COMMONWEALTH OF MASSACHUSETTS RETAIL COMPENDIUM OF LAW

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Retail, Restaurant, and Hospitality
Guide to Massachusetts Premises Liability

Introduction

Retail establishments/businesses, restaurants, hotels, taverns and shopping centers have unique exposures to risks. This compendium of (one is Massachusetts and the other is Rhode Island) law is meant to serve as a ready reference to a variety of issues likely to be experienced by a retail establishment.

1. Introduction

A. The Massachusetts State Court System

Small Claims Court

The Small Claims Court has jurisdiction over claims involving up to $7,000[1]. Cases are tried to a judge and parties do not typically need an attorney.

District Court

The District Court's jurisdiction is governed by G.L. c. 281, which provides that actions for damages "may proceed in the [District Court] only if there is no reasonable likelihood that recovery by the plaintiff will exceed $25,000." G. L. c. 218 § 19. However, an objection grounded in the $25,000 threshold may be waived if it is not timely raised. *Sperounes v. Farese,* 449 Mass. 800, 806-807 (2007); *see also* Mass. R. Civ. P. 12(h). The District Court has equitable and declaratory judgment jurisdiction in actions for money damages. G.L. c. 218 §19C. The District Court also has its own appellate-level division called the Appellate Division of the District Court that is separate and distinct from the Massachusetts Appeals Court.

Superior Court

The Superior Court is another trial-level court. This court has concurrent jurisdiction with the Supreme Judicial Court over most cases. However, a civil action for money damages may proceed in the Superior Court "only if there is no reasonable likelihood that recovery by the plaintiff will be less than or equal to $25,000." G.L. c. 212 § 3. Cases are typically tried to a twelve-member jury.

[1] In cases involving automobile accidents, amounts may be higher. G.L. c. 218 § 21.

Massachusetts Appeals Court

The intermediate appellate-level court is the Massachusetts Appeals Court. The Appeals Court is a court of general appellate jurisdiction and most appeals from the various Departments of the Trial Court are entered into the Appeals Court and decided by this Court. The Appeals Court sits in panels of three and holds sessions in Boston and locations outside of Boston.

Supreme Judicial Court

The Supreme Judicial Court is the Commonwealth's highest appellate court. The Court consists of a Chief Justice and six Associate Justices. These justices are appointed by the Governor with the consent of the Executive Counsel and hold office until the mandatory retirement age of seventy. The Supreme Judicial Court hears appeals on a broad range of criminal and civil cases.

Court Rules and Standing Orders

The most commonly used rules of procedure in Massachusetts are the Massachusetts Rules of Civil Procedure and the Massachusetts Rules of Appellate Procedure. Practitioners should additionally look to the District/Municipal Courts Supplemental Rules of Civil Procedure, the applicable Court Rules, and Standing Orders for procedural guidance.[2] Although the Massachusetts Rules of Civil Procedure resemble the federal rules in some aspects, they differ in many ways from federal court rules and practice.

[2] An exhaustive list of the relevant court rules and orders may be found at http://www.lawlib.state.ma.us/source/mass/rules/index.html.

B. Massachusetts Federal Courts

The U.S. District Court for the District of Massachusetts is governed by the Federal Rules of Civil Procedure. It additionally has local procedural rules that vary from the state rules. The U.S. District Court for the District of Massachusetts has three divisions: Boston, Worcester, and Springfield.

2. Negligence

A. General Negligence Principles

Negligence is defined as "the failure of a responsible person, either by omission or by action, to exercise that degree of care, vigilance, and forethought which, in the discharge of the duty then resting on him, the person of ordinary caution and prudence ought to exercise under the particular circumstances." *Altman v. Aronson*, 231 Mass. 588, 591 (1919). In order to succeed in an action for negligence, the plaintiff must establish (1) that the defendant owed the plaintiff some duty, (2) that the defendant breached its duty, (3) that the defendant's conduct was the cause of damage to the plaintiff, and (4) that the plaintiff was damaged. *Cannon v. Sears, Roebuck & Co.*, 374 Mass. 739, 742 (1978) *citing White v. Schnoebelen*, 91 N.H. 273, 274-275 (1941).

A storekeeper has a duty to exercise reasonable care to keep the portion of his premises to which customers are invited in a safe condition, or to warn them against any unknown or non-obvious dangers which were known or should have been known to the storekeeper. *Greenfield v. Freedman*, 328 Mass. 272, 274 (1952). In Massachusetts, there is no distinction between business invitees and licensees. *Mounsey v. Ellard*, 363 Mass. 693, 707-708 (1973). A shopkeeper must exercise "reasonable care in all the circumstances" with respect to lawful visitors. Id. The plaintiff must establish more than a mere condition that is the natural result of the manner in which the business is openly and visibly being carried on. *Griffin v. Fletcher Hardware Co.*, 327 Mass. 235, 236 (1951). However, a defendant still has a duty to anticipate reasonably foreseeable conditions that are likely to cause injury. *Lombardi v. F.W. Woolworth Co.*, 303 Mass. 417, 419 (1939).

3. Cause of Action of Negligence

A. Required Elements

A property owner must maintain its premises in a reasonably safe condition. If it fails to do so, the owner must warn a lawful visitor of known dangers. *Oliveri v. Massachusetts Bay Transportation Authority*, 292 N.E.2d 863, 864-65 (Mass. 1973). Liability attaches when a property owner has actual or constructive notice of a dangerous condition and sufficient time to remedy the condition. *Id.* The length of time varies, and depends on "the opportunity for discovery open to the defendant's employees by reason of their number, their physical proximity to the condition in question, and the likelihood that they would become aware of the condition in the normal performance of their duties." *Id.*

B. Contributory Negligence & Assumption of the Risk

Contributory negligence is governed by G. L. c. 231 § 85. The statute states, in pertinent part, "Contributory negligence shall not bar recovery in any action by any person or legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not greater than the total amount of negligence attributable to the person or persons against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person for whose injury, damage, or death recovery is made."

In addition to limiting contributory negligence as a defense, G. L. c. 231 § 85 abolishes the defense of assumption of the risk "in all actions hereunder." As a result, where the plaintiff's assumption of the risk is reasonable, plaintiff will still be entitled to full recovery.

4. Specific Issues of Negligence Claims

A. "Slip and Fall" Type Cases

i. Snow and Ice

Previously, Massachusetts case law held that a property owner's failure to remove natural accumulations of snow and ice did not constitute a breach of the owner's duty of reasonable care because natural accumulations of snow and ice were not an actionable property defect. *Sullivan v. Brookline*, 626 N.E.2d 870, 872 (Mass. 1994). However, in 2010, the Supreme Judicial Court abolished the distinction between natural and unnatural accumulations of snow and ice, holding that a property owner has the same duty of reasonable care that a property owner owes to lawful visitors regarding hazards resulting from accumulations of snow and ice. *Papadopoulos v. Target Corp.*, 930 N.E.2d 142, 144 (Mass. 2010). The Court opined that a property owner has a duty to keep the property reasonably safe for lawful visitors regardless of whether the source of danger is an act of nature or an act of another person. *Id.* at 150-51.

However, the duty of reasonable care does not make a property owner an "insurer of its property" and does not impose "unreasonable maintenance burdens." *Papadopoulos*, 930 N.E. 2d at 154. In considering what snow removal efforts are reasonable, a fact finder may consider "the amount of foot traffic to be anticipated on the property, the magnitude of risk reasonably feared, and the burden and expense of snow and ice removal." *Papadopoulos*, 930 N.E. 2d at 154. *Id.* Further, although every property owner has a duty of reasonable care, what constitutes reasonable snow removal may vary. *Id.*

The open and obvious doctrine, which provides that a property owner owes no duty to warn of an open and obvious danger because the warning would be superfluous to an ordinarily intelligent plaintiff, is insufficient. *Papadopoulos*, 930 N.E. 2d at 151. A property owner must remedy an open and obvious danger where it "can and should anticipate that the dangerous condition will cause physical harm to the [lawful visitor] notwithstanding its known or obvious danger." *Soederberg v. Concord Greene Condominium Ass'n*, 921 N.E. 2d 1020, 1024-25 (Mass.App.Ct. 2010)

B. Mode of Operations Rule

Prior to *Sheehan v. Roche Bros. Supermarkets, Inc.*, Massachusetts followed the traditional approach to premises liability; liability only attached where the owner had actual or constructive notice of the condition and sufficient time to remedy the condition. *Gallagher v. Stop & Shop, Inc.*, 126 N.E.2d 190, 191 (Mass. 1955). However, the Supreme Judicial Court recently held that a plaintiff's burden to prove notice of a dangerous condition is satisfied if the plaintiff establishes that their injury is attributable to a reasonably foreseeable dangerous condition on the premises that is related to the owner's self-service mode of operation. *Sheehan v. Roche Bros. Supermarkets, Inc.*, 863 N.E.2d 1276, 1285-86 (Mass. 2007). The Court cited the Restatement (Second) of Torts § 343 (1965) as supporting its conclusion, noting "one entering a store, theatre, office building, or hotel, is entitled to expect that his host will make far greater preparations to secure the safety of his patrons than a householder will make for his social or even his business visitors." *Id.* at 1284. The Court reasoned that "it is unjust to saddle the plaintiff with the burden of isolating the precise failure that caused injury, particularly where a plaintiff's injury results from a foreseeable risk of harm stemming from an owner's mode of operation." *Id.* Adoption of the mode of operation approach simply substitutes for the

traditional elements of a prima facie case and does not make the owner of a self-service or modern grocery store an insurer against all accidents. *Id.* at 1286. An owner may be held liable only if it could reasonably foresee that a dangerous condition exists and failed to take adequate steps to forestall resulting injuries. *Id.* The court summarized, stating "the adoption of the mode of operation approach will not modify the general rule governing premises liability requiring a plaintiff to prove that an owner had either actual or constructive notice of an unsafe condition on the premises. However, if a plaintiff proves that an unsafe condition on an owner's premises exists that was reasonably foreseeable, resulting from an owner's self-service business or mode of operation, and the plaintiff slips as a result of the unsafe condition, the plaintiff will satisfy the notice requirement." *Id.*

C. Liability for Violent Crime

According to the Restatement (Second) of Torts § 344 (1965), a possessor of land "is subject to liability to members of the public… for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and for the failure of the possessor to exercise reasonable care to (a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise protect them against it." However, the owner only has a duty to exercise reasonable care under the circumstances, and should not be held liable where the defendant neither knows, nor should know, of the risk. Comment e. Restatement (Second) of Torts § 314A (1964). A defendant is not "required to take precautions against a sudden attack from a third person which he has no reason to anticipate. *Id.*

Under Massachusetts law, as a general rule, a landowner is not required to take steps to protect against dangerous or unlawful acts of third persons. *Luoni v. Berube*, 729 N.E.2d 1108,

1111 (Mass. 2000). However, an exception arises where there is a special relationship between the owner and the plaintiff. *Id.* A special relationship may exist by statute or by common law. *Id.* In the case of a special relationship grounded in common law, the relationship is "predicated on a plaintiff's reasonable expectations and reliance that a defendant will anticipate harmful acts of third persons and take appropriate measures to protect the plaintiff from harm." *Id.* Common carriers, bars, colleges, hospitals, and other business have been required to foresee that their patrons could suffer criminal attacks by third persons. *Husband v. Dubose*, 531 N.E.2d 600, 602 (Mass. App. Ct. 1988). In deciding whether a defendant may be held liable, a jury must consider whether the risk of injury was within the range of foreseeable consequences and whether the defendant had notice of such a risk. *See Copithorne v. Framingham Union Hosp.*, 520 N.E.2d 139 (Mass. 1988).

D. Joint & Several Liability

When determining whether joint liability will apply, the court will look to the test stated in *Feneff v. Boston & Maine R.R.* "[I]f two or more wrongdoers negligently contribute to the personal injury of another by their several acts, which operate concurrently, so that in effect the damages suffered are rendered inseparable, they are jointly and severally liable." *Feneff v. Boston & Maine R.R.*, 196 Mass. 575, 581 (1907). Also, when joint tortfeasors are found to be jointly and severally liable, joinder is allowed, but is not mandatory. *See Old Dominion Copper Mining & Smelting Co. v. Bigelow*, 203 Mass. 159 (1909). Thus, the requisite factors for determining joint and several liability are concurrent negligence and inseparable damages. Restatement (Second) of Torts §§ 433A, 433B, 434.

E. Claims Arising From the Wrongful Prevention of Thefts

i. False Imprisonment and the Shopkeeper's Privilege

False imprisonment is the restraint of another person's freedom of movement by the imposition of force or threats. *Wax v. McGrath*, 151 N.E. 317, 318 (Mass. 1926). In order to sustain its burden, the plaintiff must establish (1) an unlawful restraint on his freedom of movement by force or threat, and (2) that the restraint caused the plaintiff damage. Id. at 318-20.

The Shopkeeper's Privilege is articulated in G.L. c. 231 § 94B, which provides,

> In an action for false arrest or false imprisonment brought by any person by reason of having been detained for questioning on or in the immediate vicinity of the premises of a merchant or an innkeeper, if such person was detained in a reasonable manner and not for more than a reasonable length of time by a person authorized to make arrests or by the merchant or innkeeper or his agent or servant authorized for such purpose and if there were reasonable grounds to believe that the person so detained was committing or attempting to commit a violation of section thirty A of chapter two hundred and sixty-six or section twelve of chapter one hundred and forty, or was committing or attempting to commit larceny of goods for sale on such premises or larceny of the personal property of employees or customers or others present on such premises, it shall be a defense to such action.

The defendant bears the burden of proving that the confinement, including the length of time, and the manner in which the plaintiff was confined, was reasonable under the circumstances. *Foley v. Polaroid Corp.*, 508 N.E.2d 72, 76-77 (Mass. 1987).

ii. Malicious Prosecution

A claim for malicious prosecution arises out of a person's right to be free from unjustifiable litigation, and is appropriate in both civil and criminal contexts. In order to maintain an action for malicious prosecution, a plaintiff must prove "that [he or she] suffered damage because [defendant] instituted criminal proceedings against him with malice and

without probable cause, and that the proceedings terminated in [his or her] favor." *Foley v. Polaroid Corp.*, 508 N.E.2d 72, 82-83 (Mass. 1987).

In order to defend a malicious prosecution claim, the defendant typically seeks to attack the essential elements that the Plaintiff seeks to prove, for example, by introducing evidence that the defendant acted in good faith, or that there was probable cause. *Perkins v. Spaulding*, 65 N.E. 72, 72 (Mass. 1902).

iii. Defamation

Defamation is the act of harming a person's reputation by making false statements about the person to a third person. *Lyman v. New England Newpaper Pub. Co.*, 190 N.E. 542, 543 (Mass. 1934). In order to succeed in a claim for defamation, the plaintiff must prove that the words used "would hold the plaintiff up to contempt, hatred, scorn, or ridicule, or would tend to impair his [or her] standing in the community." *Grande & Son, Inc. v. Chace*, 129 N.E.2d 898, 899-900 (Mass. 1955). To prove a claim of defamation under Massachusetts law, the Plaintiff must establish that (1) the defendant made a statement, concerning the plaintiff, to a third party; (b) that the statement could damage the plaintiff's reputation in the community; (c) that the defendant was at fault in making the statement; and (d) the statement either caused the plaintiff economic law, or is actionable without proof of economic loss. *Ravnikar v. Bogojavlensky*, 782 N.E.2d 508, 510-11 (Mass. 2003). Statements that constitute libel, statements that charge the plaintiff with a crime, statements that allege that the plaintiff has certain diseases, and statements that may prejudice the plaintiff's profession or business are actionable without proof of economic loss. *Id.*

Assertion of an absolute privilege provides a complete defense to a defamation suit, even in cases where the statement is made maliciously or in bad faith. Absolute privilege is extremely restricted and only applies in limited circumstances, typically in cases in where public policy or the administration of justice requires immunity. Absolute privilege is traditionally found in the following circumstances: judicial and quasi-judicial proceedings; legislative proceedings; publication concerning communications made by U.S. government officials concerning their official duties[3]; where publication is required by law; publication by a spouse to the other spouse of defamatory material concerning a third person. *Dear v. Devaney*, 983 N.E.2d 240, 245-247 (Mass. App. Ct. 2013); *see also* Restatement, 2d, Torts, § 592

Assertion of a conditional or qualified privilege may provide protection to a defendant in certain circumstances so long as the defendant does not publish the defamatory material knowing it to be false, or with reckless disregard as to its truth or falsity. *Dear v. Devaney*, 983 N.E.2d at 245. Upon showing that the privilege was abused, the privilege is lost and the defendant may be liable. *Sheehan v. Tobin*, 93 N.E.2d 524, 529 (Mass. 1950). Conditional privileges include the following categories of statements: (1) statements of self-interest, interest of another, or common interest[4]; (2) statements of public interest[5]; (3) report of public proceedings[6]; (4) fair comment on matters of public concern[7]; and (5) consent of the person to the publication of defamatory matter concerning him.[8]

[3] Massachusetts has not decided whether state executive officials have an absolute privilege. *See Barrows v. Wareham Fire Dist.*, 976 N.E.2d, 830, 838 n. 10 (Mass. App. Ct. 2012).
[4] *Christopher v. Akin*, 101 N.E. 971, 972 (Mass. 1913).
[5] *Hutchinson v. New England Tel. & Tel. Co.*, 214 N.E.2d 57, 59 (Mass. 1966).
[6] *LaChance v. Boston Herald*, 942 N.E.2d 185, 189-90 (Mass.App.Ct. 2011).
[7] *Sheehan v. Tobin*, 93 N.E.2d 524, 528 (Mass. 1950).
[8] According to the Restatement 2d of Torts, the consent of the person to the publication of defamatory matter concerning him is a complete defense. However, under Massachusetts law, the privilege only applies wehre there

F. Negligent Hiring, Retention, and Supervision of Employees

i. Respondeat Superior

Under Massachusetts law, the general proposition is that an employer can be held vicariously for any tortuous acts committed by its employees within the scope of their employment under the doctrine of respondeat superior. *Dias v. Brigham Med.*, 780 N.E.2d 447, 449 (Mass. 2002); Restatement (Third) of Agency, §2.04 (2006)[9]. To establish respondeat superior, the plaintiff must prove that: (1) an employer-employee relationship existed at the time of the incident in question; and (2) the employee's conduct was within the scope of his employment. *Dias*, 480 N.E.2d at 450-51. Whether an employer-employee relationship exists is fact dependent. *Id.* at 451. Courts will generally consider a number of factors,[10] the most important of which is the amount of control an employer has over its employee's actions. *Id.* Thus, the more control an employer has over the employee, the more likely an employer-employee relationship exists. *Id.* When determining whether an employee's conduct was within his scope of employment, three factors are considered by the court: (1) whether the

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is a good faith belief by the publisher that the material was true. *Dellorusso v. Monteiro*, 714 N.E.2d 362, 365 (Mass.App.Ct. 1999).

[9] The Restatement (Third) of Agency, §2.04 (2006) provides:

> An employer is subject to liability for torts committed by employees while acting within the scope of their employment.

[10] The Restatement (Second) of Agency, §220 (1958) provides:

> …(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:
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> (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
> (b) whether or not the one employed is engaged in a distinct occupation or business;
> (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
> (d) the skill required in the particular occupation;
> (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
> (f) the length of time for which the person is employed;
> (g) the method of payment, whether by the time or by the job;
> (h) whether or not the work is a part of the regular business of the employer;
> (i) whether or not the parties believe they are creating the relation of master and servant; and
> (j) whether the principal is or is not in business.

employee's conduct was the type for which he was hired to perform; (2) whether the employee's acts were conducted within authorized space and time limits; and (3) whether the employee's acts were in furtherance of serving his employer. *Lord v. Panaro,* No. 993389, 2001 WL 1470352 at *2 (Mass. Super. Sept. 18, 2001).

ii. Negligent Hiring/Retention

Under Massachusetts law, an employer can be held directly liable for negligent, intentional or criminal acts of its employees, even if the acts occur outside of the scope of employment. *E.g., Foster v. The Loft, Inc.*, 526 N.E.2d 1309 (Mass. App. Ct. 1988). Under the tort of negligent hiring/retention, an employer can be held directly liable for third party injuries sustained by tortuous or criminal acts of its employees when: (1) the employer knew or should have known, before or during the employment, the employee was unfit for employment; and (2) the employer failed to take any further corrective action such as investigating or discharging the employee. *See id.* at 1310-11. The employer's knowledge of past acts of the employee or the employee's propensity to cause harm has been held to be sufficient in forewarning an employer who selects or retains such an employee for its business. *Id.* at 1311.

iii. Negligent Supervision

Negligent supervision is a cognizable claim under Massachusetts law. A claim for negligent supervision requires the plaintiff to establish the following: (1) the employer owed a duty of care to him; (2) the employer's conduct was in breach of such duty; (3) there was a causal relationship between the employer's conduct and the plaintiff's injuries; and (4) there was actual harm suffered by the plaintiff. *Grant v. John Hancock Mutual Life Insurance Co.*, 183 F.Supp.2d 344, 368 (D. Mass. 2002). An employer owes a general duty to take reasonable care in supervising its employees during the course of business so that the employees do not

commit tortuous injury to third parties.[11] *LTX Corp. v. Daewoo Corp.*, 979 F.Supp. 51, 56 (D. Mass. 1997). This view is consistent with that of the Restatement (Second) of Agency, §219. *Id.*

5. The Massachusetts Consumer Protection Statute: G.L. c. 93A

A. G. L. c. 93A Generally

The Massachusetts Consumer Protection Statute ("Chapter 93A") protects against unfair or deceptive trades or practices by businesses in the Commonwealth. In order for there to be subject matter jurisdiction in a Chapter 93A claim, the plaintiff must plead and prove that the defendant is engaged in trade or commerce and that the acts giving rise to liability take place "in the conduct of any trade or commerce." G. L. c. 93A § 2. A claim under Chapter 93A may be brought by the attorney general (§ 4), consumers (§ 9), or businesses (§ 11). G. L. c. 93A.[12] The statute is extremely broad and "creates new substantive rights and provides new procedural devices for the enforcement of those rights." *Kattar v. Demoulas*, 739 N.E.2d 246, 256 (Mass. 2000). The statute is not dependant on traditional tort or contract law concepts and what conduct constitutes "unfair or deceptive practices" is not limited by traditional tort or contract law requirements. *Nei v. Burley*, 446 N.E.2d 674, 677-678 (Mass. 1983).

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[11] The Restatement (Second) of Agency, §219 (1958) provides:

> (1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.
> (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
> > (a) the master intended the conduct or the consequences, or
> > (b) the master was negligent or reckless, or
> > (c) the conduct violated a non-delegable duty of the master, or
> > (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

[12] The process and requirements are different for each type of plaintiff and are outlined in the statute.

B. G. L. c. 93A and Premises Liability

The Supreme Judicial Court recently decided that in limited circumstances, liability may be established under Chapter 93A based on building code violations through the vehicle of 940 Code Mass. Regs. § 3.16(3)[13]. *Klairmont v. Gainsboro Restaurant, Inc.*, 987 N.E.2d 1247, 1252 (Mass. 2013). The court opined that a violation of law will be a violation of Chapter 93A only if the conduct leading to the violation is unfair or deceptive and occurs in trade or commerce. *Id.* at 1255. Whether a particular violation is unfair or deceptive conduct is "best discerned from the circumstances of each case." *Kattar v. Demoulas*, 739 N.E.2d 246, 257 (Mass. 2000). The Court held that although very few building code violations will give rise to violations of Chapter 93A[14], where the defendants egregiously and knowingly violated the building code for more than twenty years and created a hazardous condition that placed commercial patrons at risk, the defendants may be held liable under Chapter 93A. *Klairmont*, 987 N.E.2d at 1255-57.

C. Damages under G. L. c. 93A

In order to establish a prima facie case, the consumer plaintiff must show only that he or she "has been injured." G. L. c. 93A § 9. The business plaintiff must show the loss of money or property to proceed. G. L. c. 93A § 11.

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[13] 940 Code Mass. Regs. § 3.16 provides, "Without limiting the scope of any other rule, regulation or statute, an act or practice is a violation of M.G.L. c. 93A § 2 if: (1) it is oppressive or otherwise unconscionable in any respect; or (2) any person or other legal entity subject to this act fails to disclose to a buyer or prospective buyer any fact, the disclosure of which may have influenced the buyer or prospective buyer not to enter into the transaction; or (3) it fails to comply with existing statutes, rules, regulations or laws, meant for the protection of the public's health, safety, or welfare promulgated by the Commonwealth or any political subdivision thereof intended to provide the consumers of this Commonwealth protection; or (4) it violates the Federal Trade Commission Act, the Federal Consumer Credit Protection Act or other Federal consumer protection stautes within the purview of M.G.L. c. 93A § 2."

[14] The Court reasoned that building code violations may lack the unfairness or deceptiveness present in the *Klairmont* case or may not arise in trade or commerce, and therefore would be insufficient to give rise to a violation of G. L. c. 93A. The Court further emphasized that negligence, on its own, is insufficient to warrant a violation of G. L. c. 93A. *See Klairmont v. Gainsboro Restaurant, Inc.*, 987 N.E.2d 1247, 1257 (Mass. 2013).

Both §§ 9 and 11 provide that where a plaintiff establishes that there was a violation of Chapter 93A, the plaintiff shall recover at least "the amount of actual damages…" G.L. c. 93A §§ 9, 11. Both direct and consequential damages are available under the statute, as "injuries under G.L. c. 93A comprehend all foreseeable and consequential damages arising out of the conduct which violates the statute… [including] emotional distress occurring contemporaneously with personal injuries." Brown *v. LeClair,* 482 N.E.2d 870, 873 (Mass.App. Ct. 1985). The measure for actual damages may vary depending on whether the violating conduct was intentional or negligent. *Anzalone v. Strand,* 436 N.E.2d 960, 962 (Mass. App. Ct. 1982). Equitable relief may also be awarded. *Kattar v. Demoulas*, 739 N.E.2d 246, 258-260 (Mass. 2000).

Where a defendant commits a willful or knowing violation, multiple damages of two to three times the actual damages may be awarded. G.L. c. 93A §§ 9, 11. In order to establish a "willful or knowing" violation of Chapter 93A, there must be evidence that the defendant acted with the intention or conscious objective of engaging in unfair or deceptive conduct or of causing an unfair or deceptive result. *Arthur D. Little Intern., Inc. v. Dooyang Corp.*, 979 F. Supp. 919, 927 (D. Mass. 1997). Where a defendant acts recklessly, he may also be found to have acted willfully in violation of Chapter 93A . *Briggs v. Carol Cars, Inc.*, 553 N.E.2d 930, 932-33 (Mass. 1990).

6. Damages

A. Introduction

In tort cases, generally, the plaintiff bears the burden of proving that they have suffered actual or special damages that are the direct result of some act or omission committed by the defendant. *See Sullivan v. Old Colony St. Ry.*, 200 Mass. 303 (1908). "Damages" is the dollar

figure representative of the injury plaintiff has suffered. "Expenses" are an element of damages that are calculated into the total damages award. *See Berube v. Selectmen of Edgartown,* 336 Mass. 634, 639 (1958). In a personal injury case, a plaintiff is entitled to "fair compensation for the injuries sustained." *Rodgers v. Boynton,* 52 N.E.2d 576, 577 (Mass. 1943).

B. Economic Loss Doctrine

Massachusetts recognizes the traditional economic loss rule which provides that when a defendant interferes with a contract or economic opportunity due to negligence and causes no harm to either the person or property of the plaintiff, the plaintiff may not recover for purely economic losses. *See Garweth Corp. v. Boston Edison Co.,* 415 Mass. 303, 306 (1993). Currently, in order to recover purely economic losses in tort cases or under the strict liability doctrine, the plaintiff must have also suffered some personal injury or property damage. *See FMR Corp, v. Boston Edison Co.,* 415 Mass. 393, 395 (1993). The exception is that pecuniary losses related to damage to property caused by a defendant is a recoverable injury. *See Aldrich v. ADD Inc.,* 437 Mass. 213, 222 (2002); *see also Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co.,* 439 Mass. 387, 413 (2003) (economic loss rule is waived if not raised).

C. Special Damages

Massachusetts Rule of Civil Procedure 9(g) provides that special damages must be specifically stated. Mass. R. Civ. P. 9(g). Special damages are defined as either: (1) damages not necessarily flowing from the acts set out in the declaration, and of which the defendant could not be supposed to have notice unless they were properly averred; (2) special damages needed to establish a cause of action for slander; and (3) specific allocable items in a personal injury case, such as loss of earning capacity, hospital and medical bills, and out-of pocket loss. 1973 Reporter's Notes to Mass. R. Civ. P. 9.

D. Punitive Damages

Generally, tort damages are compensatory. *See Kattar v. Demoulas*, 739 N.E.2d 246, 258 (Mass. 2000). However, there are specific damages - punitive damages - that look entirely to the defendant's wrongful conduct. *See M. O'Connor Contracting, Inc. v. City of Brockton*, 809 N.E.2d 1062, 1068 n.12 (Mass. App. Ct. 2004). In Massachusetts, punitive damages are recoverable only if specially authorized by statute. *Flesner v. Technical Communications Corp.*, 575 N.E.2d 1107, 1112 (Mass. 1991). In accord with Massachusetts law, punitive damages are recoverable in negligence only for claims of gross negligence and wrongful death.[15] M.G.L. c. 229, §2. Thus, only when the defendant's conduct is one of malicious, willful, wanton reckless or gross negligent nature will punitive damages be awarded. *Id.*

E. Nominal Damages

According to the Restatement (Second) of Torts § 907, nominal damages are "a trivial sum of money awarded to a litigant who has established a cause of action but has not established that he is entitled to compensatory damages." Nominal damages may be awarded when there has been an invasion of a legally protected interest but no harm for which actual damages can be awarded. *Leardi v. Brown*, 474 N.E.2d 1094, 1101-1102 (Mass. 1985). However, under Massachusetts law, nominal damages are not recoverable in an action for

[15] M.G.L. c. 229, §2 provides in pertinent part:

> A person who (1) by his negligence causes the death of a person, or (2) by willful, wanton or reckless act causes the death of a person under such circumstances that the deceased could have recovered damages for personal injuries if his death had not resulted… shall be liable in damages in the amount of:…(3) punitive damages in an amount of not less than five thousand dollars in such case as the decedent's death was caused by the malicious, willful, wanton or reckless conduct of the defendant or by the gross negligence of the defendant; except that (1) the liability of an employer to a person in his employment shall not be governed by this section…

negligence because there "can be no invasion of the rights of another unless legal damage is caused." *Donovan v. Philip Morris USA, Inc.*, 914 N.E.2d 891, 899 (Mass. 2009).