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Chapter 13: Insurance Law

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CHAPTER 13

Insurance Law

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§ 13.1. "Motor Vehicle Liability" Exclusion in Homeowners Policy — Severability of Interests — Additional Insured — Homeowners' Negligent Supervision of Minor's Driving. In *Worcester Mutual Insurance Co. v. Richard J. Marnell*,[1] the Supreme Judicial Court held that the motor vehicle exclusion[2] in a homeowners insurance policy, when considered in light of the policy's severability of interest clause,[3] did not eliminate coverage for the named insureds against allegations that they had negligently supervised a party at their home at which their son (an unnamed "additional insured" under the policy) became intoxicated, left the party in his automobile, and negligently killed another person.[4] Therefore, the Court held that Worcester Mutual had a duty to defend the insured homeowners against the ensuing wrongful death action.[5]

The wrongful death complaint alleged that Richard and Ellen Marnells' negligent supervision of a party at their home was the proximate cause of the death of Robert J. Alioto.[6] The complaint further alleged that the Marnells knew or should have known that their son Michael was under

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[1] 398 Mass. 240, 496 N.E.2d 158 (1986). Besides Richard J. Marnell, the defendants were Ellen Marnell, Michael J. Marnell, and William J. Alioto, administrator of the estate of Robert J. Alioto. *Id.* at 240 n.1, 496 N.E.2d at 158 n.1.

[2] *Id.* at 242, 496 N.E.2d at 159.

[3] *Id.*

[4] *Id.* at 245–46, 496 N.E.2d at 161. Summary judgment was ultimately entered in favor of homeowners, Richard and Ellen Marnell, in the underlying tort action, Civil Action No. 138800 (Norfolk County Superior Court).

[5] *Marnell*, 398 Mass. at 245–56, 496 N.E.2d at 161. In Massachusetts an insurer has a duty to defend the insured for the underlying tort action not only when the plaintiff in that action alleges facts in the complaint which give rise to the coverage, but the duty also arises when facts are known or readily knowable to the insurer. Desrosiers v. Royal Ins. Co., 393 Mass. 37, 40, 468 N.E.2d 625, 628 (citing Terrio v. McDonough, 16 Mass. App. Ct. 163, 167, 450 N.E.2d 190, 193 (1983)).

[6] *Marnell*, 398 Mass. at 241, 496 N.E.2d at 159.

statutory legal age to consume alcohol[7] at the party;[8] that the Marnells knew or should have known Michael would use his automobile to drive several guests home;[9] and that Michael became intoxicated at the party, left in his car, and struck and killed Robert J. Alioto.[10] The Marnells notified Worcester Mutual of the Alioto's cause of action.[11] Worcester Mutual advised Richard and Ellen Marnell that it would defend them against the wrongful death suit, but only under a reservation of Worcester Mutual's rights because it appeared to the company that coverage did not exist under the Marnells' homeowners policy.[12] Worcester Mutual subsequently commenced the instant declaratory judgment action to determine the scope of its indemnity and defense obligations.[13]

The Supreme Judicial Court agreed that the superior court had properly determined that Richard and Ellen Marnell were named insureds, and that their son Michael, as a minor relative who resided in the Marnell household, was an unnamed "additional insured" under the Worcester Mutual policy.[14] Second, the Court agreed with the superior court that Michael Marnell was the "owner" and "operator" of the motor vehicle involved in the underlying death action.[15] In light of these facts, the *Marnell* Court observed that the provisions of the homeowners policy entitled "liability coverages,"[16] "motor vehicle exclusion,"[17] and "sever-

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[7] *Id. See* G.L. c. 138, § 34 (legal drinking age in Massachusetts is again 21 years). *Cf.* G.L. c. 23, § 85P and G.L. c. 4, § 7 cl. Forty-eighth to Fifty-first (eighteen is the age of majority in Massachusetts, and an "adult" is defined as a person who has obtained eighteen years of age). It is uncertain how this impacts a parent's right or ability to control unlawful drinking by adult offspring.

[8] *Marnell*, 398 Mass. at 241, 496 N.E.2d at 159.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.* at 241–42, 496 N.E.2d at 159. Worcester Mutual took the position that coverage was unavailable to the Marnells because of the policy's motor vehicle exclusion, which Worcester Mutual believed applied to all insureds notwithstanding the policy's severability of insurance clause. *Id.* at 242, 496 N.E.2d at 159; *see infra* notes 20–22 and accompanying text.

[13] *Marnell*, 398 Mass. at 242, 498 N.E.2d at 159.

[14] *Id.*

[15] *Id.*

[16] *See id.* The insuring agreement of section II, the "Liability Coverages" section of the standard homeowners policy, as promulgated and filed by Insurance Services Office, Inc. with the Insurance Commissioner and as used by insurers in Massachusetts for the past decade, provides:

> If a claim is made or a suit is brought against any insured for damage to which this coverage applies, we will: a. pay up to our limit of liability for the damages for which the insured is legally liable; and b. provide a defense at our expense by counsel of our choice . . . .

Id.

[17] *Marnell*, 398 Mass. at 242, 498 N.E.2d at 159. The "motor vehicle exclusion" provides that the "[liability coverages] do not apply to bodily injury or property damage . . . arising

ability of insurance,"[18] were pertinent in determining Worcester Mutual's duty to defend Richard and Ellen Marnell.[19]

Worcester Mutual argued that the severability of insurance clause did not affect the application of the motor vehicle exclusion of the homeowners policy, which specifically precluded coverage for bodily injuries "arising out of the use . . . of a . . . motor vehicle owned and operated by . . . *any* insured."[20] Because Michael Marnell was an insured under the policy, Worcester Mutual asserted that Richard and Ellen Marnell were not covered against the death claim because the motor vehicle exclusion specifically excepted coverage arising from operation by "any insured."[21] Additionally, Worcester Mutual argued that the language of the motor vehicle exclusion was clear and unambiguous and expressed the "clear underwriting objective to place automobile accidents beyond the coverage afforded by a homeowner's policy."[22] The Court, however, determined that the meaning of the motor vehicle exclusion must be construed in conjunction with the severability of insurance clause, rather than alone as Worcester Mutual urged.[23]

In *Marnell*, the Court concluded that the severability of insurance clause in section II of the homeowners policy had the effect of separately extending liability coverage to *each* insured.[24] Analyzed in that way, it was significant that the automobile was "owned" and "operated" by Michael at the time of the accident.[25] The Court concluded that the policy afforded coverage and that Worcester Mutual had a duty to defend Richard and Ellen Marnell because the injury alleged in the underlying action did not arise out of *Richard and Ellen's* ownership or use of Michael's automobile.[26]

Such an interpretation of the policy was preferable to that proposed

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out of: (1) the ownership, maintenance, use, loading or unloading of motor vehicles or all other motorized land conveyances, including trailers, owned or operated by . . . an insured; . . . " *Id.*

[18] *Id.* at 242, 496 N.E.2d at 159–60. The "severability of insurance" clause states that "[t]his insurance applies separately to each insured. This condition shall not increase our limit of liability for any one occurance." *Id.*

[19] *Id.* at 241, 498 N.E.2d at 159.

[20] *Id.* at 242, 498 N.E.2d at 160 (emphasis in original).

[21] *Id.* at 242–43, 498 N.E.2d at 160.

[22] *Id.* at 242, 498 N.E.2d at 160.

[23] *Id.* The Court stated, "[T]he severability of insurance clause makes coverage available for Richard and Ellen Marnell." *Id.* at 244, 498 N.E.2d at 160. The Court distinguished *Marnell* from a similar Massachusetts case because the other case involved compulsory motor vehicle insurance. See *infra* notes 39–44 and accompanying text for a discussion of Desrosiers v. Royal Ins. Co., 393 Mass. 37, 468 N.E.2d 625 (1984).

[24] *See supra* note 14 and accompanying text.

[25] *See supra* note 15 and accompanying text.

[26] *Marnell*, 398 Mass. at 244, 498 N.E.2d at 161 ("Insured" when used in the context of a motor vehicle exclusion refers only to the individual claiming coverage).

by Worcester Mutual, the Court reasoned, because it gave reasonable meaning to both the motor vehicle exclusion and the severability of insurance clause.[27] Conceding that its interpretation rendered superfluous the phrase "any insured" in the motor vehicle exclusion,[28] the Court still preferred that interpretation because adoption of Worcester Mutual's interpretation would render the entire severability of insurance clause meaningless.[29] Thus, the Court's construction gives the maximum possible effect to both policy provisions. This interpretation extends homeowners' coverage for negligent supervision claims to those who do not own or operate the automobile involved in the underlying action. Furthermore, the motor vehicle exclusion continues to preclude coverage as to the particular "insured" who owns or operates the automobile involved in any such accident.[30]

By giving a reasonable meaning to both the motor vehicle exclusion and the severability of insurance clause, the Court adhered to the long-standing rule of construction favoring the interpretation which effectuates the "main manifested design of the parties."[31] The Court concluded that the purpose of a homeowners policy is to protect the homeowners from unexpected risks associated with the home.[32] In *Marnell*, the wrongful death complaint alleged that Richard and Ellen Marnell's negligent supervision of activities occurring within their home had proximately caused the death of Robert Alioto.[33] The Court reasoned that the Marnells could reasonably expect coverage for such an unexpected incident to exist under the homeowners policy.[34]

Significantly, the Court distinguished the negligent supervision theory which *Marnell* advanced from a theory of negligent entrustment. Negligent entrustment derives from the concept of ownership, operation, and use of a motor vehicle. Negligent supervision, however, concerns an alleged failure to prevent certain activities within the insureds' house-

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[27] *Id.* at 245, 498 N.E.2d at 161 (citing Sherman v. Employers' Liab. Assurance Corp., 343 Mass. 354, 357, 178 N.E.2d 864, 866 (1961)).

[28] *Id.*

[29] *Id.* (citing Desrosiers v. Royal Ins. Co., 393 Mass. 37, 40, 468 N.E.2d 625, 628 (1984)).

[30] *Id.*

[31] *Id.* (citing King v. Prudential Ins. Co., 359 Mass. 46, 50, 267 N.E.2d 643, 646 (1971), quoting Joseph E. Bennett Co. v. Firemans Fund Ins. Co., 344 Mass. 99, 103–04, 181 N.E.2d 557, 561 (1962)).

[32] *Id.* ("Clearly, the manifest design of homeowners insurance is to protect homeowners from risks associated with the home and activities related to the home.").

[33] *Id.* at 245–46, 498 N.E.2d at 161. *But see id.* at 243, 498 N.E.2d at 160 (inclusion of the phrase, "any insured" in the motor vehicle exclusion expressed the clear intention of the underwriter to exclude automobile accidents from the scope of coverage under the homeowner's policy).

[34] *Id.* at 245–46, 498 N.E.2d at 161.

hold.[35] The Court distinguished negligent supervision of activities within the home from allegations which involve automobile ownership by the insured.[36] The Court held that Worcester Mutual had a duty to defend Richard and Ellen Marnell against the wrongful death because they were "insureds" under the policy who neither owned nor operated the automobile involved in the fatal accident, and plaintiffs' damage was alleged to have arisen from activities occurring in connection with the Marnells' home.[37]

Because of the peculiar factual situations in *Marnell* and other recent cases which have involved policies with motor vehicle exclusions and severability of insurance clauses,[38] it is difficult to predict the future trend of such decisions. In the 1984 decision of *Desrosiers v. Royal Ins. Co. of America*,[39] the Court refused to apply a severability of insurance clause to a motor vehicle exclusion.[40] Although *Marnell* and *Desrosiers* reflect two opposing viewpoints to a similar problem, the *Marnell* Court suggested that *Desrosiers* could be limited to its facts because, unlike *Marnell*, it involved a policy of compulsory motor vehicle insurance.[41] Upon closer scrutiny, it appears that the Court in *Marnell* adopted an interpretation of the motor vehicle exclusion and the severability of insurance clause which it believed courts should adopt as the general rule in Massachusetts; courts should read *Desrosiers* as an exception to that general rule.[42] Despite the holding in *Desrosiers*, such an interpretation is supported by the "considerable force" that exists, as *Desrosiers* acknowledged, for applying a severability of interests clause to the motor vehicle liability exclusion.[43]

Assuming that the *Marnell* and *Desrosiers* decisions reflect the Supreme Judicial Court's willingness to extend the applicability of the severability of insurance clause to the motor vehicle exclusion in a homeowners policy, the question remains to what extent, if any, the motor vehicle exclusion is relevant in a homeowners policy. With regard to

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[35] *Id.* at 243, 498 N.E.2d at 160 (citing Barnstable County Mut. Fire Ins. Co. v. Lally, 374 Mass. 602, 373 N.E.2d 966 (1977)). The Court distinguished negligent entrustment from negligent supervision by concluding that negligent entrustment is derived from the concept of ownership, operation and use of the automobile whereas an action involving negligent supervision is separate from the automobile involved in the accident.

[36] *Id.*

[37] *Id.* at 245–46, 498 N.E.2d at 161.

[38] *See infra* notes 39, 41–43 and accompanying text.

[39] 393 Mass. 37, 468 N.E.2d 625 (1984).

[40] *See* Moran, *Insurance Law*, 1984 ANN. SURV. MASS. LAW § 15.7, at 534, and *cf.* § 15.4, at 520.

[41] *Marnell*, 398 Mass. at 240, 498 N.E.2d at 628.

[42] *Id. See Desrosiers*, 393 Mass. at 40, 469 N.E.2d at 628 (citations omitted).

[43] *Desrosiers*, 393 Mass. at 40, 468 N.E.2d at 628 (citations omitted).

named insureds whose alleged negligence is passive rather than active — as in the case of Richard and Ellen Marnell — it is likely that the Court will apply the severability of insurance clause to the motor vehicle exclusion as the general rule. Cases such as *Desrosiers* will become exceptions to that rule.[44] Such an approach would comport with the Court's analysis in *Desrosiers* and its holding in *Marnell*.[45] It would also carry out the Court's stated preference for giving a reasonable meaning to *all* policy provisions rather than an interpretation that renders entire clauses inapplicable or meaningless.[46]

Courts will, however, continue to uphold the motor vehicle exclusion when the homeowners' insured is directly and actively involved in the commission of an automobile tort. Giving effect to the motor vehicle exclusion in such a case would be entirely consistent with *Marnell*. In such an instance it would be the insured claiming coverage who was the person involved in the accident. Thus, consideration of the severability of interests clause will not be necessary in every accident case to determine the scope of coverage under a homeowners policy.[47] What triggers homeowners coverage under *Marnell* is an allegation of negligence by a named insured that is separate and distinguishable from such insured's ownership, use, or operation of the motor vehicle alleged to have caused the bodily injury or property damage about which the plaintiffs complain.[48] Therefore, despite the decision in *Marnell*, the motor vehicle exclusion should still have a limited application in a homeowners policy in Massachusetts.

Clearly, however, the Court has limited the applicability of the motor vehicle exclusion in the homeowners policy,[49] and in effect has rewritten that exclusion to read "each insured" rather than "any insured." In so doing, the Court overlooks or misconstrues the underwriting purpose served by the severability of insurance clause.[50] Insurers can be expected to re-evaluate the phrasing of their two clauses so as to effectuate better

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[44] *See supra* notes 42 and 43 and accompanying text.

[45] *See supra* notes 1–5 and 39–43 and accompanying text.

[46] *Marnell*, 398 Mass. at 246, 498 N.E.2d at 161. *But cf.*, Reliance Ins. Co. v. Aetna Cas. & Sur. Co., 17 Mass. App. Ct. 218, 221–22, 457 N.E.2d 622, 647 (1983) *rev'd* 393 Mass. 48, 51, 468 N.E.2d 621, 623 (1984) (application of severability of interests clause causes tractor trailer exclusion to be read out of commercial motor vehicle policy).

[47] *Marnell*, 398 Mass. at 244, 498 N.E.2d at 161.

[48] *Id.* at 245–46, 498 N.E.2d at 161.

[49] *Id.* at 242, 498 N.E.2d at 159–60.

[50] *Compare* Reliance Ins. Co. v. Aetna Casualty & Sur. Co., 17 Mass. App. Ct. 218, 221, 456 N.E.2d 645, 647 (1983) ("The purpose of the severability of interests clause was to express an underwriting intent that nonliability or a discharge of liability under the policy as to one category of insured did not leave another category of insured unprotected.").

the underwriters' intentions underlying both provisions of the homeowner's contract.[51]

§ 13.2. Excessive Indemnification — Amount of Recovery for Wind and Water Loss — Pro Rata Apportionment of Loss — Other Insurance — Evidence of Value. In *McCormick v. Travelers Indemnity Co.*,[1] the Appeals Court scrutinized the coverage clauses of two insurance policies which insured the same property against separate and distinct risks of loss.[2] The court determined that the circumstances did not necessitate proration of the amount of the insured's loss between the two carriers.[3] The conflict arose over damage to an insured's home caused by contributing factors[4] during the infamous "Blizzard of '78." The homeowner held two policies: one exclusively covering damage by flood[5] and the other covering damage by windstorm.[6] The amount of loss was at question, and the court allowed the homeowner to testify as to the value of the home before and after the storm.[7]

McCormick's dispute with Travelers Indemnity Company (Travelers) arose after the "Blizzard of '78."[8] The McCormick home on Surfside Road in Scituate, Massachusetts, was damaged during that storm to such an extent that local officials condemned the structure; it was subsequently razed.[9] Under a policy issued by the National Flood Insurance Program (NFIP) of the Federal Insurance Administration, McCormick received policy proceeds of $35,000 in full settlement of flood damage to her home.[10] McCormick had a separate insurance contract in force at that time with Travelers, which expressly insured the property against damage caused by windstorms[11] but which specifically excluded coverage for damage from water, even if driven by wind.[12]

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[51] *Marnell*, 398 Mass. at 243, 244, 498 N.E.2d at 161. As the Court stated, "we agree that without the severability provision a literal reading of the motor vehicle exclusion by itself precludes the Marnells from coverage under the policy because Michael Marnell, an insured, owned and operated the motor vehicle involved in the fatal accident. But the severability of insurance clause makes coverage available to Richard and Ellen Marnell nonetheless." *Id.* at 244, 498 N.E.2d at 161.

§ 13.2 [1] 22 Mass. App. Ct. 636, 496 N.E.2d 174 (1986).

[2] *Id.* at 637, 496 N.E.2d at 175.

[3] *Id.* at 639, 496 N.E.2d at 176.

[4] *Id.* at 636, 496 N.E.2d at 174.

[5] *Id.*

[6] *Id.* at 637, 496 N.E.2d at 175.

[7] *Id.*

[8] *Id.* at 637, 496 N.E.2d at 174.

[9] *Id.* at 636, 496 N.E.2d at 174.

[10] *Id.*

[11] *Id.* at 637, 496 N.E.2d at 174.

[12] *Id.*

Based on that water damage exclusion, Travelers denied any liability to McCormick on its policy.[13] McCormick subsequently filed the instant suit against Travelers,[14] claiming at trial that she sought compensation under Travelers' policy for only the property damage to the structure actually caused by heavy winds.[15] Travelers argued that the property damage was caused by water, and thus excluded.[16] The jury returned a verdict for McCormick and the court entered the judgment.[17]

Travelers requested that the court reduce the judgment by the $35,000 previously paid to McCormick by the NFIP.[18] The trial judge concluded that Travelers was not entitled to such proration because the policies insured against two separate and distinct risks.[19] Travelers appealed,[20] arguing that the court should set aside the judgment on the ground that it was supported by insufficient evidence.[21] Alternatively, Travelers argued that the judgment should be reduced on the grounds that it compensated McCormick more than her actual loss.[22]

The Appeals Court affirmed the judgment.[23] The court began its analysis of the case by examining the sufficiency of the evidence presented.[24] In particular, Travelers challenged the trial court's admission of McCormick's opinion as to the fair market value of her property before the blizzard, which she had testified was $135,000.[25] The Appeals Court found no error in the admission of such evidence. Although testimony as to value is usually given by experts, such testimony can be given by a non-expert who is familiar with the property in question.[26] The court found that the plaintiff had based her opinion on years of residency and employment in Scituate.[27] Also, the foundational evidence showed that McCormick previously had researched land valuations in her neighborhood because she had an interest in selling her property[28] just prior to the "Blizzard of '78."[29]

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[13] *Id.* at 637, 496 N.E.2d at 175.
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *See generally*, LIACOS, MASSACHUSETTS EVIDENCE 118–19 (5th ed. 1981 & Supp. 1985).
[27] McCormick v. Travelers Indemnity Co., 22 Mass. App. Ct. 636, 496 N.E.2d 174 (1986).
[28] *Id.* at 636, 496 N.E.2d at 175.
[29] *Id.*

It would seem that McCormick did have an opinion based on particular familiarity with the subject property, which the law requires a property owner to show before he or she may express a valuation opinion.[30] The Appeals Court noted that prior to plaintiff's testimony, the trial judge had correctly instructed the jury about the forthcoming opinion.[31] Under such circumstances, the trial judge must explain to the jury the difference between lay and expert testimony, note the legal requirement that the lay witness must demonstrate particular familiarity with the property, and instruct the jury as to the weight which it is free to give such evidence.[32] The Appeals Court noted that in all respects, the judge gave correct instructions to the jury.[33] Based on McCormick's opinion testimony regarding her property's fair market value — and the evidence that in 1978 the assessed value of McCormick's land was a mere fifteen percent of the total assessed valuation for her land and structure — the Appeals Court found that the jury had a sufficient basis for determining the amount of McCormick's compensable loss.[34]

The Appeals Court also considered the excessive indemnification issue raised by Travelers' assertion that McCormick had been permitted to recover more than the amount of her loss.[35] In its analysis, the court apparently believed that Travelers misperceived the jury's verdict.[36] Travelers asserted that the jury's award of $80,000 was a determination of the extent of McCormick's property damage rather than a determination of the amount of the defendant's liability on its policy.[37] On this basis Travelers sought a reduction in the judgment by subtracting the amount already paid by the NFIP.[38] It is axiomatic that any damage award should compensate a plaintiff for no more than the amount of damage actually suffered.[39] Travelers argued that the happenstance of McCormick having two policies in force did not give her the right to recover indemnity for more than what she actually had lost due to the blizzard.[40]

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[30] LIACOS, *supra* note 26, at 118–19, notes that Massachusetts evidence law requires such a foundation before lay evidence as to property value may be admitted by a property owner.

[31] *McCormick*, 22 Mass. App. Ct. at 638, 496 N.E.2d at 176.

[32] *Id.* at 637, 496 N.E.2d at 175 (citing Southwick v. Massachusetts Turnpike Auth., 339 Mass. 666, 668–69, 162 N.E.2d 271 (1969); LIACOS, *supra* note 26, at 118–19.

[33] *McCormick*, 22 Mass. App. Ct. at 637, 496 N.E.2d at 175.

[34] *Id.* at 638, 496 N.E.2d at 175 (citing Agoos Leather Cos. v. American & Foreign Ins. Co., 342 Mass. 603, 607–10, 342 N.E.2d 652, 656 (1961)).

[35] *Id.* at 637, 496 N.E.2d at 175.

[36] *Id.* at 638, 496 N.E.2d at 175.

[37] *Id.*

[38] *Id.*

[39] 8A APPLEMAN, INSURANCE LAW AND PRACTICE § 4907.35, at 354 (1981); Wiggin v. Suffolk Ins. Co., 35 Mass. (18 Pick.) 145, 153 (1836).

[40] *McCormick*, 22 Mass. App. Ct. at 638, 496 N.E.2d at 175 (citing Kingsley v. Spofford,

The court discredited Travelers arguments on several grounds.[41] According to the court, the jury had to determine the amount of defendants' liability based on how much of the total damage was caused by the winds.[42] Travelers, according to the court, made no showing that the jury based its verdict in any way upon water damage rather than wind damage.[43] When making its determination, the jury had known of McCormick's $35,000 flood policy settlement as well as the terms of the Travelers coverage and the exclusion of water damage upon which Travelers relied.[44] The court concluded, therefore, that from this evidence the jury had a proper basis for determining to what extent wind caused McCormick's property damage.[45]

The language of Travelers' policy, according to the court, defeated its claim for a pro-rata apportionment of the loss with the NFIP policy.[46] The "pro-rate liability" clause of Travelers' policy provided that it would not be liable for a greater proportion of any loss "than the amount hereby issued shall bear to the whole insurance covering the property against *the peril* covered." In this case it was undisputed that the "peril" insured against by Travelers was the risk of windstorm.[47] Thus, the court construed the "other insurance" clause of Travelers' policy to limit the proration provision to only those situations where the damage was the result of identical "perils"[48] covered under *both* Travelers' policy and any other policies held by the insured.[49] The Travelers' policy insured

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298 Mass. 469, 475, 11 N.E.2d 487, 491–92 (1937), quoting from Tabbot v. American Ins. Co., 185 Mass. 419, 421, 70 N.E.2d 430, 431 (1904)).

[41] *McCormick*, 22 Mass. App. Ct. at 638–39, 469 N.E.2d at 175–76.

[42] *Id.* at 638, 496 N.E.2d at 175.

[43] *Id.* at 639, 496 N.E.2d at 176.

[44] *Id.* at 638, 496 N.E.2d at 175.

[45] The court discussed, however, whether a special verdict had been requested of the jury pursuant to Rule 49 of the Massachusetts Rules of Civil Procedure. The record on appeal did not show whether special questions were posed to the jury regarding the degree of water versus wind damage. If such questions had been asked there would have been no uncertainty as to the degree to which the jury had considered water and wind to be causative factors in McCormick's property damage. *McCormick*, 22 Mass. App. Ct. at 639, 496 N.E.2d at 176.

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.* at 176 n.2, 496 N.E.2d at 176 n.2. That clause, entitled "Other Insurance," states in pertinent part:

> The company shall not be liable for a greater proportion of any loss from *any peril or perils* included in this policy (1) than the applicable limit of liability under this policy bears to the whole amount of . . . insurance covering the property, or which would have covered the property except for the existence of this insurance, whether collectible or not, and whether or not such other . . . insurance covers against the *additional* perils or perils insured hereunder, nor (2) for a greater proportion of any

against various named perils including the peril of wind damage, while the NFIP policy covered only damage by water.[50] Therefore, the coverages of the two policies did not overlap but were separate and distinct.[51]

It is a fundamental principle that to constitute "other insurance" permitting proration of a loss, the policies in question must cover the same risks.[52] It seems clear that the court reasoned correctly in this regard; the reasoning accords with this basic principle of "other insurance."[53] As the court noted, it "is generally held that in order for a proportionate recovery clause to operate in the insurer's favor, there must, under the policies, be both an identity of the insured interest and an identity of risk; and the requirement with respect to identity of risk is not obviated by the fact that the apportionment clause refers to other insurance 'whether concurrent or not.'"[54] The two policies here in question contained no such ambiguity and were clear as to their respective risks.[55]

The *McCormick* decision is more important for its evidentiary analysis than its interpretation of the insurance coverage. The court's treatment of the valuation opinion offered by the lay plaintiff of her property's value raises questions as to its actual sufficiency. Although once it was assumed that an owner of property had sufficient familiarity to testify to its value, the practicality of this supposition no longer exists.[56] An owner now, like any other witness, must be particularly familiar with the property to testify to its value.[57] For example, one who owns several properties, or an investor who purchases an interest in a real estate investment trust, might prove to be far less familiar with the actual condition of such properties than an owner-occupant of single-family residential property. As *McCormick* makes clear, the proposition that an owner of a property may testify as a lay witness as to her opinion of its value, includes the qualification criteria that the Appeals Court found the trial court had applied.[58] For lay as well as expert opinion evidence, the proponent must

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loss than the applicable limit of liability under this policy bears to all insurance whether collectible or not, covering in any manner such loss, or which would have covered such loss except for the existence of this insurance.

Id.

[50] *Id.* at 637, 496 N.E.2d at 174.

[51] *Id.*

[52] *Id.* at 639, 496 N.E.2d at 176 (quoting 6 APPLEMAN, INSURANCE LAW AND PRACTICE § 3907 (1972)).

[53] *Id.*

[54] *Id.* at 639–40, 496 N.E.2d at 176 (quoting 16 COUCH ON INSURANCE 2D, § 62:93 (Rhodes Rev. 1983)).

[55] *Id.*

[56] *See* LIACOS, *supra* note 26, at 119.

[57] *Id.*

[58] *McCormick*, 22 Mass. App. Ct. at 639–40, 496 N.E.2d at 175.

establish a foundation as to the source of the witness's knowledge and the basis for that testimony.[59]

The court's analysis of the excessive indemnification issue was orientated to the specific facts of *McCormick*.[60] The insurer failed to prove that the judgment reflected all the property damage which a combination of overlapping elements had caused.[61] Because there was no proof that the perils overlapped, proration was not justified under Travelers' own "other insurance" clause.[62] The court hinted, however, that if the defendant could have shown (possibly through special questions to the jury) that the jury had decided on the degree of damages caused by wind and water, then the insurer would have had better grounds to justify such proration.[63]

§ 13.3. Penal Sum of Bond Defines Surety's Liability — "Per Occurrence" Interpretation Rejected for Surety Bonds. In a case of first impression in Massachusetts, during the *Survey* year the Supreme Judicial Court faced the question of whether a surety on a public warehouseman's licensing bond is liable for all claims against the warehouseman only to a maximum of the penal sum of the bond, or whether the bond applies on a "per occurrence" basis to each such claim.[1] The Court in *Peerless Insurance Co. v. South Boston Storage and Warehouse* held that a surety is liable only to the extent of the penal sum of the bond, irrespective of the number of claimants.[2]

Suretyship is the contractual relationship created when one party, the surety, guarantees under certain circumstances the payment or performance owed by another party (the "principal") to a third party (the "obligee").[3] The surety's obligation is set out in a bond running not to the principal, but to the obligee.[4] By virtue of chapter 175, section 2,

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[59] *Id.* at 637, 496 N.E.2d at 175.

[60] *Id.* at 637–40, 496 N.E.2d at 175–76.

[61] *Id.*

[62] *Id.* at 640, 496 N.E.2d at 176.

[63] *Id.*

§ 13.3 [1] 397 Mass. 325, 491 N.E.2d 253 (1986). One of the authors represented The Surety Association of Massachusetts and the American Insurance Association, which jointly submitted an *amici curiae* brief to the Supreme Judicial Court in this matter.

[2] *Id.* at 326, 491 N.E.2d at 253.

[3] *See generally*, G.L. c. 175, § 105; RESTATEMENT OF SECURITY §§ 82–83 (1941).

[4] Inapplicable to surety bonds, therefore, are statutory provisions allowing a judgment creditor to reach and apply an insurer's obligations under an insurance contract. *Cf.* G.L. c. 175, §§ 112, 113 and c. 214, § 3(9).

contracts of insurance essentially embody two-party relationships; in contrast, surety bonds are tripartite in nature.[5] In this case, Peerless was the surety in a licensing bond which the principal, South Boston Storage and Warehouse, Inc. posted in obtaining a license as a public warehouse from the Commissioner of Public Safety.[6] The bond, as required by chapter 105, expressly ran in favor of the State Treasurer, as obligee.[7]

Several claimants confronted Peerless alleging loss or damage to their property while stored by South Boston Storage. The aggregate claims far exceeded the penal sum of Peerless' bond.[8] Peerless attempted to limit its liability to the penal sum of that bond by tendering it into court for payment and filing a complaint for declaratory relief and interpleader against the claimants, the State Treasurer as bond obligee, and the Commissioner of Public Safety as the relevant licensing authority.[9] Peerless' motion for summary judgment, which raised the question of the extent of its liability under the bond, was reported to the Appeals Court,[10] and the Supreme Judicial Court took the case on direct appellate review pursuant to chapter 211A, section 10(A).[11]

The Commonwealth and the claimants argued that the language of the bond and the provisions of the public warehouseman statute required a "per occurrence" interpretation.[12] The Court, however, rejected this argument and relied instead on "settled principles of contract and suretyship law"[13] to hold that a surety bond is a contract which establishes the limits of the surety's liability.[14]

Massachusetts law recognizes the contractual nature of a statutory bond obligation. In *Treasurer & Receiver General v. Massachusetts Bonding & Insurance Co.*, the Court held that sureties "cannot be [held] beyond the fair scope of their engagement, as intended by the parties when undertaken."[15] That the bond is statutory does not create a larger

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[5] By statute, surety contracts in Massachusetts are deemed not to be contracts of insurance. G.L. c. 175, § 107; General Electric Co. v. Lexington Contracting Corp., 363 Mass. 122, 124, 292 N.E.2d 874, 876 (1973).

[6] *Peerless*, 397 Mass. at 326, 491 N.E.2d at 253–54.

[7] *Id.* at 326, 491 N.E.2d at 254.

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] 349 Mass. 256, 258, 207 N.E.2d 684, 686 (1965) (citing President of Dedham Bank v. Chickering, 21 Mass. (4 Pick.) 314, 340 (1827)).

risk for the surety.[16] Consistent with this contractual analysis,[17] Massachusetts has long accepted the fundamental rule that limits a surety's liability on a surety bond to the penal sum named in the bond. "[T]he measure of the principal's liability ceases to operate as the rule against the surety when that liability exceeds the penalty agreed upon."[18] As held in *Brown v. London & Lancashire Indemnity Co.*,[19]

> The maximum for which the defendant can in any event be held liable is the penalty of the bond . . . . Up to that amount as the maximum, the surety may be held for the damages actually sustained by the obligee on the bond. For more than that amount the surety cannot be held no matter how great may be the damages sustained by the obligee . . . . If [the plaintiff's actual damage] is more than the penal sum of the bond, with interest, it cannot enhance the liability of the surety. If it is less than the penal sum of the bond the surety gets the benefit.[20]

In *Hartford Accident and Indemnity Co. v. Casassa*,[21] the Supreme Judicial Court held that a surety's liability on a construction bond followed "the general rule that the penal amount named in the bond limits the amount of recovery to that sum."[22] Similarly, *Union Market National Bank of Watertown v. Nonantum Investment Co.*,[23] held that recovery

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[16] *Id.* The Court held that a bond given pursuant to a statute should be understood to provide the coverage which the legislature has required in order for the right which the statute provides. *Id.* at 257, 207 N.E.2d at 685–86 (citing United States v. Hartford Acc. & Indem. Co., 117 F.2d 503, 505 (2d Cir. 1941)).

[17] Because a surety bond is deemed not to be an insurance contract, *see* G.L. c. 175, § 107 and General Electric Co. v. Lexington Contracting Corp., 363 Mass. 122, 124, 292 N.E.2d 874, 876 (1973), it follows that *contra insurer* rules of policy construction have no application in cases involving true surety bonds: "The contract of a surety is interpreted according to the standards that govern the interpretation of contracts in general." RESTATEMENT OF SECURITY § 88 (1941).

[18] Bank of Brighton v. Smith, 94 Mass. (11 Allen) 243, 251 (1866).

[19] 249 Mass. 511, 516, 144 N.E. 395, 396 (1924).

[20] *Id.* at 516, 144 N.E. at 396. This principle is similarly recognized by Corbin and other commentators:

> One who guarantees payment of the debt of another is always promising the same performance as is the principal debtor. This is true even though he [the surety] limits the amount of his liability. Up to that limit, the performance promised is one and the same.

CORBIN ON CONTRACTS, § 926 (1951). As for amounts beyond a bond's penal sum, however, the surety's obligations are not joint with those of the defaulting principal. "The surety's obligation may be co-extensive with that of his principal or may be less, as where the debt is $10,000 and the surety has guaranteed only $5,000 . . . . Suretyship obligations are contractual, and the important point of inquiry should be the precise undertaking of the surety and the duty of the principal." RESTATEMENT OF SECURITY § 82 comment (g) (1941). In this regard, the RESTATEMENT recognizes that a "surety's liability may be limited . . . by a stipulated maximum." *Id.* at § 83 comment (b).

[21] 301 Mass. 246, 16 N.E.2d 860 (1938).

[22] *Id.* at 255–56, 16 N.E.2d at 866.

[23] 291 Mass. 439, 197 N.E. 57 (1935).

on a banking surety bond was limited to the penal sum of the bond even though the claimant's damages exceeded the face amount of the bond.[24] Moreover, the Massachusetts statute which generally governs actions against bonds — General Laws chapter 235, sections 9–13 — also embodies this general rule. Chapter 235, section 10 authorizes a court in equity to issue execution against a bond "for so much of the penal sum as is then due and payable;"[25] section 12 of that statute allows such recoveries against a bond "until the penalty is exhausted."[26]

At one time, the State of Washington adopted a minority rule. In *Salo v. Pacific Coast Casualty Company*,[27] the Washington Court adopted a "per occurrence" rule,[28] reasoning that if a bond were exhausted, it would be possible for the principal to continue to engage in business with a bond posted on which the surety could have no liability.[29] The court concluded that the Washington legislature did not intend such a result, and thus each claimant could recover to the extent of the penal sum even though the combined recoveries exceeded that bond penalty.[30]

In *Peerless*, the Supreme Judicial Court was largely guided by General Laws chapter 235, sections 9, 10, and 12. As perceived by the Court, those statutes reflected the legislature's intent that a surety be liable only to the extent of the penal sum of its bond.[31] In deciding for Peerless, the Court drew Massachusetts in line with the current thinking of every jurisdiction which has confronted this issue.[32] This decision is important

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[24] *Id.* at 444, 197 N.E. at 60.

[25] G.L. c. 235, § 10.

[26] G.L. c. 235, § 12.

[27] 95 Wash. 109, 163 P. 384 (1917).

[28] *Id. Salo* is cited in Rolen v. Rauhuff, 315 F. Supp. 935, 938 (E.D. Tenn. 1970).

[29] *Salo*, 95 Wash. at 111, 163 P. at 386.

[30] Even in Washington State, the "per occurrence" rule is no longer in effect. As noted in Paulsell v. Peters, 9 Wash. 2d 599, 603 115 P.2d 708, 711–12 (1941), the Washington legislature amended the public warehouseman's statute to reverse the "per occurrence" holding of Commercial State Bank v. Palmerton-Moore Grain Co., 152 Wash. 89, 277 P. 389 (1929). Thus, at the present time, no state recognizes a "per occurrence" rule relative to public warehouseman's licensing bonds.

[31] *Peerless*, 397 Mass. at 327, 491 N.E.2d at 254.

[32] Every case addressing this specific issue has expressly rejected "per occurrence" liability under a surety bond. *See, e.g.*, United States v. America Surety Co. of New York, 172 F.2d 135 (2d Cir.) *cert. denied*, 337 U.S. 930 (1949); Town of Brookfield v. Greenridge, Inc., 177 Conn. 527, 418 A.2d 907 (1979); New Haven v. Eastern Paving Brick Co., 78 Conn. 689, 698, 63 A. 517 (1906); Travelers Indemnity Co. v. Askew, 280 So. 2d 469 (Fla. App. 1973); Jaeger Mfg. Co. v. Massachusetts Bonding and Ins. Co., 229 Iowa 158, 294 N.W. 268 (1940); St. Paul Ins. Co. v. Fireman's Fund American Ins. Co., 309 Minn. 505, 245 N.W.2d 209 (1976); Totowa v. American Surety of New York, 39 N.J. 332, 188 A.2d 586 (1963); National Grange Mutual Ins. Co. v. Prioleau, 269 S.C. 161, 236 S.E.2d 808 (1977); First Nat'l Bank v. Massachusetts Bonding and Ins. Co., 69 S.W.2d 151 (Tex. 1934). *See also* 74 AM. JUR. 2D *Suretyship* § 165 (1974).

to bonding companies and corporate sureties, not just because of the clear limit it places on their contractual liability, but principally because of the impact there might have been if the Supreme Judicial Court had breathed life into the moribund Washington "per occurrence" theory. Quite properly, the Court unequivocally rejected a "per occurrence" construction of surety bonds as antithetical to fundamental principles of contract and suretyship law.[33] Because even a statutory bond is a contract, the surety's liability justifiably is limited to the amount agreed upon by the parties. As the Court wisely observed, "liberality of construction should not place burdens on an obligor that it did not assume in its contract."[34]

§ 13.4. Wrongful Death Damages — Loss of Consortium and Society — "Per Person" or "Per Accident" Limits. For almost one hundred years, damages awarded in Massachusetts in a wrongful death action have been in a single, indivisible amount. Until 1973, the nature of the recovery was punitive, measured against the defendant's culpability. While this is no longer the case, the present wrongful death statute still requires a single, indivisible reward. During the *Survey* year, the Appeals Court clarified in *Doyon v. Travelers Indemnity Co.*,[1] that any award of damages for wrongful death encompasses claims for loss of consortium as well as the estate's statutory claim under General Laws, chapter 229. The issue on appeal was whether chapter 229, section 2 permits the recovery of wrongful death damages in a single sum "per accident" or in separate amounts "per person."[2] The Appeals Court concluded that such damages are to be awarded in a single, indivisible amount under the wrongful death statute, and that the claims of a wife and a child are simply separate ingredients of that single amount recoverable by the decedent's personal administrator for the benefit of the statutory beneficiaries.[3]

The *Doyon* plaintiff was the administrator of the deceased's estate; no claim for conscious pain and suffering was involved in this case.[4] The deceased died instantly as a result of injuries sustained when an automobile owned and operated by the defendant's insured struck the decedent.[5] A wife and minor child survived the decedent, and the court concluded that the wrongful death action was the vehicle by which the

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[33] *Peerless*, 397 Mass. at 328, 491 N.E.2d at 255.

[34] *Id.*

§ 13.4 [1] 22 Mass. App. Ct. 336, 493 N.E.2d 887 (1986).

[2] *Id.* at 337, 493 N.E.2d at 887–88.

[3] *Id.* at 339, 493 N.E.2d at 889.

[4] *Id.* at 336–37, 493 N.E.2d at 887–88.

[5] *Id.* at 336, 493 N.E.2d at 887. The circumstances of the death did not support a claim for the decedent's conscious suffering and pain. *Id.*

administrator pressed the widow's claim for loss of consortium and the child's claim for the loss of the companionship and society of his parent.[6] In and of themselves, these two subsidiary claims were appropriate.[7] In *Diaz v. Eli Lilly & Co.*,[8] the Supreme Judicial Court held that a spouse has an independent claim for loss of consortium when the other spouse is negligently injured.[9] Similarly, *Ferriter v. Daniel O'Connell's Sons, Inc.*,[10] established that a minor child has a claim for loss of society and companionship when a parent suffers a negligently inflicted injury, so long as the child can demonstrate that he is a minor dependent on that parent.[11]

In Massachusetts, a claim for wrongful death is derived from chapter 229, section 2. In *Ferris v. Monsanto Co.*,[12] the Court dismissed a widow's claim for loss of consortium on the grounds that it was included in an administrator's statutory claim for wrongful death.[13] The Supreme Judicial Court held in *Cimino v. Milford Keg, Inc.*,[14] that a widow's claim for loss of consortium is present in every wrongful death action.[15] Similarly, the Court stated in *Ferriter v. Daniel O'Connell's Sons, Inc.*,[16] that loss of society for which minor children are entitled to recover would be included as part of a wrongful death claim under chapter 229, section 2.[17] Because a wrongful death claim is purely statutory in nature, both the award of damages and the amounts allowed similarly derive from the statute.[18]

In *Doyon*, the plaintiffs argued that the wife and child were separate persons for purposes of the "per person" as well as the "per accident" limits of the policy which Travelers had issued to the operator responsible for the death of plaintiff's intestate.[19] Plaintiff relied principally on *Bilodeau v. Lumbermens Mutual Casualty Co.*,[20] in which the Supreme Judicial Court held that a loss of consortium claimant is a separate "person" entitled to an independent "per person" recovery within the

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[6] *Id.* at 337, 493 N.E.2d at 888.
[7] *Id.* at 337–38, 493 N.E.2d at 888–89.
[8] 364 Mass. 153, 302 N.E.2d 555 (1973).
[9] *Id.* at 167–68, 302 N.E.2d at 564.
[10] 381 Mass. 507, 413 N.E.2d 690 (1980). *See also* Annot., 11 A.L.R.4th 518 (1980).
[11] *Id.* at 515–16, 413 N.E.2d at 696.
[12] 380 Mass. 694, 405 N.E.2d 644 (1980).
[13] *Id.* at 694 n.1, 405 N.E.2d at 645 n.1.
[14] 385 Mass. 323, 431 N.E.2d 920 (1982).
[15] *Id.* at 334, 431 N.E.2d at 927.
[16] 381 Mass. 507, 413 N.E.2d 690 (1980). *See also* Annot., 11 A.L.R.4th 518 (1980).
[17] *Id.* at 515, 413 N.E.2d at 695.
[18] *Doyon*, 22 Mass. App. Ct. at 338, 493 N.E.2d at 888.
[19] *Id.* at 337, 493 N.E.2d at 888.
[20] 392 Mass. 537, 467 N.E.2d 137 (1984).

"per accident" limits of the insured's policy.[21] In *Doyon*, Travelers had paid the plaintiff $100,000 under a settlement agreement which permitted further litigation of plaintiff's theory that the widow and child were two separate and distinct claimants, each entitled to the full "per person" amount of $100,000 available under Travelers' policy.[22]

The Appeals Court reversed summary judgment in favor of the plaintiff.[23] The court distinguished *Bilodeau* because in that case the loss of consortium claim arose from the injured's claim for pain and suffering, while in *Doyon* the plaintiff administrator used the wrongful death statute to assert the claims for loss of consortium and society.[24] Because the claims and damages for loss of consortium and society in *Doyon* were founded in the wrongful death statute, the court viewed plaintiff's reliance on *Bilodeau* as misplaced.

The court considered the history and use of the wrongful death statute. Between 1950 and 1973, the statute provided that courts were to assess damages in a wrongful death action, within specified limits, according to the defendant's degree of culpability.[25] Therefore, because the award was punitive to the defendant rather than compensatory to the plaintiffs, the amount of the award did not vary according to the number of persons who were entitled to recover.[26] In *Gaudette v. Webb*,[27] the Supreme Judicial Court ruled that the liability in a wrongful death action based on the degree of culpability of the defendant cannot be varied according to the number of beneficiaries, even if any of those beneficiaries are guilty of contributory negligence.[28]

Chapter 229, section 2 in its present form no longer emphasizes the punitive nature of the damage remedy.[29] The award is now largely compensatory, with no monetary limit set on the total amount of the recov-

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[21] *Id.* at 538, 467 N.E.2d at 138.

[22] *Doyon*, 22 Mass. App. Ct. at 337, 493 N.E.2d at 888.

[23] *Id.*

[24] *Id.* In *Bilodeau*, the injured person had not died from his injuries. Consequently, the husband's claim for loss of consortium was distinct, as it did not rely on G.L. c. 229, § 2. *Bilodeau*, 392 Mass. at 538–39, 467 N.E.2d at 138–39.

[25] *Doyon*, 22 Mass. App. Ct. at 338, 493 N.E.2d at 888.

[26] *Id.* The court cited St. 1949, c. 427 § 3; St. 1958, c. 238 § 1; and St. 1965, c. 683 § 1.

[27] 362 Mass. 60, 284 N.E.2d 222 (1972). *See also* Annot., 61 A.L.R.3d 893 (1972).

[28] *Gaudette*, 362 Mass. at 73 n.9, 284 N.E.2d at 231 n.9. The court cited RESTATEMENT (SECOND) OF TORTS § 493, which states that the amount of damages in a wrongful death action is fixed by the gravity of the defendant's fault. *See also* Oulighan v. Butler, 189 Mass. 287, 75 N.E. 726 (1905) and Brown v. Thayer, 212 Mass. 392, 99 N.E. 237 (1912). Both cases held that the damages in a wrongful death action are assessed to the degree of the defendant's culpability. *Oulighan*, 189 Mass. at 295, 75 N.E. at 729; *Brown*, 212 Mass. at 399, 99 N.E. at 240.

[29] *Doyon*, 22 Mass. App. Ct. at 338, 493 N.E.2d at 888.

ery.[30] The Appeals Court noted, however, that the statute is expressly worded to permit "*persons*" to collect an "*amount*" of damages.[31] Thus, an unlimited number of persons entitled to recovery may collect a single amount.[32] The damages amount is indeterminate from case to case, depending on the number of beneficiaries per case and the amount each is entitled to receive, but the defendant is liable under section 2 for only a single, indivisible amount.[33]

Without overturning any major doctrines of common law or judicial interpretation, the Appeals Court in *Doyon* clarified the nature in which courts are to award damages in a wrongful death action. While the court recognized that damages in such actions are no longer punitive, it upheld the long tradition in Massachusetts of awarding single, indivisible damage awards in a wrongful death action. That tradition is preserved in the present form of chapter 229 which allows for a sole amount notwithstanding the compensatory nature of the remedy.

§ 13.5. Liquor Liability Exclusion — Obligation of Insurer to Defend Insured When Necessary Elements For Exclusion Are Not Present. In *Newell-Blais Post #443, Veterans of Foreign Wars of the United States v. The Shelby Mutual Ins. Co.*,[1] the Supreme Judicial Court affirmed a declaratory judgment of the superior court which ordered The Shelby Mutual Insurance Company (Shelby Mutual) to defend Newell-Blais Post #443 of the Veterans of Foreign Wars (Newell-Blais). The Court, however, vacated that portion of the trial court's declaration which required Shelby Mutual to indemnify Newell-Blais. The Court reasoned that a decision as to indemnification should be held in abeyance until after the trial of the underlying wrongful death action.[2]

Newell-Blais was a non-profit veterans organization, incorporated under chapter 180 of the General Laws, licensed to serve alcoholic beverages on its premises.[3] Plaintiff filed a wrongful death action against Newell-Blais which alleged that the veterans post negligently served alcoholic beverages to a patron, and that as a result of this negligence the patron had carelessly operated his motor vehicle causing the death of two minor children.[4]

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[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.* at 339, 493 N.E.2d at 889.

§ 13.5 [1] 396 Mass. 633, 487 N.E.2d 1371 (1986). The authors' law firm represented the defendant, The Shelby Mutual Insurance Company.

[2] *Id.* at 633, 487 N.E.2d at 1372.

[3] *Id.*

[4] *Id.*

Shelby Mutual had issued Newell-Blais a comprehensive general liability insurance policy in the standard 1973 form, which obligated the insurer to defend and indemnify Newell-Blais against any suit for bodily injury or property damage covered by the policy.[5] The policy, however, contained a liquor liability exclusion, clause (h)(i), which provided that coverage did not apply where the insured or his indemnitee might be held liable as a person or organization engaged in the business of manufacturing, distributing, selling or serving alcoholic beverages.[6] The issue before the court was whether the veterans post qualified as a "business" for the purpose of the liquor liability exclusion. Shelby Mutual argued that Newell-Blais was a business for the purpose of the exclusion.[7] Newell-Blais argued that its non-profit status shielded the club from the exclusion.[8] The Court ruled that the plain meaning of the word "business" was applicable because the word was unambiguous in the policy, and thus held that the bar operated by the veterans post was not a "business."[9]

The language in the second half of the liquor liability exclusion, clause (h)(2)(i), excluded from coverage, liability imposed by or because of the violation of any statute, ordinance or regulation pertaining to the sale, gift, distribution or use of any alcoholic beverage to a minor or to a person under the influence of alcohol or which causes or contributes to the intoxication of any person.[10] Shelby Mutual additionally disclaimed its liability to defend and indemnify Newell-Blais on the ground that the veterans post had violated chapter 138, section 69, which prohibits a licensed seller from selling alcoholic beverages to an intoxicated person or a person known to have been intoxicated within 6 months preceeding.[11]

The Court held that this language in the liquor liability exclusion of the comprehensive general liability policy was insufficient to excuse the insurer from its duty to defend the wrongful death action against Newell-Blais, inasmuch as that complaint was based upon common law negligence.[12] Previously, in *Three Sons, Inc. v. Phoenix Insurance Co.*,[13] the Court decided that a similar exclusion did not preclude coverage where liability was imposed by reason of any statute or ordinance pertaining to the negligent distribution or sale of alcohol.[14] The language of the liquor liability exclusion of the Shelby Mutual policy appeared to import "a

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[5] *Id.*
[6] *Id.*
[7] *Id.* at 635, 487 N.E.2d at 1373.
[8] *Id.*
[9] *Id.* at 636, 487 N.E.2d at 1373.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] 357 Mass. 271, 257 N.E.2d 774 (1920).
[14] *Newell-Blais*, 396 Mass. at 636, 487 N.E.2d at 1373.

direct causal relationship between the fact of liability and the violation of the statute."[15] Thus, the Court concluded that this clause excluded coverage only where the violation of a statute, without more, was sufficient to impose liability.[16]

The *Newell-Blais* plaintiff based their wrongful death action upon common law principles of negligence.[17] They asserted violation of chapter 138, section 69 in the wrongful death complaint only as evidence of the veteran post's negligence; it would not, without more, be sufficient to impose civil liability on Newell-Blais.[18] Thus, the Court held that the veteran post's alleged violation of this penal statute did not preclude its coverage under the comprehensive general liability policy.[19]

The Supreme Judicial Court applied essentially the same standard of construction and interpretation to the *Newell-Blais* case as the Court has applied in previous cases.[20] Although strict construction of ambiguous policy terms against an insurer appears unfair in many instances, the standard is merely an approach adopted by the courts as a reaction to the impetus of growing concern for consumer protection.[21]

An insurer can protect itself to some degree by including definitions of terms and phrases in the insurance policies. By elaborating on the provisions, there will be less likelihood for disagreements concerning the scope of coverage. If Shelby Mutual, in underwriting the Newell-Blais operations, had included in its policy a modified definition of the word "business" to expressly invoke the liquor liability exclusion, thereby clarifying that the underwriters intended the sale of liquor for a profit by the otherwise non-profit organization to be an excluded "business" operation, the insurer might have avoided having to defend the veteran's post against the wrongful claim action.

The holding in *Newell-Blais* does not change the current state of Massachusetts law. The Court applied the traditional general rules of construction, and held that the word "business" in the liquor liability exclusion was unambiguous.[22] The Court applied the ordinary and usual

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[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id. See* McGuiggan v. New England Tel. & Tel. Co., 398 Mass. 152, 158, 496 N.E.2d 141, 143 (1986); Adamian v. Three Sons, 353 Mass. 498, 499, 233 N.E.2d 18, 19 (1968); Wiska v. Stanislaus Social Club, Inc., 7 Mass. App. Ct. 813, 817, 390 N.E.2d 1133, 1135 (1979).

[19] *Newell-Blais*, 396 Mass. at 636, 487 N.E.2d at 1373.

[20] *See* Three Sons, Inc. v. Phoenix Ins. Co., 357 Mass. 271, 257 N.E.2d 774 (1920).

[21] 20 POF2d 74.

[22] It is not unreasonable for courts to apply the ordinary and usual meaning of a word to exclusionary policy provisions if the word is not inherently ambiguous. In fact, this general rule which the courts adopted is quite rational. Although somewhat rigid, this rule of construction leads to certainty and predictability.

meaning of the term and rejected the insurer's position, citing its previous decision in *Three Sons* as controlling case law. The court denied Shelby Mutual's claim that Newell-Blais' violation of a penal statute in the course of serving liquor excused the insurer from having to defend its insured. The Court held that the wrongful death claim was based on common law negligence and not the violation of a penal statute and, therefore, concluded that the insurer was obligated to defend its insured in accordance with terms of the comprehensive general liability policy.

§ 13.6. Care, Custody and Control Exclusion — Allegations of Complaint Reasonably Susceptible of Interpretation of Claim Covered By Policy — Effect of Insurer's Wrongful Failure to Defend. In *Crane Service & Equipment v. United States Fidelity & Guaranty Co.*,[1] the Appeals Court scrutinized the so-called "care, custody and control" exclusion of the standard comprehensive general liability policy, which provides that the policy does not apply to liability for damage to property "rented to, used by, and in the care, custody or control of" the insured.[2] In this case, United States Fidelity and Guaranty Co. (USF&G) argued that the word "rental" on a crane company's invoice to its insured, Caputo Construction Company (Caputo) was conclusive of the intention of the parties.[3] On that basis, USF&G disclaimed coverage for property damage to a crane used on a Caputo construction site, arguing that the crane came within the exclusions for property "rented to," "used by," and "in the care, custody or control of" its insured.[4] USF&G's insured, Caputo, had been supplied with the crane, an operator, and an oiler by the named plaintiff, Crane Service.[5] The operator and the oiler retained physical control over the crane at all times.[6] Caputo paid an hourly fee for the crane service.[7] The members of the crew were employees of Crane Service, which paid their salaries, employment taxes, and provided their worker's compensation insurance.[8] Crane Service and not Caputo retained control over hiring and firing of the crew and responsibility for fueling and repairing the crane.[9] At the end of each day, the operator and the oiler retained the keys to the crane.[10] Although Caputo supervised

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§ 13.6 [1] 22 Mass. App. Ct. 666, 496 N.E.2d 833 (1986). The authors' law firm represented the named plaintiff in this action.

[2] *Id.* at 668, 496 N.E.2d at 834.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

the crane's activities, this coordinating function was typical of the relationship between general contractor and subcontractor on a construction site.[11]

The insurer's liability to cover its insured under these circumstances turned upon the court's interpretation of Caputo's contractual relationship with Crane Service.[12] The Appeals Court found guidance in a Michigan federal court decision, *Insurance Company of North America v. Northwestern National Insurance Company*,[13] which stated that "since the term 'rented' does not lie with an inherent ambiguity to this particular fact situation, it is only necessary to determine the ordinary meaning of that term."[14] The chief characteristic of "renting" or "leasing," according to the Michigan court, is the giving up of possession to the hirer so that the hirer and not the owner uses and controls the rented property.[15]

Following this reasoning, the Appeals Court looked to the party who retained true possession and control of the crane, rather than to how the invoice characterized the contractual arrangement between the parties.[16] The court held that the dispositive factors of possession and control favored construing the transaction as a service contract rather than an equipment lease.[17] Furthermore, the court noted that in the absence of any indicia of possession or control, it could hardly be said in this case that USF&G's insured, Caputo, had "custody" of the crane.[18]

USF&G also denied coverage on the basis that the crane was "used by" the insured.[19] The court held that the words "used by" implies the same elements of responsibility for the damaged object which it had already concluded the insured did not possess.[20] Therefore, the court reasoned that the insurer could not disclaim liability even under this last aspect of the "care, custody and control" exclusion in the general liability policy.[21]

The court also reiterated the now familiar rule that the duty of a liability insurer to defend its insured attaches if the "allegations of the complaint are 'reasonably susceptible' of an interpretation that they state or adumbrate a claim covered by the policy terms."[22] Deciding whether there

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[11] *Id.*
[12] *Id.*
[13] 371 F. Supp. 550 (E.D. Mich. 1973).
[14] *Id.* at 554.
[15] *Id.*
[16] *Crane Service*, 22 Mass. App. Ct. at 668, 496 N.E.2d at 835.
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.* at 669, 496 N.E.2d at 835.

is a duty involves "envisaging what losses may be proved as lying within the range of the allegations of the complaint, and then seeing whether any such loss fits the expectation of protective insurance reasonably generated by the terms of the policy."[23] The Appeals Court faithfully followed the precedent of *Continental Casualty Co. v. Gilbane Building Co.*,[24] where the allegations of a complaint were held by the Supreme Judicial Court to be "reasonably susceptible" of an interpretation stating a covered claim,[25] and *Sterlite Corp. v. Continental Casualty Co.*,[26] where the same standard was applied to allegations asserted in a third-party complaint.[27] Particularly significant in this case, however, is that the Appeals Court applied the 1935 decision of *Miller v. United States Fidelity & Guaranty Co.*[28] to foreclose USF&G, "having defaulted in its duty to defend,"[29] from contesting the underlying judgment against its insured, Caputo.[30]

§ 13.7. Surplus Line Insurer — Interpretation of Standard Fire Policy — Interest Payable on Fire Loss — Scope of Statutory Reference as to Loss and Value. In *Church of Christ in Lexington v. St. Paul Surplus Lines Insurance Company*,[1] the Appeals Court ruled that a surplus line[2] insurer, whose fire insurance policy expressly indicated that the state's standard fire policy would govern its terms if required by the state, should be held to the language it drafted. This is particularly true where doing so com-

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[23] *Id.* (quoting Sterlite Corp. v. Continental Cas. Co., 17 Mass. App. Ct. 316, 318, 458 N.E.2d 338, 341 (1983)). *Also see* Terrio v. McDonough, 16 Mass. App. Ct. 163, 166–67, 450 N.E.2d 190, 194 (1983).

[24] 391 Mass. 143, 146, 461 N.E.2d 209, 212 (1984).

[25] *Crane Service*, 22 Mass. App. Ct. at 669, 496 N.E.2d at 835.

[26] 17 Mass. App. Ct. 316, 317, 458 N.E.2d 338, 338 (1984).

[27] *Crane Service*, 22 Mass. App. Ct. at 669, 496 N.E.2d at 835.

[28] 291 Mass. 445, 448–49, 197 N.E. 75, 78 (1935).

[29] *Crane Service*, 22 Mass. App. Ct. at 670, 496 N.E.2d at 836.

[30] *Id.* The matter on appeal in *Crane Service* was an action to reach and apply the proceeds of USF&G's insurance policy to satisfy a judgment which Crane had obtained against the general contractor, Caputo. *Id.* at 667 n.2, 496 N.E.2d at 833 n.2.

§ 13.7 [1] 22 Mass. App. Ct. 407, 494 N.E.2d 45 (1986).

[2] In insurance parlance, the term "surplus line" refers to amounts of coverage which exceed the insurance capacity of licensed (so-called "admitted") carriers. That portion of the desired coverage which exceeds the capacity of the admitted market is placed with a nonadmitted carrier known as a surplus line insurer. The term also refers to the type of coverage which no admitted carrier will write, and in this context it refers to a nonadmitted carrier willing to write the coverage. BROWN, NONADMITTED MARKETS, PROPERTY & LIABILITY INSURANCE HANDBOOK 1013 (1965). In Massachusetts, insurance brokers holding "special brokers" licenses may procure insurance from unlicensed, foreign insurers ("nonadmitted" carriers), approved by the Insurance Commissioner, upon filing an affidavit with the Commissioner which attests that three licensed carriers refused to write the risk. G.L. c. 175, § 168.

ports with the reasonable expectations of a purchaser of that insurance.[3] The court applied the time honored rule that where a policy contains an ambiguity, the court will construe the language against the insurer.[4] The court commented on the rationale for the payment of interest on policy proceeds owed but unpaid by an insurer.[5]

In *Church of Christ in Lexington*, the church obtained $800,000 of fire insurance from St. Paul Surplus Line Insurance company (St. Paul) on a building in Boston.[6] The defendant's manuscript policy included the following provision:

> STANDARD FIRE INSURANCE POLICY: If property covered hereunder is located in a state or province that requires a Standard Fire Insurance Policy at variance with this [p]olicy, then this [p]olicy shall cover such property in accordance with the provisions of such required Standard Fire Insurance Policy.[7]

Massachusetts, like most states, requires that companies incorporated or licensed to write fire insurance in this state use the standard fire policy set forth in chapter 175, section 99 when insuring property or interests in the Commonwealth.[8] The Appeals Court, ignoring the question of whether the policy of the church here at issue was required to be written using the language of the Massachusetts standard fire policy,[9] merely held that Massachusetts is "a state that requires" under some circumstances the use of such statutory language.[10] Accordingly, the court concluded that St. Paul had voluntarily bound itself under the quoted contractual provision to permit the Massachusetts statutory policy to control.[11]

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[3] Church of Christ in Lexington, 22 Mass. App. Ct. at 411, 494 N.E.2d at 47. *See generally*, 2 COUCH ON INSURANCE 2D § 15:16 (Rhodes Rev. 1984).

[4] Bates v. John Hancock Mut. Life Ins. Co., 6 Mass. App. Ct. 823, 824, 370 N.E.2d 1386, 1387–88 (1978); Morin v. Massachusetts Blue Cross, Inc., 365 Mass. 379, 390, 311 N.E.2d 914, 924 (1974); Charles Dowd Box Co., Inc. v. Fireman's Fund Ins. Co., 351 Mass. 113, 119–20, 218 N.E.2d 64, 68 (1966); KEETON, INSURANCE LAW-BASIC TEXT § 6.3 (West 1971) *cited in Church of Christ in Lexington*, 22 Mass. App. Ct. at 410, 494 N.E.2d 47.

[5] *Church of Christ in Lexington*, 22 Mass. App. Ct. at 411–12, 494 N.E.2d at 48.

[6] *Id.* at 408, 494 N.E.2d at 46.

[7] *Id.* at 409, 494 N.E.2d at 47. Had this provision not been in St. Paul's surplus line fire policy, there might be a constitutional question whether the Massachusetts legislature could regulate a nonadmitted foreign company "to the extent of imposing the required standard form on a contract entered into outside of Massachusetts." *Id.* at 411, 494 N.E.2d at 48 (citing Johnson v. Mutual Life Ins. Co., 180 Mass. 407 (1902); Stone v. Old Colony St. Ry., 212 Mass. 459 (1912); Rep. A.G., Pub. Doc. No. 12, at 98 (1937); State Board of Ins. v. Todd Shipyards Corp., 370 U.S. 451 (1962); Tisdale v. Nationwide Mut. Ins. Co., 148 Ind. 670, 673 (1971)).

[8] *Id.* at 409–10, 494 N.E.2d at 47.

[9] *Id.* at 410–11, 494 N.E.2d at 47–48.

[10] *Id.* at 410, 494 N.E.2d at 47.

[11] *Id.* at 410–11, 494 N.E.2d at 47–48.

When the insured building sustained fire damage in 1982, the parties were unable to agree upon the amount of the loss.[12] The St. Paul policy and the Massachusetts standard policy differed as to the precise procedure through which the parties were to adjust the loss and resolve that dispute,[13] although the purpose of both procedures was the same: to settle the disputed amount of the loss.[14] The Massachusetts standard fire policy requires a reference procedure, and the St. Paul policy called for an appraisal procedure.[15]

Despite such technical differences — which are more matters of nomenclature than substance — the parties agreed to submit their dispute regarding the amount of the loss to three "referees."[16] Massachusetts law explicitly provides that an insurer joining in reference proceedings does not waive any legal defenses to the claim.[17] Furthermore, the law provides that absent the parties' specific agreement, the duty of referees is to ascertain only the actual cash value of the damaged property and the amount of loss sustained by the insured,[18] and to reduce such award to writing.[19] The referees in this case, however, went beyond this legal mandate. They purported to make a legal ruling at the outset that the proceedings were governed by the Massachusetts standard fire policy.[20] Then, after determining that the church had sustained a loss of $800,000 — the full face amount of the policy — the referees proceeded to issue an award for that amount, plus interest purportedly calculated at one percent over the prime rate.[21]

The court approached the issue of whether the Massachusetts standard fire policy applied using a reasonable person standard. That is, it considered how a reasonable purchaser of insurance would construe the language employed in the St. Paul policy.[22] As a non-admitted surplus lines insurer, St. Paul had alternatives in its choice of language in order not to bind itself so firmly to the various laws in the different states.[23] The court pointed out that St. Paul's policy could have provided that it would be controlled by the laws of a given state only if its nonconforming policy

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[12] *Id.* at 409, 494 N.E.2d at 47.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.* The term "referees" connotes a proceeding in conformity with G.L. c. 175, §§ 100–101H.

[17] G.L. c. 175, § 101E.

[18] *Id. See also* G.L. c. 175, § 101D

[19] G.L. c. 175, § 101A.

[20] *Church of Christ in Lexington*, 22 Mass. App. Ct. at 409, 494 N.E.2d at 47.

[21] *Id.*

[22] *Id.* at 411, 494 N.E.2d at 48.

[23] *Id.* at 410–11, 494 N.E.2d at 47–48. *See supra* note 2.

could not lawfully be executed in such state.[24] The insurer did not do so in this instance. The court held that a reasonable purchaser of insurance would be likely to know that Massachusetts had a required standard fire policy, and would assume that the standard policy provisions would govern.[25]

As a general matter, it is sound and reasonable for courts to hold parties to the express words which appear in a contract that they enter into voluntarily.[26] This is particularly true with a manuscript insurance policy where, as in St. Paul's case, the insurer is also the drafter of the policy.[27] Such a carrier has control over the language which is used in the policy and must be held to its responsibility as set forth in the policy.[28]

After holding that the Massachusetts standard fire policy was the applicable policy in this case, the court discussed a unique aspect of the Massachusetts standard fire policy.[29] The St. Paul policy differed from the Massachusetts standard fire insurance policy in that it only required the insurer to pay interest on the amount of a loss if payment of that amount was not tendered to the insured within sixty days after the amount of loss was agreed upon by the parties, or otherwise awarded to the insured.[30] The St. Paul policy permitted the insurance carrier to delay paying a claim for sixty days after an agreement on the amount of the loss had been reached between the parties and the appropriate paperwork completed.[31] Interest accrued, as the carrier interpreted this provision, only from the date of the award.[32]

In contrast, the Massachusetts standard fire policy requires a property insurer to pay interest on the agreed amount of a loss commencing from a different point in time.[33] Section 99 of chapter 175 provides in pertinent part:

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[24] *Id.* at 411, 494 N.E.2d at 48.

[25] *Id.* (citing Slater v. United States Fid. & Guar. Co., 379 Mass. 801, 803, 400 N.E.2d 1256, 1258 (1980)).

[26] Newton Housing Auth. v. Cumberland Constr. Co., Inc., 5 Mass. App. Ct. 1, 358 N.E.2d 474 (1977); Cape Cod Gas Co. v. United Steelworkers of America, 3 Mass. App. Ct. 258, 327 N.E.2d 748 (1975); Shuman v. Mutual of Omaha Ins. Co., 350 Mass. 254, 214 N.E.2d 76 (1966); M. Ahern Co. v. John Bowen Co., Inc., 334 Mass. 36, 133 N.E.2d 484 (1956).

[27] *See generally* cases cited *supra* note 26.

[28] Kirkpatrick v. Boston Mut. Life Ins. Co., 393 Mass. 640, 473 N.E.2d 173 (1985); Surrey v. Lumbermens Mut. Casualty Co., 384 Mass. 171, 424 N.E.2d 234 (1981); Transamerica Ins. Co. v. Norfolk and Dedham Mut. Fire Ins. Co., 361 Mass. 144, 279 N.E.2d 686 (1972); Lustenberger v. Boston Casualty Co., 300 Mass. 130, 14 N.E.2d 148 (1938); Edward Rose Co. v. Globel Rutgers Fire Ins. Co., 262 Mass. 469, 160 N.E. 306 (1928).

[29] *Church of Christ in Lexington*, 22 Mass. App. Ct. at 411, 494 N.E.2d at 48.

[30] *Id.*

[31] *Id.* at 409, 494 N.E.2d at 47.

[32] *Id.*

[33] *Id.*

> The company shall be liable for the payment of interest to the insured at a rate of one percent over the prime interest rate on the agreed figure commencing thirty days after the date an executed proof of loss for such figure is received by the company, said interest to continue so long as the claim remains unpaid.[34]

There is uncertainty as to *when* under that statute the interest begins to accrue.[35] Two recent decisions applying Massachusetts law, *Trempe v. Aetna Casualty & Surety Co.*[36] and *United States v. Raphelson*[37] have increased the confusion in this area.[38] These decisions construed section 99[39] and section 102[40] of chapter 175 as causing such excess of prime interest to run from 30 days after a company's receipt of an executed proof of loss or, in situations where the company sends an adjuster out to investigate a loss but fails to request forthwith that the insured submit a sworn proof of loss from 30 days after the date the company receives notice of loss,[41] even though in neither case is there an *agreement* as to the amount of loss until much later.[42]

The *Trempe* and *Raphelson* courts misconstrued the wording of the statute[43] which provides for payment of interest "on the agreed figure commencing 30 days after the date an executed proof of loss *for such figure* is received by the company . . . ."[44] The reasoning found in *Trempe* and *Raphelson* is fundamentally flawed on this point. The courts in these cases ignored the phrase "for such figure" which immediately follows the phrase "an executed proof of loss"[45] in that sentence of section 99.

The conduct of the Massachusetts courts that is evidenced by these decisions is consistent with what may be a national trend. Although different jurisdictions have enacted different versions of either the standard New York fire insurance policy,[46] or their own variant of such a statute as section 99,[47] decisions in this area tend to focus upon the broad

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[34] G.L. c. 175, § 99, Clause Twelfth, para. 18, as amended through St. 1973, c. 1064.

[35] *Church of Christ in Lexington*, 22 Mass. App. Ct. at 411–12, 494 N.E.2d at 48.

[36] 20 Mass. App. Ct. 448, 480 N.E.2d 670 (1985).

[37] 802 F.2d 588 (1st Cir. 1986).

[38] *Trempe*, 20 Mass. App. Ct. at 458, 480 N.E.2d at 676–77; *Raphelson*, 802 F.2d at 593.

[39] G.L. c. 175, § 99, Clause Twelfth, para. 18, as amended through St. 1973, c. 1064.

[40] G.L. c. 175, § 102, para. 1, as amended through St. 1934, c. 110 § 1.

[41] *Trempe*, 20 Mass. App. Ct. at 459, 480 N.E.2d at 677; *Raphelson*, 802 F.2d at 593.

[42] *Id.*

[43] G.L. c. 175, § 99, Clause Twelfth, para. 18, as amended through St. 1973, c. 1064.

[44] *Id.* (emphasis added).

[45] *Trempe*, 20 Mass. App. Ct. at 459, 480 N.E.2d at 677.

[46] R. KEETON, INSURANCE LAW — BASIC TEXT 70 (1971). *See* In-Towne Restaurant Corp. v. Aetna Casualty & Sur. Co., 9 Mass. App. Ct. 534, 540–41, 402 N.E.2d 1385, 1389 (1980).

[47] G.L. c. 175, § 99 Clause Twelfth, para. 18, as amended through St. 1973, c. 1064.

public policy of what is perceived by the courts of the several states as "fairness."[48] As stated by the *Church of Christ* Court:

> Interest could be a matter of considerable concern to a person or an institution buying a policy of fire insurance on a major piece of property. The Massachusetts requirement adds an element of fairness to the contract from the point of view of the insured, as it provides that interest be paid for any period during which the company has the use of money which should have been at the disposal of the insured. The provision is also advantageous to the insured in that it discourages delay in settling claims by providing an incentive to the company to settle early.[49]

It is difficult to reconcile the *Trempe, Raphaelson* and *Church of Christ* decisions in a fashion that clearly enunciates a course of conduct that must be undertaken by insurers in this Commonwealth.

§ 13.8. Waiver of Subrogation Clause — "All Risk" Policy — AIA Form Construction Contract. In *Haemonetics Corp. v. Brophy & Phillips Co., Inc.*,[1] the Appeals Court held that an insurer that insures an owner for the construction of a building under an "all risk" builders risk policy will not be allowed subrogation rights if the owner waives such rights in a subsequent contract with the general contractor.[2] Under equitable principles of subrogation, an insurer steps into the shoes of an insured that it compensates. While the insurer may be indemnified by any third-party against whom that insured has a cause of action for the damages paid for by such insurer, in pursuing subrogation the insurer will be bound by contractual language to which the insured had freely consented before the loss occurred.[3]

The plaintiff in *Haemonetics Corp.* owned and occupied a building in Braintree, Massachusetts[4] used in Haemonetics' business of manufacturing and selling medical products.[5] In 1980, the plaintiff entered into a contract with the defendant, Brophy & Phillips Company, Inc., for the construction on a mezzanine within the building.[6] Brophy & Phillips, as general contractor, engaged a subcontractor, A & C Steel Erectors, Inc., to construct the steel part of the work.[7] While employees of A & C Steel were engaged in electric arc welding at the building, a fire occurred which

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[48] *Church of Christ in Lexington*, 22 Mass. App. Ct. at 411, 494 N.E.2d at 48.
[49] *Id.*

§ 13.8 [1] 23 Mass. App. Ct. 254, 501 N.E.2d 524 (1986).
[2] *Id.* at 255, 501 N.E.2d at 525.
[3] *See* 16 COUCH ON INSURANCE 2D, § 61:1 (Rhodes Rev. 1982).
[4] *Haemonetics Corp.*, 23 Mass. App. Ct. at 254, 501 N.E.2d at 524.
[5] *Id.* at 254–55, 501 N.E.2d at 524–25.
[6] *Id.* at 255, 501 N.E.2d at 525.
[7] *Id.*

caused damage to Haemonetics' property.[8] Haemonetics was compensated for its loss by its "all risk" insurance policy.[9] The insurance carrier then exercised its contractual subrogation rights, and filed the instant suit in the name of Haemonetics against the contractor and the subcontractor alleging negligence and seeking recovery based upon damage to the property.[10]

This case revolves around the interplay between Haemonetics' insurance contract and its construction contract with the general contractor. Haemonetics' insurance policy included a specific provision regarding the waiver of subrogation rights for losses caused by the fire.[11] The construction contract between Haemonetics and the general contractor was based upon the 1977 edition of the American Institute of Architects (AIA) standard form contract. Article 11.3 of the standard construction contract provided in pertinent part:

> § 11.3.1 Unless otherwise provided, the owner shall purchase and maintain property insurance upon the entire work at the site to the full insurable value thereof. This insurance shall include the interests of the owner, the contractor, the subcontractors, and sub-subcontractors in the work and shall insure against the perils of fire and extended coverage and shall include "all risk" insurance for physical loss or damage including, without duplication of coverage, theft, vandalism and malicious mischief.
>
> . . . .
>
> § 11.3.6 The owner and contractor waive all rights against (1) each other and the subcontractors, sub-subcontractors, agents and employees each of the other . . . for damages caused by fire or other perils to the extent covered by insurance obtained pursuant to this Paragraph 11.3 or any other property insurance applicable to the work . . . .[12]

The Appeals Court held that the fire damage sustained by Haemonetics in the course of the construction was not damage to the "work" within the meaning of the waiver of subrogation clause of the construction contract.[13] The standard AIA form contract defined "work" to include "the completed construction required by the Contract Documents, . . . all labor necessary to produce such construction, and all materials and equipment incorporated or to be incorporated in such construction."[14] "Work" was also specifically defined by Haemonetics' contract with Brophy & Phillips as the erection of the building mezzanine.

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[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.* at 255–56, 501 N.E.2d at 525. *See also* Tokio Marine and Fire Ins. v. Employers Ins. of Wausau, 786 F.2d 101, 104 (2d Cir. 1986).

[13] *Haemonetics Corp.*, 23 Mass. App. Ct. at 256, 501 N.E.2d at 525.

[14] *Id. See also* E.C. Long, Inc. v. Brennan's of Atlanta, Inc., 148 Ga. App. 796, 252 S.E.2d 642 (1978).

The cause of the fire was hot slag generated by one of the subcontractor's arc welding machines which fell onto a tarpaulin strung under the construction site.[15] The sprinkler system was activated and the resultant fire, smoke, and water damaged Haemonetics' equipment located under the construction area. Inasmuch as the fire damaged equipment and property of the owner — not property of Haemonetics' which was related to the erection of the mezzanine — the court reasoned that the damage therefore was not included in the construction contract's definition of "work." Alternatively, the court held that even if such damage was to the "work," Haemonetics' contract with the general contractor waived, probably as an incentive for the general contractor to agree to do the "work" in the first place, any subrogation rights that Haemonetics' insurer may attempt to assert.[16]

Construction contracts typically have a clause regarding the procurement of insurance to cover property which might be damaged or destroyed in the course of the construction.[17] In this case, Haemonetics' construction contract required it to secure a policy which provided coverage for the entire property and all interests of the owner, the contractor, subcontractors, and sub-subcontractors. The waiver of subrogation language in section 11.3 of the AIA form contract used by Haemonetics, the court held, effectively waived subrogation rights of Haemonetics' insurer under *any* insurance policy provided to satisfy the broad section 11.3 coverage requirements.[18]

The purpose of a waiver of subrogation clause, such as that in section 11.3 of Haemonetics' contract, is to avoid disruption of the construction work due to a dispute over the party responsible for property damage which might occur:[19] "[i]t eliminates the need for lawsuits, and yet protects the contracting parties from loss by bringing all property damage under the all risk builder's property insurance."[20] In this case, Haemo-

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[15] *Haemonetics Corp.*, 23 Mass. App. Ct. at 255 n.2, 501 N.E.2d at 525 n.2.

[16] *Id. See also* Tokio Marine and Fire Ins. v. Employers Ins. of Wausau, 786 F.2d 101 (2d Cir. 1986) (The construction contract between the owner of the project and the general contractor was based upon the same AIA provision. The language was held to constitute a waiver of subrogation rights).

[17] *Tokio Marine*, 786 F.2d at 104.

[18] *Id. Haemonetics Corp.*, 23 Mass. App. Ct. at 257, 501 N.E.2d at 526; *cf.* Trump-Equitable Fifth Ave. Co. v. H.R.M. Constr. Corp., 106 A.D.2d 242, 485 N.Y.S.2d 65 (1985) (with almost identical facts to the present case, the court held that the insurer could not exercise subrogation rights against a subcontractor).

[19] *Haemonetics Corp.*, 23 Mass. App. Ct. at 258, 501 N.E.2d at 526; *see also* Firtin v. Nebel Heating Corp., 12 Mass. App. Ct. 859, 1006 (1981) (the language in §§ 11.3.1 and 11.3.6 of the AIA form must be construed as providing mutual exculpation to bargaining parties, who agreed in the event of loss to look solely to the insurance and not each other for indemnity).

[20] *Haemonetics Corp.*, 23 Mass. App. Ct. at 258, 501 N.E.2d at 526.

netics' insurer drafted the policy which made specific reference to the possibility of such a waiver of subrogation rights by Haemonetics when contracting with the general contractor.[21] The insurer likely was well aware, given the inclusion of waiver of subrogation provisions in the AIA standard forms of construction contract, that property owners commonly are required to waive subrogation rights in construction contracts.[22] For these reasons, the court upheld the waiver clause and rejected the subrogation claim by Haemonetics' insurer.[23]

§ 13.9. "Stacking" — Distinction Between Mandatory and Optional Coverages — Underinsured Motorist Coverage — "Regular Use" Exclusion. During the *Survey* year, the Supreme Judicial Court rendered opinions in two cases which involved uninsured motorist coverage. The coverage is now a mandatory part of the standard Massachusetts automobile policy and includes what formerly was optional "under-insured" coverage.[1] Both cases, *Lumbermen's Mutual Casualty Company v. DeCenzo*[2] and *Manning v. Fireman's Fund American Insurance Companies*,[3] built on the Court's analysis of the cognate statute, chapter 175, section 113L, in the seminal 1985 decision of *Cardin v. Royal Insurance Company of America*.[4] These three decisions are so important developmentally that they must be studied and understood as a trilogy.

The issue in *Cardin* was whether the "regular use" exclusion contained in the plaintiff's uninsured motorist coverage contravened the legislative intent of chapter 175, section 113L.[5] The plaintiff in *Cardin* had been injured while a passenger in a car owned by her husband.[6] Although she received the maximum amount under the liability provisions of her husband's policy,[7] it was insufficient to compensate Cardin fully for her

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[21] *Id.*

[22] *Id.*

[23] *Id.*

§ 13.9 [1] G.L. c. 175, § 113L.

[2] 396 Mass. 692, 488 N.E.2d 405 (1986), *aff'g* 18 Mass. App. Ct. 973, 469 N.E.2d 1316 (1984). The authors' law firm represented the plaintiff, Lumbermens Mutual Casualty Company.

[3] 397 Mass. 38, 489 N.E.2d 700 (1986).

[4] 394 Mass. 450, 476 N.E.2d 200 (1985).

[5] *Id.* at 450, 476 N.E.2d at 201.

[6] *Id.* at 451, 476 N.E.2d at 202. The plaintiff's husband was operating the car at the time of the accident. *Id.*

[7] *Id.* Cardin's husband's car was insured by Royal Insurance Company. *Id.* His policy afforded coverage for bodily injury if the policyholder was legally responsible for the accident. *Id.* Because this provision did not fully compensate the plaintiff, Cardin's husband was regarded as underinsured. *Id.* at 451 n.2, 476 N.E.2d at 202 n.2. As a result, the provision of the policy concerning injury caused by an underinsured automobile was also applicable to the plaintiff. *Id.* at 451, 476 N.E.2d at 202.

injuries.[8] Cardin, therefore, sought coverage from her own insurer under the uninsured motorist coverage provision of a policy covering a car she owned.[9] Cardin's insurer refused to pay under this provision, relying on the policy's regular use exclusion. That exclusion required that a premium be paid as a predicate to underinsured motorist coverage for an injury sustained by an occupant in an automobile owned or regularly used by the insured or a member of his or her household.[10] Although Cardin had not paid the premium required for such coverage upon her husband's car,[11] the Supreme Judicial Court concluded that any such exclusion to uninsured motorist coverage contravened the legislative purpose behind chapter 175, section 113L, and consequently, was invalid.[12]

The *Cardin* Court distinguished uninsured motorist coverage from automobile liability insurance. Uninsured motorist coverage is not limited to incidents arising from use of an insured's own automobile.[13] Rather, it applies regardless of where a person is injured;[14] in effect, it is limited personal accident insurance chiefly for the benefit of the named insured.[15] Because the uninsured motorist coverage statute, as enacted by the legislature, required compulsory coverage, the Court in *Cardin* concluded that exclusionary language in the policy was invalid, despite the promulgation and approval of that language by the Commissioner of Insurance.[16] Not only did the statute explicitly require every insurance policy to contain uninsured motorist coverage,[17] but the legislature also placed a

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[8] *Id.* at 451, 476 N.E.2d at 202.

[9] *Id.*

[10] *Id.*

[11] *Id.* The plaintiff asserted that this provision was contrary to the legislative purpose underlying G.L. c. 175, § 113L. *Id.* at 452, 476 N.E.2d at 202. Secondly, the plaintiff argued that "the exclusion fails to serve the purpose for which it was intended and that it deprives her of the substantial economic value of her policy while conferring an unfair benefit on the defendant." *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.* at 453, 476 N.E.2d at 203. Generally, if the language of an insurance policy is unambiguous, the plain meaning of the language will prevail. *Id.* The Court recognized, however, that because of the mandatory nature of the statute, the insurance policy was not an ordinary contract. *Id.* Therefore, "[t]he well-settled principles covering the interpretation of an ordinary policy of insurance have been properly disregarded in determining the scope and extent of a compulsory motor vehicle policy in order to accomplish the legislative aim of providing compensation to those who have been injured by automobiles." *Id.* at 454, 476 N.E.2d at 203 (citing Desmarais v. Standard Accident Ins. Co., 331 Mass. 199, 202, 118 N.E.2d 86 (1954)).

[17] *Id.* at 455, 476 N.E.2d at 204. By virtue of enactment of G.L. c. 175, § 113L(2) by St. 1980, c. 532 § 2, "uninsured motorist" coverage now includes "*under*insured motorist"

few explicit conditions upon such coverage, requiring "that the insured be legally entitled to recover damages, that the tortfeasor be uninsured or underinsured, and that payment not exceed the monetary limit of the insured's policy."[18] The Court reasoned that inasmuch as these were the only limitations sanctioned by the legislature, any other exclusions or exceptions would be contrary to the legislative purpose.[19] In so doing, the Court recognized that its determination would frustrate insurers' efforts to prevent "stacking" of uninsured motorists coverage, but noted that the legislative policy allowed no other course.[20]

The policyholder in *DeCenzo* principally relied on *Cardin* to support his position that Lumbermen's Mutual Casualty Company (Lumbermen's) was precluded from denying coverage on the basis of an "anti-stacking" provision in the Massachusetts automobile policy.[21] In *DeCenzo*, the defendant's son was killed in an automobile accident.[22] The automobile in which he was a passenger was uninsured.[23] The defendant's family owned three cars, each separately insured by Lumbermen's.[24] DeCenzo requested payment of the total amount of the underinsurance benefits specified in the three policies,[25] each of which contained an "anti-stacking" provision.[26] On the basis of those provisions, Lumbermen's refused to pay the total amount demanded, but instead offered DeCenzo the maximum amount specified in any one policy.[27] To resolve the coverage dispute, Lumbermen's sought declaratory relief against DeCenzo individually and as administrator of his son's estate. The superior court ruled that Lumbermen's was liable only to the maximum amount on any one policy.[28] The Appeals Court affirmed that decision which was sub-

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coverage. *Id.* at 450 n.1, 476 N.E.2d at 201 n.1. *Also see Manning*, 397 Mass. at 42 n.4, 489 N.E.2d at 702 n.4.

[18] *Cardin*, 394 Mass. at 455, 476 N.E.2d at 204.

[19] *Id.*

[20] *Id.* at 456–57, 476 N.E.2d at 204–05.

[21] Lumbermen's Mut. Casualty v. DeCenzo, 396 Mass. 692, 694, 488 N.E.2d 405, 406–07 (1986).

[22] *Id.* at 693, 488 N.E.2d at 406.

[23] *Id.*

[24] *Id.* The policies contained optional underinsurance coverage applicable to both the insured and members of his/her household. *Id.* Separate premium payments were required for such coverage, which the plaintiff had paid. *Id.*

[25] *Id.*

[26] *Id.* The "anti-stacking" language in the 1978 version of the Massachusetts automobile policy, which was in force at the time of DeCenzo's accident, provided, "[s]ometimes two or more auto policies cover the same accident. If all the policies are with us, the most we will ordinarily pay is the highest dollar limit on any one policy . . . ." *Id.*

[27] *Id.*

[28] *Id.* at 692–93, 488 N.E.2d at 406–07.

sequently considered by the Supreme Judicial Court on DeCenzo's application for further appellate review.[29]

The Supreme Judicial Court affirmed the Appeals Court decision.[30] The plaintiff argued that the "anti-stacking" provisions were contrary to chapter 175, section 113L.[31] The *DeCenzo* Court, however, refused to apply the *Cardin* holding because the statute in force when DeCenzo's son was killed differed from the statute discussed in *Cardin*.[32] The wording of chapter 175, section 113L construed in *Cardin* had been adopted subsequent to the accident in *DeCenzo*,[33] and it was the amended statute which the Court found indicative of a legislative intent to preclude limitations on underinsured motorist coverage.[34] The Court perceived no such intent in the previous version of the statute in force when DeCenzo's son was killed.[35] Most significantly, the amended statute upon which the *Cardin* Court relied converted underinsured motorist coverage from an optional to a mandatory coverage; under the prior version, the coverage was optional.[36] By virtue of the 1981 amendment, "uninsured motor vehicle coverage" was broadened to encompass underinsured coverage.[37] Moreover, between DeCenzo's 1978 accident and Cardin's 1983 injury, the minimum amount of underinsured motorist coverage which insurers in Massachusetts were required to offer for sale had been increased substantially by the legislature.[38]

In *Manning*, the Court determined that the legislative policy of chapter 175, section 113L was not contravened by prohibiting an automobile accident victim from recovering the benefits of the tortfeasor's underinsured motorist coverage.[39] The plaintiff victim was injured when the tortfeasor's automobile collided with the car Manning was driving.[40] After recovering under his underinsured motorist coverage, as well as under the tortfeasor's bodily injury policy, the plaintiff sought recovery from

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[29] *Id.* at 692, 488 N.E.2d at 406.

[30] *Id.*

[31] *Id.*

[32] *Id.* at 694, 488 N.E.2d at 407.

[33] *Id.*

[34] *Id.*

[35] *Id.* at 695, 488 N.E.2d at 407.

[36] *Id.* at 694, 488 N.E.2d at 407.

[37] *Id.*

[38] *Id.* Under the earlier version, insurers were not required to exceed $5,000/person or $10,000/accident in underinsured motorist coverage options. *Id.* at 695, 488 N.E.2d at 407. In 1983, the amounts were increased to $15,000/person and $40,000/accident. *Id.* at 694–95, 488 N.E.2d at 407.

[39] Manning v. Firemen's Fund American Ins. Co., 397 Mass. 38, 42, 489 N.E.2d 700, 702 (1986). The victim recovered the limit of available funds. *Id.* at 39, 489 N.E.2d at 701.

[40] *Id.*

the tortfeasor's underinsured coverage.[41] Manning argued that such recovery was required under the "fair meaning" of the tortfeasor's policy, and within the legislative intent of chapter 175, section 113L.[42]

Relying on *Cardin*, the Court found the plaintiff's interpretation unreasonable because of the distinction emphasized in *Cardin* between underinsured coverage and liability insurance.[43] If the plaintiff's interpretation were given effect, this distinction would cease to exist.[44] Furthermore, the Court found the language of the tortfeasor's policy unambiguous,[45] which further supported the Court's finding that the legislative intent of chapter 175, section 113L was not violated[46] by a prohibition of "stacking" in this instance. Although chapter 175, section 113L required underinsured motorist coverage, the Court observed that the intent of that statute was not to create additional liability insurance.[47]

Both the *DeCenzo* and *Manning* opinions are based upon sound reasoning. The *DeCenzo* Court's decision is consistent with previous holdings.[48] In *Royal Globe Insurance Co. v. Schultz*[49] — which involved an accident occurring in 1978 when the applicable statute was the same as that in *DeCenzo*[50] — the Supreme Judicial Court had enforced a similar exclusion.[51] Moreover, in *Royal Indemnity Co. v. Blakely*,[52] which involved an accident occurring in 1973[53] — the Court similarly had held that an anti-stacking provision was not contrary to the legislative purpose of chapter 175, section 113L.

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[41] *Id.*

[42] *Id.*

[43] *Id.* at 41, 489 N.E.2d at 701–02. See *supra* notes 13–15 and accompanying text for a discussion of the distinction between underinsured and liability coverage.

[44] *Manning*, 397 Mass. at 41, 489 N.E.2d at 701–02.

[45] *Id.* at 41, 489 N.E.2d at 702.

[46] *Id.* at 42, 489 N.E.2d at 702.

[47] *Id.*

[48] *See infra* notes 49–54 and accompanying text.

[49] 385 Mass. 1013, 1014, 434 N.E.2d 213, 214 (1982). The Court first determined whether a moped was within the meaning of the term "land motor vehicle." *Id.* at 1013, 434 N.E.2d at 213. Once the Court concluded that it was, the accident victim was precluded from recovering because he did not pay additional premiums. *Id.* at 1013–14, 434 N.E.2d at 213–14. *Also see* § 13.10, *infra*, notes 17–19 and accompanying text.

[50] *Royal Globe*, 385 Mass. at 1013–14, 434 N.E.2d at 213–14.

[51] *Id.*

[52] 372 Mass. 86, 87, 360 N.E.2d 864, 866 (1977).

[53] *Id.* at 86, 360 N.E.2d at 865. The plaintiff in *Royal* was struck by an automobile while driving his father's car. *Id.* at 87, 360 N.E.2d at 865. When the accident occurred, he lived with his parents. *Id.* Both parents had insurance on each of their cars, and the plaintiff wanted to stack three policies. *Id.* The insurance company limited plaintiff's recovery to his own policy, based upon anti-stacking language in that policy. *Id.* As noted by *Cardin*, 394 Mass. at 456, 476 N.E.2d at 205, the statute construed in *Royal* was an earlier version of G.L. c. 175, § 113L.

The *DeCenzo* Court was also correct in its interpretation of the legislative purpose behind the various versions of chapter 175, section 113L.[54] The *Cardin* decision made explicit reference to the broadened purpose behind the 1981 amendments to the statute[55] there at issue, and in that light the *DeCenzo* decision was predictable.

The *Manning* opinion likewise reflects the rationale applied by the *Cardin* Court. Both cases construed the same version of chapter 175, section 113L.[56] *Cardin* held that the statutory language and underlying legislative purpose invalidate exclusions to mandatory uninsured motorist coverage as it now exists in Massachusetts,[57] and *Manning* permitted prohibitions on "stacking" uninsured motorist coverage with liability coverages.[58]

§ 13.10. Stacking of Coverages — Medical Payments Coverage of Personal Auto Policy — "Regular Use" Exclusion. The issue before the Court in *Thomas v. Hartford Accident & Indemnity Company*,[1] was whether the plaintiff was entitled to recover medical expenses under the standard Massachusetts personal automobile insurance policy for injuries arising from an accident which occurred while the plaintiff was operating his spouse's automobile.[2] The plaintiff and his wife were separately insured by Hartford Accident and Indemnity Company (Hartford), each for their own automobile.[3] Both policies included Part 6, optional medical payments coverage with a $5000 limit of liability,[4] but each policy listed only the particular owner and his or her automobile.[5]

Hartford paid $5000 for plaintiff's medical expenses as required by the terms of his wife's policy covering the car involved in the accident.[6] Although plaintiff's medical bills far exceeded that amount, Hartford refused payment under the medical payments coverage in the plaintiff's own policy.[7] Hartford's refusal was based upon the so-called "regular use" exclusion of the standard Massachusetts personal auto policy, which provides that there is no coverage for medical expenses resulting from injuries which occur while one occupies or is struck by an automobile

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[54] *Cardin*, 394 Mass. at 453, 476 N.E.2d at 203.
[55] *Id.* at 454 n.5, 476 N.E.2d at 204 n.5.
[56] *Manning*, 397 Mass. at 39, 489 N.E.2d at 702.
[57] See *supra* notes 5–20 and accompanying text for a discussion of the holding in *Cardin*.
[58] See *supra* notes 39–41 and accompanying text for the facts of *Manning*.
§ 13.10 [1] 398 Mass. 782, 500 N.E.2d 810 (1986).
[2] *Id.* at 782, 500 N.E.2d at 811.
[3] *Id.* at 783, 500 N.E.2d at 811.
[4] *Id.* This coverage required an additional $6.00 premium which the plaintiff paid. *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*

owned or regularly used by a named insured or a member of that policyholder's household, unless that automobile is shown on the policy's Coverage Selection page as having a separate premium paid for medical expenses coverage.[8] The plaintiff was not a listed operator of his wife's car, and plaintiff's policy did not reflect the additional premium necessary for medical expense coverage for him under his wife's vehicle.[9]

Nevertheless, the plaintiff asserted he was entitled to recovery because of an additional provision in part 6 of Hartford's policy.[10] That provision, in effect, provided that the insurer will not pay medical benefits for injuries resulting from an accident where the policyholder is operating a car which he does not own, until the owner's medical payment coverage is exceeded.[11] Because the plaintiff's medical expenses exceeded the limit of his wife's policy, the plaintiff argued that he was entitled to medical benefits under this provision of his own policy.[12] The Supreme Judicial Court, however, declined to so hold.[13]

Courts give exclusionary language its ordinary meaning. Where there is no ambiguity, the Court reiterated that it "will construe the terms of an exclusionary clause according to their ordinary meaning."[14] Applying this principle, the Court concluded that the plaintiff fell within the "regular use" exclusion and, therefore, the additional language relied upon by plaintiff was not applicable to extend coverage under his own policy.[15] The Court concluded that the plaintiff was expressly excluded from medical payments coverage by paragraph 5 of Part 6 of his policy, and thus was not "someone covered under this Part" within the meaning of

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[8] *Id.* The so-called "regular use" exclusion is found in subparagraph 5 of Part 6 of the Massachusetts private passenger automobile policy, which states:

> We will not pay for [medical] expenses resulting from injuries to: . . . 5. Anyone injured while occupying or struck by an auto owned or regularly used by you or any household member unless a premium for this part is shown for that auto on the Coverage Selections page.

Id.

[9] *Id.* at 784, 500 N.E.2d at 812.

[10] *Id.*

[11] *Id.* The plaintiff relied upon additional language in Part 6 of his own policy, as follows:

> If someone covered under this Part is also entitled to medical payments coverage under another auto policy issued to you or any household member, we will pay only our proportionate share. If someone covered under this Part is using an auto he or she does not own at the same time of the accident, the owner's automobile medical payments insurance must pay its limits before we pay. Then, we will pay up to the limit shown on your Coverage Selections page for any expenses not covered by that insurance.

[12] *Id.*

[13] *Id.*

[14] *Id.* (citing Royal-Globe Ins. Co. v. Schultz, 385 Mass. 1013, 434 N.E.2d 213 (1982)).

[15] *Id.*

his own policy.[16] This conclusion, the Court ruled, was consistent with *Royal-Globe Ins. Co. v. Schultz*,[17] in which the Court had enforced virtually identical "regular use" exclusionary language.[18] The exclusionary clause at issue in *Schultz* applied to optional underinsured motorist coverage,[19] which the *Thomas* Court did not find to be a significant distinction, given the virtually identical nature of the exclusionary language.[20]

The fact that the exclusion in *Schultz* involved underinsured motorist coverage rather than medical benefits coverage is irrelevant.[21] The principle that courts should give language in insurance policies ordinary meaning, at least where no ambiguity is perceived to exist, is well established in Massachusetts, and has been applied by the Court in cases involving exclusionary clauses[22] as well as other types of insurance coverage issues.[23]

§ 13.11. Intentional Destruction of Insured Property — Insured's Failure to Rebut evidence of Intentional Destruction. Since the early part of this century, the Massachusetts courts have held that in a civil action, a fact finder may draw an inference against a party who fails to testify or offer evidence in its own behalf to controvert charges against it. During the *Survey* year, the Supreme Judicial Court specifically addressed this issue and confirmed the rule in *McGinnis v. Aetna Life & Casualty Company*.[1]

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[16] *Id.*

[17] 385 Mass. 1013, 434 N.E.2d 213 (1982). In *Schultz*, the defendant was injured while riding a moped. *Id.* Although the moped was not insured by Royal-Globe, that carrier did have a policy in force covering the defendant's automobile, and the claim for underinsured motorist benefits was brought under that policy. *Id.*

[18] *Id.* at 1013–14, 434 N.E.2d at 213–14. The clause provided that "the insurer will not pay benefits for '[a]nyone injured while occupying . . . *an auto* owned or regularly used by [the insured] . . . unless a premium for this part is shown for that auto on the Coverage Selections page' (emphasis added)." *Id.*

[19] *Id.* At the present time, *under*insured motorists coverage is no longer optional and is afforded, together with *un*insured motorists coverage, in Part 3 of the standard Massachusetts private passenger motor vehicle policy.

[20] *Thomas*, 398 Mass. 784, 434 N.E.2d at 213.

[21] *Id.*

[22] Manning v. Fireman's Fund America Ins. Co., 397 Mass. 38, 40, 489 N.E.2d 700, 702 (1986) (citing Cardin v. Royal-Globe Ins. Co., 394 Mass. 450, 453–54, 476 N.E.2d 200, 201 (1985)).

[23] *See, e.g.*, Bilodeau v. Lumbermens Mut. Casualty Co., 392 Mass. 537, 541, 467 N.E.2d 137, 140 (1984) (citing Save-mor Supermarkets, Inc. v. Skelly Detective Serv., Inc., 359 Mass. 221, 226, 268 N.E.2d 666, 669 (1971), *quoting* Oakes v. Manufacturers' Fire & Marine Ins. Co., 131 Mass. 164, 166 (1881)). In *Bilodeau*, the Court applied this principle of ordinary interpretation in construing the meaning of the common policy term "per person." *Id.*

§ 13.11 [1] 398 Mass. 37, 494 N.E.2d 1322 (1986).

The plaintiff claimed that her automobile had been stolen.[2] McGinnis' insurance policy provided coverage against theft, but not if she had intentionally procured the loss.[3] The police found the car destroyed by fire.[4] The factual issue at the trial was whether the plaintiff had intentionally destroyed her car. The legal issue on appeal, however, was whether the trial judge appropriately could rule that an inference against the plaintiff could be drawn from her failure to testify specifically that she did not set fire to the car.[5] The Appeals Court reversed the judgment and ordered a new trial, holding that the judge improperly drew a conclusive inference against the plaintiff due to her failure to deny specifically the defendant's allegations.[6]

The Supreme Judicial Court reversed the Appeals Court and reinstated the trial court's judgment.[7] The Court acknowledged the controlling precedent of *Richardson v. Travelers Fire Insurance Co.*,[8] which held that an insurer has the burden of proving its affirmative defense that the insured intentionally destroyed the covered property.[9] In the Court's view the superior court had explicitly recognized this, and the Court approved what it considered to be the trial judge's common sense reasoning.[10] The burden of proof never shifted to the plaintiff because the defendant insurer presented a *prima facie* case that the plaintiff had engaged in criminal conduct relating to the destruction of the insured property.[11] Under these circumstances, it is practical and sensible for a fact finder to give weight to an insured's failure to dispute expressly an allegation of criminal conduct and the insurer's evidence establishing a *prima facie* case in support of such charge.[12]

Because the privilege against self-incrimination applies only to criminal

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[2] *Id.*

[3] *Id.* Even apart from a specific policy exclusion for intentional loss, it is generally the case that an insured's willful destruction of property which is the subject matter of an insuring agreement will relieve the insurer from liability on account of that occurrence as a matter of public policy. *See* Osvaldo Varaine, Inc. v. Liberty Mutual Insurance Co., 362 Mass. 853, 285 N.E.2d 451 (1972); Richardson v. Travelers Fire Insurance Co., 288 Mass. 391, 19 N.E. 40 (1934); Todd v. Traders and Mutual Insurance Co., 230 Mass. 595, 120 N.E. 142 (1918); 18 COUCH ON INSURANCE 2D., § 74:663 (Rhodes Rev. 1983).

[4] *Id.*

[5] *Id.*

[6] *Id.* at 37–38, 494 N.E.2d at 1322–33, *reversing*, 20 Mass. App. Ct. 619, 621–22, 481 N.E.2d 1381 (1985).

[7] *Id.* at 38, 494 N.E.2d at 1323.

[8] 288 Mass. 391, 193 N.E.2d 40 (1934).

[9] *Id.* at 393, 193 N.E.2d at 42.

[10] *McGinnis*, 398 Mass. at 38, 494 N.E.2d at 1323.

[11] *Id.* at 39, 494 N.E.2d at 1323.

[12] *Id.* at 38–39, 494 N.E.2d at 1323.

cases, silence in a civil case can amount to an admission.[13] In *McGinnis*, the plaintiff's silence was detrimental to her position. If she had not intentionally obtained the destruction of her car, common sense suggests that she would at least expressly deny such a charge against her. Inasmuch as the insurer had presented a *prima facie* case against McGinnis, the Court held that the trial judge plainly was warranted in considering, and even "in placing 'particular significance' on the plaintiff's failure to deny her complicity in the disappearance and destruction of her motor vehicle."[14]

In reaching this conclusion, the Supreme Judicial Court applied a line of cases dating back to the early part of this century. The *McGinnis* decision is significant for insurers, however, because it clarifies that an insurer may establish the affirmative defense of intentional destruction of insured property when an insured, confronted with a carrier's *prima facie* evidence of its involvement in the cause and origin of a loss, fails to take the stand and deny such complicity at trial.

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[13] Attorney General v. Pelletier, 240 Mass. 264, 316, 134 N.E. 407, 423 (1922).
[14] *McGinnis*, 398 Mass. at 39, 494 N.E.2d at 1323.