 327, 112 N.E. 634 (1916). But death resulting from unexpected reaction to usual anesthetic administered in usual way is not death by "external, violent and accidental cause" under law of Massachusetts. See *Lee v. New York Life*, 310 Mass. 370, 38 N.E.2d 333 (1941).

Beneficiary must allege and prove that death was not caused by hazard exempted from coverage of policy in insuring clause itself. *Lubianez v. Metropolitan*, 323 Mass. 16, 79 N.E.2d 876 (1948). The beneficiary also has burden of establishing that due proof of death by accidental means has been furnished insurer. *Howe v. National*, 321 Mass. 283, 72 N.E.2d 425 (1947); *Washington v. Metropolitan*, 372 Mass. 714, 363 N.E.2d 683 (1977). Death certificate noting "suicide" as cause of death is prima facie evidence of that fact. *Noseworthy v.*

Allstate Life, 40 Mass. App. 924, 664 N.E.2d 470 (1996).

ERISA. Insurer was not arbitrary and capricious in changing decision regarding liability based on co-insurer's concerns. *Gurnack v. John Hancock*, 406 Mass. 748, 550 N.E.2d 391 (1990).

ADJUSTERS

Any one other than attorney or trustee or agent of the property injured who solicits from insured settlement or appraisal of fire loss for compensation is deemed adjuster (G.L. ch. 175, §162) and must be licensed as such G.L. ch. 175, §172. Private adjusters need not be licensed. Insurer may be bound by oral settlement agreement of its adjuster. *Vasconcellos v. Arbella Mut. Ins. Co.*, 67 Mass. App. Ct. 277, 853 N.E.2d 571 (2006).

AGE

See "AUTOMOBILES," "LIABILITY INSURANCE, Violation of Law"; "NEGLIGENCE."

Age of majority is 18 years. G.L. ch. 4, §7.

AGENTS AND BROKERS

Definition of. Any person not licensed broker or officer of domestic insurance company who for compensation solicits insurance for any company, transmits application, policy, annuity or pure endowment contract between insurer and insured, acts or offers to act in negotiation of any policy or renewal of any policy is declared to be insurance agent. Any person not licensed agent of insurer concerned in any transaction, or officer of domestic insurance company who for compensation does any act in negotiation of policy or renewal of policy, annuity or pure endowment contract or placing risks for some one other than himself is declared to be insurance broker. G.L. ch. 175, §162.

Where insurer engages contractors to conduct investigations or medical exams, insurer is not liable for their conduct unless insurer retains control such that the contractor is not entirely free to do the work in its own way. *Paradora v. CNA Ins. Co.*, 41 Mass. App. 651, 672 N.E.2d 127 (1997). But insurer may be liable for its employees' actions. *Ellis v. Safety Ins. Co.*, 41 Mass. App. 630, 672 N.E.2d 979 (1996).

Insurance agent is representative of insurance company and insurance broker is ordinarily agent of insured. *Hudson v. MPIUA*, 386 Mass. 450, 436 N.E.2d 155 (1982). Agent owes fiduciary duty to companies for whom he acts and cannot bind any company without disclosure of adverse interests and without obtaining its consent. *American Motorists Ins. Co. v. American Ins.*



Co., 14 Mass. App. 263, 438 N.E.2d 368 (1982). If insurer has knowledge that an unauthorized broker was signing certificates of insurance, and insurer takes no steps to repudiate the certifications, the insurer is estopped to deny coverage. *O'Connell v. Reliance Ins. Co.*, 50 Mass. App. Ct. 334, 737 N.E.2d 13 (2000).

Diligence Required. In absence of special circumstances which may create obligation to act promptly, failure of agent or broker to act diligently in servicing application or obtaining policy will not give rise to cause of action against agent or broker. *Construction Planners v. Dobax*, 31 Mass. App. 672, 583 N.E.2d 255 (1991); *Rapp v. Burdick*, 336 Mass. 438, 146 N.E.2d 368 (1957). Special circumstances found and insurer held liable in *McCue v. Prudential Ins. Co.*, 371 Mass. 659, 358 N.E.2d 799 (1976) and *Bicknell, Inc. v. Havlin*, 9 Mass. App. 497, 402 N.E.2d 116 (1980). Broker may be held liable in contract for failure to investigate conditions that it knew would invalidate renewal of a blank fire policy. *Cap. S. Mgt. v. Inland U/W Ins.*, 61 Mass. App. 14, 806 N.E.2d 959 (2004). For a discussion of when insurance broker assumes greater duty toward the insured, see *Baldwin Crane v. Riley & Rielly*, 44 Mass. App. 29, 687 N.E.2d 1267 (1997). Duty met by attempt to place risk with usual insurer. *Hartford Nat'l Bank v. United Truck*, 24 Mass. App. 626, 511 N.E.2d 637 (1987). Broker's expression of intent to procure policy with specific coverages is not itself contract. *Boston Camping Distrib. Co. v. Lumbermen's Mut. Cas.*, 361 Mass. 769, 282 N.E.2d 374 (1972). Agent, however, may orally contract on behalf of his principal to use reasonable effort to obtain contract of insurance. *Rayden Engineering v. Church*, 337 Mass. 652, 151 N.E.2d 57 (1958). Agent held liable to "potential beneficiary" for failure to obtain policy. *Rae v. Air-Speed, Inc.*, 386 Mass. 187, 435 N.E.2d 628 (1982). Cf. *Baldwin v. Mortimer*, 403 Mass. 142, 526 N.E.2d 776 (1988). Whether employer acts as agent to insurer in group policy context is question of fact. *Kirkpatrick v. Boston Mut. Life Ins. Co.*, 393 Mass. 640, 437 N.E.2d 173 (1985). Claim arising from reliance on agent's misrepresentations concerning policy's coverage of preexisting conditions is not preempted by ERISA. *Kelly v. Fort Dearborn Life*, 37 Mass. App. 942, 641 N.E.2d 717 (1994). Where policy clearly does not provide coverage for loss prevention measures, a business entity should read its policies rather than rely on representations by an agent. *Sarnafil v. Peerless*, 418 Mass. 295, 636 N.E.2d 247 (1994). Requirement of *Title 211 Code Mass. Regs.* §34.00, that agent provide person applying for replacement insurance with a notice recommending "careful comparison of [the] existing policy and the proposed replacement policy" does not apply to issuance of new policy after lapse of prior policy. *Mayer*

v. Cohen-Miles, 48 Mass. App. Ct. 435, 722 N.E.2d 27 (2000).

When insurance broker or agent, for compensation, undertakes to procure insurance for another and negligently fails to do so, agent is liable for any damages resulting therefrom. *Rae v. Air-Speed, Inc.*, 386 Mass. 187, 435 N.E.2d 628 (1982). Agent failing to obtain promised optional auto liability insurance is liable to plaintiff, intended beneficiary of contract between agent and insured, but is not liable to injured third party. *Flattery v. Gregory*, 397 Mass. 143, 489 N.E.2d 1257 (1986). Special circumstances of assertion, representation and reliance can give rise to agent's duty to ensure that adequate amount of insurance was obtained. *Martinonis v. Utica Nat'l Ins.*, 65 Mass. App. Ct. 418, 840 N.E.2d 994 (2006). An agent's knowledge of the insured's coverage requirements was imputed to the insurer and the insurer was bound by the agent's agreement with the insured. *Southeastern v. Lumbermen's*, 423 Mass. 1008, 668 N.E.2d 347 (1996). Insurer is not entitled to indemnification from the agent for the agent's negligent failure to request additional coverage timely, unless insurer can prove it would have refused to accept the risk had it been fully informed. *Id.* Broker is liable in tort for negligently procuring insurance policy from company not authorized to do business in Massachusetts. *MacGillivray v. W. Dana Bartlett Ins. Agency of Lexington, Inc.*, 14 Mass. App. 52, 436 N.E.2d 964 (1982).

For Whom. Insurance agent or broker negotiating, continuing or renewing insurance holds premiums as agent of insurer. G.L. ch. 175, §169. See *Ritson v. Atlas*, 279 Mass. 385, 181 N.E. 393 (1932). Premium financing agency's payment to agent was equivalent to payment to insurer. *Markel v. Tifco*, 403 Mass. 401, 530 N.E.2d 340 (1988). Intentional withholding of monies due to insurer by broker is indicative of untrustworthiness subject to sanctions. *Deluty v. Comm'r of Ins.*, 7 Mass. App. 88, 386 N.E.2d 730 (1979). G.L. ch. 175, §166. Failure to pay over premiums minus commissions on written demand is prima facie evidence of larceny. G.L. ch. 175, §176. If agent misapplies monies held, policy does not lapse and insurer will be liable. *Carter v. Empire Mut. Ins.*, 6 Mass. App. 114, 374 N.E.2d 585 (1978).

Fraud by Agent. Agents or brokers who procure payment of premiums through fraudulent representations are subject to fine of \$100 to \$1,000 or imprisonment not exceeding one year. G.L. ch. 175, §170. Insurer is liable civilly to third parties where insurer is charged with knowledge of agent's fraud. *Northeast Acceptance Corp. v. American Mfrs. Mut.*, 4 Mass. App. 172, 344 N.E.2d 208 (1976), *aff'd*, 373 Mass. 594, 368 N.E.2d 1385 (1977). Insurer is liable if its agent induces annuitants to replace annuity contracts in order to cause previ-



ous agent to lose persistency commissions and service fees. *Dunn v. Holladay*, 6 Mass. App. 842, 372 N.E.2d 286 (1978).

Knowledge of Agent. Where application for policy contains misrepresentations (as distinguished from conditions precedent to coverage) which are untrue, insured may show he supplied correct answers to insurer's agent and was unaware that false answers had been inserted by agent. Such conduct of agent cannot be relied upon by insurer to argue that since application was not truly that of insured no contract of insurance arose on basis of it. *Sullivan v. John Hancock*, 342 Mass. 649, 174 N.E.2d 771 (1961); *Guerrier v. Commerce Ins. Co.*, 66 Mass. App. Ct. 351, 847 N.E.2d 1113 (2006) (auto insurance application). In these circumstances insured is not bound by contract provisions that there were no other facts made known than were set forth in written application, and insurer is estopped to rely upon misrepresentations in that application. *John Hancock v. Schwarzer*, 354 Mass. 327, 237 N.E.2d 50 (1968). Where insured has not revealed true facts, evidence of knowledge that facts were otherwise than stated may not be admitted where effect would be to vary policy. This may not be done under guise of waiver. *Kukuruza v. John Hancock*, 276 Mass. 146, 176 N.E. 788 (1931). Making broker agent of insurer for purpose of receiving premiums does not result in imputation to insurer of knowledge concerning risk which broker may have when he accepts premium. *Ritson v. Atlas*, 279 Mass. 385, 181 N.E. 393 (1932). G.L. ch. 175, §169.

An independent insurance broker acting solely as agent for insured may be held liable to insurer for negligently or with reckless disregard for the truth placing material misinformation on application. *St. Paul Surplus Lines v. Feingold & Feingold*, 427 Mass. 372, 693 N.E.2d 669 (1998). The broker's liability is not lessened or abrogated due to fact that only insured signed application. *Id.*

Where receiver cancelled policies, agent was required to return commissions on unearned premiums. *Comm'r of Ins. v. Jankowski Ins.*, 61 Mass. App. 305, 809 N.E.2d 1084 (2004).

Licensing and Regulation. G.L. ch. 175, §162 *et seq.*

ASSIGNMENT

See "FIRE INSURANCE."

The common law doctrines of champerty, maintenance and barratry are no longer recognized. *Saladini v. Righellis*, 426 Mass. 231, 687 N.E.2d 1224 (1997).

Insurer may assign to its insured its right against other insurers for contribution to its defense costs. *Rubenstein v. Royal Ins. Co.*, 45 Mass. App. 244 (1998).

Health Insurance. Any words or acts which a reasonable patient would intend as a transfer of insurance claim is valid assignment. *City of Boston v. Aetna*, 399 Mass. 569, 506 N.E.2d 106 (1987).

Where general contractor assigned its claims against its subcontractor for contractual indemnification and breach of contract, the assignment was valid and enforceable, but employee assignee has burden of proving, in addition to the underlying claim against the contractor for negligence and loss of consortium, the assigned claims and damages in full. *Spellman v. Shawmut Woodworking & Supply, Inc.*, 445 Mass. 675, 840 N.E.2d 47 (2006).

ARBITRATION

A party cannot be compelled to arbitrate where it had not agreed to do so in writing. *Ross v. Health & Retirement*, 46 Mass. App. 82, 703 N.E.2d 669 (1998). Insurer cannot be compelled to arbitrate the plaintiff's allegation of unfair and deceptive business practices in violation of G.L. c. 93A and G.L. c. 176D. *White v. Safety Ins. Co.*, 65 Mass. App. Ct. 607, 843 N.E.2d 82 (2006).

A surety is entitled to arbitrate claims arising from construction contract dispute against owner of parcel, where surety's performance bond incorporated terms and conditions of construction contract, which contained an arbitration clause. *Travelers & Surety v. Long Bay*, 58 Mass. App. Ct. 786, 792 N.E.2d 1013 (2003).

Policy provision for arbitration is collateral agreement unless made condition precedent to recovery. Breach of collateral agreement is actionable, but not bar to recovery under policy. *Hamilton v. Home Ins. Co.*, 137 U.S. 370, 34 L. Ed. 708, 11 S. Ct. 133 (1890). If arbitration is condition precedent, may bar recovery under policy if not had or legally waived. *Second Soc'y of Universalists v. Royal Ins. Co.*, 221 Mass. 518, 109 N.E. 384 (1915). Submission of claims to arbitration is not an "action" and does not equitably toll statute of limitations during the period of arbitration. *Shafnacker v. Raymond James & Assocs.*, 425 Mass. 724, 683 N.E.2d 662 (1997).

Waiver of Arbitration. Waiver may be written, oral, or inferred from insurer's conduct. Party seeking to rely on waiver bears burden of proving waiver. *Molea v. Aetna Ins. Co.*, 326 Mass. 542, 95 N.E.2d 749 (1950); *Moran v. Phoenix Ins. Co.*, 7 Mass. App. 822, 390 N.E.2d 1139 (1979).

Preclusive Effect. No binding effect to arbitrator's award addressing claims not within his authority to determine. *Abdella v. USF&G*, 47 Mass. App. 148, 711 N.E.2d 182 (1999). Uniform Arbitration Act, G.L. ch. 251, §18, is not preempted by Federal Arbitration Act. *Miller v. Cotter*, 448 Mass. 671, 863 N.E.2d 537 (2007) (upholding arbitration provision in nursing home admission contract); *Weston Securities v. Aykanian*, 46 Mass. App. 72, 703 N.E.2d 1185 (1998). Judicial-like arbitrations should bar subsequent action on matters specifically decided (*res judicata*), *Miles v. Aetna Casualty & Surety Co.*, 412 Mass. 424, 589 N.E.2d 314 (1992), and may be used to preclude a party to the arbitration from re-litigating a decided issue (*collateral estoppel*), *Bailey v. Metropolitan Prop. & Liab.*, 24 Mass. App. 34, 505 N.E.2d 908 (1987). Claims that arbitrator did not decide are not barred by principles of *res judicata*. *TLT Constr. Corp. v. Tappe and Assoc. Inc.*, 48 Mass. App. 1, 716 N.E.2d 1044 (1999). A plaintiff required to arbitrate underinsurance claim under motor vehicle policy may subsequently file suit for breach of contract and unfair claim and settlement practices under G.L. ch. 93A, §9 and 176D, §3. *Beals v. Commercial Union*, 61 Mass. App. Ct. 189, 808 N.E.2d 824 (2004). Confirmation of the arbitration award becomes moot once insurer has tendered full payment of its insurance benefit obligation to the insured; insurer not liable for award in excess of policy limits. *Scott v. Commerce Ins.*, 62 Mass. App. Ct. 416, 816 N.E.2d 1224 (2004).

ATTORNEYS

Appointment and Authority. Attorney-client relationship may be express or implied from conduct of the parties. *Page v. Frazier*, 388 Mass. 55, 445 N.E.2d 148 (1983). Representation in one matter does not necessarily create attorney-client relationship as to client's other matters. *Robertson v. Gaston Snow*, 404 Mass. 515, 536 N.E.2d 344 (1989), *cert. denied*, 110 S. Ct. 242, 493 U.S. 894, 107 L. Ed. 2d 192 (1989). Insurer's delivery of settlement checks to attorney discharges its obligation to pay, notwithstanding that attorney forges insured's name and retains all the proceeds. *Aetna v. Fennessey*, 37 Mass. App. 668, 642 N.E.2d 1050 (1994). Attorney is in charge of litigation and acts in conduct of litigation bind client. *Burt v. Gahan*, 351 Mass. 340, 220 N.E.2d 816 (1966). Attorney may not impair cause of action without client's consent. *Friedberg v. Joblon*, 287 Mass. 510, 192 N.E. 49 (1934). Attorney cannot settle case or make substantial modifications to existing contract absent consent of client, which may be implied. *I.C.C. v. Holmes Transp. Inc.*, 983 F.2d 1122 (1st Cir. 1993).

Conflict of Interest. Prior Representation. Although never explicitly adopted, "substantially related" test is generally accepted standard for subsequent adverse rep-

resentation disqualification. *See Bays v. Theran*, 418 Mass. 685, 639 N.E.2d 720 (1994); *Mailer v. Mailer*, 390 Mass. 371, 455 N.E.2d 1211 (1983).

Court-appointed attorney representing minor plaintiff in actions pertaining to the minor's custody and maintenance, was entitled to absolute immunity from legal malpractice claims. *Sarkisian v. Benjamin*, 62 Mass. App. Ct. 741, 820 N.E.2d 263 (2005).

Simultaneous Representation. Consent of clients to simultaneous adverse representation is required even for unrelated matters. *McCourt Co. v. FPC Properties, Inc.*, 386 Mass. 145, 434 N.E.2d 1234 (1982). *See* SJC Rule 3:07, DR 5-105.

Fees. Awarded for insurer's unfair and deceptive acts and practices. *Jet Line Services v. American Employers*, 404 Mass. 706, 537 N.E.2d 107 (1989). Insurer has duty to defend insured where there is a possibility that damages would be covered under liability policy. *Boston Symphony Orchestra v. Commercial Union*, 406 Mass. 7, 545 N.E.2d 1156 (1989). Insurer liable for attorney's fees where insurer fails to defend insured who is found liable, even if insurer in good faith erroneously believed policy excluded coverage. *Shapiro v. Public Service*, 19 Mass. App. 648, 477 N.E.2d 146 (1985). Where insured brings declaratory judgment action and establishes insurer's duty to defend, insured may recover attorney's fees. *Preferred Mut. Ins. v. Gamache*, 426 Mass. 93, 686 N.E.2d 989 (1997); *Rubenstein v. Royal Ins.*, 429 Mass. 355, 708 N.E.2d 639 (1999). Recovery allowed without regard to whether insurer breached policy. *Hanover Ins. Co. v. Golden*, 436 Mass. 584, 766 N.E.2d 838 (2002). But insurer is not entitled to recover attorneys fees in action brought to establish another insurer's duty to defend. *John T. Callahan & Sons, Inc. v. Worcester*, 453 Mass. 447, 902 N.E.2d 923 (2009). Discharged attorney was entitled to recover from the successor attorney, on a theory of quantum meruit, the reasonable value of his efforts and contributions to the client's eventual recovery. *Malonis v. Harrington*, 442 Mass. 692, 816 N.E.2d 115 (2004). Suspension of an attorney for ethical misconduct barred him from recovering compensation for legal services rendered prior to the disciplinary action where the penalized misconduct was related to the case in which the fee was sought. *Kourouvacilis v. American Federation of State*, 65 Mass. App. Ct. 521, 841 N.E.2d 1273 (2006).

Joint Defense Agreements are recognized as a valid exception to waiver of the attorney-client privilege under the common interest doctrine, provided the communications were made in the course of a joint defense effort, the statements were designed to further the effort, and the privilege has not been waived. *Hanover Ins. Co. v.*



Rapo & Jepsen Ins. Svcs, Inc., 449 Mass. 609, 870 N.E.2d 1105 (2007).

Legal Malpractice. Actions in contract based on malpractice survive the death of an attorney; our Court has not decided whether a claim sounding in tort survives. *Ryan v. Ryan*, 419 Mass. 86, 642 N.E.2d 295 (1994). Doctrine of comparative negligence applies in legal malpractice actions. *Clark v. Rowe*, 428 Mass. 339, 701 N.E.2d 624 (1998). To recover for not commencing action, former clients have burden of proving they could have collected something on any judgment they might have obtained. *Jernigan v. Giard*, 398 Mass. 721, 500 N.E.2d 806 (1986). To recover for negligence in settling claim, clients must prove they would have succeeded on underlying claims. *Atlas Tack Corp. v. Donabed*, 47 Mass. App. 221, 721 N.E.2d 617 (1999). Former criminal defendant claiming negligent defense must prove innocence by a preponderance of evidence. *Correia v. Fagan*, 452 Mass. 120, 891 N.E.2d 891 (2008). Attorney drafting will, later disallowed on account of undue influence, owed no duty to heirs at law who succeeded to the estate. *Logotheti v. Gordon*, 414 Mass. 308, 607 N.E.2d 1015 (1993). Attorney is not liable to beneficiaries under a will under theory of legal malpractice. *Miller v. Mooney*, 431 Mass. 57, 725 N.E.2d 545 (2000). The court declined to extend the fiduciary duty owed among shareholders of closely held corporation to their individual attorneys. *Kurker v. Hill*, 44 Mass. App. 184, 689 N.E.2d 833 (1998). Real estate buyer who relied on Bank's attorney had no legal malpractice claim as attorney owed no duty to buyer. *Fistel v. Favaloro*, 63 Mass. App. Ct. 651, 828 N.E.2d 549 (2005). Where a malpractice claim was filed late because an attorney delayed informing other members of the firm of a potential claim, the attorney's knowledge is imputed to the firm, and the "innocent insured" provision does not apply to the firm, but may apply to individual members. *Sunrise Properties, Inc. v. Bacon, Wilson Ltd.*, 425 Mass. 63, 679 N.E.2d 540 (1997). Client may recover even if settlement in underlying action received judicial approval. *Meyer v. Wagner*, 429 Mass. 410, 709 N.E.2d 784 (1999). Client's participation in the wrongdoing barred him from recovering damages for any resulting loss, under the doctrine of in pari delicto. *Choquette v. Isacoff*, 65 Mass. App. Ct. 1, 836 N.E.2d 329 (2005).

Attorney's failure to disclose potential malpractice liability is grounds for rescission of malpractice policy. *TIG Ins. Co. v. Blacker*, 54 Mass. App. Ct. 683, 767 N.E.2d 598 (2002).

Attorneys for employer's workers compensation insurer not liable in negligence to injured employee for failure successfully to prosecute third party action. *DeRoza v. Arter*, 416 Mass. 377, 622 N.E.2d 624 (1993).

Attorneys generally owe no duty to non-clients. *Page v. Frazier*, 388 Mass. 55, 445 N.E.2d 148 (1983), except where attorney knew non-client would rely on attorney's services. *Robertson v. Gaston Snow*, 404 Mass. 515, 536 N.E.2d 344 (1989), cert. denied, 110 S. Ct. 242, 493 U.S. 894, 107 L. Ed. 2d 192.

AUTOMOBILES

See Law Digest Tables.

See "NEGLIGENCE"; "LIABILITY INSURANCE"; and "NO-FAULT."

Age. Minimum age is 18 years. Junior license (not valid between 1 A.M. and 4 A.M., unless accompanied by parent or legal guardian) issued to 17 yr. old, or 16½ years if completed approved driver education course. G.L. ch. 90, §8.

Agency. Registration of vehicle in defendant's name as owner at time of accident is prima facie evidence of operation by person for whose conduct defendant is legally responsible. G.L. ch. 231, §§85A, 85B. This statute is rule of evidence and not of liability. Vehicle owner has the burden of proving the owner is not responsible for the actions of the driver. *Covell v. Olsen*, 65 Mass. App. Ct. 359, 840 N.E.2d 555 (2006). Registration is not prima facie evidence that operator is empowered by owner to invite others to ride with him. *Gallo v. Veliskakis*, 357 Mass. 602, 259 N.E.2d 568 (1970). Owner is not responsible for negligent act of driver of automobile unless driver is servant or agent of owner, acting within scope of authority arising from such employment. *Field v. Evans*, 262 Mass. 315, 159 N.E. 751 (1928); *Cheek v. Econo-Car*, 393 Mass. 660, 473 N.E.2d 659 (1985).

Chiropractic Treatment. Insurer cannot refuse to pay chiropractor based on orthopedic surgeon's opinion; G.L. c. 90, §34M, required determination of need be made by a licensed chiropractor. *Boone v. Commerce Ins. Co.*, 68 Mass. App. Ct. 354, 862 N.E.2d 49 (2007).

Coverage. As to who constitutes "insured" see G.L. ch. 90, §34A; *Hemingway Bros. v. Great American Indem. Co.*, 356 Mass. 436, 252 N.E.2d 883 (1969); Cf. *Desrosiers v. Royal Ins. Co.*, 393 Mass. 37, 468 N.E.2d 625 (1984); *Reliance Ins. Co. v. Aetna*, 393 Mass. 48, 468 N.E.2d 621 (1984); *Worcester Mut. v. Marnell*, 398 Mass. 240, 496 N.E.2d 158 (1986); *Johnson v. Hanover Ins. Co.*, 400 Mass. 259, 508 N.E.2d 845 (1987) (all household members included in underinsured motorist coverage). Where insured's two vehicles are insured by different insurers, only the policy covering vehicle being driven by insured provides any coverage. *Chenard v. Commerce Ins. Co.*, 440 Mass. 444, 799 N.E.2d. 108 (2003). A pedestrian, the trustee and beneficiary of a



realty trust, listed as the sole driver under a policy issued to the realty trust, is not the “named insured” and has no uninsured motorist coverage. *Tatarian v. Commercial Union Ins. Co.*, 41 Mass. App. 731, 672 N.E.2d 997 (1996). *Kanamaru v. Holyoke Mut. Ins. Co.*, 72 Mass. App. Ct. 396, 892 N.E.2d 759 (2008) (cyclist). An employee injured while a pedestrian cannot recover under a policy issued to the employer. *United States Fid. & Guar. Co.*, 417 Mass. 75, 627 N.E.2d 463 (1994). An employee driving an employer’s vehicle cannot collect underinsurance benefits under the employer’s policy. *National Union Fire Ins. Co. of PA v. Figaratto*, 423 Mass. 346, 667 N.E.2d 877 (1996). Coverage of a “private passenger automobile” under a motor vehicle policy did not include coverage of a pickup truck. *Lumbermen’s v. Offices Unlimited*, 419 Mass. 462, 645 N.E.2d 1165 (1995). Under the standard automobile policy, a claim for wrongful death of a passenger and a claim by the father for negligent infliction of emotional distress are subject to the same single “per person” limit of liability. *McNeill v. Metropolitan P&L Ins.*, 420 Mass. 587, 650 N.E.2d 793 (1995).

Insurer has no duty to defend or indemnify driver operating without the insured’s consent. *Picard v. Thomas*, 60 Mass. App. 362, 802 N.E.2d 581 (2004). No coverage to insured’s son’s friends using car without permission. *Metropolitan P&L Co. v. Cichetti*, 1990 WL 112284 (D. Mass. 1990). No coverage for injury caused by insured’s son’s friend while driving temporary substitute rental car, where driver did not have rental company’s permission. *Vergato v. CU Ins. Co.*, 50 Mass. App. Ct. 824, 741 N.E.2d 486 (2001). Minor temporarily residing with insured not covered by underinsured coverage. *Pisani v. Travelers*, 29 Mass. App. 964, 560 N.E.2d 155 (1990). Sexual assault on passenger by school bus driver arose out of use of vehicle and was covered by carrier’s business motor vehicle policy. *Roe v. Lawn v. Aetna*, 418 Mass. 66 (1994).

Flight from scene not required for “hit-and-run” uninsured motorist coverage; coverage available where driver leaves scene without being identified. *Commerce Ins. Co. v. Mendonca*, 57 Mass. App. Ct. 522, 784 N.E.2d 43 (2003). But passenger may have duty to gather information from which vehicle and driver can be identified. *Pilgrim Ins. Co. v. Molard*, 73 Mass. App. Ct. 326, 897 N.E.2d 1231 (2008). Where, following an auto accident, the insured driver was attacked by the other driver who then fled without identifying himself, the injuries did not arise out of an “accident” and the insured was not entitled to recover uninsured motorist benefits, personal injury protection or medical benefits. *Rischitelli v. Safety Ins. Co.*, 423 Mass. 703, 617 N.E.2d 1243 (1996).

Cooperation. Auto insurer relieved of liability to policyholder seeking uninsured motorist benefits who refused to sit for an examination under oath in a timely manner. *Lorenzo-Martinez v. Safety Ins.*, 58 Mass. App. Ct. 359, 790 N.E.2d 692 (2003). Insurer’s denial of uninsured motorist benefits was justified where claimants refused to be separately examined under oath. *Morales v. Pilgrim Ins.*, 58 Mass. App. Ct. 722, 792 N.E.2d 987 (2003).

Comparative Negligence. Recovery allowed if negligence not greater than that of other party. G.L. ch. 231, §85 Doctrine of voluntary non-contractual surrender of all care has been eliminated from law, so that unless master-servant or joint enterprise relationship exists, only question when action is against one other than operator of car in which guest is riding, is whether guest is guilty of contributory negligence. *Bessey v. Salemme*, 302 Mass. 188, 19 N.E.2d 75 (1939). Plaintiff’s comparative negligence still considered where defendant is grossly negligent or engaged in willful, wanton, reckless conduct. *Lane v. Meserve*, 20 Mass. App. 659, 482 N.E.2d 530 (1985).

Compulsory Insurance Coverage. Compulsory Motor Vehicle Liability Insurance Law, G.L. ch. 90, §34A *et seq.* requires proof of motor vehicle liability insurance, or evidence of equivalent financial responsibility by bond or deposit with Commonwealth prior to registration on any vehicle, except vehicles owned by person, firm or corporation licensed as common carrier, G.L. ch. 159A, or subject to control of Department of Public Utilities, G.L. ch. 90, §1A, as well as vehicles owned by Commonwealth, ambulances, and police and fire department vehicles.

Alcohol/DWI. Permissible inference that driver was operating under the influence (OUI) of alcohol exists if has a blood alcohol content (BAC) of 8 one-hundredths percent (.08). G.L. ch. 90, §24; 1994 Mass. Acts 25; *Commonwealth v. Moreira*, 385 Mass. 792, 434 N.E.2d 196 (1982). BAC of .05 or less constitutes permissible inference that driver was not OUI. *Id.* at 795. Implied Consent Statute provides for suspension of license for minimum of 120 days for refusal to consent to breath or blood test (180 days if driver under 21 years of age or convicted of OUI within prior 10 years, 1 year if two or more OUI convictions in prior 10 years). G.L. ch. 90, §24N.

Damages. Insured may sue for payments due if insurer does not make payment under collision or limited collision coverage within seven days of receipt of claim. No recovery for “inherent diminished value” to motor vehicle. *Given v. Commerce Ins. Co.*, 440 Mass. 207, 796 N.E.2d 1275 (2003). Insured entitled to double damages and reasonable attorney’s fees if insurer unrea-



sonably refused to pay claim. G.L. ch. 90, §34O. Written demand required for property damage claim under automobile liability policy, to which insurer must respond within 15 days. Unreasonable refusal to pay claim may subject insurer to actual damages plus reasonable attorney's fees. G.L. ch. 90, §34O.

Exclusion. Auto rental agreement excluding liability for negligence or violation of law is void as against public policy. *Liberty Mut. v. Tabor*, 407 Mass. 354, 553 N.E.2d 909 (1990). Application of the "regular use" exclusion requires a consistent pattern of use or availability of the vehicle. *Safety Ins. Co. v. Day*, 65 Mass. App. Ct. 15, 836 N.E.2d 339 (2005).

Family Purpose Doctrine. Not recognized. Relation of parent and child standing alone does not establish agency. *McGowan v. Longwood*, 242 Mass. 337, 136 N.E. 72 (1922). No interspousal tort immunity arising out of motor vehicle accident (below drinking age). *Lewis v. Lewis*, 370 Mass. 619, 351 N.E.2d 526 (1976). Parents not liable for emancipated son living at home, who drove after party at home. *Alioto v. Marnell*, 402 Mass. 36, 520 N.E.2d 1284 (1988).

Guest Cases. Where plaintiff was passenger in exercise of due care, plaintiff may recover against operator upon proof that operator was guilty of ordinary negligence. G.L. ch. 231, §85L. Guest coverage. Liability of insurer runs with automobile so long as it is operated by insured or by one with his consent, and such operator may recover from insurer amount of unpaid judgment obtained against him by injured guest. *Crompton v. Lumbermen's*, 333 Mass. 160, 129 N.E.2d 139 (1955). "Guest occupant" interpreted to include boy eight years old who was on running board against will of operator. *Westgate v. Century*, 309 Mass. 412, 35 N.E.2d 218 (1941). As defined in G.L. 90, §34A, it includes one admittedly inside motor vehicle, even while trying to get out. *Joyce v. London & Lancashire*, 312 Mass. 354, 44 N.E.2d 776 (1942). It includes employee riding with his employer in his employer's car but not on employer's business. *Muise v. Century*, 319 Mass. 172, 65 N.E.2d 98 (1946).

Seat Belts. Children under age five or under 40 pounds must be secured by a child passenger restraint seat; other children under twelve must wear safety belts. G.L. ch. 90, §7AA.

Pedestrians. Injuries sustained by pedestrians is covered by personal injury protection. Pedestrian includes persons operating bicycles, tricycles and similar vehicles and persons upon horseback or in vehicles drawn by horses or other draft animals. G.L. ch. 90, §34A. Injury to pedestrian caused during unloading from truck by a hydraulic lift was injury "arising out of" "use"

of the truck. *Metropolitan Prop. & Cas. Ins. v. Santos*, 55 Mass. App. Ct. 789, 774 N.E.2d 1128 (2002). A person with foot on running board of motor vehicles is not pedestrian. Injuries to pedestrian from bottle thrown from passing vehicle arose from "use" of vehicle and were covered by underinsured coverage. *Assetta v. Safety Ins.*, 43 Mass. App. 317, 682 N.E.2d 931 (1997).

Motorized Bicycles. Driver of motorized bicycle required to have driver's license or learner's permit. Motorized bicycles are not to exceed 25 mph on public way. G.L. ch. 90, §1B. Helmets required. G.L. ch. 90, §7.

Notice. Auto renter who gave prompt notice of hit-and-run accident was entitled to uninsured motorist (UM) coverage, although notice of personal injuries not given for four months after the accident; UM policy does not state a continuing duty to inform the insurer of changes in physical condition. *Hale v. Elco Admin. Svcs.*, 69 Mass. App. Ct. 878, 866 N.E.2d 429 (2007). Insured under no duty to notify insurer of material changes absent an obligation in the policy or a request from the insurer at renewal (policy issued to a corporation that dissolved prior to policy renewal and prior to accident; insurer asserted misrepresentation.) *Quincy Mut. Fire Ins. Co. v. Quisset Props., Inc.*, 69 Mass. App. Ct. 147, 866 N.E.2d 966 (2007).

Personal Injury Protection "PIP" Coverage. Insurer is obligated to pay 75% of insured's average weekly wage for the past 52 weeks, rather than 75% of insured's earnings at time of the accident. *Gomes v. Metropolitan P&C*, 45 Mass. App. 27, 695 N.E.2d 673 (1998). Employee's average weekly wage is to be calculated by dividing gross earnings by the number of weeks that employee actually was employed during the preceding year. *Digiacombo v. Metropolitan P&C Co*, 66 Mass. App. Ct. 343, 847 N.E.2d 1107 (2006). Insurer is not unconditionally required to pay medical bills within 30 days, *Fascione v. CNA Ins. Cos.*, 435 Mass. 88, 754 N.E.2d 662 (2001); insurer may withhold payment of claim until it receives reasonable substantiation of claim. *Columbia Chiropractic G.P. v. Trust Ins.*, 430 Mass. 60, 712 N.E.2d 93 (1999); *Brito v. Liberty Mut.* 44 Mass. App. 34, 687 N.E.2d 1270 (1997). Insurer may terminate PIP based on IME from medical specialty different from that of treating practitioner. *Boone v. Commerce Ins.*, 451 Mass. 198, 884 N.E.2d 483 (2008). If claimant's health insurer's plan would have covered medical expenses, automobile insurer not required to pay PIP benefits under G.L. ch. 90, §34A. After \$2,000, medical bills first must be submitted to health insurer before entitlement to optional MedPay benefits. *Mejia v. American Cas. Co.*, 55 Mass. App. Ct. 461, 771 N.E.2d 811 (2002). Where insurer denied PIP benefits because insured submitted false information and not for "noncooperation," insured

could recover PIP benefits from defendant. *Figuerero v. Valverde*, 60 Mass. App. 76, 799 N.E.2d 141 (2003). Insurer must show prejudice to deny late filed PIP claim. *Boffoli v. Premier Ins.*, 71 Mass. App. Ct. 212, 880 N.E.2d 826 (2008).

Service of Process. Non-resident motorists. Non-resident motorist's use of rights and privileges conferred in G.L. ch. 90, §3 shall be deemed equivalent to appointment of the Registrar of Motor Vehicles as attorney for all lawful service in action growing out of accident or collision while operating motor vehicle in Commonwealth. Process sufficient if served on Registrar of Motor Vehicles with copy sent certified mail to owner or operator. G.L. ch. 90, §3, 3A-3D.

Settlement. Insurer's issuance of an "at-fault" notice to its insured did not trigger a duty to offer injured plaintiff a settlement. *Beach v. Commerce Ins. Co.*, 69 Mass. App. Ct. 720, 871 N.E.2d 1080 (2007).

Uninsured Motorist Coverage. Uninsured Motorist Coverage (also called in Massachusetts "Uninsured Motor Vehicle Coverage" and "Coverage U") is authorized by G.L. ch. 175, §111D. By G.L. ch. 175, §113L it must be included in any policy issued or delivered in Massachusetts with respect to motor vehicle, trailer or semi-trailer registered in state. Exclusion for "auto owned by a governmental unit" applies only when governmental unit is self-insured. *Massachusetts Ins. v. Premier Ins.*, 449 Mass. 422, 869 N.E.2d 576 (2007). This coverage protects persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured and hit and run motor vehicles, trailers and semi-trailers because of bodily injury, sickness or disease (including resultant death) sustained by insured, caused by accident, and arising out of ownership, operation, maintenance or use thereof. Snowmobile is not a "motor vehicle" under this coverage. *Arbella Mut. v. Vynorious*, 34 Mass. App. 121, 607 N.E.2d 431 (1993); *Gabriel v. The Premier Ins. Co. of Mass.*, 445 Mass. 1026, 840 N.E.2d 548 (2006) (payment from one of joint tortfeasors did not fully compensate injured operator). Personal injury coverage must be at least \$15,000 for injuries or death to any one person; \$30,000 aggregate for any one accident; property damage is not covered. Coverage under multiple policies no longer may be "stacked." G.L. ch. 175, §113L. *Cardin v. Royal Ins.*, 394 Mass. 450, 476 N.E.2d 200. (1985); *Lecuyer v. Metropolitan*, 401 Mass. 709, 519 N.E.2d 263 (1988). Insured may only look to their own auto policy, even where an insured elects not to obtain "optional" underinsured motorist coverage. *Dullea v. Safety Ins. Co.*, 424 Mass. 37, 674 N.E.2d 630 (1997). Minimum Coverage may not be reduced by coinsurance clause. *Johnson v. Travelers Indem. Co.*, 359 Mass. 525, 269 N.E.2d 700 (1971). Where insured's auto policy

provides coverage, no additional coverage is available under insured's homeowners' policy, even on theory of negligent supervision of minor. *Phoenix Ins. Co. v. Churchwell*, 57 Mass. App. Ct. 612, 785 N.E.2d 392 (2003). Insured's injured daughter could recover uninsured motorist benefits under policy covering insured's other car and providing the higher limits of the two automobile insurance policies issued to the household. *Chenard v. Commerce Ins.*, 56 Mass. App. Ct. 576, 778 N.E.2d 1031 (2002). "Uninsured motor vehicle" includes one where liability insurer is unable to make payment within limits of Uninsured Motor Vehicle coverage because of insolvency which has been declared by court as of, or within one year after, accident date. Where driver was injured by sudden onset of symptoms from the other driver's brain tumor, entitling other driver's insurer to deny coverage, driver was not entitled to uninsured motorist benefits under his policy; there was a gap in coverage. *Noel v. Metropolitan P&C Ins. Co.*, 41 Mass. App. 593, 672 N.E.2d 119 (1996).

Policy must provide that determination as to whether insured or his legal representative is legally entitled to recover such damages, and if so amount thereof, shall be made by agreement between the parties or, failing this, by arbitration.

Policy endorsements issued without approval are binding on insurer for limited purpose of protecting insureds, but are otherwise without effect. *Clarendon Nat's Ins. v. Amica Mut. Ins.*, 441 Mass. 248, 805 N.E.2d 8 (2004). Policy may be more favorable to insured than statutory requirements. It may provide for subrogation, but not as to any right of recovery against insured of insolvent liability insurer. In *Whitney v. American Fidelity*, 350 Mass. 542, 215 N.E.2d 767 (1966), insured was injured while riding as guest in automobile. It was held, resolving ambiguity against insurer, that automobile was within the definition of uninsured motor vehicle under insured guest's own policy. *Cf. Forrest v. Hartford*, 367 Mass. 106, 323 N.E.2d 865 (1975), where guest could not recover under driver's uninsured motorists coverage. Uninsured motorist coverage of host vehicle available to injured guest occupant who has recourse to no other policy. *Skinner v. Royal Ins.*, 36 Mass. App. 532, 633 N.E.2d 432 (1994). G.L. ch. 175, §113L.

Underinsured. Self-insured (bonded) motorists must maintain underinsured coverage. *Hartford v. Hertz*, 410 Mass. 279, 572 N.E.2d 1 (1991). Underinsured benefits are contractual, not "damages," and hence not subject to lien statute, G.L. ch. 111, §70A. *Meyers v. Bay State Health Care*, 414 Mass. 727, 610 N.E.2d 303 (1993). The statutory scheme for underinsured motorist coverage under G.L. c. 175, §113L(5), prevails even when it re-

sults in the denial of coverage in the face of equitable considerations. *Valley Forge Ins. Co. v. Katz*, 63 Mass. App. Ct. 759, 829 N.E.2d 1160 (2005). An injured occupant's first recourse is to own insurance policy or that of a resident relative. Only when no underinsured motorist coverage is available under either of these will an injured occupant be able to recover benefits from the policy covering the vehicle in which the injury occurred. *Mercadante v. Worcester Ins.*, 62 Mass. App. Ct. 293, 816 N.E.2d 145 (2004). Underinsured motorist policy benefit reduced by amount paid under separate out-of-state policy. *Amica Mut. v. Bagley*, 28 Mass. App. 85, 546 N.E.2d 184 (1989). Unless policy clearly provides otherwise, insured may arbitrate claim against own insurer prior to exhaustion of other claims. *Gilbert v. Hanover Ins.*, 35 Mass. App. 683, 624 N.E.2d 621 (1993). Passenger must exhaust vehicle owner's underinsured coverage before claiming under own policy. *Lumbermen's Mut. v. Mercurio*, 27 Mass. App. 111, 535 N.E.2d 234 (1989). Passenger paid full limit of optional bodily injury coverage not entitled to underinsured motorist coverage. *Nash v. Metropolitan P&L Co.*, 410 Mass. 1002 (1991). Settlement agreement establishing damages within policy limits precludes recovery under underinsured coverage, *Commercial Union v. Burns*, 30 Mass. App. 617, 572 N.E.2d 16 (1991), but recovery not precluded where there had been no determination as to the actual amount of damages. *Pritzky v. Safety Ins. Co.*, 64 Mass. App. Ct. 751, 835 N.E.2d 621 (2005). Underinsurance benefits not available to employee collecting worker's compensation benefits. *National Union Fire Ins. Co. v. Figarato*, 423 Mass. 346 (1996). Underinsurance benefits not available where tortfeasor's policy limits and claimant's underinsurance limits are identical, even if claimant's actual recovery is reduced due to multiple claimants. *Alguila v. Safety Ins.*, 416 Mass. 494, 624 N.E.2d 79 (1993). Underinsurance benefits not available where combined coverages of two tortfeasors exceeded underinsured coverage. *Hanover Ins. Co. v. Pascar*, 421 Mass. 442, 658 N.E.2d 142 (1995). An insurer is not obligated to pay underinsured motorist benefits until the insured's damages exceed the tortfeasor's policy limits, regardless of whether insured has released tortfeasor from liability. *Gleed v. Aetna*, 418 Mass. 503, 637 N.E.2d 224 (1994). The underinsured motorist provision of the standard automobile policy does not protect the named insured when the underlying bodily injury or death was sustained by a person not insured by the policy. *Colby v. Metropolitan P.&C.*, 420 Mass. 799 (1995). One having a policy providing underinsurance coverage to one's vehicle may not recover under the spouse's policy providing higher coverages. *Depina v. Safety*, 419 Mass. 135, 643 N.E.2d 430 (1994). If insured loans his car to another, and causes an accident driving a vehicle owned by a third party, claimant may

recover compulsory benefits only under third party's policy, not insured's. *Hanover Ins. Co. v. Fasching*, 52 Mass. App. Ct. 519, 755 N.E.2d 285 (2001).

Statute of limitations for action to recover underinsured motorist benefits does not commence until insurer breaches its contractual obligation to arbitrate. *Berkshire Mut. Ins. Co. v. Burbank*, 422 Mass. 659, 664 N.E.2d 1188 (1996).

Since G.L. ch. 175, §113L requires uninsured motorist coverage to be included in all motor vehicle insurance policies, it is likely that definition of "insured" under that coverage will be held to be no less extensive than that of "insured" under basic compulsory policy. Nun, struck while a pedestrian, held to be covered by policy naming nun's order as injured. *Thattil v. Dominican Sisters*, 415 Mass. 381, 613 N.E.2d 908 (1993). But corporate employee not covered under uninsured provision of policy issued to corporation. *Andrade v. Aetna*, 35 Mass. App. 175, 617 N.E.2d 1015 (1993). *Jacobs v. USF&G*, 417 Mass. 75, 627 N.E.2d 463 (1994). Policy provision limiting hit and run coverage to cases involving contact is void. *Surrey v. Lumberman's Cas. Co.*, 384 Mass. 171, 424 N.E.2d 234 (1981). Plaintiff who has recovered under his own uninsured policy and under tortfeasor's bodily injury coverage, not entitled to benefits of tortfeasor's uninsured coverage. *Manning v. Fireman's Fund*, 397 Mass. 38, 489 N.E.2d 700 (1986).

Exclusion for injuries sustained while occupying auto regularly used by injured person extends to "pool" vehicles assigned at random. *Galvin v. Amica Mut.*, 11 Mass. App. 457, 417 N.E.2d 34 (1981).

AVIATION

See "SERVICE OF PROCESS."

Licensing. The Aeronautics Commission (G.L. ch. 6, §57) has general supervision and control over aeronautics, except facilities owned by the United States. G.L. ch. 90, §39.

Town could not bring a public nuisance claim against airport on account of airplane noise. *Town of Hull v. Mass. Port Auth'y*, 441 Mass. 508, 806 N.E.2d 901 (2004).

BROKERS

See "AGENTS AND BROKERS."

BURGLARY INSURANCE

Insurer entitled to recover under G.L. ch. 93A for staged burglary. *Binder v. Jewelers Mut. Ins.*, 28 Mass. App. 459, 552 N.E.2d 568 (1990).

CANCELLATION

Accident and Health Policies. Among “standard provisions” which are required to be inserted in policies of accident and health insurance which reserve right to refuse renewal is provision for grace period during which policy remains in force, unless written notice has been given of intention not to renew at least thirty days prior to premium due date. Non-cancelable policies may be issued. G.L. ch. 175, §108.

Fire Insurance. See “FIRE INSURANCE, Cancellation.” Requirement of notice to mortgagee “if policy is canceled or not renewed by us” does not require notice where policy expires for failure to renew it. *Chisolm v. Commonwealth Mortgage*, 37 Mass. App. 925, 639 N.E.2d 733 (1994).

Life Insurance. Mailing premium notice to wrong address did not extend 61-day grace period. *Bezanson v. Metropolitan*, 952 F.2d 1 (1st Cir. 1991). Insured mailing request to group administrator to reduce coverage not effective where insured died during grace period. *Pediatrics v. Provident*, 965 F.2d 1164 (1st Cir. 1992). Where insured was in coma, beneficiary could accept insurer’s offer to accept premium after grace period had expired. *Flood v. Midland*, 419 Mass. 176, 643 N.E.2d 439 (1994). Insurer’s policy of accepting late cancellation notices without submission of the policy as evidencing a mutual consent to cancel was not binding on beneficiary where insured died before insurer sent notice of cancellation. *Nagel v. Provident Mut. Life*, 51 Mass. App. Ct. 763, 749 N.E.2d 710 (2001).

Motor Vehicle. Compliance with G.L. ch. 175, §113A by sending notice to address in policy is no defense where agent of insurer should have known that not proper address and in fact notice not received by insured, *Greenberg v. Flaherty*, 306 Mass. 95, 27 N.E.2d 683 (1940), since purpose of compulsory insurance is protection of traveler on public way. *Canavan v. Hanover Ins.*, 356 Mass. 88, 248 N.E.2d 271 (1969). But if insured refuses to accept notice valid in form, cancellation will be valid. *Liberty Mut. v. Wolfe*, 7 Mass. App. 263, 386 N.E.2d 1303 (1979). Insurer’s computer records are admissible under the business records exception to the hearsay rule, G.L. c. 233, §78, to prove policy cancelled, if they were “(1) made in good faith; (2) made in the regular course of business; (3) made before the action began; and (4) [it was] the regular course of business to make the record at or about the time of the transaction or occurrences recorded.” *Beal Bank, SSB v. Eurich*, 444 Mass. 813 (2005); *McLaughlin v. CGU Ins. Co.*, 445 Mass. 815, 840 N.E.2d 935 (2006).

Strict compliance is required. Insurer is required to give separate notice of suspension of coverage for failure

to have a used vehicle inspected within seven days of the effective date of policy, notwithstanding that the policy was in suspension for nonpayment of premiums. *Lord v. Commercial Union*, 60 Mass. App. 309 (2004). Insured must be specifically informed of reasons for cancellation. Motor vehicle insurance policies must be noncancelable after 90 days except for nonpayment of premium, fraud, or misrepresentation in obtaining insurance, or suspension of license or registration of insured or customary operator in insured’s household during policy period or prior 6 months. G.L. ch. 175, §22c. Once an accident has occurred, insurer is prohibited from denying coverage under a compulsory insurance policy because of insured’s violation of that policy. *Espinal v. Liberty Mut. Ins.*, 47 Mass. App. Ct. 593, 714 N.E.2d 844 (1999). If insurer believes claim is fraudulent, better practice is for insurer to file declaratory judgment action. *Id.*; see G.L. ch. 175, §113A(5).

Umbrella Policy. The 30-day notice of termination provision in an umbrella policy only applies where the insurer decides not to renew, not where the insured decides not to renew. *Commercial Union Ins. Co. v. Connors*, 42 Mass. App. 538, 679 N.E.2d 1012 (1997).

Workers Compensation. Insurer must comply precisely with G.L. ch. 152, §65B, or else coverage continues. *Dearmon’s Case*, 58 Mass. App. Ct. 913, 790 N.E.2d 706 (2003). Insurer remained liable for paying benefits employee injured after attempted cancellation if it fails to comply with G.L. c. 175, §187C. *Pillman’s Case*, 69 Mass. App. Ct. 178, 866 N.E.2d 990 (2007).

CHATTEL MORTGAGE

See “FIRE INSURANCE.”

CONSTRUCTION OF POLICY

Ambiguity of Terms. Ambiguous policy terms or provisions will be interpreted against the insurer. *Twombly v. AIG Life Ins. Co.*, 199 F.3d 20 (1st Cir. 1999). But when the terms of insurance policy are unambiguous, the insured is not entitled to such a favorable inference. *Sullivan v. Southland Life Ins.*, 67 Mass. App. Ct. 439, 854 N.E.2d 138 (2006). Term or provision is ambiguous if reasonably susceptible to more than one meaning. *Bird v. Centennial Ins. Co.*, 11 F.3d 228 (1st Cir. 1993); *Nelson v. Cambridge Mut. Fire Ins. Co.*, 30 Mass. App. 671, 572 N.E.2d 594 (1991). Interpretation that fails to give full force and effect to all of the policy’s provisions is rejected. *Sullivan v. Southland Life Ins. Co.*, 67 Mass. App. Ct. 439, 854 N.E.2d 138 (2006). Ambiguity not created just because parties dispute meaning. *Jefferson Ins. Co. v. Holyoke*, 23 Mass. App. 472, 503 N.E.2d 474 (1987). When construing language in an insurance policy, court considers what an objec-

tively reasonable insured reading the relevant policy language would expect to be covered. *Atlantic Mut. v. McFadden*, 413 Mass. 90, 595 N.E.2d 762 (1992).

“Arising out of” in insurance exclusionary provision must be read expansively and is analogous to “but for” causation. *Mass. Property Ins. v. Gallagher*, ___ Mass. App. Ct. ___, ___ N.E.2d ___ (2009).

Automobile Policy. Because language in automobile policy is prescribed by statute, the rule of construction resolving ambiguities against insurers is inapplicable. *Chenard v. Commerce Ins. Co.*, 440 Mass. 444, 799 N.E.2d 108 (2003). *Gomes v. Metropolitan P&C*, 45 Mass. App. 27 (1998). Policy must be interpreted according to “the fair meaning of the language used, as applied to the subject matter.” *Save-Mor Supermarkets, Inc. v. Skelly Detective Serv., Inc.*, 359 Mass. 221, 268 N.E.2d 666 (1971).

ERISA Plans. ERISA does not preempt state law claims by one who is neither employee nor beneficiary of health insurance plan. *Ritter v. Mass. Cas. Ins.*, 493 Mass. 214, 786 N.E.2d 817 (2003). When a Plan Administrator has discretion to determine an applicant's eligibility for benefits, the administrator's decision must be upheld unless “arbitrary, capricious, or an abuse of discretion,” *Doyle v. Paul Revere Life Ins. Co.*, 144 F.3d 181, 183 (1st Cir. 1998). It is the responsibility of the Administrator to weigh conflicting evidence. *Vlass v. Raytheon Company*, 244 F.3d 27 (1st Cir. 2001). Insurer did not act in “arbitrary or capricious” manner in terminating benefits to paraplegic suffering serious muscle strain and pain, and severely limited in his bodily functions. *Brigham v. Sun Life*, 317 F.3d 73 (1st Cir. 2003). Termination held to be arbitrary and capricious in *Cook v. Liberty Life*, 320 F.3d 11 (2003).

Exclusion interpreted in insurance contract is question of law. *Finn v. Nat'l Union Fire*, Mass. 452 Mass. 690, 896 N.E.2d 1272 (2008). If in doubt, court considers what objectively reasonable insured would expect to be covered. *Id.* Burden is on insurer to establish applicability of exclusion. *Id.*

Fire Policy. Policy is statutory and therefore ambiguities are not construed against insurer. *Ben Elfman v. Home Indem.*, 411 Mass. 13, 576 N.E.2d 670 (1991). Policy language implies a duty on the insurer to pay insured's expenses for measures taken to protect property from further damage. *American Comm. Fin. Corp. v. Seneca Ins.*, 66 Mass. App. Ct. 830, 850 N.E.2d 1114 (2006). Policy insuring bank's mortgage interest did not permit recovery in excess of accrual cash value of the building. *Abington Savings v. Rock*, 32 Mass. App. 23, 584 N.E.2d 640 (1992).

Homeowners Policy. Exclusion clauses upheld. *Merrimack Mut. v. Sampson*, 28 Mass. App. 353, 550 N.E.2d 901 (1990) (motor vehicle exclusion clause). *Hahn v. Berkshire Mut.*, 28 Mass. App. 181, 547 N.E.2d 1144 (1989) (excluding recovery by resident relative). *Newton v. Krasnigor*, 404 Mass. 682, 536 N.E.2d 1078 (1989) (excluding expected or intentional damage); *Commerce Ins. Co. v. Theodore.*, 65 Mass. App. Ct. 471, 841 N.E.2d 281 (2006) (injury sustained cutting down tree deemed to be “arising out of a premises”). Unambiguous exclusion language is not made ambiguous by surrounding language. *Nelson v. Cambridge Mut.*, 30 Mass. App. 671, 572 N.E.2d 594 (1991). Legally required deleading does not constitute “physical loss.” *Pirie v. Federal Ins.*, 45 Mass. App. 907, 696 N.E.2d 553 (1998). Carpenter ant damage to house not covered loss “involving collapse.” *Clendenning v. Worcester Ins.*, 45 Mass. App. 658, 700 N.E.2d 846 (1998). “Business pursuits” exclusion barred coverage to employee who poked and injured another employee. *Metropolitan Prop. & Cas. v. Fitchburg Mut.*, 58 Mass. App. Ct. 818, 793 N.E.2d 1252 (2003). Exclusion for bodily injury “expected or intended” bars coverage for harm caused by acts of molestation. *Hingham Mut. Fire Ins. Co. v. Smith*, 69 Mass. App. Ct. 1, 865 N.E.2d 1168 (2007); *Fuller v. First Fin. Ins. Co.*, 448 Mass. 1, 858 N.E.2d 288 (2006) (assault or battery exclusion applies to kidnap and rape); *U.S. Auto. Ass'n v. Doe*, 58 Mass. App. Ct. 743, 792 N.E.2d 708 (2003). Claim for property damage caused by raw sewage back up barred by policy exclusion for “water which backs up through sewers or drains.” *Citrano v. Hingham Mut.*, 58 Mass. App. Ct. 906, 788 N.E.2d 975 (2003). Insurer required to defend in dispute as to the ownership of the condominium's parking space as it equated to a claim for trespass, and limiting construction of the policy's “occurrence” requirement that would exclude intentional acts of trespass was disfavored. *Dilbert v. Hanover Ins.*, 63 Mass. App. Ct. 327, 825 N.E.2d 1071 (2005).

Life Insurance. Conditional receipt providing that applicant must be found insurable, construed and upheld. *Opara v. Mass. Mutual*, 441 Mass. 539, 806 N.E.2d 924 (2004). The doctrine of “substantial compliance,” that failure of literal compliance with the life insurance policy's requirements for a change in ownership will be excused only if the insured did everything that he could do to comply with the policy requirements, is for the benefit of the insurer; an assignor is precluded from relying mechanically on the policy's formalities to defeat a transfer as long as the evidence of the act and the intent is sufficient to confirm the assignment's validity. *Colasanto v. Life Ins. Co. of North Am. v. Farley*, 100 F.3d 203 (1st Cir. 1996). Statement in application for policy may become condition precedent rather than remain a

warranty or representation if it relates to the insurer's intelligent decision to issue policy and is made a condition precedent to recovery under the policy by using the precise words "condition precedent" or their equivalent. *Charles, Henry & Crowley Co. v. Home Ins.*, 349 Mass. 723, 212 N.E.2d 240 (1965). Policy language that insured's representations created condition precedent voiding policy was interpreted a "warranty" requiring proof of intent to deceive or increase in risk of loss, because of language used in application which was incorporated into policy. *Kobico, Inc. v. Pipe*, 44 Mass. App. 103, 688 N.E.2d 1004 (1997). "Substantial compliance" with representations is enough. *Hanover Insur. v. Treasurer and Receiver*, 74 Mass. App. Ct. 725, ___ N.E.2d ___ (2009). G.L. c. 175, §§108(5)(a), requiring a copy of the application be attached to the life policy when issued, applies only to the original policy issuance; statute applies to applications for additional coverage. *John Hancock Mutual Life Ins. Co. v. Banerji*, 447 Mass. 875, 858 N.E.2d 277 (2006).

Medical Malpractice Policy. Malpractice and consortium claims of spouse and child construed as separate and distinct, each subject to separate per claim limits. *Pinheiro v. J.U.A.*, 406 Mass. 288, 547 N.E.2d 49 (1989).

Specific Risk Policies. Liquor liability policy is not a general liability policy. *Jimmy's Diner v. Liquor Liability J.U.A.*, 410 Mass. 61, 571 N.E.2d 4 (1991). Statutorily mandated clause is not subject to usual rule that ambiguities will be construed against insurer. *Ames Privilege Ass'n v. Allendale Mut.*, 742 F. Supp. 700 (D. Mass. 1990). Policy that limited coverage to direct property losses did not cover employee's fraudulently cashing checks from the checking account of separate company of insured. *Atlas Metals, Inc. v. Lumpbermans*, 63 Mass. App. Ct. 738, 829 N.E.2d 257 (2005).

Surety. Suit against insurer to enforce mechanic's lien is limited to amount due for labor and materials; it does not include interest or attorneys' fees. *Nat'l Lumber v. United Cas. & Sur.*, 440 Mass. 723, 802 N.E.2d 82 (2004). Surety bond securing payment for labor and materials does not cover punitive damages. *C&I Steel v. Travelers Cas.*, 70 Mass. App. Ct. 653, 876 N.E.2d 442 (2007).

DAMAGES

See "ARBITRATION"; "AUTOMOBILES."

Charitable Organizations. \$20,000 limit on damages for torts committed in the course of any activity carried on to accomplish directly the charitable purpose of the organization. Limitation does not apply if the tort was committed in the course of activities primarily

commercial in character even though carried on to obtain revenue to be used for charitable purposes. G.L. ch. 231, §85K. A \$20,000 charitable cap applied where claimant injured on hospital's parking lot as lot was not primarily commercial in character. *Conners v. Northeast Hosp. Corp.*, 439 Mass. 469 (2003) (discussing distinction of purpose that separates charitable from for-profit corporations). Hospital defaulted for spoliation of relevant records still protected by \$20,000 charitable cap. *Keene v. Brigham and Women's*, 493 Mass. 223, 786 N.E.2d 824 (2003).

Class Action. Non-residents mere purchase of Massachusetts insurer's policies through their local agents did not satisfy minimum contacts test. *Moelis v. Berkshire Life*, 451 Mass. 483, 887 N.E.2d 214 (2008).

Comparative Negligence. G.L. ch. 231, §85. See "NEGLIGENCE."

Consumer Protection. If the court finds a violation of G.L. ch. 93A, §9 or 11, attorneys fees are awarded; and if the court finds that use or employment of the unfair method of competition or unfair or deceptive act or practice was a willful or knowing violation, the court shall award up to three, but not less than two times actual damages. Attorneys fees may be trebled as part of damages awarded. *Siegel v. Berkshire Life*, 70 Mass. App. Ct. 318, 873 N.E.2d 1202 (2007) If insurer did not act in bad faith or in willful and knowing violation of the Consumer Protection Act, G.L. ch. 93A, then damages for a violation of G.L. ch. 176D in failing to offer a prompt and reasonable settlement are limited to "actual damages," which is the loss of interest on the amount awarded for the period of wrongful withholding. *Yeagle v. Aetna Cas. & Sur. Co.*, 42 Mass. App. 650, 679 N.E.2d 248 (1997). No damages are awarded under G.L. ch. 93A where the act or practice did not cause injury to plaintiff. *Lord v. Commercial Union*, 60 Mass. App. 309 (2004). Where the insurer settles prior to entry of any "judgment," damages for a willful and knowing violation of G.L. ch. 176D and 93A are limited to the interest lost on the money wrongfully withheld by the insurer. *Clegg v. Butler*, 424 Mass. 413, 676 N.E.2d 1134 (1997). Where an insurer is subject to multiple damages under G.L. ch. 93A, the calculation is based on the lower of the judgment or the policy limit. *Cohen v. Liberty Mutual Ins. Co.*, 41 Mass. App. 748, 673 N.E.2d 84 (1996). Insurer's request for release as a condition of payment did not amount to an unfair settlement practice. *Phoenix Home Life v. Brown*, 49 Mass. App. Ct. 657, 732 N.E.2d 901 (2000).

Economic Loss. Purely economic losses are unrecoverable in tort actions absent personal injury or property damage. *R.L. Whipple v. Pondview Excavation*, 71 Mass. App. Ct. 871, 887 N.E.2d 1095 (2008).



Experts. No medical expert witness needed to testify that the injuries claimed were, “with a reasonable degree of medical certainty,” a consequence of the defendants’ negligence”; doctor’s notes in medical records admitted under G.L. c. 233, §79G sufficed. *Bailey v. Cataldo Ambulance Serv.*, 04-P-393 (Mass. App. Ct. August 10, 2005).

Excessive Verdicts. Questions concerning inadequate or excessive damages are initially within discretion of trial judge and should be raised by bringing motion for new trial. *Shafir v. Steele*, 431 Mass. 365, 727 N.E.2d 1140 (2000). Employee’s discrete embezzlements over time were subject to policy’s aggregate limit, not single limit damages, and additional pre-judgment interest. *Chicago Ins. v. Lappin*, 58 Mass. App. Ct. 769 (2003). Insured entitled to recover “intended selling price” of discarded product, less unincurred packaging and delivery costs, under the “actual cash value” provision in the policy. *Interstate Gourmet Coffee Roasters, Inc. v. Seaco Ins.*, 59 Mass. App. Ct. 98, 793 N.E.2d 1278 (2003).

Frivolous Actions. Upon motion of a prevailing party that substantially all of the claims or defenses of another party who was represented by counsel were wholly insubstantial, frivolous and not advanced in good faith, the court shall award an amount representing reasonable counsel fees and other costs and expenses incurred in defending against such claims. G.L. ch. 231, §6F. The award is alternative to an award under the Consumer Protection Statute, G.L. ch. 93A, §9.

Joint Tortfeasors. Right of contribution among them even though judgment has not been recovered against all or any of them. G.L. ch. 231B, §1.

Psychic Injuries. Mental Pain and Suffering. Automobile Insurance. No-fault insurance does not provide for damages for pain and suffering. *Pinnick v. Cleary*, 360 Mass. 1, 271 N.E.2d 592 (1971). However, one may recover damages under personal injury protection coverage if incurred statutory minimum medical expenses or suffered types of injuries enumerated in G.L. ch. 231, §6D. Pain and suffering damages also available in a tort action. *Chipman v. Massachusetts Bay Transp. Auth.*, 366 Mass. 253, 316 N.E.2d 725 (1974). Emotional distress is not a “bodily injury” under homeowner’s policy. *Richardson v. Liberty Mut.*, 47 Mass. App. 698, 716 N.E.2d 117 (1999).

Punitive Damages. The general rule is that punitive damages are not to be allowed in the absence of statutory authorization. *USM Corp. v. Marson*, 392 Mass. 334, 467 N.E.2d 1271 (1984). Punitive damages under G.L. c. 151B are governed by common-law and constitutional principles and may be awarded only for conduct that is

“outrageous, because of the defendant’s evil motive or his reckless indifference to the rights of others.” *Smith v. Bell Atlantic*, 63 Mass. App. Ct. 702, 829 N.E.2d 228 (2005). Statutory remedies include punitive damages for wrongful death, G.L. ch. 229, §2, treble damages for failure to remove lead paint after notice, G.L. ch. 111, §199, and treble damages and attorneys fees for unfair insurance claims practices, G.L. ch. 176D, §3(9).

Collateral Source Rule. Benefits received by plaintiff from nonparty source is collateral to the defendant’s responsibility for plaintiff’s injury and not relevant to defendant’s liability or assessment of damages. See *New York, New Haven & Hartford R.R. Co. v. Leary*, 204 F.2d 461 (1st Cir. 1953); *Jones v. Town of Wayland*, 374 Mass. 249, 373 N.E.2d 199 (1978); *Palochko v. Reis*, 67 Mass. App. Ct. 103, 852 N.E.2d 127 (2006) (insurance policy). Rationale, any windfall should benefit injured party not wrongdoer. See *Jones*, 374 Mass. at 262.

DEATH

See Law Digest Tables.

Presumption of. Common law presumption of death after unexplained absence for more than seven years is recognized. *Loring v. Steineman*, 42 Mass. 204 (1840). There is no reported case dealing with application of this presumption in action on life policy but there seems no reason to suppose that it would not be applicable. *Foster v. United States*, 25 F. Supp. 837 (D. Mass. 1939). Death certificate may be challenged based upon suspicious circumstances. *Minh Tu v. MONY*, 136 F.3d 77 (1998).

Wrongful Death. To recover under G.L. ch. 229, §2, need only prove negligence; “willful, wanton, and reckless” standard under G.L. ch. 231, §85T applies only to personal injury actions, not wrongful death actions. *Zeroulis v. Hamilton Am.*, 46 Mass. App. 912, 705 N.E.2d 1164 (1999).

DISABILITY

Loss of time benefits are regulated to avoid overinsurance. G.L. c. 175, §108. It is as yet unsettled where, if anywhere, line is to be drawn between partial and total disability. Absolute incapacity to work is not necessary in order to constitute total disability. *Norwell v. Hartford Acc. & Indem.*, 358 Mass. 575, 265 N.E.2d 915 (1971). On other hand it has been held by Commissioner that where insured is so far disabled as to reduce his earning capacity by 75% he is not totally disabled. *Mutual Benefit v. Commissioner*, 271 Mass. 365, 171 N.E. 656 (1930). Nor is disability total if he is able to do light work and earn living thereby. *Arabasz v. Metropolitan*, 312 Mass. 474, 45 N.E.2d 279 (1942) but see *Norwell v. Hartford Acc. and Indem. Co.*, 358 Mass. 575, 265



N.E.2d 915 (1971). Disability total if ability to work jeopardizes health. *Rezendes v. Prudential*, 285 Mass. 505, 189 N.E. 826 (1934). If insured does in fact work, though endangering life and health, he cannot recover disability payments. *Kaneb v. Equitable*, 304 Mass. 309, 23 N.E.2d 889 (1939). Workmen's compensation act provides for payments on account of specified disabilities. These provisions have been liberally construed so as to permit recovery for substantial disability. *Fletcher's Case*, 221 Mass. 54, 108 N.E. 1032 (1915).

Actually disabled insured is not entitled to disability payments without furnishing "due proof" required by policy. Fact physical or mental disability prevented furnishing such proof is no excuse. *Sherman v. Metropolitan*, 297 Mass. 330, 8 N.E.2d 892 (1937). Unless by unequivocal language of policy notice and proof are made conditions precedent, it is commencement of disability, not time when proof thereof is submitted, which fixed insurer's obligation as to waiver of premiums. *King v. Prudential Ins.*, 359 Mass. 46, 267 N.E.2d 643 (1971). Insured can introduce evidence of ailments or injury totally and permanently disabling him other than those stated in "proof," in absence of fraudulent intent. *Silvestris v. Metropolitan*, 305 Mass. 323, 25 N.E.2d 727 (1940).

"Due proof" of total disability not complied with by notice intended to put insurer on inquiry. Evidence in some form such as is usual and customary in such cases or as is recognized by law and is calculated to convince or persuade mind of truth of fact alleged is required. *O'Neil v. Metropolitan*, 300 Mass. 477, 15 N.E.2d 809 (1938). If initial proof is inconclusive but reasonably suggests claim may be valid, insurer has duty of further inquiry. *Burns v. Combined Ins. Co.*, 6 Mass. App. 86, 373 N.E.2d 1189 (1978).

Where policy requires insured be under care of physician, care "imports charge, oversight, watchful regard and attention," and sporadic visits not sufficient. *Brickley v. Equitable Life*, 19 Mass. App. 952, 473 N.E.2d 705 (1985).

FINANCIAL RESPONSIBILITY LAW

Owner of motor vehicle must carry insurance or liability bond which provides for payments to insured, members of his household, guests and pedestrians for medical expenses and loss of income up to \$8000 regardless of fault. G.L. ch. 90, §34A. Persons posting bond are deemed insurers under interinsurer subrogation statute. *Lumberman's Mut. Cas. v. Bay State Truck Lease*, 366 Mass. 727, 322 N.E.2d 737 (1975). In addition owner is required to give some security of his responsibility to respond in damages to actions for personal injuries. Although other methods are provided by

statute, one in most common use is for owner to take liability insurance. Minimum limits of policy for each motor vehicle covered is \$20,000. for injury to one person and \$40,000. for injury to two or more persons in one accident. Policy must cover insured and any person responsible for operation of vehicle with consent, express or implied, of insured against liability for claims for bodily injury and death, made by any person except guest riders, and employees of insured or operator who are within Worker's Compensation Act, arising out of operation or maintenance of vehicle on ways of Commonwealth. G.L. ch. 90, §1A, 34A. *Service Mut. v. Aronofsky*, 308 Mass. 249, 31 N.E.2d 837 (1941). Issuer of surety bond to satisfy insured's compulsory liability insurance obligations under G.L. c. 90, §1A not liable for judgment in excess of bond limits. *Commonwealth v. Arbella*, 64 Mass. App. Ct. 901, 831 N.E.2d 389 (2005).

FIRE INSURANCE

"Actual cash value" does not import a single standard for determining the value of insured property; Massachusetts employs the "broad evidence" rule. *O'Connor v. Merrimack Mut. Fire Ins. Co.*, 73 Mass. App. Ct. 205, 897 N.E.2d 593 (2008).

Arson. Where arson suspect filed claim with insurer, refusal to submit to examination under oath barred recovery. *Mello v. Hingham Mut. Fire Ins. Co.*, 421 Mass. 333, 656 N.E.2d 1247 (1995).

Arbitration. Standard form provides that where parties fail to agree upon amount of loss it shall be referred to three disinterested persons who shall find amount. The award in writing by majority of referees is final. *Mulrey v. Employers'*, 312 Mass. 609, 45 N.E.2d 930 (1942). Finding by referees of "no loss or damage" is within scope of reference. *F. & M. Skirt v. Rhode Island Ins.*, 316 Mass. 314, 55 N.E.2d 461 (1944). Reference, unless waived, is condition precedent to recovery, G.L. ch. 175, §99. Insured makes written demand for reference and within ten days company submits three names for referees. Within ten days insured must select one of three and submit three more names from which company, again within ten days, selects one. Two thus chosen select third. If they do not do so within ten days Commissioner on application appoints third person G.L. ch. 175, §100. If either becomes incapacitated or resigns, Commissioner fills vacancy with new referee. G.L. ch. 175, §100A. Service as referee for either party within four months disqualifies referee unless other party consents in writing. G.L. ch. 175, §100B. Reference by company is conclusive as to amount of loss but does not impair company's right to contest liability. *Augenstein v. Insurance Co. of North Am.*, 372 Mass. 30, 360 N.E.2d 320 (1977); G.L. ch. 175, §101E. Referees reduce their



award to writing, sign it in duplicate, and then third referee publishes it by delivering copy to each party, or otherwise. G.L. ch. 175, §101A. Until it has been published by giving notice of it to parties there is no valid award. *Weisman v. Fireman's*, 208 Mass. 577, 95 N.E. 411 (1911). If company refuses insured's offer to submit to reference and denies all liability it thereby waives provision. *Wainer v. Milford Mut.*, 153 Mass. 335, 26 N.E. 877 (1891). But mere failure to name its three nominees when insured writes that he is "ready to proceed under provisions of policy" does not constitute waiver. *Vera v. Mercantile*, 216 Mass. 154, 103 N.E. 292 (1913). Nor is there waiver by company where insured failed to satisfy seasonably condition of policy with respect to appraisal. *Barton v. Auto. Ins.*, 309 Mass. 128, 34 N.E.2d 516 (1941). Where mortgagee files sworn statement on failure of mortgagor to do so he must observe provisions relating to reference. *Union v. Phoenix Ins.*, 196 Mass. 230, 81 N.E. 994 (1907).

In determining amount of loss or damage, referees must reach tentative conclusion as to extent of coverage under policy. *Fox v. Employers*, 330 Mass. 283, 113 N.E.2d 63 (1953).

Validity of award may be impeached on ground of misconduct of referees in action on policy. It is not necessary to bring bill in equity to set it aside. *National v. Goggin*, 267 Mass. 430, 166 N.E. 758 (1929). It has been held that return of award is not, like reference itself, condition precedent to action on policy. *Second Society v. Royal*, 221 Mass. 518, 109 N.E. 384 (1915). Since that case limitation clause of standard form was changed by St. 1916 ch. 150 to permit action within ninety days after award where award is not made within two years after loss occurred. Conceivably this may have changed rule of case just cited. Matter has not yet been passed upon by court.

Assignment. Standard form of policy which must be written in compliance with G.L. ch. 175, §99 provides that assignment of policy shall not be valid except with written consent of insurance company. Assignment is considered to effect novation. *Trustees v. Royal*, 281 Mass. 150, 183 N.E. 264 (1932). However, assignee gets no greater rights than his assignor had. *McCluskey v. Providence*, 126 Mass. 306 (1879); *Commerce Bank & Trust Co. v. Centennial Ins. Co.*, 388 Mass. 289, 446 N.E.2d 73 (1983). If void as to assignor for lack of insurable interest, it is void in hands of assignee. *O'Neill v. Queen Ins.*, 230 Mass. 269, 119 N.E. 678 (1918). Where fire was caused by property owner's wrongful act and insurer paid first mortgagee, received an assignment of that mortgage, and held foreclosure sale, foreclosure eliminated interest of second mortgagee. *The Money*

Store v. Hingham Mut., 430 Mass. 298, 718 N.W.2d 840 (1999).

Binder. Licensed agent has authority to place oral insurance (a binder). Fact no premium has been paid is immaterial as agent could extend credit where rate was not known. Binder covered in standard form of insurance for reasonable time or until policy issued or declined. *Shumway v. Home Fire*, 301 Mass. 391, 17 N.E.2d 212 (1938). Agent inadvertently failed to countersign policy. Held binding oral contract, enforceable in equity. *Parkway v. U.S. Fire*, 317 Mass. 428, 58 N.E.2d 646 (1944).

Cancellation. Policy shall be cancelled at any time at request of insured. Upon demand and surrender of policy, excess premiums shall be refunded. Company may cancel at any time on five days written notice to insured and twenty days written notice to mortgagee, except for non-payment of premium where ten days notice to insured and twenty days notice to mortgagee is required. If excess premiums are not tendered with notice of cancellation, they shall be refunded on demand. G.L. ch. 175, §99 (as amended). Notice of Cancellation must state specific reason for cancellation. After policy has been in effect for 60 days or after 60 days from anniversary date, cancellation is only effective if done for 1) non-payment of premiums, 2) conviction of crime arising out of acts increasing hazard, 3) discovery of fraud or material misrepresentation by insured in obtaining policy, 4) discovery of willful or reckless acts or omission by insured increasing risk insured against, 5) physical change in property making such property uninsurable, 6) determination by commissioner that continuation of policy would violate law. Where reason for cancellation is nonpayment of premiums, insured may avoid effect of cancellation by payment at any time prior to effective date of cancellation. 1979 Acts. ch. 461. Insurer's notice to Agency of insurer's cancellation of Agency does not fulfill insurer's duty of notice to insured. *Brooks v. Hanover Ins.*, 23 Mass. App. 992, 504 N.E.2d 1075 (1987). Although agent regularly advanced payment of premiums and was content with insured's delay in reimbursing his agent was not estopped by this conduct from canceling insurance for failure to pay premiums due after oral and written notice to insured that he intended to do so. *Rozen v. Cohen*, 350 Mass. 231, 214 N.E.2d 451 (1966); *R&F Micro Tool v. General American*, 23 Mass. App. 694, 505 N.E.2d 539 (1987).

Insurer in civil action can recover proceeds paid for fire insurance policy where owner-insured convicted of arson and, under doctrine of collateral estoppel, insurer need not relitigate civil trial issue of whether owner-insured set fire. *Aetna v. Niziolek*, 395 Mass. 737, 481 N.E.2d 1356 (1985). This changes prior rule of *Massa-*

chusetts Property v. Norrington, 395 Mass. 751, 481 N.E.2d 1364 (1985).

Chattel Mortgage. Where policy contains warranty that property insured is sole property of insured existence of chattel mortgage will make policy void. *Harvey v. Pawtucket Mut.*, 250 Mass. 164, 145 N.E. 35 (1924). So also where insured has purchased under conditional bill of sale. *Pents v. Home Fire*, 263 Mass. 262, 160 N.E. 807 (1928).

Co-Insurance. Rider in fire policy requiring insured to insure to 80 per cent and be insurer to extent of deficit is not invalid under standard form policy requirements. *Quinn v. Fire Ass'n*, 180 Mass. 560, 62 N.E. 980 (1902).

Contribution. Standard form provides that if there be other insurance recovery shall be limited to that proportion of loss which sum insured by policy bears to total amount of insurance. G.L. ch. 175, §99. In determining amounts contributed where there are both compound and specific policies, compound policy is applied to several items covered in proportion to their value. Then each insurer contributes in proportion which his policy bears to entire insurance upon property insured. Compound and specific policies contribute together. *Taber v. Continental*, 213 Mass. 487, 100 N.E. 636 (1913). In determining amount of contribution no consideration can be given to any amount actually paid by one insurer in excess of sum which he might be required to contribute. *Austin v. Dixie Fire*, 232 Mass. 214, 122 N.E. 382 (1919). Where clauses conflict, both insurers must contribute equally. *Mission Ins. Co. v. U.S. Fire*, 401 Mass. 492, 517 N.E.2d 463 (1988).

Construction. See "CONSTRUCTION OF POLICY."

Coverage. Building formerly used as inn or tourist home, which at time of issuance of policy was occupied for dwelling purposes only, by insured, could be found to be single family dwelling within meaning of policy. *Bedrosian v. Eureka Security Fire*, 318 Mass. 713, 63 N.E.2d 905 (1945).

No coverage for loss occurring after premises vacant 60 consecutive days, G.L. ch. 175, §99 while coverage was in effect. *Pappas Enterprises, Inc. v. Commerce & Ind. Ins. Co.*, 422 Mass. 80, 661 N.E.2d 81 (1996). "Vacancy Exclusion" applied, even though owner did repair work at premises during day. *Langill v. Vermont Mut. Ins. Co.*, 268 F.3d 46 (1st Cir. 2001). Letter from insurer to its agency regarding security measures needed if building was left vacant, did not constitute waiver of policy provision. *Aguiar v. Generali Ins.*, 47 Mass. App. Ct. 687, 715 N.E.2d 1046 (1999).

Friendly Fires. Supreme Court has said distinction should be made between fire intentionally lighted and

maintained for useful purpose in connection with occupation of building and fire which starts from such fire without human agency in place where fires are never lighted or maintained. *Ellis v. Norwich*, 259 Mass. 450, 156 N.E. 696 (1927).

Ownership. A & B owners as tenants in common of dwelling house damaged by fire. Policy issued in name of A. Action at law by A & B on policy cannot be maintained. Amendment allowed permitting A to recover to extent of his interest. *Ritson v. Atlas*, 272 Mass. 73, 171 N.E. 448 (1930). Bill in equity to reform policy on ground of mutual mistake dismissed. *Ritson v. Atlas*, 279 Mass. 385, 181 N.E. 393 (1932). Where form of contract joint and legal interest in subject matter vested in two jointly, both should join in bringing action on contract. Exception where joint interest has been severed by one of parties making settlement with defendant. And if one joint party makes settlement which is fraud upon other, in which fraud insurer participates, other may bring bill in equity in his name alone to recover on joint contract. Where joint policy to husband and wife, act of husband in burning property prevents any recovery under policy even if wife innocent. It is not as if payable "as their interest may appear at time of loss." *Kosior v. Continental*, 299 Mass. 601, 13 N.E.2d 423 (1938). Words "as their interest may appear" refer not to existing interest but as of time of loss. *Finegan v. Prudential*, 300 Mass. 147, 14 N.E.2d 172 (1938). *But see Baker v. Commercial Union*, 382 Mass. 347, 416 N.E.2d 187 (1981), permitting insured to recover where fire set by mentally ill wife, and questioning *Kosior* holding. When mortgagee forecloses and takes full title to property, it is the "owner" and can no longer recover as "mortgagee." *Ideal Fin. Svcs, Inc. v. Zichelle*, 52 Mass. App. Ct. 50, 750 N.E.2d 508 (2001).

Standard form of policy. G.L. ch. 175, §99 contains what is known as standard form of policy. Interest provisions of statute take precedence over nonconforming policy provision. *Church of Christ v. St. Paul Ins.*, 22 Mass. App. 407, 494 N.E.2d 45 (1986). Shorter two year statute of limitations applies to G.L. ch. 93A and 176D claims that are based on a policy covered by §99. *Nunheimer v. Continental Ins.*, 68 F. Supp. 2d 75 (D. Mass. 1999).

Statute does not prevent parties from making temporary oral contract of insurance pending issuance of policy. *McQuaid v. Aetna*, 226 Mass. 281, 115 N.E. 428 (1917). Policy issued in violation of statute is nevertheless binding on insurer. *Austin v. Dixie Fire*, 232 Mass. 214, 122 N.E. 382 (1919). It has been held that where policy issued is not on standard form policy as issued governs even though its issuance was a violation of statute. *Hewins v. London*, 184 Mass. 177, 68 N.E. 62

(1903). Since that case G.L. ch. 175, §193 was passed and provides if policy is issued in violation of statutes it shall be binding on company and “rights, duties and obligations of parties thereto shall be determined by this chapter.” Where two policies are taken out one after other without assent of insurer obvious complication arises as to “other insurance” clause. If no assent is obtained from either insurer second policy is void. If second insurer assents but not first, first policy is avoided. If first assents but not second, then, of course, second is avoided. *Thomas v. Builders*, 119 Mass. 121 (1875); *Smith v. Middlesex*, 228 Mass. 301, 117 N.E. 331 (1917); *Koeski v. Springfield*, 234 Mass. 23, 124 N.E. 476 (1919). *Compare Hayes v. Milford*, 170 Mass. 492, 49 N.E. 754 (1898).

No insurer or insurer’s employee subject to civil or criminal liability for obtaining from or furnishing to law enforcement authorities investigative information. G.L. ch. 148, §32.

FRAUD

See “AGENTS AND BROKERS”; “REPRESENTATIONS AND WARRANTIES.”

Insurer who issues settlement check to claimant’s counsel, who forges claimant’s endorsement, is not liable. *Terry v. Kemper Ins.*, 390 Mass. 450, 456 N.E.2d 465 (1983).

Insurer entitled to recover under G.L. 93A for insured’s fraud. *Binder v. Jewelers Mut.*, 28 Mass. App. 459, 552 N.E.2d 568 (1990). See *International Fidelity Ins. v. Wilson*, 387 Mass. 841, 443 N.E.2d 1308 (1983).

GUEST CASES

See “AUTOMOBILES”; “LIABILITY INSURANCE.”

Social host has no duty to prevent intoxicated guest from injuring himself. *Sampson v. MacDougall*, 60 Mass. App. 394, 802 N.E.2d 602 (2004); *Manning v. Nobile*, 411 Mass. 382, 582 N.E.2d 942 (1991); *Hamilton v. Ganius*, 417 Mass. 666, 632 N.E.2d 407 (1994) (underage drinker). Social host has no liability to third party for accident following a “B-Y-O-B” party, where host did not supply or serve liquor. *Ulwick v. DeChristopher*, 411 Mass. 401, 582 N.E.2d 954 (1991). Social host may have a duty to protect his guest from criminal acts of another guest where this can be done without risk to host. *Doe v. Walker*, 193 F.3d 42 (1st Cir. 1999). Employer liable only if employer furnishes and controls the alcohol consumed by the employee. *Lev v. Beverly Enterprises*, 74 Mass. App. Ct. 413, 907 N.E.2d 1114 (2009).

HOSPITALS

See “DAMAGES.”

Evidence-Records. The statutory hospital records exception to the hearsay rule applies only to the portion of the record that relates to treatment and medical history; nothing shall be admissible as evidence of liability. G.L. ch. 233, §79. But that does not bar admission of results of tests ordered for purposes of treatment. *Commonwealth v. Riley*, 22 Mass. App. 698, 497 N.E.2d 651 (1986).

Liens. Hospital has a lien for treatment of accident cases. G.L. ch. 111, §70A. Lien statute does not require lien holder to pay any portion of plaintiff’s fees and costs incurred in recovering judgment from third party. *Pierce v. Christmas Tree Shops, Inc.*, 429 Mass. 91, 706 N.E.2d 633 (1999).

HUSBAND AND WIFE

See Law Digest Tables.

Interspousal Immunity. Claims for personal injuries between married persons decided on case-by-case basis. *Brown v. Brown*, 381 Mass. 231, 409 N.E.2d 717 (1980). No immunity for automobile accidents, *Lewis v. Lewis*, 370 Mass. 619, 351 N.E.2d 526 (1976), nor for any tortious conduct after entry of judgment nisi in divorce. *Nogueria v. Nogueria*, 388 Mass. 79, 444 N.E.2d 940 (1983).

INFANTS

See “AUTOMOBILES, Age”; “LIABILITY INSURANCE, Violations of Law”; “NEGLIGENCE, Age” and “LIMITATION OF TIME FOR COMMENCEMENT OF ACTION.”

A child, born alive, cannot maintain a tort action against mother for personal injuries incurred prior to birth due to mother’s negligence. *Remy v. MacDonald*, 440 Mass. 675, 801 N.E.2d 260 (2003).

INLAND MARINE

States have the power to regulate marine insurance. *Saunders v. Austin W. Fishing Corp.*, 352 Mass. 169, 224 N.E.2d 215 (1967); *INA v. Comm’r of Ins.*, 334 Mass. 108, 134 N.E.2d 423 (1956).

LIABILITY INSURANCE

Allocation of Liability. Under standard CGL policy, where loss occurred over more than one year, loss is allocated on a pro-rata basis by the time-on-the-risk method, in the absence of evidence more closely approximating the actual distribution of property damage,



with policyholder responsible for any uninsured periods, and liable for per-occurrence self-insured retention under each policy. *Boston Gas Co. v. Century Indem. Co.*, 454 Mass. 337, ___ N.E.2d ___ (2009).

Although “all risk” policy excludes coverage for losses caused by “conversion, embezzlement, or secretion,” claim for parts stolen from boat was covered by “missing parts” clause. *Schiappa v. Nat’l Marine Underwriters*, 56 Mass. App. Ct. 161, 775 N.E.2d 791 (2002).

Arbitration. Insured may arbitrate underinsurance claim before settling with tortfeasors. *Aetna v. Faris*, 27 Mass. App. 194, 536 N.E.2d 1097 (1989).

Compromise of Claims. Where policy provides that insurer has right to control defense of claims, insurer is free to compromise on any basis it sees fit in good faith without consulting insured. *Service Mut. v. Aranofsky*, 308 Mass. 249, 31 N.E.2d 837 (1941). Insured is bound by conduct of insurer’s investigator in inducing injured person to let statute of limitations run by promising compromise. *Hayes v. Gessner*, 315 Mass. 366, 52 N.E.2d 968 (1944). But insurer’s investigator is not agent of insured for purpose of receiving statutory notice required to establish liability covered by policy. *Rooney v. Ludlow Mfg.*, 330 Mass. 340, 113 N.E.2d 838 (1953). No action lies against insurer for refusing to settle unless, without excuse, it refuses to defend or defends negligently. *Damiano v. National*, 316 Mass. 626, 629, 56 N.E.2d 18 (1944). Insurer, where claim exceeds policy limits must decide whether or not to settle within limits or try case, as it would if no policy limits were applicable. Insurer must advise insured of adverse interest with respect to policy limits. *Murach v. Massachusetts Bonding*, 339 Mass. 184, 158 N.E.2d 338 (1959). Insurer may pay entire amount of policy to one person injured in accident and another person injured in same accident has no such right in this fund that he can prevent it. *Bruyette v. Sandini*, 291 Mass. 373, 197 N.E. 29 (1935). Insured has no right of action against insurer if his rights in another and independent proceeding are impaired as consequence of settlement effected by insurer. *Long v. Union*, 277 Mass. 428, 178 N.E. 737 (1931). But judgment entered by agreement in motor vehicle case does not bar rights of insured in another action brought by him unless he personally has signed agreement for judgment, G.L. ch. 231, §140A. Insurer may refuse to compromise, if it acts in good faith, even though ultimate result is to force insured to contribute to judgment. *Davidson v. Maryland*, 197 Mass. 167, 83 N.E. 407 (1908).

Contribution. Statute provides for contribution among joint tortfeasors. G.L. ch. 231B. In determining pro-rata shares (a) relative degrees of fault shall not be

considered (b) collective liability of some as group may be single share and (c) principles of equity applicable to contribution generally shall apply. Provision is made for subrogation of insurer and for effect of release or covenant not to sue. Contribution denied unless potential contributor is directly liable to injured person. *O’Mara v. H. P. Hood & Sons Inc.*, 359 Mass. 235, 268 N.E.2d 685 (1971); See *Liberty Mut. v. Westerlind*, 374 Mass. 524, 373 N.E.2d 957 (1978). Between insurers, coverage on car is primary and coverage on driver is excess where policies contain identical “other insurance” clauses. *Transamerica v. Norfolk*, 361 Mass. 144, 279 N.E.2d 686 (1972). Spouse may be impleaded for contribution. *Hayon v. Coca Cola*, 375 Mass. 644, 378 N.E.2d 442 (1978). Insurer’s assignment to insured of its right to contribution against other insurers is valid. *Rubenstein v. Royal Ins.*, 45 Mass. App. 244, 696 N.E.2d 973 (1998).

Construction. School’s multiple negligent acts prior to student’s rampage constitute but a single “occurrence.” *RLI Ins. Co. v. Simon’s Rock Early College*, 54 Mass. App. Ct. 286, 765 N.E.2d 247 (2002). CGL’s policy’s definition of “temporary worker” is restricted to one who is “furnished to” the insured and hence require[s] something more than asking a relative if they would work for a few days. *Monticello Ins. Co. v. Dion*, 65 Mass. App. Ct. 46, 836 N.E.2d 1112 (2005).

Co-operation of Insured. Deliberate and willful falsification of material facts by insured, constitutes breach of co-operation clause. *Williams v. Travelers*, 330 Mass. 476, 115 N.E.2d 378 (1953). Insured’s failure to produce financial records pertinent to claim barred recovery. *Rymsha v. Trust Ins. Co.*, 51 Mass. App. Ct. 414, 746 N.E.2d 561 (2001). *Hanover Ins. v. Cape Cod Custom Home Theater*, 72 Mass. App. Ct. 331, 891 N.E.2d 703 (2008) (Nonresponsive exam and late production of records). Insured’s invoking rights under Fifth Amendment violated “cooperation” clause and relieved homeowner insurer of liability under policy. *Metlife Auto & Home v. Cunningham*, 59 Mass. App. 583, 797 N.E.2d 18 (2003).

Coverage. Insurer must indemnify insured and any person responsible for operation of insured’s vehicle with express or implied consent of insured. G.L. ch. 90, §34A. Policy provision entitling insurer to reimbursement from insured for any payment to employee of insured, where no workmen’s compensation insurance, held valid. *Service Mut. v. Aronofsky*, 308 Mass. 249, 31 N.E.2d 837 (1941). Anyone operating motor vehicle with consent of insured is “beneficiary” of policy. *Adams v. American Employers*, 292 Mass. 260, 198 N.E. 147 (1935). There can be no recovery by insured or his estate under compulsory coverage of insured’s own policy, however, for injuries or death though another is op-

erating vehicle, *Oliveria v. Preferred*, 312 Mass. 426, 45 N.E.2d 263 (1942), but recovery may be available under broader language of optional coverages. *Transamerica v. Norfolk & Dedham Mut.*, 361 Mass. 144, 279 N.E.2d 686 (1972). Recovery will be allowed for death of insured's wife. *Arnold v. Jacobs*, 316 Mass. 81, 54 N.E.2d 922 (1944). Coordination-of-benefits clauses in insurance policies do not violate public policy. *Cody v. Connecticut Life*, 387 Mass. 142, 439 N.E.2d 234 (1982). *Metropolitan P&C v. Blue Cross*, 451 Mass. 389, 885 N.E.2d 825 (2008) (health insurance secondary to Med-Pay auto coverage). Commercial General Liability policy covering "insured contract" applies only when insured expressly assumes an obligation to another party by contract; there is no coverage for "implied" indemnity obligation. *Garnet Constr. Co. v. Acadia Ins.*, 61 Mass. App. 705, 814 N.E.2d. 23 (2004).

Term "property damage" in general liability policy includes loss of use of property. *Continental v. Gilbane Building Co.*, 391 Mass. 143, 461 N.E.2d 209 (1984). Economic loss incident to inability to exploit property profitably not a "loss of use of tangible property" under property damage provision. *Smart Foods v. Northbrook Property*, 35 Mass. App. 239, 618 N.E.2d 1365 (1993). Policy covering "vacant land" did not cover property with abandoned structures. *Citation Ins. v. Gomez*, 426 Mass. 379, 688 N.E.2d 951 (1998). A "consultants errors and omissions" policy also covered errors or omissions that amounted to a breach of warranty in the furnishing of consulting services. *USM v. First State*, 37 Mass. App. 471, 641 N.E.2d 115 (1994), *aff'd*, 420 Mass. 865 (1995).

Under Massachusetts auto policy loss-of-consortium claimant is entitled to separate "per person" recovery within "per accident" limit. *Bilodeau v. Lumberman's Mut. Cas. Co.*, 392 Mass. 537, 467 N.E.2d 137 (1984). Exclusion of liability for violations of alcohol statute not applicable where violation is asserted only as evidence of insured's negligence. *Newell-Blais Post v. Shelby Mut.*, 396 Mass. 633, 487 N.E.2d 1371 (1986). Employer's intentional sexual discrimination not "occurrences" under general liability policy. *Rideout v. Crum & Foster Comm'l Ins.*, 417 Mass. 757 (1994). Where an insured knows that there is a substantial probability that it will suffer or has already suffered a loss when it purchases the policy, the loss is uninsurable. *SCA v. Transportation Ins.*, 419 Mass. 528, 646 N.E.2d 394 (1995).

Death Statute. Recovery no longer limited to \$100,000. G.L. ch. 229 §2. *Compare Doyon v. Travelers*, 22 Mass. App. 336, 493 N.E.2d 887 (1986).

Personal injuries sustained by tripping on rope negligently dropped on sidewalk while unloading truck, are not within coverage. *Perry v. Chipouras*, 319 Mass. 473,

66 N.E.2d 361 (1946). But automobile property damage liability policy held to cover suit by owner of house destroyed by fire when insured's oil truck pumped more oil into cellar than tank would hold. *General Acc. v. Hanley*, 321 Mass. 72, 72 N.E.2d 1 (1947).

Policy providing that "use of motor vehicle for purposes stated includes loading and unloading thereof" covers "complete operation" of unloading including delivery of goods to purchaser. *F. W. Woolworth v. Lumbermen's*, 355 Mass. 211, 243 N.E.2d 919 (1969). Auto insurer, not general liability insurer, liable for transport company dropping elderly woman while loading her into vehicle. *Travelers v. Aetna*, 410 Mass. 1002, 571 N.E.2d 1383 (1991). Negligence of persons not connected to the automobile but whose acts are necessary to the loading process are held to be using the vehicle and are additional unnamed insureds. *Am. Home Assur. Co. v. First Spec. Ins.*, 73 Mass. App. Ct. 1, 894 N.E.2d 1167 (2008). Recovery for explosion of bottled gas four hours after installation was upheld. *LaPointe v. Shelby Mut.*, 361 Mass. 558, 281 N.E.2d 253 (1972). See *Liberty Mut. v. Agrippino*, 375 Mass. 108, 375 N.E.2d 702 (1978).

Disclaimer. In non-compulsory coverage, where insurer undertakes defense of action it may withdraw and disclaim if insured refuses to cooperate in defense. *Goldberg v. Preferred*, 279 Mass. 393, 181 N.E. 235 (1932). Such disclaimer is reasonable even when made on eve of trial. *Goldstein v. Bernstein*, 315 Mass. 329, 52 N.E.2d 559 (1943), or during trial before auditor. *Sanborn v. Brunette*, 315 Mass. 231, 52 N.E.2d 384 (1943), but not after verdict is rendered, *Allen v. Atlantic National*, 350 Mass. 181, 214 N.E.2d 28 (1966). Failure of insured to "immediately forward" summons to company is defense. *Potter v. Great American*, 316 Mass. 155, 55 N.E.2d 198 (1944). Disappearance of insured without notifying insurer of new address or furnishing some method by which he could be reached constitutes lack of cooperation and justifies insurer in disclaiming liability after it failed by reasonable methods to secure attendance of insured as witness at trial. *Peters v. Saulinier*, 351 Mass. 609, 222 N.E.2d 871 (1967). Lack of insurable interest on part of insured and misrepresentation of material facts with intent to deceive by insured constitute basis for disclaimer by insurer. *Cassidy v. Liberty Mutual*, 338 Mass. 139, 154 N.E.2d 353 (1958). Insurer has duty to exercise diligence and good faith in obtaining cooperation of insured. *Imperiali v. Pica*, 338 Mass. 494, 156 N.E.2d 44 (1959).

While insurer may investigate to determine whether case comes within contract of insurance, if it gets information warranting disclaimer it cannot continue with defense to verdict and then later withdraw, *Searls v. Standard Acc.*, 316 Mass. 606, 56 N.E.2d 127 (1944),

unless it continues defense under reservation of rights. *Salonen v. Paanenen*, 320 Mass. 568, 71 N.E.2d 227 (1947).

Insurer cannot defend under reservation of rights and at same time insist upon control of defense. *Three Sons Inc. v. Phoenix Ins.*, 357 Mass. 271, 257 N.E.2d 774 (1970). If insurer without right refuses to defend, insured need not wait for entry of judgment against him; he may declare upon policy and assign insurer's refusal to defend as breach. *Ratner v. Canadian Universal Ins.*, 359 Mass. 375, 269 N.E.2d 227 (1971).

Direct Action Against Insurer. Where insurer elects to repair damaged property, insured may recover actual damages caused by insurer's failure to restore the property, and damages under G.L. ch. 93A and 176D. *Williams v. Gulf Ins. Co.*, 39 Mass. App. 432, 657 N.E.2d 240 (1995).

Duty to Defend. Insurer has duty to defend if allegations of complaint are "reasonably susceptible" of interpretation that they state or adumbrate claim covered by policy terms. *Simplex Tech. v. Liberty Mut.*, 429 Mass. 196, 706 N.E.2d 1135 (1999); *Lusalon v. Hartford*, 400 Mass. 767, 511 N.E.2d 595 (1987); *Continental v. Gilbane Building Co.*, 391 Mass. 143, 461 N.E.2d 209 (1984). *Utica Mut. v. Fontneau*, 70 Mass. App. Ct. 553, 875 N.E.2d 508 (2007). Insurer is not subject to additional liability for failure to defend claims that insurer reasonably, but incorrectly, concluded were not covered. *Polaroid v. Travelers*, 414 Mass. 747, 610 N.E.2d 912 (1993). No duty to defend County Commissioners when inmate sued them for voting to deny inmate good time credits, as policy excluded coverage for claims "arising out of...the operation of adult and juvenile detention facilities." *County of Barnstable v. American Fin. Corp.*, 51 Mass. App. Ct. 213, 744 N.E.2d 1107 (2001). But insurer should file declaratory judgment action when it disclaims on account of fraud. *Espinal v. Liberty Mut.*, 47 Mass. App. 593, 714 N.E.2d 845 (1999).

Insured under a homeowner's policy is entitled to reasonable attorney's fees and expenses incurred in successfully establishing the insurer's duty to defend under the policy. *Shamban v. Worcester Ins.*, 47 Mass. App. Ct. 10, 710 N.E.2d 627 (1999). An insurer that breaches its duty to defend bears the burden of allocating a judgment against its insured between covered and noncovered claims. *Palermo v. Fireman's Fund Ins. Co.*, 42 Mass. App. 283, 676 N.E.2d 1158 (1997). Impleaded homeowner's insurer had no duty to investigate or defend assault and battery case where allegations in Complaint describe with precision intentional conduct which is expressly excluded from coverage under policy. *Terrio v. McDonough v. Hartford Fire Ins. Co.*, 16 Mass.

App. 163, 450 N.E.2d 190 (1983); *Timpson v. Trans-america Ins. Co.*, 41 Mass. App. 344, 669 N.E.2d 1092 (1996). The expansive term "arising out of assault and/or battery" excludes coverage for injuries caused by assault and battery, regardless of the specific legal theory advanced. *First Financial Ins. Co. v. LaRosa*, 49 Mass. App. Ct. 901, 726 N.E.2d 978 (2000).

Insurer has no duty to defend where no suit yet exists, only letters from state agency. *Ryan v. Royal Ins.*, 915 F.2d 731 (1st Cir. 1990). No duty under liability policy to defend insured who breached "voluntary payment" clause by agreeing to assume liability for clean up of contaminated site, before notifying insurer. *Atlas Tack Corp. v. Liberty Mut. Ins.*, 48 Mass. App. Ct. 378, 721 N.E.2d 8 (1999). Where there is no judgment, duty to defend is not satisfied by tendering policy limit without obtaining release of insured from at least one claimant. *Aetna v. Sullivan*, 33 Mass. App. 154, 601 N.E.2d 473 (1992); *Davis v. Allstate*, 434 Mass. 174, 747 N.E.2d 141 (2001). No duty to defend complaint alleging sexual misconduct toward minor, as intent to injure inferred as a matter of law. *Doe v. Liberty Mutual*, 423 Mass. 366 (1996). No duty to defend for rape caused by negligent failure to provide security and negligent service of liquor to intoxicated person. *Bagley v. Monticello Ins.*, 430 Mass. 454, 720 N.E.2d 813 (1999). (discussing applicable principles). Insurer defending under a reservation of rights to later disclaim coverage, that settles a medical malpractice claim to protect its own interests, without the insured's authorization, is not entitled to reimbursement. *Medical Malpractice JUA v. Goldberg*, 425 Mass. 46, 680 N.E.2d 1121 (1997). Availability of uninsured motorist benefits did not trigger duty to defend insured against action by passengers where policy expressly excluded coverage for injuries to guest occupants. *Clerger v. Commerce Ins.*, 46 Mass. App. 11, 702 N.E.2d 820 (1998). Insurer had duty to defend insured's passenger who grabbed steering wheel in response to perceived emergency. *Hingham Mut. v. Niagra Fire*, 45 Mass. App. 617, 700 N.E.2d 288 (1998). Insurer breached duty to defend where plaintiff alleged insured's violent attack was due to his negligent failure to take medication; "criminal acts" exclusion was not applicable as insured was not convicted of any crime. *Swift v. Fitchburg Mut. Ins.*, 45 Mass. App. 617, 700 N.E.2d 288 (1998). Insurer may have duty to defend even where it has no duty to indemnify. *Ruggerio Ambulance Svc. v. National Grange Mut.*, 430 Mass. 794, 724 N.E.2d 295 (2000).

Rights of Injured Party Against Insurer. Person having claim against insured which is covered by policy may proceed directly against insurer after judgment against insured. G.L. ch. 175, §113. Where insured, after jury verdict, assigns to the injured party the injured's rights against insurer for unfair settlement practices, in-



surer may not intervene as of right to pursue appeal of jury verdict. *Bolden v. O'Conner Cafe*, 50 Mass. App. Ct. 56, 734 N.E.2d 726 (2000).

Liability Between Insurers - Primary. Where only one of two policies had an "escape" clause, that insurer was not liable for loss insured by another valid policy, there was no obligation to contribute. *Aetna v. Continental Cas.*, 413 Mass. 730, 604 N.E.2d 30 (1992); *USF&G v. Hanover Ins.*, 417 Mass. 651, 632 N.E.2d 402 (1994). Primary insurer not liable to excess insurance carrier for failing to settle claim within primary insurer's limits unless no reasonable insurer would have failed to settle the case. *Hartford Cas. v. N.H. Ins.*, 417 Mass. 115, 628 N.E.2d 14 (1994). Where the "other insurance" clauses of two excess insurers are mutually repugnant, both must contribute in equal shares. *Aetna Cas. & Sur. v. Home Ins.*, 44 Mass. App. 218, 689 N.E.2d 1355 (1998). Where the primary insurer had exhausted its policy limits, excess carrier has the duty to defend the insured on a partially settled claim. *U.S. Fire Ins. v. Worcester Ins.*, 62 Mass. App. Ct. 799, 821 N.E.2d 91 (2005).

Insolvency of Insurer. Excess indemnity coverage drops down to cover consequences. *Gulezian v. Lincoln Ins.*, 399 Mass. 606, 506 N.E.2d 123 (1987), but not if excess policy unambiguously provides otherwise. *Northmeadow Tennis Club v. Northeastern Fire Ins. Co.* 26 Mass. App. 329, 526 N.E.2d 1333 (1988); *M.B.T.A. v. Allianz*, 413 Mass. 473, 597 N.E.2d 439 (1992). Reinsurer/creditor may apply amounts it owes insolvent insurer as offsets to amounts insolvent insurer owes to it without violating G.L. ch. 175, §180F. *Comm'r of Ins. v. Munich Am. Reins.*, 429 Mass. 140, 706 N.E.2d 694 (1999).

Interest. Insurer is liable for postjudgment interest on entire judgment until it unconditionally offers to pay the limits of its policy. *Davis v. Allstate Ins. Co.*, 434 Mass. 174, 747 N.E.2d 141 (2001).

Exclusions. Pollution exclusion for other than "sudden and accidental" is unambiguous and requires abrupt and accidental discharge. *Liberty Mut. v. SCA*, 412 Mass. 330, 588 N.E.2d 1346 (1992); *Lumbermen's Mut. Cas. v. Belleville Indus.*, 407 Mass. 675, 555 N.E.2d 568 (1990). The policyholder bears the burden of proving that contamination was caused by a "sudden and accidental" release. *Highlands Ins. Co. v. Aerovox*, 424 Mass. 226, 676 N.E.2d 801 (1997). A pollution exclusion clause does not apply to carbon monoxide emitted from a malfunctioning oven. *Western Alliance v. Gill*, 426 Mass. 115, 686 N.E.2d 997 (1997). Discharges of pollutants caused by water used to put out fire were not "accidental" and recovery barred by the "pollution exclusion." *Employers Ins. of Wausau v. George*, 41 Mass. App. 719, 673 N.E.2d 572 (1996). The exclusion for

"impaired property" arising out of a "defect, deficiency, inadequacy or dangerous condition" excludes a claim for loss of use of a house caused by painter's faulty workmanship that left house contaminated with lead paint. *Dorchester Mut. Fire Ins. Co. v. First Kostas Corp.*, 49 Mass. App. Ct. 651, 731 N.E.2d 569 (2000).

Phrase "arising out of" as used in exclusionary clauses of policies, must be read expansively, incorporating a greater range of causation than that encompassed by proximate cause under tort law. *Bagley v. Monticello Ins.*, 430 Mass. 454, 720 N.E.2d 813 (1999). Homeowner's policy exclusion for liability for bodily injury "arising out of" premises owned by insured but not insured under policy did not exclude personal liability coverage for dog bite occurring on such premises. *Callahan v. Quincy Mut. Fire Ins. Co.*, 50 Mass. App. Ct. 260, 736 N.E.2d 857 (2000).

"Known Loss" doctrine only applies when insured actually knows on or before effective date of policy either that a loss has occurred or is substantially likely to occur. Insurer has burden of proving insured's actual knowledge. *United States Liab. Ins. Co. v. Selman*, 70 F.3d 684 (1st Cir. 1995). Doctrine precluded coverage under general liability policy where insured filed suit against contractor for environmental clean up costs prior to policy's effective date. *Beaudette, Inc. v. Sentry Ins.*, 94 F. Supp. 2d 77 (D. Mass. 1999). Loss resulting from negligently spilled fuel oil on abutting property is covered by homeowner's policy. *Jussim v. Massachusetts Bay Ins. Co.*, 33 Mass. App. 235, 597 N.E.2d 1379 (1992). Exclusion for damage to "property owned" by insured did not preclude coverage for cost of removing pollutants from "property formerly owned" by insured. *Tufts Univ. v. Commercial Union*, 415 Mass. 844, 616 N.E.2d 68 (1993). Pollution Exclusion clause does not exclude the costs of remedial efforts on insured's property to prevent further contamination of adjacent property. *Hakim v. Massachusetts Insurers' Insolvency Fund*, 424 Mass. 275, 675 N.E.2d 1161 (1997); *Rubenstein v. Royal Ins.*, 44 Mass. App. 842, 694 N.E.2d 381 (1998). Lead in paint and plaster is not a pollutant; insurer must defend landlord. *Atlantic Mut. v. McFadden*, 413 Mass. 90 (1992). Professional liability exclusion in general liability policy does not exempt from coverage claims of ordinary negligence. *Camp Dresser & McGee, Inc. v. Home Ins.*, 30 Mass. App. 318, 568 N.E.2d 631 (1991). Exclusion for release of contaminants precluded recovery for damage to home directly caused by oil leaking from malfunctioning oil burner. *Hanover v. Smith*, 35 Mass. App. 417, 621 N.E.2d 382 (1993). Governmental action exclusion applies to damage caused by police executing search warrant. *Alton v. Manufacturers*, 416 Mass. 611, 624 N.E.2d 545 (1993). Under Homeowner's policy, baby-sitting is a "business enterprise," and hence



there is no coverage for injury to baby. *Commerce Ins. Co. v. Finnell*, 41 Mass. App. 701, 673 N.E.2d 71 (1996). A “faulty workmanship exclusion” excluded coverage for replacement of property damaged by subcontractor. *Donovan v. Commercial Union*, 44 Mass. App. 596, 692 N.E.2d 536 (1998).

Willful conduct injuring “guest occupant,” not “accident” within coverage of liability policy; wanton or reckless conduct is. *Sheehan v. Goriansky*, 321 Mass. 200, 72 N.E.2d 538 (1947). Injuries caused by assault and battery are not “accidental bodily injuries,” *Bowen v. Lloyds Underwriters*, 339 Mass. 627, 162 N.E.2d 65 (1959), unless insured lacked capacity to form intent. *Hanover v. Talhouni*, 413 Mass. 781, 604 N.E.2d 689 (1992) (voluntary LSD ingestion). Insurer issuing a commercial general liability policy excluding coverage for assault and battery was nevertheless liable for a claim of negligent failure of insured to provide security that resulted in assault. *Liquor Liability JUA v. Hermitage*, 419 Mass. 316, 644 N.E.2d 964 (1995). Injury caused by trespass by mistake is “caused by accident.” *D’Amico v. Boston*, 345 Mass. 218, 186 N.E.2d 716 (1962). As defined in homeowner’s policy “Bodily injury” does not cover defamation and emotional distress claims. *Allstate v. Diamant*, 401 Mass. 654, 518 N.E.2d 1154 (1988). Violation of Federal Age Discrimination Law due to recklessness rather than deliberate wrongdoing is covered under general liability policy. *Andover Newton Theological Sch. v. Continental*, 409 Mass. 350, 566 N.E.2d 1117 (1991). See also *Continental v. Canadian Universal*, 924 F.2d 370 (1st Cir. 1991) (Illegal harassment by superior).

Notice. Right to recover is dependent upon insured having given timely notice of claim to insurer. *Morse v. Employers*, 3 Mass. App. 712, 323 N.E.2d 769 (1975). Insurer must specifically state this defense. *Travers v. Travelers*, 385 Mass. 811, 434 N.E.2d 208 (1982) (defense not raised by general denial). Where insurer not given opportunity to protect its interest, voluntary payment exclusion released insurer from liability assumed by insured in settlement. *Augut, Inc. v. Liberty Mut.*, 410 Mass. 117, 571 N.E.2d 357 (1991). Insurer shall not deny coverage because of insured’s failure to give reasonable notice unless insurer has been prejudiced thereby. G.L. ch. 175; §112; *Johnson Controls, Inc. v. Bowes*, 381 Mass. 278, 409 N.E.2d 185 (1980); *Darcy v. Hartford Ins.*, 407 Mass. 481, 554 N.E.2d 28 (1990); *Employers Liab. Assur. v. Hoechst Celanese*, 43 Mass. App. 465, 426 N.E.2d 1103 (1997); however, insurer is not required to demonstrate prejudice from a late claim under a “claims made” policy. *National Union Fire v. Talcott*, 931 F.2d 166 (1st Cir. 1991); *Chas. T. Main, Inc. v. Fireman’s Fund*, 406 Mass. 862, 551 N.E.2d 28 (1990); *J.I. Corp. v. Federal Ins.*, 730 F. Supp. 1187 (D.

Mass. 1990). “Claims made” policy does not require that notice of claim be given within the policy period. *Tenovsky v. Alliance Ins. Group*, 40 Mass. App. 204 (1996). But “prompt notice of claims made” requires that notice to the insurer be given no later than sixty days following the expiration of the policy period; no further determination of prejudice to the insurer need be made. *Tenovsky v. Alliance Syndicate, Inc.*, 424 Mass. 678, 677 N.E.2d 1144 (1997). G.L. ch. 175, §112 is not retroactive. See *Spooner v. General Acc. Fire*, 379 Mass. 377, 397 N.E.2d 1290 (1976). Timely notice required even if no claim is anticipated. *Powell v. Fireman’s Fund*, 26 Mass. App. 508, 529 N.E.2d 1228 (1988). Where injured party has judgment against insured covered by more than one compulsory policy he may recover from all insurers up to policy limits. *Maryland Cas. v. Hunter*, 341 Mass. 238, 168 N.E.2d 271 (1960). If defendant who is insured by motor vehicle policy is defaulted for failure to enter appearance, damages shall not be assessed until after notice to insurer. G.L. ch. 231, §58 A. Insurer may set up any defense which it might use if insured were plaintiff. *Kana v. Fishman*, 276 Mass. 206, 176 N.E. 922 (1931). But see Standard Provisions (5) (below) with reference to compulsory coverage. Express or implied consent necessary refers to bailment and not to particular use at time of accident. *Buckley v. Aetna*, 297 Mass. 395, 8 N.E.2d 748 (1937). For extent to which this bailment may go see *Dufour v. Arruda*, 299 Mass. 46, 11 N.E.2d 920 (1937); *Woznicki v. Travelers*, 299 Mass. 244, 12 N.E.2d 876 (1938). It does not extend to “a practice drive by unlicensed novice” without knowledge of named insured. *Kneeland v. Bernardi*, 317 Mass. 517, 58 N.E.2d 823 (1945). (This case did not involve compulsory provisions of policy). *Scaltreto v. Shea*, 352 Mass. 62, 223 N.E.2d 525 (1967).

Absence of such consent is affirmative defense to be alleged and proved by insurer. G.L. ch. 231, §85C. *Hurley v. Flanagan*, 313 Mass. 567, 48 N.E.2d 621 (1943). Contrary to ordinary insurance compulsory policy covers willful, wanton and reckless conduct because statute is interpreted in light of its purpose to protect travelers on highways. *Greenberg v. Flaherty*, 306 Mass. 95, 27 N.E.2d 683. *Wheeler v. O’Connell*, 297 Mass. 549, 9 N.E.2d 544 (1937); *Cannon v. Commerce Ins.*, 18 Mass. App. 984, 470 N.E.2d 805 (1984). If insured or his agent took out policy, fact that he does not own auto, or other misrepresentations cannot under G.L. ch. 175, §113A (5) be relied upon by insurer in action by injured person. *Fallon v. Mains*, 302 Mass. 166, 19 N.E.2d 68 (1939). But see, *Rondina v. Employers*, 286 Mass. 209, 109 N.E. 35 (1934), where person named as insured did not own automobile or know operator and did not know of issuance of policy in his name.



Standard Provisions. Compulsory automobile insurance policies are required to contain six standard provisions: 1) that liability of company shall become absolute when loss occurs and payment of any judgment by insured shall not be required, that policy shall not be cancelled after loss, and that upon recovery against assured judgment creditor shall be entitled to have insurance money applied to satisfaction of judgment. G.L. ch. 175, §§112-113; 2) that no cancellation shall be effective until after twenty days' written notice to other party and to registrar of motor vehicles giving specific reason for cancellation, (see *Fields v. Parsons*, 353 Mass. 706; and see G.L. ch. 175, §22C for time and grounds allowable for cancellation); unearned premium to be returned; (2A) that policy shall terminate upon sale or transfer of vehicle, or surrender of registration plates; 3) that insured shall be entitled to return of unearned premium if company's authority to transact business shall cease; 4) that policy, written application, and riders and endorsements attached which do not conflict with compulsory insurance statutes shall constitute entire policy; 5) that no statement of insured, no violation of terms of policy, and no act or default of insured shall bar rights of judgment creditor under (1) *supra*; and 6) that policy shall cover legal representatives of insured for its unexpired period in event of his insolvency, or bankruptcy during its term; and in event of his death, provided the motor vehicle is properly registered, policy, unless cancelled, shall, pending appointment of legal representative of estate of deceased insured, cover any person who is related by blood or marriage to deceased and has proper temporary custody of motor vehicle, and if legal representative is appointed policy shall cover such legal representative, for its unexpired period. G.L. ch. 175, §113A. Uninsured motorist's coverage must be included. G.L. ch. 175, §113L. Uninsured motorist coverage on multiple vehicles may be aggregated to increase coverage. *Cardin v. Royal Ins.*, 394 Mass. 450, 476 N.E.2d 200 (1985). Underinsured motorist coverage limited to stated policy limit. *LeCuyen v. Metropolitan*, 401 Mass. 709, 519 N.E.2d 263 (1988); *Stearns v. Metropolitan*, 401 Mass. 1013, 519 N.E.2d 268 (1988). Standard provision (5) does not apply to "extra-territorial" clauses incorporated in compulsory policy. *Sheldon v. Bennett*, 282 Mass. 240, 184 N.E. 722 (1933).

Violation of Law. There is no case passing upon specific point of whether insurer is liable under policy of automobile insurance where operator is infant below age required for license. (See "AUTOMOBILES Age.") It has been held that violation of statute (driving without license) which presented same question of law did not exonerate insurer on grounds of public policy. *McMahon v. Pearlman*, 242 Mass. 367, 136 N.E. 154 (1922). It was stated that unlawful conduct of assured would con-

stitute defense if it were "a direct and proximate cause contributing to injury." But see Standard Provision (5) with reference to compulsory coverage.

Unemancipated minor can now sue parents to recover for personal injuries resulting from negligent operation of motor vehicle to extent of liability insurance. *Sorensen v. Sorensen*, 369 Mass. 350, 339 N.E.2d 907 (1975). Query whether parent may now sue unemancipated minor child for personal injuries caused by child's negligence. *Cf. Oliviera v. Oliviera*, 305 Mass. 297, 25 N.E.2d 766 (1940). Same case holds that administrator of estate of parent of unemancipated minor may maintain action against child for causing death of decedent by negligence. But such death is not within compulsory coverage. *Oliviera v. Preferred*, 312 Mass. 426, 45 N.E.2d 263 (1942).

LIMITATION OF TIME FOR COMMENCEMENT OF ACTION

See Law Digest Tables.

G.L. ch. 260, §2A, three year limit on contract action to recover for personal injuries.

G.L. ch. 260, §2E, enlarging statute of limitations applicable to Dalkon Shield claims is constitutional. *Kienzler v. Dalkon Shield*, 426 Mass. 87, 686 N.E.2d 447 (1997).

G.L. c. 260, §4, a statute of repose, is not subject either to equitable estoppel or tolling pursuant to G.L. c. 260, §12 (relating to fraudulent concealment). *Joslyn v. Chang*, 445 Mass. 344, 837 N.E.2d 1107 (2005); *Rudenaar v. Zafiropoulos*, 445 Mass. 353, 837 N.E.2d 278 (2005).

"Functional" test set forth in *N.E. Tel. & Tel. v. Goudreau Constr. Co.*, 419 Mass. 658 (1995), to determine applicable state's law where limitations periods differ. *Nierman v. Hyatt Corp.*, 59 Mass. App. 844, 798 N.E.2d 329 (2003).

Discovery Rule. A cause of action accrues when plaintiff learns or reasonably should have learned that he or she was harmed by defendant's conduct, *Day v. Kerkorian*, 72 Mass. App. Ct. 1, 887 N.E.2d 1098 (2008); *Franklin v. Albert*, 381 Mass. 611, 411 N.E.2d 458 (1980), and not when the plaintiff first understands the causal connection between her injuries and a legally cognizable claim against the Defendant. *Doe v. Harbor Schools, Inc.*, 446 Mass. 245, 843 N.E.2d (2006). Cause of action for legal malpractice accrues when plaintiff knows he has sustained "appreciable harm." *Cautu v. St. Paul Cos.*, 401 Mass. 53, 514 N.E.2d 666 (1987). This is usually a fact question. *Kennedy v. Goffstein*, 62 Mass. App. Ct. 230, 815 N.E.2d 646 (2004). When plaintiff



should have known of his cause of action is question of fact. *Lindsay v. Romano*, 427 Mass. 771 (1998). Legal malpractice statute commenced when client suffered “appreciable harm” in the form of legal fees to defend against a summary judgment motion that raised the attorney’s failure to file timely. *Frankston v. Denniston*, 74 Mass.App.Ct. 336, 907 N.E.2d 244 (2009). Cause of action for medical malpractice does not accrue until patient learns, or reasonably should have learned, that he has been harmed as result of defendant’s conduct. *Franklin v. Albert*, 381 Mass. 611, 411 N.E.2d 458 (1980). *Chace v. Curran*, 71 Mass. App. Ct. 258, 881 N.E.2d 258 (2008). Discovery rule applies to psychotherapists. *Riley v. Presnell*, 409 Mass. 239 (1991). “Discovery rule” tolls statute of limitations on insured’s claim for agent’s misrepresentations. *Clough v. Brown*, 59 Mass. App. 405, 796 N.E.2d 415 (2003).

Estates. Although minor’s claim against the decedent’s estate under G.L. c. 197, §13, had not accrued within the one-year statute of limitations. G.L. c. 260, §7, court held justice required claim to proceed under §10. *Estate of Grabowski*, 444 Mass. 715, 831 N.E.2d 291 (2005). Complaint could be amended to substitute administrator for deceased after one-year limit (G.L. c. 197, §9), because amendment related back to a time within the one-year limit. *Xarras v. McLaughlin*, 66 Mass. App. Ct. 799, 850 N.E.2d 1111 (2006). Late claim allowed to be filed against executor where plaintiff was not guilty of culpable neglect and executor showed no prejudice. *Gates v. Reilly*, 453 Mass. 460, 902 N.E.2d 934 (2009).

Notice to Claimant by Insurer. Generally no duty to advise claimant of statute of limitations. *Jackson v. Arooth*, 359 Mass. 721, 271 N.E.2d 586 (1971). Where insurer makes advance payment to claimant on liability policies it must inform claimant by notice in writing of applicable statute of limitations; if required notice not given claimant’s cause of action accrues on date such written notice is actually given, not date injury or damages was sustained. G.L. ch. 231, §140B; *Allstate Ins. v. Reynolds*, 43 Mass. App. 927, 685 N.E.2d 1210 (1997). Negotiations between town’s insurer and plaintiff after two year period for presenting claim under Massachusetts Tort Claims Act. (G.L. ch. 258, §4) did not estop town from relying on plaintiff’s failure to make timely claim. *George v. Saugus*, 394 Mass. 40, 474 N.E.2d 169 (1985).

Insurance policies are subject to general six year statute of limitations. G.L. ch. 260, §2. Policy may provide for lesser period, but not less than two years, G.L. ch. 175, §22. As to when two year period begins to run, see *Goldsmith v. Reliance*, 353 Mass. 99, 228 N.E.2d 704 (1967). Insurer may wait and raise statute of limita-

tions defense on eve of trial. *Trinity Church v. Hancock*, 399 Mass. 43, 502 N.E.2d 532 (1987). As corollary to this rule, conditions precedent to liability of insurer on policy must be performed within period of statute of limitations. *Barton v. Auto*, 309 Mass. 128, 34 N.E.2d 516 (1941).

Personal guaranties not executed under seal are subject to the six-year period of limitations set forth in G.L. c. 260, §2. *The Cadle Co. v. Webb*, 66 Mass. App. Ct. 269, 846 N.E.2d 1279 (2006).

In determining whether action is brought in time, action is commenced by filing (or mailing by certified or registered mail) complaint with clerk of proper court, together with entry fee. Mass. R. Civ. P. 3 New parties may be brought in by amendment even after statute has run, *Wadsworth v. Boston Gas Co.*, 352 Mass. 86, 223 N.E.2d 807 (1967), and sole defendant may be substituted for another sole defendant even though statute has run. *Peterson v. Cadogan*, 313 Mass. 133, 46 N.E.2d 517 (1943); but not where defendant was deceased at time original action was commenced, *Chandler v. Dunlop*, 311 Mass. 1, 39 N.E.2d 969 (1942), and not where amendment states new claim against new party, *Bengan v. Clark Equip. Co.*, 401 Mass. 554, 517 N.E.2d 1286 (1988). Three year statute of limitations under Massachusetts Tort Claims Act (G.L. ch. 258, §4) tolled by provisions of G.L. ch. 260, §7 if claimant is minor when right to sue first accrues. *Hernandez v. City of Boston*, 394 Mass. 45, 474 N.E.2d 166 (1985). Tolling provision applies even if a guardian is appointed prior to incident subject to suit. *O’Brien v. MBTA*, 405 Mass. 439 (1989). Complaint may be amended after statute has run so long as it is for cause of action which was originally intended. *Williams v. New York, New Haven & Hartford R.R. Co.*, 325 Mass. 244, 90 N.E.2d 320 (1950). New plaintiffs may not be brought in if their claim was barred as of date of original action. *Berkowitz v. Nee*, 4 Mass. App. 834, 351 N.E.2d 858 (1976). Provision of policy precluding bringing of action until specified time after proofs of loss have been filed bars earlier action but is waived by denial of liability by company within period. *London Clothes v. Maryland*, 318 Mass. 692, 63 N.E.2d 577 (1945). “Borrowing statute,” G.L. ch. 260, §9, applies only when defendant has resided out of state. *Wilcox v. Riverside*, 399 Mass. 533, 505 N.E.2d 526 (1987).

Fire Insurance. Standard form provides that no action shall be brought save within two years of date of loss. *Goldsmith v. Reliance*, 353 Mass. 99, 228 N.E.2d 704 (1967). Two-year limitation applies to claims against insurer for unfair and deceptive business and claims settlement practices. *Nunheimer v. Continental Ins. Co.*, 68 F. Supp. 2d 75 (D. Mass. 1999). But if mat-



ter has been referred to arbitration and no award is made within two years action may be brought within ninety days of award. G.L. ch. 175, §99. This provision may be waived. *Hutchinson v. Liverpool*, 153 Mass. 143, 26 N.E. 439 (1891). Insurer's oral agreement to settle permits insured to avoid arbitration as condition precedent to suit under fire insurance policy. *Piper Cafe v. Commercial Union*, 27 Mass. App. 317, 537 N.E.2d 1274 (1989). Prolongation by company of negotiations for settlement to induce insured not to sue within two years will amount to waiver. *Little v. Phoenix*, 123 Mass. 380 (1877). But when company ultimately denies claim, insured thereafter has only such reasonable time as is necessary to give fair opportunity to commence action. *Gallant v. Federal Mut.*, 354 Mass. 146, 235 N.E.2d 810 (1968).

Appraisal, unless waived, is condition precedent to insured's bringing action or company's seeking declaratory judgment as to its liability. *Employers v. Traynor*, 354 Mass. 763, 237 N.E.2d 34 (1968). Insured did not satisfy condition as to appraisal until after two years, so too late to perfect cause of action. *Barton v. Auto*, 309 Mass. 128, 34 N.E.2d 516 (1941).

Liability Insurance. Insurance may be reached upon judgment obtained in another state after Massachusetts Statute of Limitations has run. *Brown v. Great American*, 298 Mass. 101, 9 N.E.2d 34 (1968). Statute of limitations does not apply to suit against insurer or judgment resulting from assault and battery action. *Bowen v. Lloyds Underwriters*, 339 Mass. 627, 162 N.E.2d 65 (1959). Consequential damages to father for treatment of his minor child are not "bodily injuries" within one year statute formerly applicable to compulsory coverage. *Barbate v. LaVallee*, 299 Mass. 411, 12 N.E.2d 815 (1938).

Limitations period for insured's action against liability insurer for breach of duty to defend commences when insured begins to incur defense costs. *John Beaudette, Inc. v. Sentry Ins.*, 94 F. Supp. 2d 77 (D. Mass. 1999). Insurer's repeated misrepresentations as to coverage and exclusions did not create new limitations periods for insured's action alleging unfair and deceptive acts. *Id.* Limitations period for breach of duty to indemnify, or for failure to settle within policy limits, begins when final judgment is entered against insured. *Id.*

Life Policy. Incontestability statute, G.L. ch. 175, §132, barred rescission of a life insurance policy notwithstanding that insured concealed his misrepresentation by delaying submission of application for waiver of premium. *Protective Life v. Sullivan*, 425 Mass. 615, 682 N.E.2d 625 (1997).

Malpractice. Individual is required to commence action of malpractice within 3 years after date cause of action accrues. G.L. ch. 260, §4. Attorney's continuing representation of plaintiff tolls the statute of limitations on malpractice action against attorney arising from the handling of that matter. *Spilios v. Cohen*, 38 Mass. App. 338 (1995).

Minors. Any claim by minor against health care provider for professional services or health care rendered whether in contract or tort must be commenced within 3 years from date cause of action accrues, except that minor under full age of 6 years shall have until his ninth birthday to commence such action; provided further that any such claim by minor shall be commenced within 3 years after appointment of his administrator, executor, guardian or other representative by which action may be commenced (G.L. ch. 231, §60D as amended). *McGuinness v. Cotter*, 412 Mass. 617 (1992). Amendment giving minors under 6 years of age until their ninth birthday to commence action against health care provider does not extend the 7-year limitation under G.L. ch. 231, §60D for bringing action. *Plummer v. Gillieson*, 44 Mass. App. 578, 692 N.E.2d 528 (1998). Requirement that minor's claim be brought within seven years of act or omission causing injury, G.L. ch. 231 §60D, is constitutional. *Harlfinger v. Martin*, 435 Mass. 38, 754 N.E.2d 63 (2001). Father's commencement of malpractice action on behalf of minor son triggered 3-year limitation for minor to sue under G.L. ch. 231, §60D, even as to persons not sued. *Baker v. Binder*, 34 Mass. App. 287, 609 N.E.2d 1240 (1993). Limitations period is tolled for insane or imprisoned. *Boudreau v. Landry*, 404 Mass. 528, 536 N.E.2d 339 (1989).

Wrongful Death Claims. Not subject to "discovery rule." *Pobieglo v. Monsanto*, 402 Mass. 112, 521 N.E.2d 728 (1988).

G.L. ch. 260, §2B 6-year statute of repose barred claim against engineering firm even if plaintiff could not reasonably have discovered the harm before that period expired. *Coca-Cola Bottling v. Weston & Sampson Eng'rs*, 45 Mass. App. 120, 695 N.E.2d 688 (1998).

MALPRACTICE

See "ATTORNEYS."

Accountants. No malpractice by a CPA in preparing tax return where the plaintiff failed to show actionable damages. *Miller v. Volk*, 63 Mass. App. Ct. 303, 825 N.E.2d 579 (2005).

Legal Malpractice. Billing for legal services does not constitute rendering of legal services; insurer has no duty to defend lawyer against a charge of fraudulent billing. *Reliance Nat'l Ins. v. Sears, R. & Co.*, 58 Mass.

App. Ct. 645, 792 N.E.2d 145 (2003). Even assuming attorney negligently failed timely to advise of insurance disclaimers and of an offer of settlement in an underlying lawsuit, no recovery because as a matter of law the intervening unanticipated bankruptcy of client and not the attorney's actions were the cause of the plaintiffs' damages. *Fiduciary Trust v. Bingham*, 58 Mass. App. Ct. 245, 789 N.E.2d 171 (2003).

Medical malpractice procedure, including preliminary hearing by tribunal prohibition against stating amount of claim in Complaint, limitations on attorneys' fees, and limitations on awards of damages, is governed by G.L. ch. 231, §60 B-I. Licensed clinical social workers are not covered by the statute. *Carter v. Bowie*, 432 Mass. 563, 736 N.E.2d 385 (2000). Purpose of medical malpractice tribunal is to evaluate medical aspects of malpractice claim and not to examine legal and factual questions beyond purely medical questions raised. *McMahon v. Glixman*, 379 Mass. 60, 393 N.E.2d 875 (1979); *Bing, et al. v. Drexler*, 69 Mass. App. Ct. 186, 866 N.E.2d 996 (2007) (claim that defendant derivatively liable for another's negligence is not claim of medical malpractice). No bond required for claims of false imprisonment and infliction of emotional distress. *Segal v. First Psychiatric*, 68 Mass. App. Ct. 709, 864 N.E.2d 574 (2007). Tribunal's standard in death cases: whether defendant's negligence was "more probably than not a cause of the loss of a substantial chance to survive." *Bradford v. Bay State Med. Ctr.*, 415 Mass. 202, 613 N.E.2d 82 (1993). For a discussion of the adequacy of offer of proof to medical malpractice tribunal, see *St. Germain v. Pfeiffer*, 418 Mass. 511, 637 N.E.2d 848 (1994). Where surgeon fails to record in a postoperative report any indication of an injury, the degree of proof required of plaintiff for the Tribunal may be less. *Saunders v. Ready*, 68 Mass. App. Ct. 403, 862 N.E.2d 422 (2007).

The medical malpractice tribunal process applies to tort action against psychiatrist who misdiagnosed job applicant. *Lambley v. Kameny*, 43 Mass. App. 277, 682 N.E.2d 907 (1997). Claims for wrongful civil commitment are not within tribunal's province. *Leninger v. Franklin Med. Ctr.*, 404 Mass. 245, 534 N.E.2d 1151 (1989). Determination of tribunal to appoint expert, and expert's testimony before tribunal are admissible at trial; tribunal's decision is not. *Beeler v. Downey*, 387 Mass. 609, 442 N.E.2d 19 (1982); *Kulas v. Weeber*, 20 Mass. App. 983, 482 N.E.2d 885 (1985). Thirty day period for posting bond to pursue claim after adverse finding by state tribunal begins to run when tribunal's decision has been docketed and notice has been sent to plaintiff. *Hanley v. Polanzak*, 8 Mass. App. 270, 393 N.E.2d 419 (1979). Plaintiff may appeal from adverse finding of tribunal without filing bond, but only at risk of being out of

court entirely if one loses appeal, *Kapp v. Ballantine*, 380 Mass. 186, 402 N.E.2d 463 (1980), but defendant health care provider may not immediately appeal, *Ruggiero v. Giamarco*, 73 Mass. App. Ct. 743, 901 N.E.2d 1233 (2009). The correctness of the tribunal's decision is subject to review even after entry of judgment for defendant after trial. *LaFond v. Casey*, 43 Mass. App. 233, 681 N.E.2d 1242 (1997). Defendant may be permitted to conduct discovery prior to convening of a medical tribunal. *O'Leary v. Nepomuceno*, 44 Mass. App. 683, 693 N.E.2d 701 (1998).

Absent special circumstances (such as subsequent disfigurement or impairment of bodily function) award for pain and suffering and other items of general damages may not exceed \$500,000. G.L. ch. 231, §60H. Jury must specify amount awarded for each other element of damage. G.L. ch. 231, §60F.

Any medical malpractice action brought in a court other than the Superior Court must be referred to a tribunal in the Superior Court; after consideration by tribunal, case can be subject to trial in District or Municipal Court. *Anderson v. Attar*, 65 Mass. App. Ct. 910, 841 N.E.2d 1286 (2006). Medical malpractice actions commenced in Federal Court must first be referred to state tribunal to avoid forum shopping. *Byrnes v. Kirby*, 453 F. Supp. 1014 (D. Mass. 1978).

Loss of chance. Recovery allowed where physician's negligence reduces a patient's prospects for achieving a more favorable medical outcome. *Matsuyama v. Birnbaum*, 452 Mass. 1, 890 N.E.2d 819 (2008). *Renzi v. Paredes*, 452 Mass. 38, 890 N.E.2d 806 (2008).

Medical expert testimony concerning the standard of care generally need not be subject to analysis for relevance and reliability under *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), and *Commonwealth v. Lanigan*, 419 Mass. 15 (1994); however, when a proponent of expert testimony incorporates scientific fact into a statement concerning the standard of care, that science may be the subject of such an analysis. *Palandjian v. Foster*, 446 Mass. 100, 842 N.E.2d 916 (2006).

Minors. Claims on behalf of minors must be brought within seven years, Mass. G.L. ch. 231, §60D; time cannot be extended under the theory that physician was under a continuing duty to treat minor. *Harlfinger v. Martin*, 435 Mass. 38, 754 N.E.2d 63 (2001).

Physician owes his patient duty to disclose material risks and is liable if breach of that duty is causally related to patient's injury. *Halley v. Birbiglia*, 390 Mass. 540, 458 N.E.2d 710 (1983). Physician failing to warn patient may be liable to third party injured by patient. *Coombes v. Florio*, 450 Mass. 182, 877 N.E.2d 567

(2007). When possibility that disease associated with prescribed drug would occur or risk attendant to “no treatment” is negligible, physician has no duty to disclose risk. *Precourt v. Frederick*, 395 Mass. 689, 481 N.E.2d 1144 (1985); *Benson v. MGH*, 49 Mass. App. Ct. 530, 731 N.E.2d 85 (2000). A failure to detect breast cancer gives rise to a claim for negligence but not to a claim on principles of informed consent. *Roukounakis v. Messer*, 63 Mass. App. Ct. 482, 826 N.E.2d 777 (2005).

Unauthorized medical treatment did not amount to unfair or deceptive act under G.L. ch. 93A. *Darviris v. Petros*, 442 Mass. 274, 812 N.E.2d 1188 (2004). Negligently inflicted emotional distress arising from doctor’s failure to disclose something that happened during operation is not compensable unless it causes physical harm manifested by objective symptomatology and substantiated by expert medical testimony. *DiGiovanni v. Latimer*, 390 Mass. 265, 454 N.E.2d 483 (1983). Psychiatrist has duty to exercise care and skill of average psychiatrist and owes no specific duty of “reasonableness” to prevent harm to known suicidal patient. *Stepakoff v. Kaantar*, 393 Mass. 836, 473 N.E.2d 1131 (1985).

In medical malpractice case for mother’s death, there may be award of damages to minor son for loss of parental society. *Glicklich v. Spievack*, 16 Mass. App. 488, 452 N.E.2d 287 (1983). Malpractice and consortium claims are distinct and each subject to “per claim” limits. *Pinheird v. J.U.A.*, 406 Mass. 288 (1989). Physician who is negligent is liable for further injury caused by doctor attempting to correct condition first physician caused. *Carter v. Shirley*, 21 Mass. App. 503, 488 N.E.2d 16 (1986).

Patient’s consumer action against nursing home for unfair or deceptive trade practice when based on home’s alleged negligent care must be referred to tribunal. *Little v. Rosenthal*, 376 Mass. 573, 382 N.E.2d 1037 (1978). So must action for breach of contract to produce medical result in order that tribunal can decide whether there is sufficient evidence for judicial inquiry as to whether medical result obtained is consistent with result allegedly promised. *Salem Orthopedic Surgeons, Inc. v. Quinn*, 377 Mass. 514, 386 N.E.2d 1268 (1979).

Medical providers have immunity from malpractice in administering immunization or other protective programs. *Headley v. Berman*, 419 Mass. 624 (1995), 646 N.E.2d 1051.

Existence of liability insurance is not admissible to prove negligence, but may be admissible to prove bias on the part of an expert engaged by insurer. *McDaniel v. Pickens*, 45 Mass. App. 63, 695 N.E.2d 215 (1998). G.L. ch. 111, §§204 and 205 create an absolute privilege against disclosure of records of a medical peer review

committee. *Carr v. Howard*, 426 Mass. 514, 689 N.E.2d 1304 (1998). The experience review committee of the Medical Professional Mutual Ins. Co. has authority to limit a physician’s malpractice coverage. *Massand v. Medical Prof. Mut. Ins. Co.*, 420 Mass. 690 (1995).

NEGLIGENCE

See Law Digest Tables.

See “PROXIMATE CAUSE.”

Adults. Consenting adults are held to a standard that requires them not to engage in wanton or reckless conduct toward each other during consensual sexual conduct. *Doe v. Moe*, 63 Mass. App. Ct. 516, 827 N.E.2d 240 (2005).

Age. Negligence and contributory negligence of infants discussed. *Tucker v. Ryan*, 298 Mass. 282, 10 N.E.2d 73 (1937); *Dennehy v. Jordan Marsh*, 321 Mass. 78, 71 N.E.2d 758 (1947).

Assumption of Risk. Abolished. G.L. c 231, §85.

Attractive Nuisance. No recovery. *Prudhomme v. Calvine Mills, Inc.*, 352 Mass., 767, 225 N.E.2d 592 (1967). *But see* G.L. ch. 231, §85Q, (land owner liable for injury to children under certain conditions).

Auto rental company not negligent for renting a car to driver with suspended license. *Nunez v. A&M Rentals, Inc.*, 63 Mass. App. Ct. 20, 822 N.E.2d (2005). But taxi company can be liable for loaning taxi to driver whom company knew was incompetent to operate a taxi at an acceptable level. *Peters v. Haymarket Leasing, Inc.*, 64 Mass. App. Ct. 767, 835 N.E.2d 628 (2005). Commercial auto policy covers claim against livery service liable for dropping impaired passenger at location where it was likely person would drive. *Comm. Ins. v. Ultimate Livery Serv.*, 452 Mass. 639, 897 N.E.2d 50 (2008).

Charities. Limitation on damages, G.L. 231, §85K, applies even to intentional acts. *St. Clair v. Boston Univ.*, 25 Mass. App. 662, 521 N.E.2d 1044 (1988). Applies to trustees of nominee trust with charitable beneficiary. *Morrison v. Lennett*, 415 Mass. 857, 616 N.E.2d 92 (1993).

Cities/Towns. Liability for failure to prune tree overhanging road. *Sanker v. Orleans*, 27 Mass. App. 410, 538 N.E.2d 999 (1989). *Mamulski v. East Hampton*, 410 Mass. 28 (1991) (duty to replace stop sign).

Contributory Negligence. Abolished. G.L. ch. 231, §85.

Comparative Negligence. G.L. ch. 231, §85. Plaintiff’s negligence is to be compared with total negligence of all defendants. *Graci v. Damon*, 6 Mass. App. 160,

374 N.E.2d 311 (1978). Defendant waives comparative negligence defense if defaulted for failing to answer complaint. *Nat'l Union Fire Ins. v. Escort One*, 57 Mass. App. Ct. 1102, 780 N.E.2d 971 (2003). Landowner has comparative negligence defense to child trespasser. *Mathis v. Massachusetts Elec.*, 409 Mass. 256, 565 N.E.2d 1180 (1991). Illegal conduct contributing to injury does not alone bar recovery. *Fanagan v. Baker*, 35 Mass. App. 444, 621 N.E.2d 1190 (1993). Comparative negligence statute is not applicable to intentional or willful, wanton or reckless conduct. *Zeroulias v. Hamilton Am.*, 46 Mass. App. 912, 705 N.E.2d 1164 (1999). Comparative negligence statute applies both to negligent decedents and negligent beneficiaries in action for wrongful death under G.L. ch. 229, §1. *Santos v. Chrysler Corp.*, 430 Mass. 198, 715 N.E.2d 47 (1999). Statute did not abolish open and obvious danger rule (which relieves landowners of duty to warn). *O'Sullivan v. Shaw*, 431 Mass. 201, 726 N.E.2d 951 (2000).

Loss of Consortium. No recovery for adult step-child. *Mendoza v. BLH Electronics*, 403 Mass. 437, 530 N.E.2d 349 (1988). Child who was non-viable fetus at time of negligent act causing parent's injury or death has loss of consortium claim. *Angelini v. OMD*, 410 Mass. 653, 575 N.E.2d 471 (1991). No recovery for same-sex spouse where injury predated right to marry. *Charron v. Amaral*, 451 Mass. 767, 889 N.E.2d 946 (2008).

Definition and discussion of negligence. *Brennan v. Ocean View*, 289 Mass. 587, 194 N.E. 911 (1935).

Governmental Immunity. G.L. ch. 258, §19 (c) bars liability for intentional conduct but not for willful and wanton or reckless conduct under G.L. ch. 21, §17c. *Forbush v. City of Lynn*, 35 Mass. App. 696, 625 N.E.2d 1670 (1994). Failure of city to warn student of danger on school ground not within Discretionary Function exception, and city can be held liable for negligence. *Alter v. City of Newton*, 35 Mass. App. 142, 617 N.E.2d 656 (1993). Harm resulting from town's negligently maintained public property is not subject to a general liability exclusion under G.L. c. 258, §10. *Greenwood v. Easton*, 444 Mass. 467, 828 N.E.2d 945 (2005). Failure of corrections officers to act with due care in intervening to subdue an inmate was not barred by discretionary function immunity where officers directly harmed plaintiff (a visitor). *Serrell v. Franklin Cty.*, 47 Mass. App. 400, 713 N.E.2d 389 (1999). Sheriff who levied on property that did not belong to debtor had no immunity. *Cady v. Marcella*, 49 Mass. App. 334, 729 N.E.2d 1125 (2000).

Imputed Negligence. Negligence of operator not imputed to passenger. *Thibodeau v. Webster*, 312 Mass. 363, 44 N.E.2d 647 (1942). Nor to owner-passenger. G.L. ch. 231, §85F. Nor of husband to wife. *Wilson v. Birkenbush*, 305 Mass. 173, 25 N.E.2d 158 (1940). Nor

of parent to child. G.L. ch. 231, §85D. *Lillien v. Bibby*, 341 Mass. 148, 167 N.E.2d 863 (1960).

Invitee-licensee. Distinction abandoned; reasonable care owed to all, *Bouchard v. DeGagne*, 368 Mass. 45, 329 N.E.2d 114 (1975), including trespassers in known positions of peril, *Pridgen v. BHA*, 364 Mass. 696, 308 N.E.2d 467 (1974).

Landlord not liable for negligence for fall on leased commercial property, where landlord did not retain control over the premises. *Humphrey v. Byron*, 447 Mass. 322, 850 N.E.2d 1044 (2006).

Premises Liability. Massachusetts has adopted the "mode of operations" approach in grocery store slip and fall cases; owner is liable if reasonably foreseeable that dangerous condition caused by a third party could occur, due to chosen mode of operation, and owner failed to take adequate steps to forestall injuries. *Sheehan v. Brothers Supermarkets, Inc.*, 448 Mass. 780, 863 N.E.2d 1276 (2007).

Professional Negligence. Trend of Massachusetts cases until recently indicated that person would not be liable for negligent performance of professional services to one not in privity with him. *New England v. Bruck*, 270 Mass. 107, 169 N.E. 803 (1930). Now see *Craig v. Brooks*, 351 Mass. 497, 222 N.E.2d 752 (1967), eliminating requirement of privity at least as to injured persons whose identity was known to person performing negligent professional services. The limit of liability of an accountant to third parties is as set forth in §552 of Restatement (Second) of Torts (1997). *Nycal Corp. v. KPMG Peat Marwick*, 426 Mass. 491, 688 N.E.2d 1368 (1998). Pharmacist has no duty to warn of potential side effects of prescription drugs, absent specific knowledge of increased danger to a particular customer. *Cottam v. CVS*, 436 Mass. 316, 764 N.E.2d 814 (2002).

Recreational Use. Landowner not liable to persons using land without charge, except for willful, wanton or reckless conduct. G.L. ch. 21, §17c.

Rescue Doctrine/Firefighter's Rule. Negligence which creates peril invites rescue, and if rescuer is hurt in the process, tortfeasor will be held liable not only to primary victim, but to rescuer as well. *Hopkins v. Medeiros*, 48 Mass. App. 600, 724 N.E.2d 336 (2000). Rule precluding professional rescuers from maintaining negligence action against person responsible for bringing professional to scene where professional is injured has no continuing validity in Massachusetts. *Id.*

Social Host. No liability for unforeseen attack by one guest upon another. *Husband v. Dubose*, 26 Mass. App. 667, 531 N.E.2d 600 (1988). But social host may have duty to protect his guest from criminal acts of an-

other guest where this can be done without risk to host. *Doe v. Walker*, 193 F.3d 42 (1st Cir. 1999). Employer sponsoring social event but who did not furnish alcohol not liable for intoxicated employee's negligent driving. *Kelly v. Avon Tape, Inc.*, 417 Mass. 587, 631 N.E.2d 1013 (1993); *Mosko v. Raytheon*, 416 Mass. 395, 622 N.E.2d 1066 (1993).

A stranger who suffers emotional distress leading to physical problems after voluntarily rendering aid to an accident victim does not have a cause of action for negligent infliction of emotional distress. *Migliori v. Airborne Freight*, 426 Mass. 629, 690 N.E.2d 413 (1998). No recovery for mother who witnessed accident and, mistakenly believing her son to be victim, suffered severe emotional distress and died next day. *Barnes v. Geiger*, 15 Mass. App. 365, 466 N.E.2d 78 (1983).

NO-FAULT

Personal Injuries. Under limited no-fault recovery plan enacted in 1970, motor vehicle owner carries insurance or bond which provides for payments to insured and others, including guests for medical expenses and loss of income up to \$2,000 regardless of fault. No recovery of wages under this plan in cases of instant death. *Flanagan v. Liberty Mut.*, 383 Mass. 195, 417 N.E.2d 1216 (1981). No recovery to unemployed housewife for loss of earning capacity. *Malave v. Allstate*, 24 Mass. App. 901, 505 N.E.2d 569 (1987). Accidents which cause death, medical expenses of \$500 or more, involve total or partial loss of body member, permanent and serious disfigurement, loss of sight or hearing, or fracture entitle injured party to sue in tort for conscious pain, suffering and other damages, Ch. 670 Acts of 1970. Constitutionality of statute upheld in *Pinnick v. Cleary*, 360 Mass. 1, 271 N.E.2d 592 (1971). Proof of a causal connection between claimed injuries and services received is not a condition of admission into evidence of medical bills for meeting the \$2,000 threshold required to bring suit, but once admitted, this evidence is subject to rebuttal. *Cobb v. Gosnell*, 2003 Mass. App. Div. 21 (2003). If treated for two successive accidents, plaintiff must prove medical expenses associated with accident sued upon meet threshold. *Lima v. Marshall*, 70 Mass. App. Ct. 424, 874 N.E.2d 477 (2007).

Where neither vehicle nor struck pedestrian have no-fault insurance, pedestrian may sue for pain and suffering, regardless of degree of injury. *Chipman v. M.B.T.A.*, 366 Mass. 253, 316 N.E.2d 725 (1974). (*Compare Cyr v. Farias*, 367 Mass. 720, 327 N.E.2d 890 (1975); *Scandura v. Trombley Motor Coach Service, Inc.*, 370 Mass. 612, 351 N.E.2d 202 (1976)). So may motorcyclists. *Murphy v. Bohn*, 377 Mass. 544, 387 N.E.2d 119 (1979). But non-resident motorcyclist cannot

recover for pain and suffering against Massachusetts defendants who themselves could recover only actual losses. *Prouty v. Brown*, 22 Mass. App. 992 496 N.E.2d 841 (1986).

Property Protection. Right to sue in tort for negligence for property damage. G.L. ch. 90, §340.

Statute of Limitations. Motor Vehicle tort period is three years after cause of action accrues. G.L. ch. 260, §2A, 4.

PENALTY AND ATTORNEY FEES

See "ATTORNEYS," "DAMAGES," "SUBROGATION," "UNFAIR PRACTICES."

Insurer's underwriting actions on past applications is admissible to show insurer failed to conduct a reasonable investigation before seeking rescission of the policy, an unfair claims practice in violation of G.L. ch. 93A. *Federal Ins. Co. v. HPSC, Inc.*, 480 F.3d 26 (1st Cir. 2007).

Insured is entitled to recover attorneys' fees and expenses incurred in successfully establishing an insurer's duty to defend. *Preferred Mut. v. Gamache*, 426 Mass. 93, 686 N.E.2d 989 (1997); *Rubenstein v. Royal*, 44 Mass. App. 842, 694 N.E.2d 381 (1998). *Hanover Ins. Co. v. Golden*, 51 Mass. App. Ct. 465, 746 N.E.2d 574 (2001). The exception to the American rule, awarding attorneys fees to insured, is applicable only to cases in which an insured successfully establishes an insurer's duty to defend. *Wilkinson v. Citation Ins. Co.*, 447 Mass. 663, 856 N.E.2d 829 (2006).

If a G.L. ch. 93A violation forces someone to incur legal fees and expenses that are not simply those incurred in vindicating that person's rights under the statute, those fees may be treated as actual damages in the same way as other losses of money or property, and subject to being trebled. *Siegel v. Berkshire Life*, 64 Mass. App. Ct. 698, 835 N.E.2d 288 (2005).

Where health services provider committed unfair or deceptive acts under G.L. ch. 93A in submitting unnecessary medical bills, and sued for non-payment, insurer was entitled to recover litigation expenses. *Columbia Chiropractic Group, Inc. v. Trust Ins.*, 430 Mass. 60, 712 N.E.2d 93 (1999).

Workers' Compensation. Penalty provisions of G.L. ch. 152, §8(1) are to persuade insurers to make timely payments, not to confer rights on employees. *Johnson's Case*, 69 Mass. App. Ct. 834, 872 N.E.2d 1131 (2007). Rating and Inspection Bureau may levy penalty against insurers because of poor paid-loss ratio the insurer earned while servicing employers assigned to it from a reinsurance pool. *Eastern Cas. Ins. Co. v.*



Comm'r of Ins., 67 Mass. App. Ct. 678, 856 N.E.2d 872 (2006).

PRIVILEGED COMMUNICATIONS

Anti-SLAPP statute, G.L. c. 231, §59H. An attorney sued for voicing the positions of a petitioning client could bring a special motion to dismiss under the statute. *Plante v. Wylie*, 63 Mass. App. Ct. 151, 824 N.E.2d 461 (2005); and counterclaim for abuse of process is subject to dismissal where solely based on the plaintiffs' petitioning activity of filing suit. *Adams v. Whitman*, 62 Mass. App. Ct. 850, 822 N.E.2d 727 (2005). But statute is no defense where attorney's web site containing positions had commercial purpose. *Cadle Co. v. Schlichtmann*, 448 Mass. 242, 859 N.E.2d 858 (2007). Patient-insured's grievance letter to private health insurer, alleging inappropriate touching by health provider, did not constitute petitioning activity within the statute. *Kalter v. Wood*, 67 Mass. App. Ct. 584, 855 N.E.2d 421 (2006). Statute did not immunize expert investigator from liability for statements in an affidavit and as a witness on behalf of the Board of Registration in Medicine as expert asserted nothing more than a mere contractual connection. *Kobrin v. Gastfriend*, 443 Mass. 327, 821 N.E.2d 60 (2005). "Petitioning" encompasses a "very broad" range of activity. *North American Expo. Co. v. Corcoran*, 452 Mass. 852, 898 N.E.2d 831 (2009). But insurer's inadequate investigation and efforts to compel plaintiff to relinquish worker's comp claim were not privileged. *Maxwell v. AIG Domestic Claims*, 72 Mass. App. Ct. 685 (2008). Statements made to newspaper are protected by the statute where they essentially mirror statements made during and "in connection with" investigation. *Wynne v. Creigle*, 63 Mass. App. Ct. 246, 825 N.E.2d 559 (2005).

Attorney-Client. The privilege applies at the option of the client. In the Matter of a John Doe Grand Jury Investigation, 408 Mass. 480, 562 N.E.2d 69 (1990). There are exceptions where there are disputes between clients sharing the same attorney, in cases of fee disputes with the attorney, or with respect to a deceased's client's directions concerning drafting of a will.

Clergy-Penitent. There is a statutory privilege. G.L. ch. 233, §20A. A Religious Order may be compelled to turn over documents in response to subpoena where inhibition of religious belief was not a principal or primary effect of the subpoena. *Society of Jesus, N.E. v. Commonwealth*, 441 Mass. 662, 808 N.E.2d. 272 (2004).

Doctor-Patient. Physician's breach of confidentiality by out-of-court disclosures may give rise to a tort claim. *Alberts v. Devine*, 395 Mass. 59, 479 N.E.2d 113 (1984). There is a statutory psychotherapist-patient privilege. G.L. ch. 233, §20B. It concerns patient com-

munications made to a psychotherapist for the purpose of diagnosis or treatment. G.L. ch. 233, §20B. *Adoption of Saul*, 60 Mass. App. 546, 804 N.E.2d 359 (2004).

Social Worker-Client. There is a statutory privilege. G.L. ch. 112, §135A. Only a client or client's guardian may prevent a social worker from disclosing communications. *Commonwealth v. Pelosi*, 441 Mass. 257, 805 N.E.2d 1 (2004).

Spousal. Spouses are generally disqualified from testifying as to "private conversations with each other." G.L. ch. 233, §20. If party against whom it is offered objects, the testimony must be excluded, even if both spouses wish the evidence to be received. *Gallagher v. Goldstein*, 402 Mass. 457, 524 N.E.2d 53 (1988). The Rule is one of disqualification, and not privilege.

Tax Returns. G.L. ch. 62C, §21 prohibits the disclosure of Massachusetts tax returns.

PRODUCTS LIABILITY

Strict Liability. Where person has dangerous or ultrahazardous instrumentality he is strictly liable for direct damages without regard to fault. *Clark-Aiken v. Cromwell-Wright*, 367 Mass. 70, 323 N.E.2d 876 (1975). Consequential damages require proof of negligence. *O'Connor v. DiCarlo*, 376 Mass. 927, 378 N.E.2d 695 (1978).

Massachusetts has adopted the "sophisticated user doctrine," which relieves a manufacturer of liability for failing to warn of a product's latent characteristics or dangers when the end user knows or reasonably should know of a product's dangers, as an affirmative defense in products liability actions to claims of both negligent failure to warn and failure to warn under breach of warranty. *Carrel v. National Cord & Braid Corp.*, 447 Mass. 431, 852 N.E.2d 100 (2006).

It is well settled that manufacturer of dangerous instrumentality may be liable to persons neither known to nor in privity with such manufacturer. *See Lebourdais v. Vitrified Wheel*, 194 Mass. 341, 80 N.E. 482 (1907) and cases cited. But article need no longer be "inherently" dangerous. *Carter v. Yardley*, 319 Mass. 92, 64 N.E.2d 693 (1946). G.L. ch. 106, §2-318 removes privity requirement; lack of privity is no defense in actions for breach of warranty or negligence if plaintiff was person whom manufacturer, seller or supplier might reasonably have expected to use, consume or be affected by goods.

Cause of action accrues at time of injury. *Cannon v. Sears*, 374 Mass. 739, 374 N.E.2d 582 (1978).

There is duty to design products to avoid unreasonable risks of foreseeable injury within scope of intended use. *Smith v. Ariens*, 375 Mass. 620, 377 N.E.2d 954

(1978). See *Back v. Wickes Corp.*, 375 Mass. 633, 378 N.E.2d 964 (1978). Negligent design that enhances injuries is actionable. *Simmons v. Monarch Tool*, 413 Mass. 205, 596 N.E.2d 318 (1992). Corporate successor not liable for goods produced by predecessor. *Guzman v. MRM/Elgin*, 409 Mass. 563, 567 N.E.2d 929 (1991).

Duty to Warn. Failure to warn where there is a duty is per se negligent and breach of warranty. *Kotler v. American Tobacco Co.*, 926 F.2d 1217 (1st Cir. 1990). Evidence of manufacturer's prior recall is admissible to prove notice. *Santos v. Chrysler Corp.*, 430 Mass. 198, 715 N.E.2d 47 (1999). Manufacturer's subsequent warning which employer ignored did not absolve manufacturer. *Jones v. Cincinnati*, 32 Mass. App. 365, 589 N.E.2d 335 (1992). Manufacturer has no duty to advise purchasers about post-sale safety improvements that have been made to machine that was reasonably safe at time of sale. *Hayes v. Ariens Co.*, 391 Mass. 408, 462 N.E.2d 273 (1984). A manufacturer will be held to the standard of knowledge of an expert in their field and has continuing duty to warn of risks discovered following sale of its product. *Vassallo v. Baxter Healthcare*, 428 Mass. 1 (1998). The continuing duty to warn does not extend to remote purchasers. *Lewis v. Ariens Co.*, 49 Mass. App. 301, 729 N.E.2d 323 (2000). Manufacturer of contraceptive pills owes duty to provide written warning to consumer of known or knowable side effects and mere compliance with FDA labeling requirements not sufficient. *McDonald v. Ortho*, 394 Mass. 131, 475 N.E.2d 65 (1985). Manufacturer has no duty to warn in manual of risks created by act of another not associated with product's foreseeable use or misuse. *Mitchell v. Sky Climber*, 396 Mass. 629, 487 N.E.2d 1374 (1986).

Warning not to use near fire was inadequate to inform of danger in using near concealed pilot light; and pre-accident memos and proposed new labels were admissible as evidence of inadequacy. *Fiorentino v. A. E. Staley Mfg. Co.*, 11 Mass. App. 428, 416 N.E.2d 998 (1981).

PROXIMATE CAUSE

See "ACCIDENTAL MEANS."

Perhaps most concise definition of doctrine singularly hard to define, to be found in Massachusetts books is: "Active efficient cause that sets in motion train of events which brings about a result without intervention of any force started and working actively from new and independent source is direct and proximate cause referred to in cases." *Knowlton J. in Lynn v. Meriden*, 158 Mass. 570, 33 N.E. 690 (1893). Long and extremely learned discussion citing instances from marine insurance cases is to be found in opinion by *Shaw C.J. and dissenting opinion of Thomas J. Marble v. City*, 70

Mass. 395. See also, *Slater v. USF&G*, 379 Mass. 801, 400 N.E.2d 1256 (1980) (each act of embezzlement constitutes separate "occurrence" under all-risk policy). Recovery has been allowed under fire policy for damage to goods by weather where it could be found that loss was attributable to skylight left open by firemen in course of putting out fire on adjoining premises. There was no fire on premises where goods were damaged and loss occurred several days after fire. *Jiannetti v. National*, 277 Mass. 434, 178 N.E. 640 (1931). From standpoint of law of insurance one of most important phases of doctrine of proximate cause is distinction drawn between cause and condition on which cause acts. Thus where person suffers accident and as result contracts disease which causes loss accident may be proximate cause of loss although one reason disease was contracted was that person was peculiarly sensitive to particular disease. Showing that person in ordinary health not so sensitive would not have contracted disease and so suffered loss will not suffice to break proximate causation. *Freeman v. Mercantile*, 156 Mass. 351, 30 N.E. 1013 (1892). So also where person falls in delirium and is killed fall is proximate cause of death even though it would not have occurred but for delirium. *Bohaker v. Travelers*, 215 Mass. 32, 102 N.E. 342 (1913); *Freyermuth v. Lutfy*, 376 Mass. 612, 382 N.E.2d 1059 (1978). But see *Vahey v. John Hancock*, 355 Mass. 421, 245 N.E.2d 251 (1969).

RELEASE

See Law Digest Tables.

Inclusion of the language in release specifically referencing one transaction did not operate to limit the scope of the broadly worded release that preceded it. *Eck v. Godbout*, 444 Mass. 724 (2005).

Under G.L. ch. 231B providing for contribution among joint tortfeasors release of one tortfeasor does not discharge any of other tortfeasors unless its terms so provide. *Cram v. Northbridge*, 410 Mass. 800 (1991). (See *supra*, "LIABILITY INSURANCE - Contribution"). A low settlement figure alone is not evidence of "bad faith" that would warrant setting aside a release to a joint tortfeasor. *Slocum v. Donahue*, 44 Mass. App. 937, 693 N.E.2d 179 (1998). Where bailee received full payment for damage to bailed automobile and gave release to person causing damage who was unaware of bailment, release and satisfaction of claim barred action by bailor. *Associates Discount v. Gillineau*, 322 Mass. 490, 78 N.E.2d 192 (1948). Opposite result had been reached in *Belli v. Forsyth*, 301 Mass. 203, 16 N.E.2d 656 (1938), where, though release had been given by bailee, it was not shown that settlement money was in fact paid and received in satisfaction for all damage to automobile and

not merely in satisfaction of personal injury and property claims of bailee. Endorsement of check bearing notation that it is in full settlement does not, without more, have force of release. *Rosenblatt v. Holstein*, 281 Mass. 297, 183 N.E. 705 (1933); *Marcellino v. Carma, Inc.*, 3 Mass. App. 722, 324 N.E.2d 629 (1975). But endorsement of draft stating that it is release would, in absence of fraud, constitute release. *Shaw v. Victoria*, 314 Mass. 262, 50 N.E.2d 27 (1943).

Infants. It cannot be said that release by parents, though it contain covenant of indemnity, is sufficient to bar action by infant. There should be judgment entered in pending action. *Nagle v. O'Neil*, 337 Mass. 80, 148 N.E.2d 183 (1958). While legal guardian of infant may compromise claim without approval of court, such compromise is at guardian's own risk; so safe course for him is to secure approval of court.

Insurer's insistence upon a release of the insured as a condition of payment of the policy limits where the liability of its insured is undisputed and damages exceed the policy limits amounts to an unfair settlement practice in violation of G.L. ch. 176, but not if liability is not "reasonably clear." *Thaler v. American Ins. Co.*, 34 Mass. App. 639, 614 N.E.2d 1021 (1993). Where insurer was unable to demonstrate that released tortfeasor had assets from which it could recover, insured was entitled to underinsured coverage notwithstanding an almost 3-year delay in giving notice to insurer. *Lighter v. Lumbermens Mut.*, 43 Mass. App. 415, 683 N.E.2d 297 (1997).

Execution of release as condition of participating in race barred claim for ordinary negligence but not for gross negligence. *Zavras v. Capeway Rovers*, 44 Mass. App. 17, 687 N.E.2d 1263 (1997). A valid release of liability for ordinary negligence is not void as against public policy. *Vallone v. Donna*, 49 Mass. App. 330, 729 N.E.2d 648 (2000). When action against insurer is based on negligence claim against insurer's agent, insurer's liability is exclusively vicarious, and voluntary dismissal of claim against agent precludes recovery against insurer. *Medeiros v. Middlesex Ins.*, 48 Mass. App. Ct. 51, 716 N.E.2d 1076 (1999).

REPRESENTATIONS AND WARRANTIES

See "LIABILITY INSURANCE, Standard Provisions."

The incontestability statute bars rescission of a life insurance policy on the basis of fraud after two years, even if applicant actively conceals the fraud. *Protective Life Ins. Co. v. Sullivan*, 425 Mass. 615, 682 N.E.2d 625 (1997).

Oral or written misrepresentations or warranties made in negotiation of policy by insured may not avoid

policy or prevent its attaching unless made with actual intent to deceive or unless the matter misrepresented or warranted increased risk of loss. G.L. ch. 175, §186. This statute does not apply to provisions in policy which by agreement of parties are made conditions precedent to duty of performance on part of insurance company. *Lopardi v. John Hancock*, 289 Mass. 492, 194 N.E. 706 (1935). But statute (G.L. ch. 175, §186) does apply to misrepresentations or warranties inserted in policy itself as well as to those made in previous negotiations. *Goldstein v. Royal*, 297 Mass. 55, 7 N.E.2d 420 (1937); *St. Paul v. BHA*, 25 Mass. App. 6, 514 N.E.2d 363 (1987). However, unless correct copy of application for life or endowment insurance is endorsed on or attached to policy when issued it shall not be considered part of policy or received in evidence for any purpose. G.L. ch. 175, §131.

Life policy issued without a medical exam is governed by G.L. ch. 75, §124 and misrepresentations as to "physical condition" do not defeat policy unless "willfully false, fraudulent or misleading." *Torres v. Fidelity & Guaranty Life*, 34 Mass. App. 376, 611 N.E.2d 733 (1993). Term "medical examination" in G.L. ch. 175, §124 refers to examination by physician and does not include examination by nurse. *Robinson v. Prudential*, 56 Mass. App. Ct. 244, 776 N.E.2d 458 (2002). Even where there has been no medical examination, misrepresentations concerning "personal habits," such as past alcohol intake consumption, that increase the risk of loss are grounds for denying a death claim even without proof of intent to deceive. *Jenkins v. Aetna Life Ins. & Ann. Co.*, 1996 WL 617264 (D. Mass. 1996). As to accident and health policies, falsity of any statement in application may not bar recovery unless it materially affected either acceptance of risk or hazard assumed by insurer. G.L. ch. 175, §108-5 (c). By provisions of G.L. ch. 175, §186A, delivery of policy creates presumption that any conditions precedent (other than one requiring prepayment of initial premium) to attaching of policy have been performed. Subject to provisions of this statute there is no question but that failure to comply with condition precedent avoids policy of insurance. *Simons v. Royal*, 258 Mass. 210, 154 N.E. 768 (1927); *Campagna v. Newark*, 259 Mass. 205, 156 N.E. 54 (1927). If policy is void for failure to comply with condition precedent no return need be made of premium. *Elder v. Federal*, 213 Mass. 389, 100 N.E. 655 (1913). Court leans toward construing policy provisions as representations rather than conditions precedent. For discussion of rules of construction see *Fuller v. New York*, 184 Mass. 12, 67 N.E. 879 (1903). For reference to Massachusetts cases on warranties, representations and conditions, see *Terrasi v. Pierce*, 304 Mass. 409, 23 N.E.2d 871 (1939); *Giannelli v. Metropolitan*, 307 Mass. 18, 29 N.E.2d 124



(1940); *Henry & Crowley v. Home Ins.*, 349 Mass. 723, 212 N.E.2d 240 (1965).

Ordinary application for life and health insurance provide that statements contained in them in absence of fraud shall be deemed representation rather than warranties. Diversity is to be noticed in applications for reinstatements of life policies. G.L. ch. 175, §186 does not apply to applications for reinstatement and where statements contained in them are declared to be warranties or conditions precedent, as is usual, falsity will avoid reinstatement without more. *Umans v. New York Life*, 259 Mass. 573, 156 N.E. 721 (1927); *Clarke v. Mutual*, 251 Mass. 1, 146 N.E. 43 (1925); *Shurdut v. John Hancock*, 320 Mass. 728, 71 N.E.2d 391 (1947). Cancer is material as matter of law. *McDonough v. Metropolitan*, 228 Mass. 450, 117 N.E. 836 (1917). *But see, Smardon v. Metropolitan*, 243 Mass. 599, 137 N.E. 742 (1923). G.L. ch. 175 §§131 & 132 which prevent insurers from denying coverage for misrepresentations in the application unless application is attached to policy when issued do not apply to applications to reinstate a lapsed policy. *Opara v. Mass. Mut.*, 441 Mass. 539, 806 N.E.2d 924 (2004).

For list of diseases which do or do not increase risk of loss as matter of law, *see Schiller v. Metropolitan*, 295 Mass. 169, 3 N.E.2d 384 (1936). Insured answered that he had no stomach ailment when in fact he had cancer. Court found insured did not know he had cancer so representation did not defeat recovery. Where question in application is one which cannot be answered with certainty, it is construed as calling for mere opinion and false answer does not necessarily constitute misrepresentation. *Metropolitan v. Burno*, 309 Mass. 7, 33 N.E.2d 519 (1941). *But see, Lennon v. John Hancock*, 339 Mass. 37, 157 N.E.2d 518 (1959) where innocent misrepresentation as to existence of cancer was held to avoid policy. Question as to "illnesses" or "physical condition" calls for opinion. *Davidson v. Massachusetts Cas.*, 325 Mass. 115, 89 N.E.2d 201 (1949).

Intent to deceive may be found where insured had been monitored once each year for blood pressure, for five years, and disclosed only one visit to doctor with notation "no problems." *DiBenedetto v. Continental*, 11 Mass. App. 910, 414 N.E.2d 1036 (1981).

Failure to satisfy provision creating condition precedent in application for original issue of policy will avoid policy. *Krause v. Equitable*, 333 Mass. 200, 129 N.E.2d 617 (1955); *Massachusetts Mut. v. Sullivan*, 5 Mass. App. 816, 361 N.E.2d 1321 (1977).

Insurer has right, during contestable period, to cancel policy for misrepresentations made with intent to deceive or which increased risk. *Mutual v. Shattuck*, 328

Mass. 561, 105 N.E.2d 247 (1952); *Continental Ins. v. Bahnan*, 216 F.3d 150 (1st Cir. 2000) (submission of false lead paint compliance letter). A property insurer was entitled to rely on insured's warranty in application that premises had sprinkler system, despite insurer's possession of inspection report indicating that property had no sprinkler system. *General Star Indem. Co. v. Duffy*, 191 F.3d 55 (1st Cir. 1999); *See also* G.L. ch. 175, §186.

Application undated and signed before September 30. Policy effective October 30. Operation on foot on October 14 not made known to insurer is defense to later claim under policy for back injury. *Gabbett v. Connecticut General*, 303 Mass. 433, 21 N.E.2d 950 (1939).

Concealments by life applicant of hospitalizations or treatment for diseases which increase risk of loss, as matter of law, are misrepresentations which themselves increase risk of loss as matter of law. *Pahigian v. Manufacturers Life*, 349 Mass. 78, 206 N.E.2d 660 (1965).

SERVICE OF PROCESS

See "AUTOMOBILES."

Aviation Accidents. Anyone operating aircraft within the Commonwealth is deemed to have appointed the Chairman of the Aeronautics Commission as lawful attorney for service of process in any action arising out of an accident or collision within the Commonwealth. G.L. ch. 90, §50. Process is filed with the Commission and also served on defendant by registered mail or in hand by a disinterested person. G.L. ch. 90, §49Q.

Domestic Corporations. Service shall be made by duly authorized process server upon the president, treasurer, clerk, secretary, agent or other officer in charge of its business. G.L. ch. 223, §37.

Foreign Insurers. Service may be made upon Insurance Commissioner. Foreign insurers authorized to do business in the Commonwealth are required to appoint the Commissioner as their lawful attorney for such purpose. G.L. ch. 175, §§151, 154; ch. 223A, §6.

Non-Resident Motorist. See "AUTOMOBILES, Service of Process." Failure to give notice to non-resident defendant as required by G.L. ch. 90, §3C bars action. *Hanson v. Venditelli*, 47 Mass. App. 413, 712 N.E.2d 1212 (1999).

Personal Service. By duly authorized process server serving defendant personally, or leaving at defendant's last and usual place of abode and mailing copies to defendant, or delivery to defendant's agent. Mass. R. Civ. Proc. 4. Court may authorize alternative means of service. Failure to serve process within 90 days together with failure to show "good cause" for non-compliance

requires dismissal of action without prejudice. *Comm'r of Revenue v. Carrigan*, 45 Mass. App. 309, 698 N.E.2d 23 (1998). Default judgment obtained by serving defendant where defendant never resided, is void; no time limit on filing motion for relief from default judgment. *First Select Corp. v. Mastromattei*, 2007 Mass. App. Div. 77 (2007).

SUBROGATION

See "WORKERS' COMPENSATION."

Contracts. Anti-assignment provision in construction contract held not intended to preclude surety's subrogation claim. *Reliance Ins. v. City of Boston*, 71 Mass. App. Ct. 550, 884 N.E.2d 524 (2008).

Insurer commencing subrogation action without "probable cause" judged by an objective standard may be subject to claim of malicious prosecution. *Chervin v. Travelers*, 448 Mass. 95, 858 N.E.2d 746 (2006). "Improper purpose" may be substituted for the element of malice in malicious prosecution. *Id.*

Where insurer pays loss occasioned by wrongdoing of third person it is subrogated to rights of insured against wrongdoer. *N.E. Gas & Electric v. Guarantee*, 330 Mass. 640, 116 N.E.2d 671 (1953), including right to sue insured's 16 year old son who damaged insured's auto while driving without authority. *N.H. Ins. Co. v. Fahey*, 385 Mass. 137, 430 N.E.2d 1193 (1982). It may enforce rights of insured by action in his name and release given by insured will not bar action, *Hart v. Western*, 54 Mass. 99, or it may recover from insured or his attorney the amount received from person liable. *General Exch. v. Dirscoll*, 315 Mass. 360, 52 N.E.2d 970 (1944). A health insurer that has paid medical expenses as a result of an auto accident may assert a lien against a damage award or settlement from the responsible third-party tortfeasor, to the extent expenses paid exceed PIP benefits. *Creswell v. Medical West Community Health Plan*, 419 Mass. 327, 644 N.E.2d 970 (1995). Self-insured owner of rental car may seek subrogation against operator's insurer for PIP benefits paid. *Enterprise v. Arbella Mut.*, 451 Mass. 264, 884 N.E.2d 973 (2008). Insured's release prejudicing insurer's subrogation rights is a defense to insured's claim against insurer. *Lumbermen's Mut. v. Mercurio*, 27 Mass. App. 111, 535 N.E.2d 234 (1989). But insurer must prove material prejudice. *MacInnis v. Aetna*, 403 Mass. 220, 526 N.E.2d 1255 (1988). Similar rule applies to workmen's compensation cases. G.L. ch. 152, §15. *Hall v. Thayer*, 225 Mass. 151, 113 N.E. 644 (1916).

Fire Insurance. Ordinarily there is subrogation clause in policies. Standard form of fire policy contains such clause which requires insured to assign all rights

against third persons. Where lease is silent, residential tenants are covered by landlord's policy and insurer has no indemnification claim against tenants. *Peterson v. Silva*, 428 Mass. 751, 704 N.E.2d 1163 (1999). But commercial tenants status determined by lease provisions. *Seaco Ins. Co. v. Barbosa*, 435 Mass. 772, 761 N.E.2d 946 (2002). Where "yield-up" clause of lease excepted the lessee from liability to the lessor for damage to the premises caused by fire, or where lease required tenant to contribute to insurance premium and made tenant a co-insured, insurer has no subrogation rights against tenant. *Peterson v. Silva*, 428 Mass. 751, 704 N.E.2d 1163 (1999); *Lexington v. All Regions Chem. Labs*, 419 Mass. 712, 647 N.E.2d 399 (1995); *Lumber Mutual v. Zoltek*, 419 Mass. 704, 647 N.E.2d 395 (1995). Right of subrogation under policy covering property damage is implied, *Travelers Ins. Co. v. Graye*, 358 Mass. 238, 263 N.E.2d 442 (1970), but see *Charles Parisi, Inc. v. Gloucester Marine Ry. Corp.*, 16 Mass. App. 538, 453 N.E.2d 459 (1983). Absent assignment of subrogation rights, insurer may not rely on same, whereas there is no implied right of subrogation for medical expenses recovered by an insured in personal injury action. *Frost v. Porter Leasing Corp.*, 386 Mass. 425, 436 N.E.2d 387 (1982).

Indemnity provision in the club's handbook required deceased's estate to indemnify club for losses sustained by club as a result of deceased's death in golf cart accident. *Post v. Belmont Country Club*, 60 Mass. App. 645, 805 N.E.2d 63 (2004).

Mortgagees. Clause which provides that when policy is payable to mortgagee company may at its election pay mortgagee full amount secured by mortgage and thereupon receive assignment of mortgage. G.L. ch. 175, §99. If mortgagee forecloses after loss and buys in property he destroys this right of subrogation and consequently cannot enforce policy. *Canton v. American*, 219 Mass. 132, 106 N.E. 635 (1914). Insurer with full assignment and transfer of first mortgage, who conducted foreclosure sale, had no obligation to second mortgagee. *Money Store v. Hingham Mut.*, 430 Mass. 298, 718 N.E.2d 840 (1999). It should be noted that diversity exists where mortgagee takes out policy and is himself insured. Under those circumstances there is no right to subrogation. *Suffolk v. Boyden*, 91 Mass. 123. If insured wishes to cancel right of subrogation, insured must do so within a reasonable time. *Town of Middleborough v. Middleborough Gas & Elec. Dept.*, 47 Mass. App. 655, 715 N.E.2d 467 (1999).

UNFAIR PRACTICES

See "MALPRACTICE," "DAMAGES."

Unfair Methods of Competition. G.L. c 176D, §3 defines unfair methods of competition and unfair or deceptive acts and practices in business of insurance to include 1) misrepresentations with respect to nature, contents or benefits of insurance policy, 2) discrimination between individuals of same class and risk, and 3) various practices with respect to settlement of claims. Commissioner is empowered to investigate complaints and issue cease and desist orders. He may also suspend licenses and revoke licenses for repeated offenses. G.L. ch. 176D, §1-14. Suit may be brought against insurer under consumer protection statute (G.L. ch. 93A) for unfair and deceptive acts and practice. *Dodd v. Commercial Union*, 373 Mass. 72, 365 N.E.2d 802 (1977). A voluntary intervener in an action against an insurer is exempted from the requirement of sending a demand letter under G.L. ch. 93A, §9(3) before filing a cross claim against the insurer. *Siegel v. Berkshire Life*, 64 Mass. App. Ct. 698, 835 N.E.2d 288 (2005). A single act can constitute a violation exposing the insurer to multiple damages. *Hopkins v. Liberty Mut.*, 434 Mass. 556, 750 N.E.2d 943 (2001). An insurer's failure to pay a jury verdict promptly may expose the insurer to multiple damages. *R.W. Granger & Sons v. J&S Insul. Co.*, 435 Mass. 66, 754 N.E.2d 668 (2001). Claims are governed by the four-year statute of limitations, Mass. G.L. ch. 260, §5A, and not the two-year period allowed by Mass. G.L. ch. 175, §99 and set forth in the policy. *Schwartz v. Travelers Indem. Co.*, 50 Mass. App. Ct. 672 (2001).

"Unfair practices" is not a defined term in 93A, and what is "unfair" must be determined on case-by-case basis. *Green v. Blue Cross & Blue Shield of Mass.*, 47 Mass. App. 443, 713 N.E.2d 992 (1999). In Consumer Protection (G.L. ch. 93A) action against insurer alleging unfair practices, possibility that insurer's conduct may have been permitted either by statute or by one interpretation of policy is not conclusive on issue of bad faith or unfairness. *DiMarzo v. American Mut.*, 389 Mass. 85, 449 N.E.2d 1189 (1983). Insurer has an obligation to deal with insured with "candor and fairness." *Green v. Blue Cross & Blue Shield*, 47 Mass. App. 443, 713 N.E.2d 992 (1999).

The procedures and remedies under the Workers' Compensation Act, G.L. c. 152, foreclose 93A claims by employees against the workers' compensation insurer and its claims processing company for mishandling claims for workers' compensation benefits. *Fleming v. National Union Fire*, 445 Mass. 381, 837 N.E.2d 1113 (2005). Self-insured company is not subject to G.L. ch. 176. *Morrison v. Toys "R" US, Inc.*, 441 Mass. 451, 806 N.E.2d 388 (2004). *Compare Miller v. Risk Mgt. Found. of the Harvard Med. Insts., Inc.*, 36 Mass. App. 411 (1994).

Where liability is reasonably clear, insurer is required to make a reasonable offer even if insurer knows case cannot be settled. *Metropolitan Prop. & Cas. v. Choukas*, 47 App. Ct. 196, 711 N.E.2d 933 (1999). Insurer has duty to make a prompt and fair settlement offer even if claimant has stated he would not accept any offer. *Bobick v. U. S. Fid. & Guar. Ins.*, 439 Mass. 652, 790 N.E.2d 653 (2003). Whether the insurer's liability became "reasonably clear" calls for an objective standard of inquiry into the facts and law; factors such as the cost of defense, the size of plaintiff's demand, and the insurer's "business judgment" are all inapplicable factors. *Demeo v. State Farm*, 38 Mass. App. 955 (1995). G.L. ch. 176D, §3(9) does not call for [a] defendant's final offer, but only one within the scope of reasonableness. *Bobick v. U. S. Fid. & Guar. Ins. supra*. A violation of G.L. ch. 176D, §3 (9) does not support a business-against-business G.L. ch. 93A claim. *DiVenuti v. Reardon*, 37 Mass. App. 73, 637 N.E. 234 (1994).

To recover under G.L. ch. 93A for unfair claims practice violation, plaintiff has to be adversely affected by violation. *Chubb v. Electric Ins. Co.*, 17 Mass. App. 61, 455 N.E.2d 646 (1983). G.L. c. 93A, §9, does not authorize purely vicarious suits by self-constituted private attorneys-general; plaintiff must demonstrate that the illegal contract (the invasion of a legally protected interest) causes some loss. *Roberts v. Enterprise Rent-a-Car*, 445 Mass. 811, 840 N.E.2d 541 (2006); *Hershenow v. Enterprise Rent-a-Car*, 445 Mass. 790, 840 N.E.2d 526 (2006). No recovery absent causal relationship between unfair acts and claimed loss. *Abdella v. USF&G*, 47 Mass. App. 148, 711 N.E.2d 182 (1999); *Massachusetts Farm Bureau v. Blue Cross*, 403 Mass. 722, 532 N.E.2d 660 (1989); *Bertassi v. Allstate*, 402 Mass. 366, 522 N.E.2d 949 (1988) (recovery limited to loss of interest). Where there has been no judgment entered on the underlying claim, an award of treble damages under G.L. ch. 93A for an insurer's unfair settlement practice is calculated by trebling the interest lost on the funds wrongfully withheld by the insurer, and not by trebling the amount withheld. *Kapp v. Arbella Mut.*, 426 Mass. 683, 689 N.E.2d 1347 (1998). Insurer's 6-month delay in disclaiming coverage did not violate G.L. ch. 93A where insured was not prejudiced by the delay. *Doe v. Liberty Mut. Ins. Co.*, 423 Mass. 366, 667 N.E.2d 1149 (1996). Under G.L. ch. 93A, §9, plaintiffs who prevail on unfair acts or practices claim entitled to attorney's fees even though not entitled to damages. *Trempe v. Aetna*, 20 Mass. App. 448, 480 N.E.2d 670 (1985). Although insured not entitled to damages under G.L. ch. 93A, § 11, insurer must pay attorney's fees for violation of G.L. ch. 93A, §2 for failure to produce documents for insured's defense. *Shapiro v. Public Service*, 19 Mass. App. 648, 477 N.E.2d 146 (1985). But there is no separate cause of



action for spoliation of evidence. *Fletcher v. Dorchester Mut.*, 437 Mass. 544, 773 N.E.2d 544 (2002).

To establish claim against insurer for failure to enter into good faith settlement, insured must prove that plaintiff in underlying action would have settled claim within policy limits and that no reasonable insurer would have refused settlement offer. *Beaudette, Inc. v. Sentry Ins.*, 94 F. Supp. 2d 77 (D. Mass. 1999). No unfair claims settlement practice where insurer had independent professional advice showing reasonable prospect of success at trial, even though said advice was not obtained until after unfair claims practice action was filed. *Van Dyke v. St. Paul Fire & Marine Ins. Co.*, 388 Mass. 671, 448 N.E.2d 357 (1983). And insurer is not liable under G.L. ch. 93A for lack of diligence in investigation of claim and delay in payment where insured fails to supply requested information, *Swanson v. Bankers Life Co.*, 389 Mass. 345, 450 N.E.2d 577 (1983), or insurer reasonably questioned plaintiff's interest in policy, *Cullen v. Massachusetts Property Ins.*, 399 Mass. 886, 507 N.E.2d 717 (1987). Insurer did not commit unfair settlement practice by insisting claimant release all claims against insured before paying claimant in circumstances where liability was not "reasonably clear." *Lazaris v. Metropolitan Prop. & Cas.*, 428 Mass. 502, 703 N.E.2d 205 (1998), *overruling Thaler v. American Ins.*, 34 Mass. App. 639, 614 N.E.2d 104 (1993); *Premier Ins. v. Furtado*, 428 Mass. 507, 703 N.E.2d 208 (1998) (insurer had reasonable and good faith belief it was not obligated to make payment and took active steps to resolve underlying dispute). No one conducting trade may bring unfair claim action under G.L. ch. 93A, §11 against another business unless both have place of business in Massachusetts. G.L. ch. 93A, §11.

WAIVER AND ESTOPPEL

Appeal. Acceptance of an order for additur or remittitur waives right to appeal. *Baudanza v. Comcast*, ___ Mass. ___, ___ N.E.2d ___ (2009).

Auto Insurance. Insurer's issuance of an "at-fault" notice to its insured does not trigger a duty to offer injured person a settlement under a theory of estoppel or res judicata so as to preclude any subsequent consideration of fault. *Beach v. Commerce Ins. Co.*, 69 Mass. App. Ct. 720, 871 N.E.2d. 1080 (2007).

Rule in Massachusetts is that denial of liability or refusal to pay by insurer, not based upon failure to comply with procedural conditions of liability, is waiver of any objections on that ground. *Fuller v. Home Indem.*, 318 Mass. 37, 60 N.E.2d 1 (1945). Reason for rule is discussed in *Milton v. Travelers*, 320 Mass. 719, 71 N.E.2d 232 (1947). Letters allegedly waiving due proof were not binding on insurer, however, when none came

from officer who was empowered by policy to waive conditions. *Cooper v. Prudential*, 329 Mass. 301, 107 N.E.2d 805 (1952).

As applied to insurance transactions estoppel usually resolves to question of whether company has misled insured to his detriment. *Fitchburg Bank v. Massachusetts Bonding Co.*, 274 Mass. 135, 174 N.E. 324 (1931). Insurer sent proper notices canceling motor vehicle liability policy, but did not notify accounting department for three weeks when clerk accepted check for balance due on premium. Accident following day. Held that acceptance by insurer of balance of premium after cancellation of policy estopped insurer from insisting upon cancellation as defense. *Paloeian v. Day*, 299 Mass. 586, 13 N.E.2d 398 (1938). Acceptance after cancellation of premium due prior to cancellation does not give rise to estoppel. *R&F Microtool v. General American*, 23 Mass. App. 694, 505 N.E.2d 539 (1987). Where insurer treated prior similar claim as not excluded, insurer estopped to deny coverage. *Jet Line Svcs. v. American Employers*, 404 Mass. 706, 537 N.E.2d 107 (1989).

Injured third party in action against tortfeasor's liability insurer could raise estoppel claim against insurer based on insurer's assurance to third party that coverage existed. *Beaudette, Inc. v. Sentry Ins.*, 94 F. Supp. 2d 77 (D. Mass. 1999). Underinsured coverage insurer's consent to insured's settlement with alleged tortfeasor does not bar insurer from contesting tortfeasor's liability in relation to its coverage of excess damages. *Furukawa v. Arbella Mut. Ins.*, 59 Mass. App. Ct. 142, 794 N.E.2d 1225 (2003).

Insurer estopped from relying on cancellation where it made no effort to determine true address of insured after notice of cancellation was returned with notation "no such number." *Canavan v. Hanover Ins.*, 356 Mass. 88, 248 N.E.2d 271 (1969).

In life insurance where true answers were given to examining physician but recorded falsely by him, such false answers cannot be relied upon by insurer to avoid liability on theory that contract never existed. *Sullivan v. John Hancock*, 342 Mass. 649, 174 N.E.2d 771 (1961); *James H. Boyle & Son, Inc. v. Prudential Ins.*, 359 Mass. 191, 268 N.E.2d 651 (1971). Similarly, insurer is barred by doctrine of equitable estoppel from relying upon false answers in application where applicant gave writing agent truthful answers. *John Hancock v. Schwarzer*, 354 Mass. 327, 237 N.E.2d 50 (1968). Where conflict exists between terms of group policy and individual certificate, language of certificate, where more favorable to insured, prevails. *Kirkpatrick v. Boston Mut.*, 393 Mass. 640, 473 N.E.2d 173 (1985).

After failing to recover from insurer for breach of contract and violation of G.L. c. 93A, insured's suit against agent for tortious interference with contractual relations and violation of G.L. c. 93A issues is not barred by issue preclusion. *Day v. Kerkorian*, 61 Mass. App. Ct. 804, 814 N.E.2d 745 (2004).

Under fire insurance policy it could have been found company waived arbitration where it did nothing but deny liability for nearly two years and if adjuster is sent by general agent to investigate and adjust loss it is within apparent scope of his authority to waive proofs of loss and agree upon amount of loss. *Alba v. Fireman's*, 295 Mass. 80, 3 N.E.2d 36 (1936). By provisions of G.L. ch. 175, §102, failure of insured under fire policy to file sworn statement of loss forthwith upon loss does not preclude recovery if he gives prompt notice of fire and files sworn statement forthwith upon receipt of written request to file statement. Also, failure of insured to file sworn statement or to give written notice of loss does not preclude recovery if company sends representative for purpose of investigating, estimating, appraising or adjusting, provided that insured files sworn statement immediately upon receipt of written request so to do made by company forthwith after sending of representative. See G.L. ch. 175, §186B extending applicability of provisions of §102 to claims arising under any policy issued in Massachusetts. *Employers v. Garney*, 348 Mass. 627, 205 N.E.2d 8 (1965). See *Moran v. Phoenix Ins.*, 7 Mass. App. 822, 390 N.E.2d 1139 (1979).

Reinsurer. Absent explicit contractual commitment to do so, reinsurer is not bound by the settlement ceding insurer makes for the same claim, even if the language of the nonsettling policy follows the form of the settling policy. *Allmerica Fin. Corp. v. Lloyd's*, 449 Mass. 621, 871 N.E.2d 418 (2007).

WORKERS' COMPENSATION

See generally G.L. ch. 152. See Law Digest Tables. G.L. ch. 152, §11A, requiring employees appealing case with medical issue with assistance of counsel to pay fee not required of pro se employees is unconstitutional. *Murphy v. Department Indus. Acc.*, 415 Mass. 218, 612 N.E.2d 1149 (1993).

Where employee "prevailed" against action for recoupment, employee was entitled to an award of attorneys' fees, notwithstanding that insurer succeeded in its bid to discontinue benefits. *Mary Conroy's Case*, 61 Mass. App. 268, 809 N.E.2d 1069 (2004). Even though the employee's claim for benefits was denied, employee prevailed for purposes of recovering attorney's fees under G.L. c. 152, §13A(5), where employee prevailed on insurer's complaint for fraud. *Richards's Case*, 62 Mass. App. Ct. 701, 819 N.E.2d 604 (2004).

Death. Where claimant signed agreement accepting a lump sum settlement and withdrawing his appeal, agreement was enforceable, even though claimant died before insurer had signed agreement. *Donovan's Case*, 58 Mass. App. Ct. 566, 791 N.E.2d 388 (2003); but agreement not enforceable where claimant dies before signing. *Bertocchi's Case*, 58 Mass. App. Ct. 561, 791 N.E.2d 384 (2003). Insurer required to furnish or pay for legal services for appointment of estate representative, G.L. c. 152, § 39. *Lopes's Case*, 74 Mass. App. Ct. 227, 905 N.E.2d 577 (2009).

Dependency Benefits. In calculating benefit, payments to employee's unremarried widow from settling her loss of consortium claim with husband's employer are considered as income. *Wilson's Case*, 67 Mass. App. Ct. 1, 851 N.E.2d 462 (2006). Surviving spouse's receipt of deceased's pension excluded in determining whether spouse is self-supporting. *Haines's Case*, 71 Mass. App. Ct. 845, 887 N.E.2d 1070 (2008). Surviving spouse wholly dependent on employee's earnings at time of injury is entitled to minimum benefit under G. L. ch. 152, §31, even though employee had no earning capacity at time of death. *Joseph v. McDonough's*, 448 Mass. 79, 858 N.E.2d 1084 (2006).

Double Compensation. Employee is entitled to double compensation for injury caused by employer's "serious and willful misconduct." Mass. G.L. ch. 152, §28. Minor's parents entitled to double compensation for employer permitting minor employee to operate a golf cart causing minor's death. *Carey's Case*, 66 Mass. App. Ct. 749, 850 N.E.2d 610 (2006). Employer must repay the extra compensation to the insurer, but insurer must pay double compensation to employee even if employer is insolvent. *CNA Ins. Cos. v. Sliski*, 433 Mass. 491, 744 N.E.2d 634 (2001).

Medical expert's opinion as to causal relationship must be expressed in terms of "probability" and be based on personal knowledge or other admissible evidence. *Patterson v. Liberty Mut.*, 48 Mass. App. 586, 723 N.E.2d 1005 (2000). Prima facie evidence of impartial medical examiner's report (G.L. ch. 152 §11A(2)) held rebutted in *Dalbec's Case*, 69 Mass. App. Ct. 306, 867 N.E.2d. 792 (2007).

Insurer is entitled to an offset for sums that employee recovers from a third party, but not when the third party is the Massachusetts Insolvency Fund. *Dufresne's Case*, 51 Mass. App. Ct. 81, 743 N.E.2d 850 (2001). Receipt of Worker's Compensation payments forecloses right to recover PIP (no-fault) benefits. *Flaherty v. Travelers*, 369 Mass. 482, 340 N.E.2d 888 (1976); *Mailhot v. Travelers*, 375 Mass. 342, 377 N.E.2d 681 (1978). Provision setting off workers' compensation payments from underinsured motorist payments is en-

forceable. *Mayo v. Aetna*, 419 Mass. 596, 646 N.E.2d 746 (1995). Employee not entitled to payments if prior injuries misrepresented to employer, employer relied, and there is a causal connection to subsequent injury. *Shaw's Supermarkets v. Delgiacco*, 410 Mass. 840, 575 N.E.2d 1115 (1991). Administrative Judge has authority to order recoupment of benefits paid by insurer within a proceeding to modify or discontinue benefits. *Charles Murphy's Case*, 53 Mass. App. Ct. 708, 761 N.E.2d 998 (2002).

Worker's compensation insurer's failure to exhaust administrative remedies against other insurer bars court action. *St. Paul Cos. v. TIG Premier Ins.*, 58 Mass. App. Ct. 650, 792 N.E.2d 666 (2003).

Insurer has no duty to warn workers of unsafe conditions noted during inspection of insured employer, *Swift v. American Mut.*, 399 Mass. 373, 504 N.E.2d 621 (1987), or to advise worker to bring action against third party. *Costa v. Liberty Mut.*, 29 Mass. App. 176, 558 N.E.2d 999 (1990). Employee has no claim against insurer for improper claims handling. *Boduch v. Aetna*, 26 Mass. App. 462, 528 N.E.2d 1182 (1988). But employer has claim against insurer for improper claim payment; and insurer has burden to prove payment was proper. *Deerfield Plastics v. Hartford*, 404 Mass. 484, 536 N.E.2d 322 (1989). Insurer may be liable under G.L. ch. 152 for delay in payment. *Kelly v. Raytheon, Inc.*, 29 Mass. App. 1000, 563 N.E.2d 1372 (1990).

Third-party tortfeasor may recover indemnity from employer who has paid worker's compensation benefits on express or implied contract basis; but this does not extend "upstream" to manufacturer. *Decker v. Black & Decker Mfg. Co.*, 389 Mass. 35, 449 N.E.2d 641 (1983). Third-party tortfeasor may not rely on comparative negligence statute; and may not rely on employer's negligence unless employer's and employee's negligence was sole proximate cause of employee's injuries. *Correia v. Firestone Tire & Rubber Co.*, 388 Mass. 342, 446 N.E.2d 1033 (1983).

Notwithstanding that notice to Division of Industrial Accidents stated that Worker's Compensation Policy was issued for nine months, G.L. ch. 152, §63 requires separate notice of termination to Division. See *Frost v. David ch. Wells Ins. Agency, Inc.*, 14 Mass. App. 305, 438 N.E.2d 1086 (1982). Where insurer failed to comply with cancellation notice requirements of G.L. ch. 152, §65B, policy remains in effect. *Armstrong's Case*, 47 Mass. App. 693, 716 N.E.2d 114 (1999). Insurer designated to issue assigned risk policy who has not been paid initial premium may not unilaterally rescind. *In re Cummings*, 52 Mass. App. Ct. 444, 754 N.E.2d 715 (2001).

Employment Defined - Casual. Where special employer of leased driver paid cost of workers' compensation premium to general employer but did not have an agreement making it liable to pay workers' compensation benefits, special employer may be sued by employee for negligence. *Numberg v. GTE Transport*, 34 Mass. App. 904, 607 N.E.2d 1 (1993). Insurer for leased employee's company had no obligation to defend client company or to indemnify client company's insurer. *Home Ins. Co. v. Liberty Mut.*, 444 Mass. 599, 830 N.E.2d 186 (2005).

Arising Out Of and in the Course Of. "Course of employment," not "scope of employment" is the test for the coemployee immunity rule. *Mulford v. Mangano*, 418 Mass. 407, 636 N.E.2d 272 (1994). "Arising out of" refers to causal origin while "in the course of" refers to the time, place, and circumstances of the injury in relation to the employment. *Aetna v. Commonwealth*, 50 Mass. App. Ct. 373, 737 N.E.2d 880 (2000). No recovery for employee who elected to work long hours and fell asleep driving home. *Haslam's Case*, 451 Mass. 101, 883 N.E.2d 949 (2008). Employee may not recover worker's compensation benefits for mental injuries resulting from employer's good faith decision to lay off or transfer employee. G.L. ch. 152, §29. *Kelly's Case*, 17 Mass. App. 727, 462 N.E.2d 348 (1984). It is error to make one of five factors issue determinative of whether participation on employer's sports team was compensable. *Bengstron's Case*, 34 Mass. App. 239, 609 N.E.2d 1229 (1993). Employee "involuntarily" detained, but "voluntarily" participating in sports, is not entitled to worker's compensation benefits. *Gatley's Case*, 415 Mass. 397, 613 N.E.2d 918 (1993); *Hammond's Case*, 62 Mass. App. Ct. 684, 819 N.E.2d 684 (2004).

No recovery against employer under wrongful death statute for death of employee insured under workers' compensation act. *Peerless Ins. Co. v. Hartford Ins. Co.*, 48 Mass. App. 551, 723 N.E.2d 996 (2000). No workers compensation to widow of worker who voluntarily retired prior to onset of illness. *In re McDonough*, 440 Mass. 603, 800 N.E.2d 1027 (2003).

Exclusivity provision in G.L. ch. 152, §23 did not bar employee's widow from recovering against employer's wholly-owned subsidiary. *Berger v. H.P. Hood*, 416 Mass. 652, 624 N.E.2d 947 (1993). Nor did it bar chiropractor's claims against insurer for violation of G.L. ch. 93A & 176D. *Adams v. Liberty Mut.*, 60 Mass. App. 55, 799 N.E.2d 130 (2003). Claim against employer and co-employee for co-employee's harassment was barred by the exclusivity clause, G.L. ch. 152, §24. *Catalano v. First Essex Savings Bank*, 37 Mass. App. 377, 639 N.E.2d 1113 (1994). But the exclusivity provision, G.L. ch. 152, §24, barring employee's action



against her employer for intentional infliction of emotional distress did not bar claim against co-employee not acting in the scope of his employment. *Brown v. Nutter, McClennen*, 45 Mass. App. 212, 696 N.E.2d 953 (1998).

Prior Injury. Employee with prior noncompensable injury must establish that the new injury was a major cause of his disability. *Castillo v. Cavicchio Greenhouses, Inc.*, 66 Mass. App. Ct. 218, 846 N.E.2d 415 (2006). But this is an affirmative defense and insurer first must produce evidence of prior noncompensable injury. *In Re MacDonald's*, 73 Mass. App. Ct. 657, 900 N.E.2d 899 (2009).

Under the “successive insurer” rule, a partially disabled employee who was injured again is entitled to workers’ compensation benefits from the new employer’s insurer, determined on the basis of the claimant’s position and abilities at the time of his first injury. *Sliski's Case*, 424 Mass. 126, 676 N.E.2d 441 (1997).

Average Weekly Wage. Only wages from insured employers are considered. *Sellers's Case*, 71 Mass. App. Ct. 75 (2008). Certain fringe benefits must be included in calculating these. *McCarty's Case*, 445 Mass. 361, 837 N.E.2d 669 (2005). Partial disability benefits can be included in an employee’s average weekly wage used to determine compensation for a subsequent injury. *Louis's Case*, 424 Mass. 136, 676 N.E.2d 791 (1997). Wages include those from uninsured employer, *Sellers's Case*, 452 Mass. 804, 898 N.E.2d 494 (2008), but not unemployment benefits, *Mike's Case*, 73 Mass. App. Ct. 44, 895 N.E.2d 512 (2008).

Employee is still entitled to benefits even though as result of his working longer hours his post-injury weekly earnings exceed his pre-injury weekly wage. *Sjoberg's Case*, 18 Mass. App. 1, 462 N.E.2d 353 (1984).

Vacation pay earned during employee’s disability period is included in calculating employee’s actual “earnings” to determine benefits. *Bradley's Case*, 46 Mass. App. 651, 708 N.E.2d 963 (1999). Employee’s self-employment or out-of-state employment cannot be used to determine “average weekly wage.” *Letteney's Case*, 429 Mass. 280, 707 N.E.2d 1071 (1999).

A claimant is not entitled to present testimony to contradict an independent medical examiner’s report. *O'Brien's Case*, 424 Mass. 16, 673 N.E.2d 567 (1997). An independent medical examiner’s report has prima facie effect only as to medical issues, not as to the employee’s earning capacity. *Scheffler's Case*, 419 Mass. 251, 643 N.E.2d 1023 (1994).

Employee’s release of claims in return for lump sum settlement did not extend to “unknown injuries.” *La*

Fleur v. C.C. Pierce Co., 398 Mass. 259, 496 N.E.2d 827 (1986).

Jurisdiction of Industrial Accident Board over dispute between insurers as to which is liable on claim not terminated by board’s approval of settlement between one insurer and employee. *Utica Mut. v. Liberty Mut.*, 19 Mass. App. 262, 473 N.E.2d 722 (1985). Under worker’s compensation statute, every settlement must be approved by Industrial Accident Board, rather than Judge, unless trial has actually commenced. G.L. ch. 152, §15. Hearing on merit of proposed settlement between insurer and third party liable for injuries constitutes commencement of trial and so court had jurisdiction to approve settlement. *Hartford Acc. v. Atlantic*, 395 Mass. 1009 (1985). A reviewing board does not have authority to permit claimant to reopen case to pursue previously unasserted claim. *Taylor's Case*, 44 Mass. App. 495, 691 N.E.2d 997 (1998).

Where employer disclaimed workers’ compensation coverage and employee sued in tort in superior court, insurer’s subsequent acceptance of claim did not deprive court of subject matter jurisdiction. *O'Dea v. J.A.L. Inc.*, 30 Mass. App. 449 (1991). Insurer’s agreement to extend the 180-day-payment-without-prejudice period was not subject to statutory penalties. *Guilfoyle's Case*, 44 Mass. App. 344, 690 N.E.2d 1245 (1998).

Liens. Court has no discretion to discharge insurer’s full right of subrogation under G.L. ch. 152, §15. *Taylor v. Trans-Lease Group*, 34 Mass. App. 404, 612 N.E.2d 254 (1993). Insurer is entitled to recover full amount of its lien from employee’s settlement with third party (less statutory share of legal fees and expenses; court has no discretion to reduce lien). *Rhode v. Beacon Sales*, 416 Mass. 14, 616 N.E.2d 103 (1993). Workers’ compensation insurer has standing to contest settlement structured to defeat its lien. *Lane v. Plymouth Restr. Gr.*, 440 Mass. 469, 799 N.E.2d 1246 (2003). Employee’s recovery against attorneys for malpractice in failing to recover against manufacturer of equipment responsible for employee’s injury is subject to lien by employer’s workers’ compensation insurer. *Bongiorno v. Liberty Mut.*, 417 Mass. 396, 630 N.E.2d 274 (1994). When employee obtains a third-party judgment, the insurer is not required to obtain prior approval before effectuating its offset rights. *Percoco's Case*, 418 Mass. 136, 634 N.E.2d 1385 (1994).

Weekly wage for schoolteachers is calculated by dividing annual salary by 52 weeks. *Herbst's Case*, 416 Mass. 648, 624 N.E.2d 564 (1993).

