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Child trespassers and water hazards

By Roger T. Manwaring

Late on a warm August night, a 14-year-old girl and a group of her friends trespass on the property of a nearby apartment complex in order to swim in its pool. The pool, which is closed on the night they arrive, is fenced and locked but teenagers often trespass, either by scaling the fence or cutting through it. The girl, who knows that she cannot swim, enters the shallow end of the pool to play a tag-like game with her friends.

Although it is lit by floodlights, the pool has no interior illumination. There is a rope dividing the relatively flat shallow end from the steeply sloping deep end. Engrossed in the game, the girl fails to notice that other swimmers have removed the dividing rope in order to expand the "playing field." In the excitement of the moment, she steps over the now unmarked dividing line, slips down the sloped floor into the deep end, and nearly drowns, sustaining serious, permanent injuries.

She sues, claiming that the apart-

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'Consumers first'

By Mary Jane McKenna

PRESIDENT'S MESSAGE

This year, Americans face a multitude of problems that are directly tied to the economy and the many decisions being made by legislators both on Beacon Hill and on Capitol Hill. The flurry of financial assistance for corporations in both state and federal government are being done in the hopes of slowing the economic meltdown so many companies are experiencing at this time. Somewhere in that mix are consumers who may be diversely affected by these actions. Their only access to justice at this crucial and important time remains the members of the trial bar.

It is not only important to be a MATA member right now, but it is vital that each of us be involved as much as possible in the legislative process and be even more diligent in our efforts to make sure that the needs of the consumer are protected and represented. Every state is experiencing legislation that will be targeting protection for insurance and corporate entities, and Massachusetts will not be an exception. The rights of consumers cannot be sacrificed to make corporations solvent. Our role as members of the trial bar has never been more essential on every possible level.

MATA offers its members both visible representation and a strong voice on Beacon Hill that strives to protect the rights of their clients and of consumers everywhere. This takes tremendous time and effort on the part of the MATA members who volunteer to screen the many legislative bills that are filed each session, write summaries of bills of interest to MATA and meet with legislators to discuss various issues.

These MATA volunteers have also given their time and energy to attending and speaking at hearings on bills, sometimes taking full days to do so. We need members to join these committees to work on all types of legislative issues, including workers' compensation, auto insurance, medical malpractice, products

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MedPay update

By John J. McMaster

The interplay between Personal Injury Protection benefits, Part 2, and Medical Payments benefits, Part 6, of the Massachusetts Standard Automobile Insurance Policy, and an injured person with health insurance and medical expenses in excess of $2,000, has been the subject of considerable debate over the last few years.

Given the language in a few court decisions, the availability and proper procedure for accessing MedPay has been the subject of much confusion and resulting frustration to claimants. (This article will not deal with situations in which the injured person either has no health insurance, or a health plan such as Medicaid which does pay benefits until the full $8,000 in PIP benefits has been exhausted. In those cases, there has not been much debate that MedPay would begin paying after the full $8,000 in PIP has been exhausted.)

The PIP portion of the automobile policy, Part 2, states, "We will pay up to $2,000 of medical expenses for any injured person. We will also pay medical expenses in excess of $2,000 for such injured person which will not be paid by a health plan. Medical expenses must be submitted to the health plan to determine what the health plan will pay before we pay benefits in excess of $2,000 under this Part." Therefore, an injured party with health insurance must submit the first $2,000 in medical expenses to the PIP insurer and then the balance to his health insurance. Thereafter, PIP will pay only for medical expenses in excess of $2,000 which are denied by the health insurer, although there are exceptions to that practice that are not relevant to this issue.

The Medical Payments provisions, Part 6, of the standard Massachusetts Automobile Insurance policy, seventh edition, state in pertinent part, "Under this Part, we will pay reasonable expenses for necessary medical and funeral services incurred as a result of an accident." It goes on: "We will not pay under this Part for any expenses that are payable, or would have been payable except for a deductible, under the PIP coverage of this policy or any other Massachusetts auto policy."

In *Allstate Ins. Co. v. Bearce*, 412 Mass. 442 (1992), Allstate paid Bearce $25,000 in MedPay benefits for injuries received in an auto accident. Bearce then sought underinsured benefits from Allstate. In evaluating the amount of benefits due Bearce, Allstate took the position that they were entitled to an offset of the $25,000 paid in MedPay benefits, claiming that failure to take the offset would allow Bearce to receive duplicate payments, i.e. Bearce would be allowed to be reimbursed the $25,000 in medical bills through MedPay, and also be allowed to claim the same $25,000 as part of his damages in the underinsured claim.

The SJC disagreed with Metropolitan and stated that the express language of the various parts of the policy "clearly reflects the contemplation of the parties that payments under the medical payments coverage might properly result in the insured

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Editor's note: digital imagery evidence

By J. Michael Conley

The more things change, the more they remain the same. As technology has rapidly advanced to facilitate courtroom use of digital imagery and to enable relatively easy creation or alteration of images, I have often thought that such developments would increase rather than decrease the importance of credible verbal testimony providing foundation for the image. In other words, a picture may still be worth 1,000 words, but only where the fact-finder believes that it is what it purports to be.

Some judges have reacted to digital technology with suspicion and near panic by requiring the equivalent of foundation testimony from a photo developer. In reality, the predicate of evidence of any imagery, from a photograph to a witness's blackboard sketch, has been the reliability and credibility of the person vouching for the image in his or her testimony that it fairly and accurately represents what it is offered to depict.

Recently, in *Renzi v. Paredes*, 452 Mass. 38 (2008) — which, along with its companion case, *Matsuyama v. Birnbaum*, has received considerable fanfare for other reasons — the Supreme Judicial Court addressed the admissibility of digital photographic evidence reaffirming an approach that is sensible, manageable and faithful to established trial practice.

"The use of demonstrative aids, including digital photographs and computer-generated images, is now commonplace in our courts. See generally 2 McCormick, Evidence §214 (6th ed. 2006). A judge has broad discretion in the admission of such evidence. See *Commonwealth v. Nixon*, 319 Mass. 495, 536, 66 N.E.2d 814 (1946) (admission of photographs largely in discretion of trial judge).

Authentication is a preliminary question of fact for the judge to decide. Id. at 537, 66 N.E. 2d 814. The person testifying as to the substantial similarity of the photograph and the original need not be the photographer but may be a person familiar with the details pictured. See *Commonwealth v. Weichell*, 390 Mass. 62, 77, 453 N.E. 2d 1038 (1983), cert. denied, 465 U.S. 1032, 104 S.Ct. 1298, 79 L. Ed. 2d 698 (1984) ("the best evidence rule does not apply to photographs"). See generally H.J. Alperin & L.D. Shubow, Summary of Basic Law §10.151 (4th ed. 2007).

When, as here, the demonstrative photograph is generated as a digital image or video image, the judge must determine whether the image fairly and accurately presents what it purports to be, whether it is relevant and whether its probative value outweighs any prejudice to the other party. See, e.g., *Commonwealth v. Leneski*, 66 Mass. App. Ct. 291, 294, 846 N.E. 2d 1195 (2006), quoting *Commonwealth v. Harvey*, 397 Mass. 351, 359, 491 N.E. 2d 607 (1986), and *Commonwealth v. Mahoney*, 400 Mass. 524, 527, 510 N.E. 2d 759 (1987) ("videotapes are 'on balance, a reliable evidentiary resource,' ... and ... 'should be admissible as evidence if they are relevant [and] provide a fair representation of that which they purport to depict'... [D]igital images placed and stored in a computer hard drive and transferred to a compact disc are subject to the same rules of evidence as videotapes").

See also 2 McCormick, supra ("enhanced images within category of demonstrative aids so long as they accurately illustrate what witness has to say"), concerns regarding the completeness or production of the image go to its weight and not its admissibility. See *Commonwealth v. Leneski*, supra at 295-296, 846 N.E.2d 1195; *Renzi v. Birnbaum*, 452 Mass. 38, 51-52 (2008).

Keep it in your trial notebook.

'Consumers first'

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liability and others.

In 2009, MATA will continue its aggressive legislative agenda and we expect to face a number of issues that threaten the civil justice system. The more volunteers to assist in this task the more we can accomplish together to protect the rights of all consumers.

Tort reform is still a major priority on both the state and national legislative agendas in 2009. The insurance industry will continue its eternal and expensive campaign against the trial bar and try to convince the public and legislators that they work to protect their clients, not their bottom line. Despite declining verdicts and fewer payouts, they will continue to insist that their ever-rising premiums are necessary. In this year of financial unrest, I am sure we will see many attempts to curb the rights of clients. The U.S. Chamber of Commerce has a multimillion dollar campaign centered on tort reform that will be visible in every state in the country.

We face a number of challenges in 2009, but I am confident that we will succeed in our goals to protect the rights of our clients and to protect the civil justice system against tort reform. Strength lies in numbers and we are only as strong as our membership. If you are not a MATA member at this time, please call the MATA offices and become one today. If you are a MATA member, please consider volunteering on one of MATA's many committees to work on the various legislative issues that are of concern to the academy.

I look forward to working with each of you in the months to come and to making 2009 a successful year for all.

Amicus curiae update

By J. Michael Conley

MATA has been active in providing friend of the court briefs over the past year. Recently completed briefs and cases include the following:

MATA submitted a brief to the SJC, principally authored by Michael Harris, in support of the plaintiffs in the *Renzi* and *Matsuyama* cases, which addressed loss-of-chance issues in cases focusing on failure to timely diagnose cancer. *Matsuyama v. Birnbaum*, 452 Mass. 1; *Renzi v. Paredes*, 452 Mass. 38 (2008).

Joe Borsellino co-authored MATA's brief in *Coombes v. Florio*, 450 Mass. 182 (2007) in which the Supreme Court confirmed that a physician could be liable to a third party injured by a patient and a physician was negligent in prescribing medications or warning patients about medications thereby giving rise to the subject accident.

Mike Najjar authored MATA's amicus brief in support of the plaintiff in *Law v. Griffiths* on the issue whether a trial judge erred in excluding evidence of medical expense offered pursuant to G.L.c. 233, §79G because the amount actually paid was less than the face value of the bill.

Deborah Kohl prepared a brief filed in January focusing on a public employee's entitlement to accidental disability retirement benefits in the face of a changing job description. *Foresta v. Contributory Retirement Appeal Board.*

Adam Troupe co-authored a brief in the *Moss's Case*, 451 Mass. 704 (2008), regarding the dispute about whether the statutory prima facie presumption would apply to claims for double damages under G.L.c. 152, §28.

MATA also provided an amicus brief in support of the prevailing employee in the *Sellers's Case*, 452 Mass. 802 (2008), addressing the wage calculation for multiple employment and cases in which the workers' compensation trust fund is involved due to an employer being uninsured.

In *Iannacchino v. Ford Motor Co.*, 451 Mass. 623 (2008), MATA signed on to an amicus brief supporting the prevailing plaintiffs on the question of whether a consumer who purchases a car with a defective door latch is required to wait until the latch fails or until he incurs the cost of repairing it to assert a claim under Chapter 93A; more generally, whether a consumer who purchased a product with an undisclosed safety defect suffers no "injury" unless or until the defective product causes physical harm or economic loss.

Welcome new members

Peter Bizinkauskas
Catherine Brown
Christopher Brown
Michael Coyne
Joseph Curran
Sandra Dupuy
Sara Hammond
Matthew Lallier
Richard Madore
Sean McElligott
Deborah Medows
Daniel Pogoda
Robert Rzeszutek
Joan Scanlon

Legislation Committee update

By Timothy C. Kelleher III

Over the last year, many bills were considered by various committees at the State House that would have done the following:

• eliminated the rights of victims of medical negligence to have their cases decided by juries and limited the amount of damages they could recover;

- severely restricted the rights of consumers injured by defective products and eliminated the types and amount of damages they could recover;
- eliminated joint and several liability;
- expanded legal immunity to certain special interest groups;
- granted tort immunity to companies that use leased employees;
- reduced the statute of limitations applicable to certain individuals and entities; and
- eliminated liability for punitive damages against certain individuals and entities.

In addition to those bills, there were many other bills pending that would have had a significant impact on our civil justice system and the rights of Massachusetts citizens. Supporters of these bills submitted written materials and testified in favor of them. They invested a great deal of time and effort to convince senators and representatives at the State House that these bills would be good for the citizens of Massachusetts.

MATA members worked diligently to prevent these bills from becoming law. Many of our members drafted position statements and appeared before legislative committees to testify. They also met with legislators and their staff members to address concerns related to the impact these bills would have had on consumers, injured victims and their families. MATA was very successful in getting its position across to the decision makers, but that happened only because of the tremendous effort of the MATA members who volunteered to help.

MATA would like to thank members who helped and recognize them for their efforts. Special thanks to immediate past President Paul Leavis of Leavis and Rest for his leadership and commitment to MATA. He not only spent a great deal of time dealing with legislative issues, he also helped mobilize people when they were needed most. Jennifer Comer and Sheila Sweeney were instrumental in helping to gather information and mobilize MATA members.

Mike Najjar of Albert Marcotte Law Office, Michael Harris of Crowe & Mulvey, Alan Pierce of Alan S. Pierce & Associates and John Morrissey of Quinn & Morris led the effort in the areas of auto legislation, medical negligence legislation and workers' compensation legislation.

MATA President Mary Jane McKenna of Gallagher & Cavanaugh, Leo Boyle of Meehan, Boyle, Black & Bogdanow, Andrew Abraham of Baker & Abraham, Pat Jones and Robert DeLello of Cooley Manion Jones, Doug Sheff of Sheff Law Offices, Jay Angoff of the Law Offices of Jay Angoff, Jeff Catalano of Todd & Weld, Frank Riccio of Law Office of Frank J. Riccio, Kim Winter of White, Freeman & Winter and Annette Gonthier Kiely of A. Gonthier Kiely & Associates also assisted in the effort to review bills and prepare written testimony. They appeared before committees to provide verbal testimony and attended conferences to provide technical advice and important information to members of the Massachusetts House and Senate.

I have had the privilege of watching these people testify at hearings and have been at meetings with them where they have explained the problems with these bills. They are all such great speakers and advocates for MATA. Their efforts truly made a difference.

MATA would also like to thank Brian Hickey and Associates for its efforts on behalf of MATA. Brian Hickey and Jeff Haggerty have provided great insight, knowledge and experience in dealing with the legislative process. They monitored relevant bills, attended hearings and attended meetings with the senators and representatives who were considering these important issues. They continue to help MATA in its efforts to convey its position at the State House.

MATA also appreciates the fact that so many senators and representatives took the time to meet with us and carefully considered our positions at the hearings. In my experience, they have listened and wanted to know all of the implications of the various bills. Most of the time, once they were made aware of the issues or problems, they responded appropriately.

MATA's Legislation Committee will continue to monitor and address proposed legislation this year. The bills described above, however, will be filed again this year, some with modifications. Some of the bills will be written in such a way that one would not know from the title that the bill had anything to do with the civil justice system or that it would impact, in any manner whatsoever, the health and safety of families. It is likely that these bills will be appearing on the lists of numerous different committees. It is no longer the case that bills that impact the civil justice system or the health and safety of families will be heard before the Judiciary Committee. They will be heard in many different committees as they were over the last year. Tracking these bills has been a difficult task, but MATA will continue to monitor them.

In addition to spending a great deal of time opposing bills, MATA members have submitted written testimony and testified in support of a number of bills that would improve our civil justice system. Our members will continue to do so. The following list summarizes some of the proposed bills which impact issues pertinent to MATA:

House Bill 1649

An act granting discretion to the Superior

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In this issue

Supreme Court rules smokers' state lawsuit over 'light' cigarettes not pre-empted by federal law

By Sarah Dean
Public Justice Correspondent

Tobacco companies cannot avoid being sued for fraudulently advertising that their "light" cigarettes delivered less tar and cigarettes that "regular" cigarettes, the U.S. Supreme Court ruled on December 15. The Court held 5 to 4 in *Altria Group, Inc, v. Good* that federal law does not preempt – i.e., wipe out – state lawsuits. Public Justice had joined in an *amici* brief authored by Georgetown Law Professor David Vladeck urging the Court to rule as it did.

The majority decision by Justice Stevens reaffirms the presumption *against* preemption of state law. "When addressing questions of express or implied preemption, we begin our analysis with the assumption that the historic police powers of the States are not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress," the Court wrote. "Thus, when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors preemption."

Against that background, the Court rejected the tobacco companies' argument that federal law preempts the plaintiffs' claims that, when it promoted and advertised Marlboro and Cambridge Lights cigarettes as "light" and having "lowered tar and nicotine," Philip Morris violated Maine laws prohibiting fraudulent misrepresentation.

The tobacco companies contended that the plaintiffs' claims were expressly preempted by the Federal Cigarette Labeling and Advertising Act and that, in addition, preemption was implied by the "efforts of Congress and the [Federal Trade Commission] for 40 years to implement a national, uniform policy of informing the public about the health risks of smoking."

The Court firmly rejected both arguments, ruling that the federal statute does not immunize tobacco companies for making fraudulent statements. In regard to implied preemption, the Court held that the FTC never had a policy authorizing the use of "light" or "low tar" as descriptive terms, and did not prevent the states from considering the tobacco companies' use of those terms.

To read the Supreme Court's decision in *Atria*, or to learn more about Public Justice, go to www.publicjustice.net.

Child trespassers and water hazards

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ment complex owed her a duty of reasonable care and breached that duty by, among other things, negligently installing and maintaining a dividing rope that could easily be removed.

Does she have a case? Perhaps. The greatest obstacle to the lawsuit may not be that the girl was trespassing or that she entered the water knowing she could not swim. Most significant may be her age as it relates to the obviousness of the danger posed by the water in the pool.

The Child Trespasser Statute, G.L.c. 231, §85Q

Although she was a trespasser, Massachusetts law provides that:

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

Section 85Q was enacted in order to "ameliorate the harsh effects of the common law rule upon child plaintiffs." At common law, a landowner owed a trespassing child only the "duty to refrain from willful, wanton, or reckless disregard for the trespasser's safety."

Section 85Q imposes a duty of reasonable care to trespassing children if its conditions are satisfied. To recover under §85Q, a child trespasser must satisfy all five of its conditions. The plaintiff arguably satisfies requirements (a), (b), (d) and (e) of the statute. The defendant apartment complex would likely argue, however, that the 14-year-old plaintiff, due to her age, fails to satisfy requirement (c) of §85Q that the danger posed by the pool be one which the plaintiff, because of her youth, did not discover, or as to which plaintiff did not "realize the risk."

How old is too old to be a "child" protected by §85Q?

A defense based on subsection (c) of §85Q raises a number of issues. First, is a 14-year-old simply too old to qualify as a "child" for purposes of the child trespasser statute? Not necessarily. Both Massachusetts courts and the Restatement make clear that a 14-year-old can be a "child" trespasser. To avoid application of §85Q, a defendant must show not just that a child had some appreciation of the danger posed by a condition, but that she appreciated the full extent of the danger. The child must be able to appreciate the danger to the same extent as an adult. The Restatement provides that:

The lack of experience and judgment normal to young children may prevent them from realizing that a condition observed by them is dangerous or, although they realize that it is dangerous, may prevent them from appreciating the full extent of the risk …Where a child fully understands the danger, but nevertheless voluntarily encounters the risk, his actions are not merely negligent but negate any duty of reasonable care owed by the defendant landowner.

The law protects children "from those conditions which, though observable by adults, are likely not to be observed by children, or which contain the risks the full extent of which an adult would realize but which are beyond the imperfect realization of children. It does not extend to those conditions the existence of which is obvious even to children and the risk of which should be fully realized by them," Restatement (Second) Torts §339, comment i. It does not hold a landowner responsible for the harm resulting to children resulting from a reckless "spirit of bravado" or in gratifying "some other childish desire ... with as full a perception of the risks which they are running as though they were adults." Id.

"The resulting test is whether a child of like age, intelligence, and experience would fully appreciate the hazard of intermeddling with an artificial condition existing on a piece of property as intelligently as an adult." Jackson, 1993 WL 818727, *4.

The "status of 'child' for purposes of the rule will vary with the nature of the hazard. It may range as high as 16 or 17 years of age. As the age of the child increases, the conditions become fewer for which there can be recovery."

Whether a teenager fully appreciates the risk posed by a given condition is generally a question of fact to be determined by the jury. In an extreme case, however, a court may rule, as a matter of law, that a particular hazard is so obvious that a child of the plaintiff's age must have perceived and understood it.

Is water so obvious a danger that children must in all cases understand it, rendering §85Q inapplicable?

In arguing that the 14-year-old girl fails to satisfy subsection (c) of §85Q, the defendant apartment complex would likely assert that, even if a 14-year-old can sometimes be a "child" under §85Q, the dangers posed by bodies of water are obvious, as a matter of law, to any child old enough to be allowed a large (the "obvious water hazard rule"). While there is some support for this position, the plaintiff girl can argue: (1) the obvious water hazard rule is not applied in Massachusetts; and (2) even if applied in Massachusetts, the rule does not govern her case because the swimming pool constituted a trap, containing concealed, exceptionally dangerous conditions not common to swimming pools in general.

Courts in many other states apply the obvious water hazard rule. However, it is not clear that under Massachusetts law bodies of water are always deemed obvious to all children.

(a) Massachusetts law as to obvious water hazards.

The cases on which defendant complex would probably rely, including *O'Sullivan v. Shaw*, 431 Mass. 201 (2000); *Phachansiri v. City of Lowell*, 35 Mass. App. Ct. 576 (1993) and *Davidson v. MDC*, 1997 WL 1368044 (Mass. Super. Dec. 26, 1997), do not dictate that, as a matter of law, water hazards are always obvious to children of all ages and under all circumstances.

O'Sullivan involved an adult guest who dove into shallow water in a swimming pool. The court ruled for the defendant landowner because the danger of "diving headfirst into the shallow end" of a pool was open and obvious. While *O'Sullivan* does deem a water hazard obvious, it involved diving and an adult plaintiff. Clearly, diving presents risks very different from wading in shallow water.

Davidson also is distinguishable because it involved diving into shallow water by a 16-year-old plaintiff. The court held that the plaintiff could not recover under §85Q because the danger was obvious and the plaintiff was, therefore, engaged in behavior which a normal 16 year-old would not do.

More relevant is *Phachansiri*, in which a 5-year-old was injured and his 7-year-old brother was killed when they slipped into a swimming pool which had been drained but had filled with ground water. Considering liability under §85Q, the jury decided that the defendant knew that children were likely to frequent the pool but also decided that the condition of the pool did not pose an unreasonable risk to children. Holding that the jury's two answers were not inconsistent, the Appeals Court noted that:

"The jury could have concluded that the danger of water in a pool is one that could reasonably be expected to be fully understood and appreciated by any child of an age to be allowed at large on his own." 35 Mass. App. Ct. at 579.

In support of this statement, the court quoted comment "j" to Restatement §339. Thus, *Phachansiri* appears to apply the obvious water hazard rule. See *Rodriguez v. Winiker*, 2004 Mass. App. Div. 191, 2004 WL 2853936, *7 (holding that 5-year-old child, under supervision of her mother, was sufficiently aware of the danger of falling off retaining wall and noting, based on *Phachansiri*, that "there are many dangers, such as those of fire and water, or falling from a height, which under ordinary conditions may reasonably be expected to be fully understood and appreciated by any child of an age to be allowed at large"); *Feliciano v. Andersen Corp.*, 1995 WL 1146822, *3 (holding that whether leaning on window screen was so obviously dangerous that no warning need be given to child was question of fact, but noting, based on *Phachansiri*, that "some dangers, such as fire, water, and great heights, can be fully appreciated even by children, and therefore, do not need a warning").

Although *Phachansiri*, *Rodriguez* and *Feliciano* seem to refer to a rule of law that water hazards are always obvious even to children, the 14-year-old girl in our example can make a reasonable argument that Massachusetts courts do not apply such a rule mechanically. *Phachansiri* did not rule that water hazards are always, as a matter of law, obvious to all children. The court merely held that the jury could have found that water in a pool is an obvious hazard, indicating that the determination in any given case is still a question of fact. Neither *Rodriguez* nor *Feliciano* actually concerned a water hazard.

Further, in *Godsoe v. Maple Park Properties, Inc.*, 2007 WL 2316468 (D. Mass. Aug. 9, 2007), a case not involving trespass, the court held that the shallow depth of a lake, the bottom of which had been graded like a swimming pool, was not obvious as a matter of law to the minor plaintiff. Id. at *4. The *Godsoe* court denied summary judgment holding that "the conditions of the lake and the lake water raise a question of whether the water depth was open and obvious …"

The Restatement also adopts a case by case approach. The first paragraph of comment "j" recognizes the obvious water hazard rule, stating:

There are many dangers, such a [sic] those of fire and water, or of falling from a height, which under ordinary conditions may reasonably be expected to be fully understood and appreciated by any child of an age to be allowed at large. To such conditions the rule stated in this Section ordinarily has no application, in the absence of some other factor creating a special risk that the child will not avoid the danger, such as the fact that the condition is so hidden as not to be readily visible, or a distracting influence which makes it likely that the child will not discover or appreciate it. Restatement §339 com. "j".

However, the second paragraph of comment "j" indicates that the Restatement does not adopt the obvious water hazard rule as a matter of law for children of all ages in all circumstances:

Where, however, the possessor knows that children too young to appreciate such dangers are likely to trespass on his land, he may still be subject to liability to such children under the rule stated.

Thus, the applicability of the obvious water hazard rule in Massachusetts remains somewhat unclear.

(b) The trap exception to the obvious water hazard rule

Even if Massachusetts courts were to rule apply a rule that, as a matter of law, water hazards are obvious, the injured 14-year old girl might successfully invoke a well-recognized exception to that rule, arguing that the pool in which she almost drowned constituted a trap, because it contained exceptionally dangerous conditions not inherent to pools in general. This exception is recognized by the Restate-

ment which provides:

There are many dangers, such a those of fire and water, or of falling from a height, which under ordinary conditions may reasonably be expected to be fully understood and appreciated by any child of an age to be allowed at large. To such conditions the rule stated in this Section ordinarily has no application, in the absence of some other factor creating a special risk that the child will not avoid the danger, such as the fact that the condition is so hidden as not to be readily visible, or a distracting influence which makes it likely that the child will not discover or appreciate it.

Restatement §339, com."j".

Massachusetts law recognizes such a trap exception to the open and obvious danger rule (applied in *O'Sullivan v. Shaw* to the adult who dove into shallow water). The courts have recognized that a landowner may have a duty of due care with respect to an otherwise obvious danger where the circumstances are such that the owner should foresee that visitors may be distracted or otherwise unlikely to notice the obvious condition. Whether a landowner should have foreseen that the plaintiff would be distracted is a question of fact for the jury. *Bradshaw*, 2005 WL 1869170, *2.

The circumstances of the plaintiff 14-year-old's use of the pool, which arguably should have been foreseen by the defendant apartment complex, were such that she was not aware of the absence of the dividing rope. As might be expected of children in a pool, she was engaged in play and distracted from noticing the absence of the rope or appreciating the dangers thereby created.

Cases from other jurisdictions recognize the "trap" exception, often applying it to situations where water appeared safe but concealed an abrupt drop into deeper water or where there was a danger that a child would slip into the water. In *Mennetti v. Evans Construction Co.*, 259 F. 2d 367, 370-71 (3rd Cir. 1958), a minor died after slipping into a rain-filled ditch. The court stated:

"The appellees argue that appellant's minor decedent must be taken to have realized the hazard involved in the ditch filled with water. The same argument was recently rejected by the Pennsylvania Supreme Court in the case of *Cooper v. City of Reading*, 392 Pa. 452, 140 A.2d 792, 797 (decided May 2, 1958). There the city discharged its storm drainage water into the bed of a former canal, causing a pool to form at the outlet pipe. The court said that the pool created an unreasonable risk of harm to child trespassers by the 'very fact that the pool was deceptively shallow at its edges and therefore innocent in appearance.'

"In the present case, there was evidence that the water in the ditch was muddy so that its depth was deceptive, especially to children accustomed to playing in the shallow pools which existed on the tract. Furthermore, the ditch was at the low point of slightly higher surrounding lands; it was at a place where a shallow pool of water would naturally gather. In addition, the jury could have found that the gradually sloping ramp leading into the ditch would tend to give to the pool a deceptive appearance of shallowness."

Similarly, in *Simmons v. Whittington*, 444 So. 2d 1357 (La.App. 1984), the landowner had installed an above-ground pool which appeared to be uniform in depth but had then dug out the bottom so that, while the sides remained at about three-and-one-half foot depth, the pool floor sloped sharply to a deep end more than 5 feet in depth. A trespassing child, who knew he could not swim, went into the pool, was able to stand in the shallow end, but then stepped off the ledge and sank into the deeper waters. The court said:

"We agree with the trial court that the dangers inherent in this pool were to a substantial degree hidden from one who had never before been in it. While Michael was aware he could not swim, upon first entering the pool he was able to stand on the bottom. He was obviously unaware that the same was not true for the entirety of the pool. It appeared to be an above-ground pool of uniform depth and there were no contrary indications. A child's carelessness in entering a pool with which he is unfamiliar is one of the risks against which the pool's owner has a duty to take precautions. The risk encountered here is clearly encompassed within the duty not to create an unreasonable risk of harm in a neighborhood peopled by inquisitive and impulsive youngsters."

Id. at 1361.

Also relevant is *Davies v. Land O'Lakes Racing Assoc.*, 244 Minn. 248 (1955). A child drowned when he entered an apparently shallow puddle which concealed a drop off into a 6-foot deep excavation with vertical sides. Rejecting the defendant's contention that liability should not be imposed under Restatement §339 because water hazards are obvious, the court stated:

"It is generally conceded that the ordinary body of water, even though it be artificial, while it does involve the risk of death or serious harm, does not constitute an unreasonable risk thereof because even a child to some extent appreciates the risks that are connected with it ...

We believe that the circumstances and the evidence in this case combine to form a sufficient basis for the jury's finding that this particular body of water in its condition on the day in question involved more risk than an ordinary water hazard and amounted to a condition, created by defendants, involving an unreasonable risk of death or serious bodily harm to children within the meaning of Restatement, Torts, s 339 …

"There are … decisions in other jurisdictions which are in point. In those cases liability has

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MedPay update

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recovering a sum in excess of the loss caused by his accident."*Id*. at 448.

Meanwhile, in an advisory contained in Division of Insurance Bulletin B-90-2, the insurance commissioner confirmed that"where there is health insurance coverage available, ... medical expenses over $2,000 are not payable under PIP, so MedPay begins to provide coverage at that point, not after $8,000 of PIP benefits have been exhausted. Barring language in the health insurance contract allowing it to defer primary coverage to MedPay ... after the claimant has submitted $2,000 in medical expenses to the PIP carrier, the claimant may submit further medical bills to either MedPay or the health insurer, or both."

Accordingly, the customary practice thereafter was to allow access to MedPay benefits after the first $2,000 in medical expenses were paid by PIP, even those covered by health insurance. This was usually done by presentation to the MedPay carrier of a PIP exhaust letter.

In 1999, the SJC heard *Dominguez v. Liberty Mutual Ins. Co.*, 429 Mass. 112, 706 N.E.2d 647 (1999). In this case, the injured party incurred $2,785 in medical expenses and submitted them to the PIP insurer for payment. The insurer paid $2,000 in PIP benefits and denied payment of the additional $785 as it exceeded the $2,000. The injured party resubmitted the $785 in bills for PIP payments after the inured party's health insurer denied payment because the medical providers chosen by the injured party were outside his network. The SJC upheld the insurer's denial of payment of the additional $785 in PIP benefits in part because the statutory scheme's"legitimate purposes of coordinating insurance benefits so that costs of automobile insurance may be reduced."*Id*. at 118. Although this case did not touch upon MedPay, the theme of"cost control"would become an issue in subsequent MedPay cases.

The wrinkle in the MedPay fabric came in *Meijia v. American Casualty Co.* 55 Mass. App. Ct. 461 (2002). In this case, the insurer paid the first $2,000 in medical expenses through PIP. When the parties submitted the balance of those medical expenses directly to the insurer under MedPay, the insurer stated that it first wanted denials of those bills by the parties' health insurer, and later denied payment when those denials were not produced. According to the decision, the injured parties sought to have the balance of the bills paid under MedPay to avoid a lien by the health insurer. The Appeals Court upheld the insurer's denial of MedPay benefits by stating:

"Thus, in the matter at hand, after they had each received $2,000 of PIP benefits for medical expenses, the plaintiffs were required to send their bills for additional medical expenses to their health insurers. If the health insurers refused coverage, the plaintiffs were then required to send the bills to the automobile insurer for consideration under the PIP coverage of the policy. Only if PIP benefits were not payable for these expenses, because, for example, the policyholder had elected to go outside her health plan to obtain a medical service that could have been obtained through her health plan, would MEDPAY come into play. See *Dominguez v. Liberty Mut. Ins. Co.*, 429 Mass. 112, 706 N.E.2d 647 (1999). As the plaintiffs failed to submit their claims in this fashion, it was not improper for the defendant to refuse to pay them."*Id*. At 465.

Fundamentally, *Meijia* was a decision about the procedure for obtaining MedPay benefits, and not the scope of the coverage. However, dicta in a footnote led to confusion:

"We note that, unlike PIP, MedPay is an optional coverage, the terms of which are not prescribed by statute. Thus, the coordination of benefits provisions in G.L.c. 90, §34A, that were construed in the Dominguez case do not apply to MedPay coverage. MedPay provides a meaningful optional benefit for some consumers because it covers treatment which would not otherwise be covered by health insurance or PIP." *Id.* at 466, n. 6.

Some insurers seized upon this language to argue that MedPay covered only expenses which were not payable by health insurance or PIP. The insurers refused to pay MedPay if the medical bills were paid by the party's health insurer, which seemed to counter the holding in *Bearce* which allowed for double recovery, contrary to the insurance commissioner's policy interpretation in Bulletin B-90-2, and lacking support in the language of the policy.

The reason typically offered for this position was not only the wording in *Meijia*, but also the purported legislative policy of reducing the costs of automobile insurance as announced in *Dominguez*. This reduced the MedPay benefits to that of third tier insurer, only accessible after a denial by a health insurer and an examination as to whether the denial would allow PIP payment. Accordingly, some insurers were taking the opposition that the full $8,000 in PIP benefits had to be exhausted prior to any payments under MedPay, which was a high hurdle if the injured party had health insurance.

The plaintiff's bar advanced a different interpretation of MedPay based primarily on the language of the insurance policy, as stated above, and that the statutory scheme involving coordination of benefits between health insurance and automobile insurance (G.L.c.90 §§34A-Q) regulated only compulsory coverage, such as PIP, and not the optional coverage of MedPay. That is, since MedPay was optional coverage, it was not subject to the PIP/health insurance coordination rules other than the requirement that the first $2,000 in medical expenses be paid by PIP.

In a situation in which medical bills in excess of $2,000 were paid by a health insurer, and the bills were not payable under PIP (in which case they would be excluded from MedPay), MedPay coverage would be available. In other words, *Bearce* was still good law.

The latest case touching on this subject is *Metropolitan Property & Casualty Ins. Co. v. Blue Cross & Blue Shield Of Mass. Inc.*, 451 Mass. 389 (2008) in which the two insurers sought guidance from the SJC on the priority of payments for medical expenses arising from an automobile accident after PIP has paid the first $2,000 in medical expenses and the health insurer's policy contained language making it secondary to MedPay.

In this case, the injured automobile passenger incurred medical expenses in the amount of $5,266. The automobile policy had the standard PIP benefits and $10,000 in optional Medpay Coverage. The bills were submitted to Metropolitan which paid $2,000 in PIP benefits and told the injured passenger to submit the balance to his health insurer, Blue Cross, for payment. Blue Cross denied the charges based on language in a portion of the health insurance contract which read"[u]nless otherwise required by law, coverage under this contract will be secondary when another plan [defined to include'automobile insurance, including medical payments coverage'] provides you with coverage for health care services."*Id*. At 390-91.

Blue Cross took the position that this language made its insurance secondary to MedPay and sent the charges back to Metropolitan for payment under MedPay. Metropolitan filed a declaratory judgment action seeking a determination that it had no obligation to pay any medical expenses after the initial $2,000 in PIP, and took the position that requiring it to pay MedPay under these circumstances violated the coordination of benefits scheme under G.L.c.90 §34A.

The SJC upheld Blue Cross' position and found that Metropolitan should pay the balance under the MedPay portion of the policy. In laying a foundation for its decision, the SJC stated that it looked at the plain language of the policy and found that the coordination of benefits scheme pertained to compulsory coverage only and that allowing deferral to its insured's optional"MedPay benefits does nothing to undermine the legislative goal of controlling the cost of *compulsory* insurance."*Id*. at 394.

The court also rejected Metropolitan's argument that if Blue Cross is allowed to deny the balance of the charges, Metropolitan must pay those bills out of PIP prior to using the MedPay benefits which allows"an'end run'around the coordination of benefits provisions of § 34A." *Id*. at 395.

In rejecting that argument, the court stated that"paying medical costs from PIP when the health insurer has denied coverage because of the existence of MedPay is not only illogical, it is contrary to the legislative intent of § 34A to reduce the cost of compulsory motor vehicle insurance."*Id.*

The court supported its decision by quoting Division of Insurance Bulletin B-90-2, thereby reaffirming the vitality of a document which has clear language on how the coordination of benefits should work between PIP, MedPay and various types of health insurance, and which concludes with the statement that"the claimant may submit further medical bills to either MedPay or the health insurer, *or both*."

Moreover, the court erased any doubt that the *Bearce* decision which allowed payment under MedPay for medical expenses beyond the $2,000 in PIP benefits, and double recovery, remained good law:"The conclusion that MedPay constitutes primary coverage accords with the court's holding in *Allstate Ins. Co. v. Bearce*, 412 Mass. 442, 448-449, 589 N.E.2d 1235 (1992), that an automobile insurer must cover medical expenses under MedPay even if the injured insured has been fully compensated for his injuries by the liable party or by underinsured motorist coverage."

That is, no offset for MedPay payments in an uninsured or underinsured claim, and no denials of MedPay benefits allowed based on a third party recovery in which the bills submitted for MedPay have been considered as part of the third party claim.

However, the SJC endorsed the procedural requirements outlined in the *Meijia* decision. Specifically, the SJC stated:

"The suggestion in the second quoted sentence that the insured may choose whether to seek coverage from their health insurer, MedPay or both, has been rejected by the Appeals Court in Mejia v. *American Cas. Co.*, 55 Mass. App. Ct. 461, 771 N.E. 2d 811 (2002)."

The court concluded in that case that even when an injured insured has MedPay benefits available, he or she must first submit any health care bills above $2,000 to the health insurer for consideration before the bills may be forwarded to the automobile insurer for payment:

"Whether or not the health insurance policy contains a deferral provision for MedPay, we agree with the Appeals Court in the *Mejia* case that after collecting $2,000 in medical coverage under PIP, an insured must submit further medical bills to his or her health insurance provider for potential coverage. If the health insurer denies coverage, the insured may then submit the bills to the automobile insurer for consideration under the PIP coverage of the policy."*Id.* at 466, 771 N.E.2d 811. "If PIP is unavailable — a determination that will depend on the health insurer's reasons for denying coverage — then any available MedPay benefits will come into play."*Id.* n. 10.

In essence, *Meijia* established and *Metropolitan* reaffirmed the procedure that must be followed to determine which expenses that are payable, or would have been payable except for a deductible, under the PIP coverage and are therefore ineligible for payment under MedPay. Therefore, in order to access MedPay in a situation where an insured has in excess of $2,000 in medical bills and has private health insurance, any bills in excess of $2,000 must be presented to the health insurer, denied, re-presented to

Turning back the hands of 'T.I.M.E.'

By William O'Donnell and Kimberly Miles

MILES O'DONNELL

In our hectic lives, it seems there's just never enough time. But when it comes to planning for our financial future, there's always too much "T.I.M.E," or, Taxes, Inflation, Mistakes and Emergencies. Building a nest egg that can withstand the test of T.I.M.E. requires careful planning. We can't change T.I.M.E., but there are some steps we can take to help minimize its ravages.

"T" is for taxes

The old saying is that only two things are certain in life: death and taxes. It's true, we can't evade taxes, but some financial products do have particular tax advantages.

Permanent life insurance, which is purchased for death benefit protection, has three distinct tax advantages: cash value accumulates within the policy on a tax-deferred basis; loans taken against cash value are generally not taxable; and in most instances, the death benefit paid to beneficiaries is free from federal income tax.

A fixed annuity is another product that puts the power of tax deferral to work for you. With a fixed annuity, you will not pay taxes on your funds while they are growing, only as you withdraw them. Withdrawals prior to age 59-and-a-half may be subject to a 10 percent early withdrawal penalty.

"I" is for inflation

Always lurking just around the corner, eroding the buying power of hard-earned dollars, is the specter of inflation. Even moderate inflation can have harmful effects on your lifestyle and purchasing power. For example, in just 15 years, a 4 percent inflation rate will almost double the cost of everything you buy. An option? Place a portion of your portfolio in growth-oriented financial products, provided these are suitable investments for your individual financial solution. There may be risk to your capital, but over the long haul, you may be rewarded with returns that keep you ahead of inflation.

"M" is for mistakes

Nobody's perfect — we all make mistakes. But financial mistakes can cost us dearly. There's no foolproof strategy to avoid missteps, but here is an outline of the five most common insurance and personal planning errors:

- Failure to plan — Most people don't put together a cohesive plan for reaching their financial goals. However, with a comprehensive and flexible plan, you have a blueprint for success.
- Insufficient diversification — "Don't put all your eggs in one basket" is an excellent rule of thumb. True diversification utilizes a variety of different products, asset categories and lengths of maturity in an attempt to reduce risk and raise the potential for a positive return.
- Inadequate life insurance — Failure to cover all income earners with a sufficient amount of life insurance can cause a burden for survivors.
- Inadequate disability income insurance — Our income-earning potential is the engine that powers our lifestyle. If that engine were to break down, would our lifestyle suffer? Sufficient disability income insurance could help in that emergency.
- No estate plan — Some people think that estate planning is just for the wealthy. Not necessarily true. A proper estate plan can help reduce exposure to applicable taxes and provide heirs with an inheritance.

"E" is for emergencies

Unfortunately, from time to time disaster strikes and we end up paying the bill. We can do little to prevent death and disability, but through sufficient insurance coverage, the financial damage can be lessened. Life insurance proceeds can provide beneficiaries with the means to pay final expenses, defray lost income and continue to live in the lifestyle to which they are accustomed. Disability income insurance covers a portion of your salary (usually 50-60 percent) if you become unable to work due to disability. Private insurance, such as long-term care insurance and Medicare supplemental insurance, may help fill in the gaps of government-sponsored programs.

Yes, T.I.M.E. marches on, trying to wreak havoc on your finances. But you don't have to surrender to it. With proper insurance and personal planning, you can limit the ravages of T.I.M.E. in order to retire with a comfortable nest egg.

Continued from page 6

the PIP insurer for secondary payment and denied, before MedPay will come into play.

The ruling in *Metropolitan* upholds the Appeals Court's actual ruling in *Meijia*, but debunks the position of some automobile insurers that the decision required the full $8,000 in PIP benefits to be exhausted prior to reaching MedPay.

One certain aspect of the current MedPay situation is that will demand significant time and cost for attorneys and insurers to navigate the administrative route required by the recent decisions — to submit medical bills to PIP, submit the balance to the health insurer with a PIP exhaust letter, re-submit the bills to PIP with a denial from the insurer, submit those bills to the MedPay carrier with the PIP exhaust letter, health insurance denial, and the PIP re-submission denial. Moreover, the claim procedure and coverage availability (as well as the practical utility of MedPay coverage) may be uncertain as claimants, auto insurers, and medical insurers adapt to the *Metropolitan* ruling.

John J. McMaster was admitted to the bar in 1992. After two years as an assistant district attorney in Worcester County, he has focused his practice on personal injury law. McMaster is a sole practitioner in Northborough with a general practice that includes personal injury matters.

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The Seventh Annual Diamond Ball














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MATA Women's Caucus holds second annual wine-tasting benefit

BARNES

PARKER

By Lauren Guth Barnes and Kristen Johnson Parker

Approximately one year ago, to broadcast the revitalization of the MATA Women's Caucus, these pages announced the holding of the MATA Women's Caucus first annual wine-tasting benefit. We're now proud to publicize year two. Please join us for the MATA Women's Caucus "Second Annual Benefit to Warm the Heart" on Wednesday, Feb. 18.

Over the last 12 months, the caucus has held a number of networking events and received tremendous support from MATA members, staff and affinity partners. Co-chair Lauren Guth Barnes is encouraged by the amount of interest: "It was our goal to create a forum within MATA for the exchange of knowledge and discussions of issues that are particular to women trial attorneys. This past year was a great start, and we look forward to further fostering an environment where women attorneys can learn from one another."

On Feb. 18, from 6 to 8 p.m., the MATA Women's Caucus will host its "Second Annual Benefit to Warm the Heart" at the offices of Hagens Berman Sobol Shapiro in Cambridge. This annual wine-tasting benefit is an opportunity for MATA members to enjoy fine wines, delectable chocolates, good music and great conversation. Member Kristen Johnson Parker reports, "Last year's event was a tremendous success. We brought together a great group of people, sipped wine, ate chocolate and benefited a very worthy charity. What could be better?"

This year's event benefits On the Rise, a nonprofit organization supporting the initiative and strength of women living in crisis or homelessness. In a physically and psychologically safe environment, On the Rise builds the relationships and provides the tools that each woman needs to rise to her potential and reach a safe environment. The Women's Caucus is proud to involve On the Rise for the second year running.

As part of its mission, On the Rise collects donations of casual clothing and personal-sized toiletries. In connection with the benefit, we ask you to start your spring cleaning a little early, clear out the closets and dressers and donate those clothes to a greater cause. And for those of you with cabinets like ours, full of hotel toiletries from nights spent in hotels preparing for depositions, here's your chance to put them to terrific use!

As a result of donations gathered at last year's benefit, the MATA Women's Caucus provided On the Rise with two carloads of clothing and a suitcase full of toiletries, as well as a significant monetary donation. We know we can do even more this year. Between the souring economy and the particularly cold, snowy winter Massachusetts has faced this year, the women whom On the Rise supports can use our collective help now more than ever.

Please join us on Feb. 18. We hope to see all of you — women, men, MATA members and friends — for an evening of wine, hors d'ouevres, chocolates, music and conversation in support of a terrific charity.

For more information on the benefit or to get involved in the MATA Women's Caucus, please contact Susan Simpson at MATA, e-mail: susan@massacademy.com or Lauren Guth Barnes at lauren@hbsslaw.com. For more information on MATA, please visit www.massacademy.com. Additional information on On the Rise can be found at www.ontherise.org.

Upcoming events

February

7-11 **AAJ Winter Convention, New Orleans**

16 **MATA Office Closed, President's Day**

17 **Executive Committee Meeting** 4-6 p.m., 8 New England Executive Park, Burlington

18 **2nd Annual Women's Caucus Wine & Chocolate Tasting Benefit to Warm the Heart,** 6-8 p.m., Hagens Berman Sobol Shapiro, Kendall Square, Cambridge

March

8 **Daylight Savings begins**

7-14 **MATA Mid-Winter Conference** Mayan Riviera

17 **Executive Committee Meeting** 2:30-4 p.m., Citizens Bank, 53 State St., 8th floor

Board Meeting, 4-6 p.m., Citizens Bank, 53 State St., 8th floor

April

9 **Passover Begins**

10 **MATA Office Closed, Good Friday**

12 **Easter Sunday**

16 **Workers' Comp Dinner,** Marriott, Newton

MATA Guardians

The following firms have committed to giving a percentage of their fees to a MATA reserve fund to ensure the longevity of the organization and continued ability for MATA to preserve the rights of your clients and succeed in obtaining its mission of keeping Massachusetts families safe. The goal of the Guardians is one year's budget in reserve.

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If you are interested in participating in this program or would like more information on program specifics, please contact Jennifer Comer at the MATA office.

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Legislation Committee update

Continued from page 3

Court to allocate certain settlement proceeds

Allocates proceeds from a personal injury judgment or settlement between the plaintiff and the insurance company that provided benefits for treatment of said injury; authorizes the court to reduce amounts of insurers' liens if said settlement or judgment amount does not sufficiently compensate the plaintiff for damages incurred;

House Bill 1625

An act to prohibit the use of certain liability waivers as against public policy

Defines any agreement, waiver, disclaimer, exclusion or limitation of liability in an employment contract or application releasing any third party from liability for injuries or death resulting during the scope of employment as void against public policy; prohibits the mandatory signing of said documents by employees or employment applicants;

House Bill 1628

An act relative to the examination of jurors

Establishes a pilot program governing the voir dire procedures for selection of jurors in civil and criminal trials; authorizes the direct oral examination of the potential jury members by a party to the trial or the attorney therefore; authorizes the court to impose reasonable limitations on questions presented;

House Bill 1651

An act providing for the equitable apportionment of certain liens

Requires the hospital, health maintenance organization or medical or dental services corporation and the plaintiff in a personal injury action to divide costs and expenses incurred in enforcing the liability of the tortfeasor, including attorneys' fees and court costs;

House Bill 913

An act relative to liquor legal liability insurance

Prohibits the issuance or renewal of a license for the sale of alcohol to be drunk on the premises unless the applicant provides proof of coverage under a liquor legal liability policy of at least $250,000 for a single incident and $500,000 for multiple incidents;

Senate Bill 942

An act to clarify the charitable purposes of certain organizations

Prohibits use of the fact that a corporation, trust or association is a charity as a defense to any tort action; limits liability in said cases to $20,000 if said tort was committed in the course of charitable activity and said corporation, trust or association earns more than 50 percent of its income from gifts or donations; limits liability for organizations established primarily for religious purposes to $20,000;

MATA Auto Legislation

House Bill 1621

An act relative to personal injury litigation

Regulates adjudication of settlements for lawsuits against insurers relative to failure to pay personal injury benefits; authorizes courts to assess costs, reasonable attorneys' fees and interest against insurers for costs accrued up to the time of payment by the insurers;

House Bill 911

An act relative to requiring insurance for taxicabs and commercial vehicles

Requires all commercial vehicles and taxi cabs charging a fee to passengers to maintain liability insurance policies of at least $100,000 for death or injury of any one person or of at least $300,000 for accidents resulting in death or injury to more than one person;

House Bill 1058

An act to protect consumers in the issuance of automobile insurance policies and bonds

Prohibits the changing of any coverage, condition or definition of any motor vehicle liability policy or bond without the approval of the Commissioner of Insurance after notice of such proposed changes to the public and the Financial Services Committee prior to a public hearing;

House Bill 912

An act relative to certain medical examinations

Amends provisions relative to automobile insurance liability insurance; requires an injured person to submit to physical examination by a licensed practitioner, selected by the insurer, as often as required but no more than one every six months; requires said examinations to be conducted in a location accessible from the injured person's residence; failure to comply constitutes a violation of Chapter 176D;

House Bill 910

An act to repeal no fault motor vehicle insurance

Repeals existing provisions relative to the inclusion of personal injury protection in motor vehicle insurance policies and maintenance of assigned claim plans by motor vehicle insurance companies; amends various provisions relating to coverage under assigned risk plans including, but not limited to, increasing the limits of medical payment coverage and providing wage protection coverage thereunder; articulates mandatory coverage by companies issuing motor vehicle insurance including, but not limited to, medical payment provisions without regard to negligence or fault and wage protection coverage; repeals tort threshold requirement;

MATA Workers' Compensation Legislation

House Bill 1862

An act relative to worker's compensation

Amends provisions relative to the payment of workers' compensation benefits by insurers; requires insurers to pay workers' compensation benefit allowances to workers with bodily disfigurement in the amount up to 29 times the average weekly wage in the commonwealth; increases benefit allowances for burial expenses from $4,000 to $8,000; repeals provisions limiting compensation for workers who are partially incapacitated; authorizes extension of said benefits for the articulated cases including, but not limited to, workers who return to work pursuant to individual written rehabilitation plans, workers who are found unsuitable for vocational rehabilitation, and workers who return to employment for wages less than their pre-injury wages;

House Bill 1828

An act relative to injured workers

Authorizes administrative judges to determine the rates for health care services in workers' compensation cases, if the insurer, employer and health care service provider cannot agree, or if equity and justice require a rate other than one otherwise provided;

House Bill 1826

An act relative to impartial medical examiners

Amends various provisions relative to the modification or discontinuation of workers' compensation benefits by employers; amends regulations pertaining to the appointment of impartial physicians to examine beneficiary employees and use of the reports of impartial physicians to authorizing benefit changes; authorizes the use of reports as evidence in hearings pertaining to benefit discontinuation or modification; repeals provisions designating reports as binding on all parties; regulates the contents of medical reports; designates failure to report to impartial physicians for examination as sufficient cause for suspension of workers' compensation benefits

The committee welcomes the ongoing participation of its members and invites more members to become involved. For copies of legislation, visit the Legislature's website at http://www.mass.gov/legis/. For more information about MATA's Legislation Committee, visit http://www.massacademy.com/ma/.

MATA thanks the people who gave their time to address important issues at the State House.

Monthly Contributors 2009

MATA's monthly contributors have made a tremendous commitment to MATA and to AAJ, the American Association for Justice, on behalf of their clients and their profession. Their dedication to the preservation of the jury system has made it possible for MATA and AAJ to continue to protect consumers against tort reform movements that threaten the rights of citizens every day.

Approximately 80 percent of each contribution goes directly to MATA to fund items such as the lobbyists, and a portion goes to Lawyers for Action PAC (political action committee) which provides support to state political legislators and candidates. The remaining 20 percent of the monthly contribution goes to AAJ's PAC to support federal legislators and candidates.

These contributions make it possible for both MATA and AAJ to continue and increase their political efforts both locally and nationally. It allows for both organizations to educate the public and politicians and to directly impact consumers via the legislature.

We are grateful for the support our Monthly Contributors provide and their dedication to the rights of consumers and victims.

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Membership application now available

The following is a list of MATA's benefits and services and a membership application form:

E-mail Listserv — This online forum currently puts over 700 attorneys' insights and resources at your fingertips. With a click of the mouse, you can ask for an expert, a question of law or experience with a certain mediator, and receive an answer instantaneously.

Deposition bank — Members have online and phone/fax access to over 250,000 expert depositions right from the MATA website.

Case evaluations — Seasoned attorneys evaluate and provide input on various cases, as requested by individual members.

Deposition coaching — This service allows members to meet with one of our expert coaches to discuss and receive guidance on a particular deposition.

Practice sections — MATA provides necessary resources to members practicing in a specific area, such as auto litigation, medical negligence, new lawyers and workers' compensation.

Client newsletters — "You & the Law"is a high-quality, affordable publication developed by a fellow state trial lawyer association, which helps educate clients about legal issues. It can be customized with your own personal message and firm information.

Mentor service — This service offers new lawyers an opportunity to work with an experienced attorney in their practice area.

Legislative representation — Through our professional lobbying firm, MATA initiates, monitors and acts on legislation as it best serves the interests of consumers. In a typical legislative session, MATA fights to block 50 to 70 anti-consumer bills, and initiates 20 to 30 pieces of pro-consumer legislation.

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Amicus briefs — MATA members can request that an amicus curiae be filed in support of their case.

Publications — The MATA Journal offers practical legal articles. E-clips — daily news clips of interest to the trial bar — are e-mailed daily. Also offered is the MATA Minute, a monthly e-newsletter providing important organization information.

Networking and information exchange — Interact with fellow members at key events, including the golf tournament, Diamond Ball and Annual Dinner, as well as the Bermuda Convention in November and the Caribbean Mid-Year Convention in March. MATA also provides suburban luncheons and monthly social events.

Website — Our website provides access to the MATA calendar and Board of Governors, MATA Journal articles, verdicts, settlements and arbitration awards, depositions and legal briefs, pertinent news articles, legislative updates, membership listings, CLE DVDs and materials, case law research, referral service, links to firms, vendors and other legal resources.

Massachusetts Academy of Trial Attorneys

MEMBERSHIP APPLICATION

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Public education and media — MATA focuses its efforts on improving the image of the legal profession by increasing the understanding of the role of attorneys and the issues that affect clients.

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Affinity partnerships — MATA has entered into several long-term agreements with vendors to provide a variety of services pertinent to your profession. Some of our premier service providers include FORGE Consulting, Citizens Bank Law Firm Banking Program, Catugno Court Reporting, Experienced Resolution Resources, Workers' Comp RX, Legal Talk Network, Robson Forensic, Premier Global Services and TrialSmith. In addition, several companies provide discounts to our members, including professional liability insurance, health insurance, conference calling, video services and computer services.

Meeting space — Space is available at the MATA office for members to utilize, whether it be for a client meeting, section meeting, seminar or deposition.

Mayan Riviera

March 7-14, 2009

MASSACHUSETTS ACADEMY OF TRIAL ATTORNEYS

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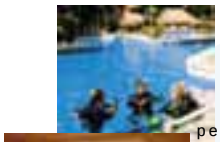

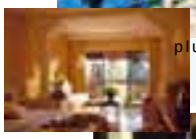

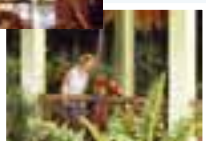

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RESERVATION APPLICATION

Mail to: KARAS TOURS, P.O. Box 508, Sudbury, MA 01776

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Child trespassers and water hazards

Continued from page 5

been imposed on the possessors of land for the drowning of children, whether trespassers or not, caused when they were wading in water beds, regarded as safe and to all appearances involving no more than the ordinary risks of a body of water, and then suddenly stepped off into a deep hole created or maintained by the defendant."*Coeur d'Alene Lumber Co. v. Thompson*, 9 Cir., 215 F. 8, L.R.A.1915A, 731 (boys wading in shallow pool of water surrounded by piles of sawdust on defendant's land suddenly step off into deep hole or well); *Ide v. City of St. Cloud*, 150 Fla. 806, 8 So. 2d 924 (city maintaining bathing beach allowed deep hole in lake to remain unguarded); *Dinnihan v. Lake Ontario Beach Imp. Co.*, 8 App. Div. 509, 40 N.Y.S. 764 (dangerous hole in bathing beach); *City of Altus v. Millikin*, 98 Okl. 1, 223 P. 851 (city's failure to construct spillway which caused formation of a pond generally shallow but containing a dangerous hole where excavations had been made); *City & County of Denver v. Stutzman*, 95 Colo. 165, 33 P. 2d 1071 (child wading in Platte river, generally shallow but in some places knee deep, stepped into large hold dredged in the bottom of the river by defendant city); *Sanchez v. East Contra Costa Irrigation Co.*, 205 Cal. 515, 271 P. 1060 (children playing at edge of irrigation canal held to have assumed risk of open and obvious danger incident to canal but not to have assumed risk of unknown, concealed, and unguarded danger incident to a large siphon constructed at one point in canal by defendant); *City of Indianapolis v. Williams*, 58 Ind. App. 447, 108 N.E. 387 (child wading in stream running through city in which children usually waded stepped into a large and deep hole caused by flow of water into stream from sewer constructed by defendant city)."Id. at 255-58.

The 14-year-old plaintiff might argue successfully that the dangers of the apartment complex swimming pool were not obvious as a matter of law, and, therefore, that she has satisfied the requirement of §85Q(c) that, because of her youth, she did"not discover the condition or realize the risk involved in intermeddling with it."Because the dividing rope had been removed, the pool in which she was injured presented risks greater than those of pools in general and greater than the risks posed by that very pool on earlier occasions when the plaintiff may have been in it or when she entered the pool on this occasion. The absence of the rope caused the location where the floor began its slope into the deep end of the pool to be concealed, thereby creating a trap.

The absence of the dividing rope arguably increased the danger to the girl in at least two ways: (1) the rope was not there to warn her that the slope into deeper water began at that location, a warning she no doubt would have heeded, as she knew she could not swim and (2) had the rope been present, plaintiff could have grabbed it to stop herself from slipping into the deep water after having stepped onto the sloping floor.

The interplay between the child trespasser statute, G.L.c. 85Q, and the obvious water hazard rule remains less than crystal clear. Like other determinations as to whether a trespassing child noticed and appreciated fully the danger posed by a condition on the defendant's land, whether §85Q(c) is satisfied where the danger arises from a body of water is probably a question of fact for the jury. Even if the courts were to rule that water is obvious as a matter of law, evidence that the water contained any unusual, exceptional or hidden dangers would likely raise a jury issue as to whether a trap existed, rendering the obvious water hazards rule inapplicable.

When claiming that a water hazard was not obvious to a trespassing child, the nature of the hazard should be carefully defined. Instead of arguing generally that the child did not understand the risk posed by a pool full of water, the plaintiff should perhaps define the danger more narrowly, as in the hypothetical just discussed, by focusing on a particular danger (e.g. the absence of a rope, slope of the floor, etc.) in the design or maintenance of the pool or other water body.

Roger T. Manwaring is an attorney at Barron & Stadfeld in Boston. He concentrates in civil litigation with an emphasis on legal research and writing. Manwaring is senior researcher for the Barron & Stadfeld Legal Research and Writing Service (www.barronstad.com/research.html), serving attorneys in private and corporate practice. He can be reached at rtm@barronstad.com.

Please join the MATA Women's Caucus for:

The Second Annual Benefit to Warm the Heart

Wednesday, February 18th, 6-8 pm

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Please RSVP to Jennifer@massacademy.com by February 11th

Brought to you by the MATA Women's Caucus