

Syllabus – Personal Injury Practice – Fall, 2018

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Texts: Massachusetts Personal Injury Law Sourcebook & Citator (MCLE) –
Recommended, Not Required

Grading Policy: 1. **Final Exam –100%**

I. Automobile Accident Claims:

August 21, 2018 - **Auto Accident Intake, Initial Claim Evaluation & Insurers**

- Client Interview
- 1st Party Coverage v. 3rd Party Coverage
- File Set-Up.
- Reserves & Disclosure of Policy Limits
- Documentation of Calls
- 3rd Party Requests for Statements & IME

August 23, 2018 - **Ethical Considerations in Undertaking Representation**

- M.G.L. c.221, §§43 & 44 Prohibition against employing runners; Disqualification for violation of §43.
- M.G.L. c.266, §111C – Fraudulently obtaining benefits under insurance contract; runners; punishment.
- *Comm. v. Lonardo*, 74 Mass. App. Ct. 566 (2009)

August 28, 2018 - **Massachusetts Automobile Insurance Policy, 8th Edition**

a. Compulsory Insurance–M.G.L. c.90, §34A

- ***Bodily Injury to Others* (/discussion/case review):**
 - o **Vehicles Covered** - *Hanover Ins. Co. v. Locke*, 35 Mass. App. Ct. 679, 624 N.E. 2nd 615 (1993)(BI coverage/consent of the owner);
 - o M.G.L. c.231, §85C (Presumption of Consent; Lack of Consent an affirmative defense);
 - o *Hurley v. Flanagan*, 313 Mass. 567, 48 N.E.2nd 621 (1943);
 - o **Persons Covered** - M.G.L. c.90, §34M; *Skinner v. Royal Ins. Co.* 36 Mass. App. Ct. 532, 633 N.E.2nd 432 (1994)(guest occupants right of recovery from uninsured provision) and

- **Limits of Coverage** – *Santos v. Lumbermans Mut. Cas. Co.*, 408 Mass. 70, 556 N.E.2nd 983 (1990)(application of per person limit to loss of consortium claims).
- M.G.L. c.175, §112C – Mandatory disclosure of Policy Limits.
- **Mass. Tort Threshold** – M.G.L. c.231, §6D, (But see, *Chipman v. Massachusetts Bay Transp. Auth.*, 366 Mass. 253, 316 N.E.2nd 725 (1974)(Persons exempt from recovering PIP benefits under Mass. “No-Fault” law, i.e. motorcyclists, etc., not subject to tort threshold.)

August 30, 2018 - **Massachusetts Automobile Insurance Policy, 8th Edition (cont.)**

- ***Personal Injury Protection (P.I.P.)–M.G.L. c.90,§34A & 34M***
 - **Benefits Provided-** *Scalia v. Liberty Mutual Ins. Co.*, 1995 Mass. App. Div. 69. (evidence of reasonable necessary medical treatment); *Gomes v. Metropolitan Property & Casualty Ins. Co.*, 45 Mass. App. Ct. 27, 695 N.E. 2nd 673 *review denied* 428 Mass 1101, 700 N.E. 2nd 544 (1998); *DiGiacomo v. Metropolitan Property & Cas. Ins. Co.*, 66 Mass.App.Ct. 343, 847 N.E.2d 1107 (2006). (calculation of average weekly wage);

September 4, 2018 - **Massachusetts Automobile Insurance Policy, 8th Edition (cont.)**

- ***Personal Injury Protection (P.I.P.)–M.G.L. c.90,§34A & 34M***
 - **Presentation of Claims** – *Brito v. Liberty Mutual Ins. Co.*, 44 Mass. App. Ct. 34, 687 N.E.2nd 1270 (1997) *review denied* 426 Mass, 1109, 691 N.E. 2nd 581 (1998)(IME affecting “due & payable provision);
 - **Persons Entitled to Benefits** – *Rosebrooks v. National Gen. Ins. Co.*, 13 Mass. App. Ct. 1049, 434 N.E. 2nd 675 (1982)(occupancy of a vehicle requirement).

September 6, 2018 - **Massachusetts Automobile Insurance Policy, 8th Edition (cont.)**

- ***Personal Injury Protection (P.I.P.)–M.G.L. c.90,§34A & 34M***
 - **Coordination of Health Insurance & PIP -** *Dominguez v. Liberty Mutual Ins. Co.*, 706 N.E.2nd 647 (1999) (coordination of benefits between HMO and PIP). (CONTINUED ON NEXT PAGE)

- **Exclusions from Benefits** – *Flaherty v. Travelers Ins. Co.*, 369 Mass. 482, 340 N.E.2nd 888 (1976) (applicability of PIP provisions to work related injuries).
- **PIP Deductible** – *Mallegol v. Divino*, 2007 Mass. App. Div. 62 (2007) (Election of a PIP deductible by plaintiff is enforceable by tortfeasor)
- **1st Party Examinations Under Oath & Recorded Statements** – *Iaconi-Young v. Arbella Mut. Ins. Co.*, 1998 Mass. App. Div. 63 (recorded statements); *Lorenzo-Martinez v. Safety Insurance Co.*, 58 Mass. App. Ct. 359 (2003); *Knight v. CAN Insurance Co.*, 2003 Mass. App. Div. 198 (2003) (examinations under oath).
- **Lost Wages** – *Gomes v. Metropolitan Prop. & Cas. Ins. Co.*, 45 Mass. App. Ct. 27, 695 N.E.2nd 673 (1998) (75% of What?)

September 11, 2018 - Massachusetts Automobile Insurance Policy, 8th Edition (cont.)

- ***Bodily Injury Caused by Uninsured Auto-M.G.L.c175, §113L***
 - **Notice** – MAIP 7th, p.32; *Goodman v. American Casualty Co.*, 419 Mass. 138, 643 N.E. 2nd 432 (1994)(prompt notice of uninsured claims);
 - **Persons Covered – Review of UM Roadmap; Review of Definitions, i.e. “Household Member,” “You,” “Your Auto.”** *Vaiarella v. Hanover Insurance Co.*, 409 Mass. 523, 526, 567 N.E.2nd 916, 919 (1991)(scope of the term “Household Member”); *Thattil v. Dominican Sisters of Charity, Inc.*, 415 Mass. 381, 613 N.E.2nd (1993)(applicability of UM coverage where corporation is named insured).

September 13, 2018 - Massachusetts Automobile Insurance Policy, 8th Edition (cont.)

- ***Bodily Injury Caused by Uninsured Auto-M.G.L.c175, §113L***
 - **Amounts Recoverable** – MAIP 8th, p. 9
 - **Arbitration** - MAIP 8th, p. 9
 - **Permission to Settle** - MAIP 8th, p. 10

September 18, 2018 - **Massachusetts Automobile Insurance Policy, 8th Edn (cont.)**

b. Optional Insurance:

- ***Optional Bodily Injury to Others (/discussion/case review)***

- **Persons Covered** – *Hanover Ins. Co. v. Locke*, 35 Mass. App. Ct. 679, 624 N.E.2nd 615 (1993) (requirement of owner’s consent to operate vehicle);
- **Types of Uses Excluded** – Regular Use Exclusion – *RLI Ins. Co. v. Hanover Ins. Co.*, 42 Mass. App. Ct. 913, 675 N.E.2nd 1167 *review denied*, 424 Mass. 1108, 678 N.E. 2nd 1334 (1997)(enforcement of regular use exclusion); (cont.)
- **Accidents Occurring Outside of Massachusetts** – *Heinrich-Grundy v. Allstate Ins. Co.*, 402 Mass. 801, 525 N.E.2nd 651 (1988)(concerning accidents occurring in other parts of the world).

September 20, 2018 - **Massachusetts Automobile Insurance Policy, 8th Edition (cont.)**

- ***Optional Bodily Injury to Others (discussion/case review)***

- **Calculating OBI Coverage** – *Hanover Ins. Co. v. Mota*, 34 Mass. App. Ct. 928, 929, 612 N.E.2nd 272, 273 (1993) *aff’d*, 416 Mass. 1101, 624 N.E.2nd 967 (1994)(OBI coverage expanding BI coverage);

September 25, 2018 - - ***Medical Payments Coverage (/discussion/case review)***

- **Stacking of Med Pay Policies;**
- **Coordination of Med Pay & PIP Coverages** – *Massachusetts Division of Insurance Bulletin B-90-2 (February 21, 1990) & Massachusetts Division of Insurance Letter to Andrew Aloisi, Esq. dated February 25, 2003. Note: These documents can be found within MCLE’s Mass Motor Vehicle Torts, Volume I, chapter 2, exhibits 2D & 2G. This volume is on reserve in the library!*
- *Mejia v. American Casualty Co.*, 55 Mass. App. Ct. 461, 466 (2002). (Coordination of Med Pay, PIP & Health Insurance)
- *Thevenin v. Liberty Mutual Insurance Co.*, 2001 Mass. App. Div. 165 (2001). (Coordination of Med Pay & PIP Coverages / Med. Pay Trigger).

- *Metropolitan Property and Casualty Insurance Co. v. Blue Cross and Blue Shield of Massachusetts, Inc.*, 451 Mass. 389, 885 N.E. 2nd 825 (2008) (Coordination of Med Pay, PIP & Health Insurance);
- “2017-06 Clarification of Coordination of Benefits under M.G.L. 211 CMR 38.00 for Medical Claims Associated with Motor Vehicle Accidents
- *Golchin v. Liberty Mutual Insurance Co.*, 460 Mass. 222 (2011)(Claimant may recover medpay benefits even where the claimant has already recovered those expenses under a separate policy of health insurance).

September 27, 2018 - **Massachusetts Automobile Insurance Policy, 8th Edition (cont.)**

- ***Underinsured Motorist Cov. (discussion/case review)***

- **The Deduction “Trigger”** – *Hanover Ins. Co. v. Pascar*, 421 Mass. 442, 658 N.E.2nd 142 (1995) – (BI coverage as an offset against UM coverage limits).
- **Insurer’s Consent to Settle 3rd Party Claim** - *MacInnis v. Aetna Life & Cas. Co.*, 403 Mass. 220, 222-23, 526 N.E.2nd 1255, 1257-58 (1988)(insurer’s consent to settle may not be unreasonably withheld).
- **Arbitration Before Tort Case** – *Gilbert v. Hanover Ins. Co.*, 35 Mass. App. Ct. 683, 686-87, 624 N.E.2nd 621, 623-24 (1993)(addresses when an arbitration proceeding can commence).

October 2, 2018 -

Case Evaluation, Demand & Settlement

- ***Valuing a Case***

- **Special Damages** – Medical Expenses, Wage Loss & Replacement Services.
- **General Damages** – Pain & Suffering, Permanency & Disfigurement, Quality of Life, Future Medical Problems, Vocational Rehabilitation/Counseling, Liability, Social Security Life Tables.

October 4, 2018 -

Case Evaluation, Demand & Settlement (cont.)

- ***Demand Preparation***

- **Use of Experts**
- **Preparation of Demand Letter**
- **M.G.L. c.93A & 176D**

- October 9, 2018 - **Case Evaluation, Demand & Settlement (cont.)**
- ***Settlement & Release***
 - **Release Document**
 - **Settlements Involving Minors M.G.L.c231, §140C1/2.**
 - **Liens – Workers Comp, Hospital, Medical Providers and compromise of liens; *Meyers v. Bay State Health Care, Inc.* 414 Mass. 727, 610 N.E.2nd 303 (1993)(Proceeds received from Underinsurance coverage not subject to HMO’s statutory lien.) M.G.L. c.111, §§70A & 70B.**
 - **Petition for Approval of 3rd Party Approval, i.e. Workers Comp/Auto Claims. M.G.L. c.152, §15 See, *Curry v. Great American Insurance Co.*, 80 Mass. App. Ct. 592 (2011). (Any portion of a 3rd party award or settlement designated as “pain & suffering” is not subject to WC insurer’s right to recovery Pursuant to M.G.L. c.152, §15.)**

- October 11, 2018 - **Litigation & Alternative Dispute Resolution**
- **Complaint – Superior v. District Court**
 - **Discovery – Interrogatories, Document Requests, Requests for Admissions, & Deposition **Medical Certification - M.G.L. c.233, §79G****

- October 16, 2018 - **Litigation & Alternative Dispute Resolution (cont.)**
- ***Alternative Dispute Resolution***
 - **Binding High/Low Arbitration**
 - **Mediation**

II. Workers’ Compensation Claims:

- October 18, 2018 - **Overview of Massachusetts Workers’ Compensation**
- Intake Interview
 - Benefits Scheme: M.G.L. c.152, §§ 30, 34, 34A, 35& 36.
 - Amount of Weekly Benefit

October 23, 2018 -

Uninsured Employers

- *O'Malley's Case*, 361 Mass. 504, 281 N.E. 2nd 277 (1972); (Independent Contractor Designation to avoid Procurement of Workers' Compensation Insurance)
- Uninsured Subcontractors – M.G.L. c.152, §18
- Massachusetts Workers' Compensation Trust Fund: M.G.L. c.152, §§ 65 & 66.

October 25, 2018 -

Workers' Compensation - Injury

- Demand for Employee's Statement -M.G.L. c. 152, §7B
- Nature of Injury – Aggravation of Preexisting Conditions: M.G.L. c.152, §1(7A): *Hammond v. Merit Rating Board.*, 9 Mass. Workers' Comp Rep. 708 (1995).
- Nature of Injury – Emotional/Mental Injuries: *Cirignano v. Globe Nickel Plating*, 11 Mass. Workers' Comp. Rep. 17 (1997)

October 30, 2018 -

Injury (cont.)

- Nature of Injury – Wear and Tear: *Zerofski's Case*, 385 Mass. 590, 433 N.E. 2nd 869 (1982).
- Nature of Injury – Recreational Injury: *Moore's Case*, 330 Mass. 1 (1953); *Sikorski's Case*, 455 Mass. 477 (2009)
- Site of Injury – *Lavoie's Case*, 334 Mass. 403, 135 N.E. 2nd 750 (1956).

November 1, 2018 -

Injury (cont.)

- Site of Injury/Choice of Law – *Migues' Case*, 281 Mass. 373, 183 N.E. 847 (1933).
- Off Premises of Employer – The Coming and Going Rule: *Gwaltney's Case*, 355 Mass. 333, 244 N.E. 2nd 314 (1969); & *Rogers Case*, 318 Mass. 308, 61 N.E.2nd 341 (1945). (CONT.)
- Employer's Quasi-Criminal Conduct – M.G.L. c.152, §28; *McCarthy's Case*, 314 Mass. 610, 51 N.E.2nd 113 (1943).

November 6, 2018 -

Workers' Compensation Claims Procedure

- 452 C.M.R. 1.01 thru 1.08

November 8, 2018 -

Workers' Compensation Claims Procedure (cont.)

- 452 C.M.R. 1.10 (Conferences)

- November 13, 2018 - **Workers' Compensation Claims Procedure (cont.)**
 o 452 C.M.R. 1.11 (Hearings)
- November 15, 2018 - **Workers' Compensation Claims Procedure (cont.)**
 o 452 C.M.R. 1.12 (Discovery and Depositions)
- November 20, 2018 - **Workers' Compensation Claims Procedure (cont.)**
 o Lump Sum Settlements and Fee Petitions pursuant to M.G.L. c.152, §15. *See, Curry v. Great American Insurance Co.*, 80 Mass. App. Ct. 592 (2011). (Any portion of a 3rd party award or settlement designated as "pain & suffering" is not subject to WC insurer's right to recovery Pursuant to M.G.L. c.152, §15.)
- November 22, 2018 Thanksgiving Day.
- November 27, 2018 - **Review for Final Exam (Auto & Workers' Compensation or Make-up Class)**
- November 29, 2018 - **Review for Final Exam (Auto & Workers' Compensation or Make-up Class)**
- December 3, 2018 - Last Day of Classes
- December 11, 2018 through December 22, 2018 - **Final Exams**

Personal Injury Final Exam - TBA

NOTE: ALL FINAL EXAMINATION SCHEDULING CONFLICTS MUST BE BROUGHT TO MY ATTENTION WHEN THE TENTATIVE FINAL EXAMINATION SCHEDULE IS RELEASED. STUDENTS WHO FAIL TO SERVE NOTICE OF A CONFLICT WILL NOT BE ACCOMODATED!

The instructor reserves the right to modify and/or amend the content of this syllabus.