

MA MULTISTATE DISTINCTIONS: PROPERTY

◆ **FUTURE INTERESTS**

- **Rule in Shelley's Case & Doctrine of Worthier Title DO NOT Apply in MA**
- **Fee Tail:** Though MA Recognized Fee Tail, it has been rendered obsolete. If own a piece of property in fee tail, may convey it in FSA to another
- **Rule Against Perpetuities;** MA Does Recognize it
 - MA, though, has Adopted the Uniform Rule Against Perpetuities Act
 - 2 Ways to Satisfy RAP
 1. *Common Law Method:* Certain to Vest or Fail within 21 Years of a Life in Being; or
 2. *Wait & See Method;* wait for **90** years to determine if the interest did in fact vest or fail (within that 90 years).
 - Doctrine of **cy pres** applies regardless of method; court will reform mere milestones

◆ **CONCURRENT ESTATES**

- Key is to know the **Unities**; T-TIP(m) (Time, Title, Interest, Possession, Marriage)
- **Tenancy by the Entirety:** possess all 5 unities T-TIPm
- **Joint Tenancy:** T-TIP
- **Tenancy-in-common:** Possession + any 3 others
 - ON the Exam, trace the unities from person to person
 - 8 Hypos re: Concurrent Estates
 1. *A conveys 'to B & C, and their heirs'.* How do B & C hold?
 - MBE – Tenants in Common
 - MA – Tenants in Common
 - Key: “and their heirs”. Says nothing about survivorship. Only JT and TxE have the right of survivorship
 - Here; the heirs have NOTHING
 2. *A conveys 'to B & C, and their heirs'. B & C are legally married. Title?*
 - MBE: Trick: if conveyance to 2 legally married people & manifested in grant is a Right of Survivorship, then presume TxE unless otherwise. Here, there is nothing expressed regarding the right of survivorship, therefore it is a Tenancy in Common
 - MA: Same Rule. **In MA**, the **ONLY** way to create a TxE is EXPRESSLY (must use the magic words, tenants by the entirety)
 3. *A conveys 'to B & C, then to the Survivor of them' Title?*
 - MBE: No TinC because there is a Right of Survivorship. Only way to be a TxE is if B&C are legally married. Thus, by default, it is a JOINT Tenancy
 - MA: Same: JT, A right of Survivorship with NO Express TxE language
 4. *A conveys 'to B & C, jointly'. Title?*
 - MBE: TinC – “jointly” does not specify the type of concurrent estate, therefore, presume Tenancy in Common
 - MA; Joint Tenancy: Statute; “Any Conveyance to **2 or more** which uses the words ‘**jointly**’, ‘**as joint tenants**’ or otherwise manifests an intention to be a joint tenancy with a right of survivorship is a joint tenancy with a right of survivorship

5. A conveys 'to B & C, as Joint Tenants'. Title?
 - MBE: Joint Tenancy: using words creates it
 - MA: Joint Tenancy: using words creates it
6. A conveys 'to B & C, or the Survivor thereof'. B & C are legally married. Title?
 - MBE: Any Conveyance to Legally Married People Expressly Expressing a Right of Survivorship is Presumed to be a Tenancy by the Entirety
 - MA: Only way to create TxE is to Expressly state that it is a TxE. Since Right of Survivorship is given in the facts, it can't be a Tenancy in Common. Therefore, it must be a Joint Tenancy
7. A conveys 'to B & C, as Tenants by the Entirety.' Title?
 - MBE: TxE
 - MA: TxE
8. A conveys 'to B & C, as Tenants by the Entirety.' But B & C are not legally married. Title?
 - MBE & MA: Any Attempt to create a TxE in people NOT legally married will create a Joint Tenancy & not a TinC.

◆ **LANDLORD-TENANT**

- Statute of Frauds will generally apply for **Tenancy by the Years, Periodic, and At-will**
- MBE: Any of the 3 Tenancies can be ORAL
- MA: Statute of Frauds is more strict. All TENANCY for Term of YEARS MUST BE in Writing, REGARDLESS of Length
 - Only way to have a periodic tenancy in MA is to have it WRITTEN (rare, because only happens with HOLDOVER tenants)
 - Any tenancy NOT in writing is a TENANCY AT WILL (attempted tenancy for a term of years or an attempted Periodic Tenancy which fails for lack of Writing will be a Tenancy AT WILL)
- Summary Process:
 - It's a Court Action used to EVICT someone; Very Procedure Oriented
 - Tenant receives More protection in MA than anywhere else
 - Statutory Protection (look in Book)
- Security Deposit
 - Applies ONLY to **residential tenancies**
 - Landlord REQUIRED to put the Security Deposit in a SEPARATE Bank Account (co-mingling is forbidden)
 - Landlord Must Give NOTICE to Tenant, informing where the funds are located
 - Landlord MUST pay INTEREST to Tenant (same as he receives from the bank)
 - Landlord, if he uses any of the money from the Deposit, MUST provide a Full WRITTEN ACCOUNT of how the money was used
 - Landlord Must provide EITHER a Written Account OR Return the Money WITHIN 30 DAYS of the Termination of the Tenancy
 - Caveat: Landlord may use the Security Deposit ONLY for:
 - **Damage** Caused by the Tenant
 - Applied toward **Rent** in Arrears
 - NOTHING ELSE

◆ **EQUITABLE SERVITUDE**

- **COMMON SCHEMES**

- Recognized in MA
- Apply the Statute of Frauds STRICTER in MA
- It is IMPOSSIBLE to have an ORAL Common Scheme (sub-division)
- There MUST be some type of Writing
- Usually, the document will say ‘*Common Development Scheme*’ and will be in the Hall of Records
- Can be TESTED in 1 of 2 Ways;
 1. *Developer OWNS a large tract of Land of and DIVIDES it into 10 SEPARATE Lots. Developer will then sell those lots. HE will sell like 7 of them, in which the Deeds Say “This Lot is to be used ONLY for Residential purposes”.* For the 8th Parcel, there is NO such restriction. The 1st 7 Owners want Parcel 8 to be used ONLY for residential purposes. The new 8th Parcel owner wants to put up a 7-11. May he do it? No, Cannot enforce a Common Scheme because there is NO WRITING which MANIFESTED an INTENT to Bind All 10 lots under the Common Scheme
RULE: As Long as there is a WRITING which MANIFESTS an INTENT to BIND ALL lots into a COMMON SCHEME, there will be a common scheme. Anything short of that fails.
 2. *Same Facts. Except the 7 DEEDS say “This & All other lots in the Subdivision is to be used for Residential Purposes ONLY”.* This Satisfies the Statute of Frauds. It Also Manifests an Intent to Bind ALL lots into a Common Scheme. 8th Lot will be bound even though his Deed said nothing. He Has a DUTY to search other Title within the Sub-division (RECORD notice)

◆ **CONDOMINIUMS**

- Review the Hand-out in Outline regarding Condos.
- Very Procedure Oriented
- Condos are like Democracy; unit owners are S/H or Votes, Bd = Bd = Congress, Master Deed = Charter = Constitution, etc.

MA MULTISTATE DISTINCTIONS: CRIMINAL PROCEDURE

◆ **TIPS**

- Know the Cases (recent)
- Understand the Interplay between MA Constitution & Federal Constitution
 - Fed: 4th, 5th, 6th, & 8th Amendments v. MA Article 12, 14, & MA Declaration of Rights
 - Federal Constitution acts as a THRESHOLD of Rights via 14th Amendment, Federal Constitution applies to ALL states
 - MA Defendants have at least as many rights as the Federal Constitution guarantees, but may have more under the MA Constitution Article 12, 14, or Declaration of Rights

◆ **ARRESTS & DETENTION**

- Standard: Reasonable Suspicion (both Fed. & MA)
- In MA, considered SEIZED as soon as PURSUIT BEGINS (≠ Fed where not seized until actual detention)

◆ **USE OF INFORMANTS TO OBTAIN SEARCH WARRANTS**

- MA ≠ Fed
- MA: *Aguilar Spinelli Test*; (up until 1983, it was the Fed Test as well). Now, *Gates v IL* has eroded some of the stuff at the Fed Level. MA still follows *Aguilar*
- To Obtain Probable Cause for a Search Warrant, Police present an Affidavit which contains:
 1. *Information relating to the Reliability of the Informant*
 2. *Basis of Officers Knowledge of that Information*
- GATES: Totality of the Circumstances Test; Common Sense determination of probable Cause

◆ **RIGHT TO CONFRONT WITNESSES**

- **Article 12 of the MA Declaration of Rights**: Every Defendant has a Right to Confront His/her Accusers “FACE to FACE”
- In 1984: MA SJC in Comm v Johnson (child molester) the Face to Face Right is LITERAL, all defendants have the right to look at their accusers in the eye
- Amerault Case; SJC Right to Face to Face and Right to Finality

MA MULTISTATE DISTINCTIONS; CONSTITUTIONAL LAW

◆ **EQUAL PROTECTION**

- 14th Amendment (Fed) Equal Protection:
 - **Suspect Class** is RACE & National Origin, Apply Strict Scrutiny Test
 - Other Class, either Middle Tier or Rational Basis
 - MA has 6 Suspect Classifications
 1. *Race*
 2. *Alienage*
 3. *Religion*
 4. *Ethnicity*
 5. *Handicapped*
 6. *Gender*

◆ **MA EQUAL RIGHTS ACT**: Everybody in the State is entitled to the Same Rights as WHITE MALES

◆ **MA CIVIL RIGHTS ACT**: Applies to PRIVATE Actors as well as Government Actors.

- Private Actors have a higher standard: Actions must Include **threats, intimidation, or coercion** to be civil rights violations committed by private actors

◆ **MA PUBLIC ACCOMODATIONS LAW**: Providers are Treated as Though they were state actors

◆ **MCAD**: Deals with Discrimination

- Ch. 151-b has a **6 month** statute of limitations. Must 1st go to the MCAD before file suit in court

◆ **FREEDOM OF RELIGION**: SJC 151-b § 4 is Unconstitutional because require court to look at religion to see if working on Christmas was necessity of religion. MA legislature; to be Protected under the act requires Good Faith Belief that Creed/ Religion Prohibited work on that day

MA MULTISTATE DISTINCTIONS: EVIDENCE

◆ **INTRODUCTION**

- MA Rules of Evidence are NOT Codified (≠ Fed)
- If an Evidence problem is on the Essay, say “MA Evidence is not yet Codified, like the FRE, but rather it is Adopted from a Mix of the Common Law and Various Statutes. Also, MA has not adopted the Proposed Rules of Evidence. Nonetheless, it has adopted some portions of it.
- Exam will Ask the Following Questions:
 - *Is the Evidence RELEVANT?*
 - *Is the Evidence from a COMPETENT Source*
 - *Had a PROPER FOUNDATION been laid for the Admission of the Evidence*
 - *Are there any HEARSAY problems with the Evidence*
 - *Are there any 403 type problems (Excluding admissible evidence because its prejudicial value outweighs its probative value)*

◆ **RELEVANCE**

- Relevance: Any Material Fact of Consequence to the Action
- Does it make the proposition more probable than not
- **MA**: Rational Tendency to Prove an Issue in the case
- *Relevant Scope of Cross*;
 - FRE**: Bias, Credibility, Direct
 - MA**; Wide Open Cross: Anything goes. Any one can impeach any witness.
 - CANNOT use HABIT to show Act in Conformity with habit, though
 - CANNOT use Specific Instances of Misconduct to Impeach

◆ **COMPETENCY**

- MA = FED: Witness Ability to **perceive, understand, remember & communicate the event**
- Infancy & Insanity are NO Bars to Competency
- Privileges
 - Attorney-Client, Priest-Penitent, Social Worker, Spouse
 - H&W DISQUALIFIED from testifying about **Private Oral Communication** (but not written letters between them). This Rule of SPOUSAL Disqualification applies even if both spouses want to testify. On Non-oral communications, the Privilege Applies to the Spouse in the Witness Box
 - There is NO Patient-Physician Privilege in MA, But there is Psycho-therapist privilege, Attorney-client (privilege survives death)
 - NO Accountant-client privilege, NO Reporter-Source Privilege
 - MA Recognizes the CRIME FRAUD exception to Attorney Client Privilege
 - Confessional & Testimonial Privileges must be Voluntary
 - 5th Amendment Privileges include the right NOT to submit to a BREATHALYZER

◆ **FOUNDATION**

- Must lay a foundation for evidence to show that it is **authentic, trustworthy & reliable**
- MA: **lay witnesses** may testify as to their OPINIONS re:
 - Speed of Car
 - Person's Intoxication
 - Whether Handwriting is Genuine (if they've 1st hand knowledge of that handwriting)
 - MAY NOT testify as to SANITY, which is reserved for EXPERT testimony opinion. However, exception: lay witness to a will may testify as to Testator's Capacity
- MA: **Expert witnesses** may testify their opinions as soon as lay foundation:
 - Must Establish Sufficient Education, Training, Background, Experience
 - May Offer Opinion if it will ASSIST the Fact Finder in Understanding the Situation
 - DAUDERE Test for Scientific Evidence: Reliability of the Scientific Device or Theory before admitted as expert opinion
- Photos: Do not need the photographer to come in to the witness box and authenticate the photo. Instead, just need a person who can say that the photo is what it purports to be
- Uniform Copies of Business Records: Allow a Photocopy of a Public or Business Record to be admitted into evidence (way around best evidence rule)
- Best Evidence & Other Problems:
 - Chain of Custody
 - Best Evidence (recording, CD, writing) & Accuracy of the recordings
 - Eavesdropping: there are civil & criminal penalties

◆ **HEARSAY**

- Any OUT of COURT Statement Offered for the truth of the matter (a statement may be oral or written)
- FRE: except for the party's own statement offered against him (that is defined as not hearsay)
- MA; Admissible Hearsay for stuff the Feds call non-hearsay.
 - Admissions
 - Agent Admissions
 - Co-conspirator Admissions
 - Prior Inconsistent Statements of witnesses at trial (or in grand jury) if witness available, voluntary & corroborated)
- MA: No Present Sense Impression Exception to Hearsay
 - No Lack of Business Record Exception to Hearsay
 - The Family Pedigree Exception is Limited
 - Learned Treatise Exception is Limited (Only in Cross or Re-direct may it be read into evidence)
 - Ancient Documents require **30** years, not 20

- Declarant unavailable Exceptions to the Hearsay Rule
 - Dying Declaration; in MA applies ONLY to **homicide** cases and the declarant MUST die
 - Declaration against interest
 - Former Testimony
 - Family History
 - **Dead man statement** is admissible if show, in *good faith* with 1st hand knowledge
 - Child Hearsay: More admissible, especially in cases involving sexual contact. Other sexual assault victims as well. **Fresh complaints** 21 months is the outer limit of a fresh complaint

- ◆ 403 ISSUES
 - Exclude Relevant Admissible Evidence on the grounds of **prejudice, confusion, waste of time, undue delay, jury confusion or SURPRISE** if that *outweighs* the evidence's Probative Value
 - MA: SORRY RULE: if Apologize right after an Accident, that is NOT admissible; however statements regarding settlement discussions are NOT protected (≠ FRE) and May be Admitted
 - MA: COURT RULE: the court needs to be Aware of any settlements that a co-defendant made which could offset any future judgments

MA MULTISTATE DISTINCTIONS: CRIMINAL LAW

◆ **INSANITY**

- MA has NOT adopted the Model Penal Code. Thus MA criminal Law is a MIX of Statute and Common Law. But MA has adopted the Model Penal Code Test for Insanity
- **Insanity**; **MPC**: Suffer from a Mental Disease or Defect such that the Defendant **COULD NOT UNDERSTAND** the criminality of his Act nor Conform his actions to the Law.
- It is an Affirmative Defense that **MUST** be raised by the Defendant
- Once Raised, the **PROSECUTION** bears the burden of showing beyond a Reasonable Doubt that the Defendant is Sane

◆ **INCHOATE**

- **Contemplated**: more than 1 person involved, it is a Conspiracy
- **Involved**: Solicitation, which merges into the Committed Crime; OR Attempt OR Accessory
- **Committed**: the Actual Criminal Act & liability
- **MA**: Does NOT Require an **OVERT ACT** for **Conspiracy**; only an Agreement to Commit the Crime
- **Attempt**: Must Commit an **OVERT ACT** which is **DANGEROUSLY CLOSE** to the Actual Commission of a Crime
- **Accessory**: there is **NO** accessory to misdemeanor crimes. Certain Family Members **CANNOT** be Accessories After the Fact
- **Joint Venturer**: only a Theory of Liability. Same Mental State as the Principal, but convicted of the **CRIME**, not the Joint Venture (i.e., convict someone of burglary not joint venturism)

◆ **CRIMES AGAINST THE PERSON**

- Murder, Voluntary Manslaughter, Involuntary Manslaughter, Battery, Mayhem, Assault, False Imprisonment, Kidnapping & Rape
- Threats Intimidation
- Hate Crimes (distinct from the Underlying Crime)
- **Murder v Manslaughter**: **MALICE**: Absence of Malice = Manslaughter
 - **Murder**: Unlawful Killing of a Human Being with Malice Aforethought. A dangerous weapon is evidence of malice aforethought. A viable fetus is a human being for murder purposes.
 - **Murder 1**: Premeditated, Deliberate, Extreme Atrocity, cruelty, in the commission of a felony (NOT applicable to the homicide of a co-felon)
 - **Murder 2**: Not punishable by death
 - **Manslaughter** (No Malice);
 - **Involuntary**: Death Thru Recklessness, or Battery likely to cause death
 - **Voluntary**: Killing in the heat of **PASSION** upon a Reasonable Provocation
 - **Mayhem**: Intent to Disfigure the Victim
 - **Assault**: Neither Fear nor Apprehension of harm is necessary: **JUST** Action Reasonably Calculated to Place the Victim in **IMMINENT FEAR** of Bodily Injury

◆ **CRIMES AGAINST PROPERTY**

- Common Law ≠ MA
- MA: **larceny**: either Petty or Grand. If < \$250 Petty, if >\$250 Grand

◆ **DEFENSES**

- Insanity: MPC Test: Defendant suffers from a mental disease or defect such that the defendant could not understand the criminality of his act nor conform his conduct to the law.
- Infancy: Because of his Tender Youth, the Defendant could not Recognize the Wrongfulness of his Act (<14 can commit Rape, though)
- Intoxication: Defense which is available **ONLY** in Specific Intent Crimes
- Justification: Self-defense and Defense of others: MA has **abandoned the retreat rule**. If reasonable belief of intruder about to inflict death or great bodily harm, can use deadly force without first retreating.
- Entrapment: Modern Rule: Can Deny Commit Crime and Still Claim Entrapment?
- Lack of Capacity: Diminished Responsibility (< Insanity). Did NOT have the requisite mental state to commit the crime charged.

◆ **PUNISHMENT & JURISDICTION**

- Misdemeanors have a **MAXIMUM** Sentence of 2 ½ Years (but can't be state prison, just county jail)
- Felonies: all other non-misdemeanor crimes
- **SUPERIOR** Court may hear **ALL** Crimes
- **DISTRICT** Court has Limited Jurisdiction. May hear All Misdemeanors + Felonies with a Maximum Sentence of 5 years. However, the District Court has No Power to incarcerate a prisoner to State prison, only to county jail

MA MULTISTATE DISTINCTIONS: CONTRACTS

◆ **FORMATION**

- MA essentially = MBE
- Offer Acceptance Consideration are keys to formation of contract
- Mailbox rule may be Negated by the offeror
- **Consideration:**
 - **MA:** No Pre-existing Duty Rule. MA says one has the right to Breach the contract
- **Specific Enforcement:**
 - Equitable Remedy: Sufficiency of Consideration is an issue (ONLY time that is true)
 - MA has adopted the UCC for the Sale of Goods: Modification without Consideration is OK; however, if the underlying modified contract requires writing, then the modification requires writing
- **Consideration Substitute**
 - Usually Require a Writing [Discharge in Bankruptcy, Re-affirmation of a minor, Statute of Limitations runs on a breach, re-affirm the debt] – Because there was a contract with valid consideration with the new writing?
- **Promise Under Seal:**
 - UCC Seal does not Apply (Seal is not a valid substitute for Consideration). But in Non-UCC area, Seal does apply. Seal is a Valid Substitute for Consideration

◆ **DEFENSES**

- Defenses to Formation: Void
- Contracts made on **SUNDAY** are VOID (by statute) however, there are many exceptions, including the following:
 - Hospital business
 - Library
 - Public Bath
 - Prepare for Trial
 - Self-serve Laundry
 - State Lottery
 - Home Video Rental
 - Liquor
- **Incapacity**
 - *Infancy:* If under Age of 18, may disaffirm except for Necessities & auto insurance or life insurance
 - *Mental Incapacity:* may disaffirm
- **Defenses to ENFORCEMENT**
- **Statute of Frauds:** Real Estate Interests must be in writing except if there is POSSESSION, VALUABLE IMPROVEMENTS, & PART PAYMENT THAT IS OBVIOUSLY NOT RENT
- **Unconscionability:**
 - *Price:* Gross Disparity between Value and Price charged
 - *Procedural:* Boiler Plate: Adhesion, Fraud, Duress, Misrepresentation

◆ ETC.

- 3rd Party Beneficiaries
 - Same as MBE
- Assignment of Rights
 - *General Rule*; All contractual Rights may be ASSIGNED, However **MA** wants to protect families, ergo **anti-assignment statute** which prevents assignment of an ENTIRE PAYCHECK (require written consent of employer & spouse)
- Anticipatory Repudiation
 - **MA** Does not recognize Anticipatory Repudiation
 - Must Await the time of performance before can sue (may, however, suspend own performance)
- Doctrine of Substantial Performance
 - **UCC: Perfect Tender Rule**: If goods fail, buyer may reject. To prevent forfeiture in non-UCC cases, if 1 party SUBSTANTIALLY Performs, other party is under the duty to perform. But in MA, although there is NO recognition of this doctrine, it is generally under *Quantum Meruit*.
- Equal Dignities
 - **MA** Does not Recognize this doctrine
 - **EDR** states that to be bound, if appoint an agent, require a writing if the underlying contract to which the agent will bind the principal requires a writing.
 - **MA**, no EDR; 1 may orally appoint an agent to sign an Underlying contract

MA MULTISTATE DISTINCTIONS: TORTS

◆ **FALSE IMPRISONMENT**

- Elements: Confinement + Intent + Causation of Injuries
- **MA** follows the general rule re: felonies, if wish to make a Citizen's Arrest for a felony, may do so. But if you're sued for False Imprisonment, the Defense of Citizen's Arrest will be valid. However, for MBE MISDEMEANORS, a private citizen may detain another as long as the misdemeanor was committed in his presence and a breach of peace occurred. MA has NO Right to DETAIN for MISDEMEANORS Except for Merchants with a Reasonable Belief that misdemeanor had occurred, Innkeepers, and STOLEN Public Records

◆ **INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS**

- Elements: EXTREME & OUTRAGEOUS + INTENT + CAUSE + DAMAGES
- **MA**; if horrified & die, the estate may sue. C.O.A. SURVIVES Plaintiff's Death
- No punitive damages in that case, though

● **DEFENSES to INTENTIONAL Torts**

- Include: Self-Defense: Modern view: Retreat if Reasonably Safe to do so (need not retreat to protect the home)
- Defense of Others (Self Defense as long as rescuing someone with self defense defense)

◆ **DEFAMATION**

- Elements: Writing which Discredits Plaintiff and Discredits the Plaintiff in the eyes of ANY respectable or Credible Class in the Community
- Note: A person may be libel proof if no matter what is said about him, his reputation may never be harmed in the eyes of any respectable or credible class in the community
- Libel:
 - *Per se*: on Face
 - *Per Quod*; extraneous Evidence
 - NO MA Distinctions & Need NOT prove Special Damages
- Slander:
 - *Per se*; (per quod is not per se)
 - Crime Allegation (no moral turpitude requirement)
 - Loathsome Disease
 - Words Injuring Profession or Business
 - No Punitive Damages
 - Truth as a DEFENSE is OK for slander, but Truth is NOT an absolute defense for Libel. If plaintiff can prove malice, there will be liability for libel even with the truth as a defense

◆ **INVASION OF PRIVACY**

- Narrowly constructed: must be a Substantial Invasion
- Statute: Incidental use of Name or Likeness for Commercial Purposes is NOT actionable

◆ **MISREPRESENTATION IN SALES**

- If the Sale of PERSONAL Property is INTENTIONALLY Misrepresented, the Buyer can RECEIVE **Treble Damages** (does not apply to real property)
- For Real Property: Modified Caveat Emptor: No Duty to Disclose, but if asked, must tell the truth

◆ **MALICIOUS PROSECUTION**

- Institution of Criminal Proceedings
- Defendant Wins (is acquitted or case dismissed)
- Absence of Probable Cause
- Improper Purposes
- Damages
- MALICE

◆ **WRONGFUL DISCHARGE**

- Termination of At-Will Employees (can walk away without breach or be fired at any time)
- At will Termination is OK for Good Cause or NO Reason, so long as there is no BAD CAUSE, such as:
 1. *Constitutional Reasons (Race or Sex Wrongful Discharge)*
 2. *Statute Reasons (Workers Comp. Claim, Jury Service, Whistle Blowing)*
 3. *Public Policy*
- Shareholder in A Closely Held Corporation has a High Level of Fiduciary Duty to other Shareholders (if discharged, breach of fiduciary duty)
- Employee Manuals: If 1 Exists & says certain procedures must be followed during the termination phase, that manual becomes part of the employment contract and if discharged without following procedure, can sue for breach of employment contract

◆ **NEGLIGENCE**

- **MA:** General Rule: Wrongful Life is NOT a cause of Action, however Wrongful Birth or Wrongful Pregnancy is a Cause of Action
- For In Vitro Children, if damaged in vitro due to negligence, unless there is viability, cannot be a cause of action under wrongful death
- **Standards of Care**
 - Professionals; Average Qualified Practitioner throughout the Profession
 - Attractive Nuisance: Right of Comparative Negligence in Defendant ; For **ski areas**, very hazardous activity; can sue bad skiers, but not the ski area. If icy, can't sue the ski area. Only negligent if place a Green Circle where a Black Diamond should be. 1 year statute of limitations
 - Land Lord: Residential Landlord has a very high duty of care to tenants
 - Good Samaritan: Dr, Nurse, Vet, EMT, Cop, Fireman acting as a Good Samaritan are EXEMPT from ALL Civil Liability. However, if CPR Certified, but not quasi-professional, Exempted from ORDINARY Negligence, but NOT Gross Negligence. If no CPR Certification, Liable for Ordinary Negligence.

◆ **STRICT LIABILITY**

- There is **NO 1 Bite Rule** in Massachusetts for Dogs. Dogs are recognized as Inherently Dangerous. Therefore, Strict Liability. However, if the Plaintiff either teased or trespassed, it may be a Defense to Strict Liability. But the Burden of Proof is on the Plaintiff to show no Trespassing & NO Teasing. Kids under 7 are presumed NOT to tease or trespass and the Burden of Proof is on the Defense to show that the Plaintiff did tease or trespass
- **Lead paint**; Strict Liability for Kids under **6**. Parents may be liable for Contributory Negligence from Landlord for letting the kids ingest the lead paint
- **Products & Services**: Strict Liability in TORT for Products **DOES NOT EXIST** in **MA**
 - Strict liability is in contract law for products in MA
 - MA Cannot **DISCLAIM** an **IMPLIED** Warranty for sale of goods or services
 - Vendors are Presumed to Know all Defects
 - Do Not bring Action in TORT, but **RATHER** in **CONTRACT**; stream of commerce, no privity requirement

◆ **VICARIOUS LIABILITY**

- *Respondeat Superior*; Public Policy. If the Employer has an Employee who is Negligent while Acting within the Scope of Employment, the Employer is Responsible for the Liability.
- *Employer/Employee Relation*; Determined by Right to Control
- *For Independent Contractors*: there is **NO** right to control; Employer will be liable for the torts of Independent Contractors **ONLY** if Fail to use care in Selecting the Independent Contractor
- *Bar Owners*: Are responsible for Ordinary Negligence
- *Social Hosts*; Liable if Negligent (if control the Supply of Alcohol, liable; if don't control the supply of Alcohol, not liable). Party committing the Negligence may then sue the Dispenser of Alcohol. If it is a Bar owner, can find negligence there. If not, if social host; must show **RECKLESSNESS**

◆ **WRONGFUL DEATH**

- Spouse & Kids may sue; Spouse gets 50% of Recovery, Kids get 50% per stirpes
- Distinct from P & S; the Estate may sue & Creditors can get the P&S, but not the Wrongful Death Recovery

◆ **MA TORT CLAIMS ACT**

- **Sovereign Immunity**: No long Applicable
- **May Sue the State for Torts**, but
 1. *Limited Recovery of \$100,000*
 2. *Cannot Sue Individual Wrong-doer, but sue the Government Entity (as long as not an Intentional Tort, for Intentional Tort, the government agent is liable and not the governmental entity)*
 3. *Discretionary FUNCTION: Fact Based*; Cannot sue a town for Failing to provide a fire department or for negligently dousing a fire. However, can sue the town if the fire truck runs you over on the way to putting out the fire.