

1-1-2012

# PREMISES LIABILITY—BREAKING NEWS: IT SNOWS IN MASSACHUSETTS AND SNOW IS SLIPPERY. WHY MASSACHUSETTS SHOULD ADOPT THE STORM-IN- PROGRESS RULE

Connor Fallon

Follow this and additional works at: <http://digitalcommons.law.wne.edu/lawreview>

---

### Recommended Citation

Connor Fallon, *PREMISES LIABILITY—BREAKING NEWS: IT SNOWS IN MASSACHUSETTS AND SNOW IS SLIPPERY. WHY MASSACHUSETTS SHOULD ADOPT THE STORM-IN-PROGRESS RULE*, 34 W. New Eng. L. Rev. 579 (2012), <http://digitalcommons.law.wne.edu/lawreview/vol34/iss2/11>

This Note is brought to you for free and open access by the Law Review & Student Publications at Digital Commons @ Western New England University School of Law. It has been accepted for inclusion in Western New England Law Review by an authorized administrator of Digital Commons @ Western New England University School of Law. For more information, please contact [pnewcombe@law.wne.edu](mailto:pnewcombe@law.wne.edu).

PREMISES LIABILITY—BREAKING NEWS: IT SNOWS IN MASSACHUSETTS AND SNOW IS SLIPPERY. WHY MASSACHUSETTS SHOULD ADOPT THE STORM-IN-PROGRESS RULE.

INTRODUCTION

In the middle of one of the hottest summers in Massachusetts in years,<sup>1</sup> the Massachusetts Supreme Judicial Court came down with a snowy decision. In July of 2010, the court in *Papadopoulos v. Target Corp.* reversed nearly one hundred and thirty years of precedent and changed the standard of review for cases involving slip-and-falls on snow and ice.<sup>2</sup> The court abolished the “natural accumulation” rule, a legal rule that had acted as an exception to a property owner’s duty to use reasonable care under the circumstances in maintaining his or her property.<sup>3</sup> Moving forward, the court opted to apply the duty of reasonable care generally, without any exceptions.<sup>4</sup> However, in the opinion, the court explicitly noted that it was not yet deciding whether to adopt a different exception known as the “storm-in-progress” rule.<sup>5</sup> It is the stance of this Note that, when given the opportunity, the Supreme Judicial Court should promptly adopt the “storm-in-progress” rule, because it ap-

---

1. See *Sizzling Heat Wave Tightens Grip on Northeast*, FOX NEWS (July 6, 2010), <http://www.foxnews.com/weather/2010/07/05/hot-ya-temps-soar-near-east/> (describing the heat wave that hit the east coast during the summer of 2010).

2. *Papadopoulos v. Target Corp.*, 930 N.E.2d 142, 156 (Mass. 2010).

3. *Id.* at 144.

4. *Id.* at 154.

We now will apply to hazards arising from snow and ice the same obligation that a property owner owes to lawful visitors as to all other hazards: a duty to “act as a reasonable person under all of the circumstances including the likelihood of injury to others, the probable seriousness of such injuries, and the burden of reducing or avoiding the risk.”

*Id.* (citation omitted).

5. *Id.* at 153-54, n.17. The storm-in-progress rule provides, quite simply, that a property owner has no duty to remove snow and ice from the property until the storm has ended and “a reasonable time thereafter.” See *Kraus v. Newton*, 558 A.2d 240, 244 (Conn. 1989). Currently, Connecticut, Vermont, and Rhode Island apply the storm-in-progress rule, while Maine does not. See *Budzko v. One City Ctr. Assocs. Ltd. P’ship*, 767 A.2d 310, 314 (Me. 2001) (refusing to adopt the storm-in-progress rule); *Terry v. Cent. Auto Radiators, Inc.*, 732 A.2d 713, 717 (R.I. 1999); *Kraus*, 558 A.2d at 243; *McCormack v. State*, 553 A.2d 566, 568 (Vt. 1988); *Turmel v. Univ. of Vt.*, No. S0980-01 Cncv, 2004 WL 5460386 (Vt. Super. Ct. Apr. 20, 2004) (stating that “the Storm in Progress Rule, which has been implied in previous Vermont cases, applies”) (citing *Wakefield v. Tygate Motel Corp.*, 640 A.2d 981, 982 (Vt. 1994)).

appropriately balances the interests of the property owner and the general public, while avoiding most of the complications that led to the downfall of the natural accumulation rule.

Property owners have good reason to be interested in the legal standard applied to snow and ice removal because slip-and-falls on snow and ice are a common occurrence,<sup>6</sup> particularly in a northeastern state like Massachusetts. Massachusetts is hit heavily by snow every winter.<sup>7</sup> In fact, Boston averages about 42.2 inches of snowfall per year, and Worcester averages a whopping 67.6 inches per year.<sup>8</sup> And, the reality is—snow is slippery. On top of that, snow can turn to ice—which is more slippery. In addition, humans, by design, are prone to slip, trip, and fall. In fact, in a book titled *The Slip and Fall Handbook*, the author described the art of human walking as “an accident waiting to happen.”<sup>9</sup> As the author explained it, “[e]ach human step has the potential to be interrupted with the person teetering on the edge of falling. That accident most often happens when the normal human locomotor pattern is interrupted. A fall is the common end result.”<sup>10</sup>

Due to these obvious considerations, property owners need some form of protection from unwarranted slip-and-fall claims, and, as will be demonstrated, the storm-in-progress rule is the best option at hand to provide this protection. Part I of this Note discusses the basic tenets of premises liability and gives a synopsis of the evolution of premises liability, as well as the development and subsequent demise of the natural accumulation rule in Massachusetts. Part II discusses three different approaches to dealing with snow and ice in premises liability. Part III discusses the reasoning of *Papadopoulos* in reaching the conclusion to abolish the natural accumulation rule. Part IV analyzes the different standards and explains why the storm-in-progress rule is the best approach.

---

6. *Slip and Fall Accident Stats*, LAW FIRMS.COM, <http://www.lawfirms.com/resources/personal-injury/slip-and-fall-accident/slip-and-fall-accidents.htm> (last visited May 24, 2012). For example,

over one million Americans suffer a slip, trip, and fall injury and over 17,000 people die in the U.S. annually because of these injuries. Slip, trip and fall injuries make up 15 percent of all job related injuries, which account for between 12 and 15 percent of all Workers' Compensation expenses.

*Id.*

7. National Climatic Data Center, *Snowfall—Average Total In Inches*, NCDC (Aug. 20, 2008, 12:21:34 EDT), <http://lwf.ncdc.noaa.gov/oa/climate/online/ccd/snowfall.html>.

8. *Id.*

9. STEPHEN I. ROSEN, *THE SLIP AND FALL HANDBOOK* 241 (1995).

10. *Id.*

## I. THE EVOLUTION OF PREMISES LIABILITY AND THE NATURAL ACCUMULATION RULE IN MASSACHUSETTS

Premises liability is “the liability of owners or occupiers of real property for personal injury sustained by entrants (including tenants) upon the land.”<sup>11</sup> In order for a plaintiff to succeed on a premises liability claim under the tort of negligence, he must show that: (1) the owner of the premises owed a duty to the plaintiff; (2) he breached that duty; (3) the owner’s actions or omissions caused the plaintiff’s loss; and (4) the plaintiff suffered measurable damages.<sup>12</sup> This Note focuses on the “duty” and “breach” elements of premises liability. Specifically, this Note addresses what duty property owners should owe to visitors on commercial and residential property.

To be clear, there are legal scenarios that are beyond the scope of this Note. First, this Note does not discuss premises liability for municipalities. Public sidewalks, public roads, and other public property are owned by the municipality and are treated differently under the law.<sup>13</sup> Second, this Note only addresses *what* the duty should be, not *who* should owe the duty. Disagreements regarding who owes the duty often arise in landlord/tenant law, where the rights to a property are divided between ownership and possession,<sup>14</sup> or where the property owner hires an independent

11. GLEN WEISSENBERGER & BARBARA B. MCFARLAND, *THE LAW OF PREMISES LIABILITY* § 1.02 (4th ed. 2011)

12. *See* Glidden v. Maglio, 722 N.E.2d 971, 973 (Mass. 2000); RESTATEMENT (SECOND) OF TORTS § 281 (1965); JOSEPH R. NOLAN & LAURIE J. SARTORIO, 37A MASS. PRACTICE, TORT LAW § 21.1 (3d ed. 2005).

13. For information on municipal premises liability, see MASS. GEN. LAWS. ch. 84, § 17 (2008).

A county, city or town shall not be liable for an injury or damage sustained upon a public way by reason of snow or ice thereon, if the place at which the injury or damage was sustained was at the time of the accident otherwise reasonably safe and convenient for travelers.

*Id.*; Goulart v. Canton Hous. Auth., 783 N.E.2d 864, 866 n.1 (Mass. App. Ct. 2003); NOLAN & SARTORIO, *supra* note 12, § 21.9.

14. In most cases, property owners both own and occupy the property, and because all legal rights in the property are held by one entity, all premises liability flows to that person. *See* WEISSENBERGER & MCFARLAND, *supra* note 11, § 1.04 (4th ed. 2011). On the other hand, where a property owner decides to become a landlord and lease the property to a tenant, the rights are split. *See* Miller v. Berk, 104 N.E.2d 163, 165 (Mass. 1952) (finding a mutual understanding that landlord was to remove snow and ice); Connors v. Wick, 59 N.E.2d 277, 278 (Mass. 1945); Backoff v. Weiner, 25 N.E.2d 718, 719 (Mass. 1940) (recognizing that there are “reciprocal obligations” between landlord and tenant). The landlord has the right to own the property while the tenant has the right to possess the area that the tenant is leasing. *See* WEISSENBERGER & MCFARLAND, *supra* note 11, § 1.05. The potential for liability is determined by who has “control” over the

contractor to remove the snow.<sup>15</sup>

The central question to be addressed is simple: what duty should a commercial or residential property owner have to remove snow and ice for the safety of visitors that may come onto the property, and when is that duty breached?

### A. *Abolishing the Invitee/Licensee Distinction and Adopting the Duty of Reasonable Care*

Prior to 1973, the duty that landowners in Massachusetts owed to a person on their land varied depending upon whether the visitor was an “invitee” or a “licensee.”<sup>16</sup> Then, in *Mounsey v. Ellard*, the Supreme Judicial Court abolished the invitee/licensee distinction and established the rule that a property owner has a duty of reasonable care for all lawful visitors.<sup>17</sup>

The court in *Mounsey* acknowledged that though the “rigid” division of the invitee/licensee distinction may have made sense at the time it was created, it found that “[its] application . . . in the modern context has produced confusion and conflict.”<sup>18</sup> The court

area in which the plaintiff fell. *See id.* § 1.04 (“Where ownership and possession are divided, the general rule, subject to certain exceptions, is that the possessor or person in control of the premises is liable for injury suffered by entrants as a result of conditions or activities that violate a legal duty owed by the possessor to entrants.”).

15. *See* LOUIS A. LEHR, JR., 2 PREMISES LIABILITY § 41:12 (3d ed. 2010) (“A landlord has a nondelegable duty to maintain safely those areas over which it has retained control, and this duty cannot be avoided by hiring an independent contractor to make repairs.”); NOLAN & SARTORIO, *supra* note 12, § 21.3 (discussing landlord and tenant liabilities to each other).

16. Under traditional common law, the duty owed by a property owner to a visitor on a property depended on the visitor’s classification as an invitee, a licensee, or a trespasser. *Mounsey v. Ellard*, 297 N.E.2d 43, 45 (Mass. 1973). An invitee is someone that “conferr[ed] a benefit in the performance of something in which the [property owner] ha[d] an interest.” *Id.* at 50 (quoting *Taylor v. Goldstein*, 107 N.E.2d 14, 16 (Mass. 1952)). A common example of an invitee is a customer on commercial property. *See, e.g., Mansfield v. Spear*, 48 N.E.2d 677, 678 (Mass. 1943) (plaintiff who was entering a business was an invitee). A licensee, on the other hand, is someone on the property “for his [or her] own convenience or pleasure.” *Mounsey*, 297 N.E.2d at 45 (quoting *Sweeny v. Old Colony & Newport R.R. Co.*, 83 Mass. 368, 373 (Mass. 1865)). A trespasser is someone who is illegally on the property without permission. *Monterosso v. Gaudette*, 391 N.E.2d 948, 953 (Mass. App. Ct. 1979). To an invitee, a property owner owed a duty to “exercise ordinary care and prudence to render his premises reasonably safe.” *Mounsey*, 297 N.E.2d at 57 (quoting *Smith v. Arbaugh’s Rest., Inc.*, 469 F.2d 97, 100 (D.C. Cir 1972)). To both licensees and trespassers, property owners owed a much lesser duty merely “not to inflict wilful or wanton injury.” *Id.* at 45.

17. *See Mounsey*, 297 N.E.2d at 51-52.

18. *Id.* at 49 (citing *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630-31 (1959)) (internal quotation omitted).

pointed out that the lines between licensee and invitee were obscure and often blurred,<sup>19</sup> which provided the court with sufficient justification to adopt the duty of reasonable care as the requisite standard for property owners to all “lawful visitors.”<sup>20</sup> The duty towards trespassers remained unchanged, as they are not lawful visitors.<sup>21</sup>

Pursuant to *Mounsey* the prevailing rule in Massachusetts has been that landowners generally owe a duty to all lawful visitors to use “reasonable care in all the circumstances.”<sup>22</sup> The duty of reasonable care specifically requires a landowner to “act as a reasonable man in maintaining his property in a reasonably safe condition in view of all the circumstances.”<sup>23</sup> This duty applies to protect all lawful visitors, including tenants.<sup>24</sup> In making a determination, the jury is to rely upon three factors: “[1] the likelihood of injury to others, [2] the seriousness of the injury, and [3] the burden of avoiding the risk.”<sup>25</sup>

#### B. *A Subset of the Duty of Reasonable Care: The Duty to Remove Defects from the Property*

Included in this catch-all duty to use reasonable care in maintaining the property is the duty to remove defects from the property.<sup>26</sup> One of the most common examples of a defect is a foreign substance that is dropped or left in a place where people might in-

19. In particular, the court noted that it was difficult to determine when a public employee or official on private property qualifies as an invitee, a licensee, or a trespasser, as they do not fit neatly into any category. *Id.* at 46-49.

20. *Id.* at 51.

21. The court in *Mounsey* specifically noted that trespassers are not considered “lawful visitors.” *Id.* at 51 n.7.

22. *Id.* at 52; see also *Ali v. City of Boston*, 804 N.E.2d 927, 931 (Mass. 2004) (holding that “[l]andowners now owe a reasonable duty of care to all lawful visitors”); *Davis v. Westwood Group*, 652 N.E.2d 567, 569-70 (Mass. 1995) (applying the reasonableness standard from *Mounsey*).

23. *Mounsey*, 297 N.E.2d at 52 (quoting *Smith v. Arbaugh’s Rest., Inc.*, 469 F.2d 97, 100 (D.C. Cir. 1972)).

24. *King v. G & M Realty Corp.*, 370 N.E.2d 413, 415 (Mass. 1977). Relying on *Mounsey*’s “rule that [all] occupiers owe a duty of reasonable care to all lawful visitors,” the court concluded that this duty should extend to landlords because they are also “occupiers.” *Id.* (emphasis added) (citations omitted) (internal quotation marks omitted).

25. *Mounsey*, 297 N.E.2d at 52 (quoting *Smith v. Arbaugh’s Rest., Inc.*, 469 F.2d 97, 100 (D.C. Cir. 1972)).

26. *Aylward v. McCloskey*, 587 N.E.2d 228, 230 (Mass. 1992) (“[U]nder Massachusetts law, landowners are liable only for injuries caused by defects existing on their property . . . .”), *overruled by Papadopoulos v. Target Corp.*, 930 N.E.2d 142 (Mass. 2010).

jure themselves upon it.<sup>27</sup> A property owner may be found negligent for injuries that result from dangerous foreign substances where he or she either (1) created the dangerous condition or (2) had actual or constructive knowledge of its presence and failed within a reasonable time to remove it.<sup>28</sup>

One example of the property owner “creating” the dangerous foreign substance is where the design of the physical property itself causes the dangerous condition to develop.<sup>29</sup> The most common example of a dangerous foreign substance created by the physical property itself is dangerous accumulations of water on flooring.<sup>30</sup> Liability may result where flooring is inappropriately slanted or designed in a manner that causes water to collect in a puddle, or where the type of flooring or gloss on the flooring becomes particularly slippery when wet.<sup>31</sup>

The property owner also “creates” the dangerous condition if employees of the business drop or leave items in an area that is trafficked by pedestrians. For example, in *Jennings v. First National*

---

27. See, e.g., *Oliveri v. Massachusetts Bay Transp. Auth.*, 292 N.E.2d 863, 864 (Mass. 1973) (hard, dirty substance on stairway); *Deagle v. Great Atl. & Pac. Tea Co.*, 178 N.E.2d 286, 288 (Mass. 1961) (pine oil on floor); *Uchman v. Polish Nat'l Home, Inc.*, 116 N.E.2d 145, 145 (Mass. 1953) (banana peel); *Jennings v. First Nat. Stores, Inc.*, 3 N.E.2d 179, 179–80 (Mass. 1936) (employees dropped grapes on floor); *Judson v. Am. Ry. Express Co.*, 136 N.E. 103, 103 (Mass. 1922) (water on floor from mopping); *Wexler v. Stanetsky Memorial Chapel of Brookline, Inc.*, 321 N.E.2d 686, 686–88 (Mass. App. Ct. 1975) (melted snow carried onto premises by patrons).

28. See, e.g., *Jennings*, 3 N.E.2d at 179–80 (employees created condition); *Wexler*, 321 N.E.2d at 686–88 (condition created by physical structure of property); see also NOLAN & SARTORIO, *supra* note 12, § 21.8 (“Proof of the defendant’s negligence may consist of showing that he caused the offending substance to be at the place of injury or, if someone else caused it to be there, that the defendant knew or should have known of its presence and failed within a reasonable time to remove it.”) (citations omitted).

29. See *infra* notes 30–31. For examples of outdoor property attributes that redirect snow or ice and may result in liability for the property owner, see *infra* notes 79–87.

30. See, e.g., *Correira v. Atl. Amusement Co.*, 18 N.E.2d 435, 436 (Mass. 1939). For examples of cases where water was left on the floor and liability was considered, but ultimately rejected, see *Wexler v. Stanetsky Mem'l Chapel of Brookline, Inc.*, 321 N.E.2d 686, 687–88 (Mass. App. Ct. 1975); *Lowe v. Nat'l Shawmut Bank of Boston*, 292 N.E.2d 683, 685–86 (Mass. 1973).

31. See *Correira v. Atl. Amusement Co.*, 18 N.E.2d 435, 436 (Mass. 1939) (finding the property owner liable where puddle was “about two and one half feet wide by four feet long, and of such a depth that a movement of the foot would cause a ‘splash’”); see also *Wexler v. Stanetsky Mem'l Chapel of Brookline, Inc.*, 321 N.E.2d 686, 687–88 (Mass. App. Ct. 1975) (citations omitted) (finding the property owner not liable, in part, because there was “no evidence that the floor, for any reason, became peculiarly slippery when wet”); *Lowe v. Nat'l Shawmut Bank of Boston*, 292 N.E.2d 683, 685–86 (Mass. 1973) (similarly finding no liability where “[t]he plaintiff has not proven that a tile floor is inherently defective when wet”).

*Stores, Inc.*, the court found a grocery store liable when employees dropped cartons of grapes they were carrying into the grocery store, failed to pick them up, and a customer later slipped on them.<sup>32</sup> Also, in *Rossley v. S. S. Kresge Co.*, the business owner was held liable when the plaintiff slipped on an “accumulation of sweepings,” which were swept up by employees and then left in a trafficked area.<sup>33</sup>

Aside from creating the condition, a property owner may also be found liable if he had *notice* (actual or constructive) that a dangerous condition existed and failed to fix it within a reasonable time.<sup>34</sup> The property owner has actual notice of a danger if he, or his employees, actually see the danger.<sup>35</sup> Constructive notice, on the other hand, is present if the owner merely *should* have seen the danger.<sup>36</sup> It is often difficult to prove actual knowledge considering the defendant will deny having seen it; thus constructive knowledge is the route most often used.<sup>37</sup>

In determining constructive knowledge, the two relevant factors considered are: (1) the location of the substance; and (2) the

32. *Jennings*, 3 N.E.2d at 180 (“The jury could find that in dropping so many grapes, and in not discovering and removing them, those employees were negligent.”); see also *Bennett v. Cohen*, 39 N.E.2d 571, 571 (Mass. 1942) (property owner found liable when fruits and vegetables on a sidewalk stand were stacked in a way that it was “likely to result in some of their contents falling on the sidewalk”). *But see* *Kanter v. Mass. Wholesale Food Terminal, Inc.*, 164 N.E.2d 321, 323 (Mass. 1960) (“There was no finding from which it could be concluded that the suet was on the ramp by reason of any act of any person for whose conduct the defendant was responsible.”); *Beach v. S. S. Kresge Co.*, 20 N.E.2d 409, 410 (Mass. 1939) (insufficient evidence that defendant’s employees dropped the ice cream which plaintiff slipped on).

33. See *Rossley v. S. S. Kresge Co.*, 162 N.E.2d 26, 27 (Mass. 1959).

34. See, e.g., *Oliveri v. Mass. Bay Transp. Auth.*, 292 N.E.2d 863, 864-65 (Mass. 1973); *Hennessey v. Stop & Shop Supermarket Co.*, 836 N.E.2d 1135, 1140 (Mass. App. Ct. 2005); see also *NOLAN & SARTORIO, supra* note 12, § 21.8 (“[I]f someone else caused [the offending substance] to be there, . . . [and] the [property owner] knew or should have known of its presence and failed within a reasonable time to remove it,” the property owner can be liable for negligence.) (citation omitted).

35. *Oliveri*, 292 N.E.2d at 864-65 (Mass. 1973) (negligence of property owner resulted from employees’ actual knowledge of danger).

36. *Id.* “In the more usual case, however, the plaintiff attempts to establish the defendant’s negligence by showing that the foreign substance was present on the defendant’s premises for such a length of time that the defendant should have known about it.” *Id.* at 865.

37. David Peebles, *Lawsuit Shaping and Legal Sufficiency: The Accelerator and the Brakes of Civil Litigation*, 62 BAYLOR L. REV. 339, 387 (2010) (“The plaintiff usually has no direct evidence that an employee actually knew of a slippery substance, or that the substance had been on the floor long enough to put any employees on constructive notice that it was there.”).



time within which the defendant should have observed it.<sup>38</sup> For instance, in *Gallagher v. Stop & Shop, Inc.*, summary judgment for the property owner was denied where an ice cream cone was dropped in a trafficked and visible area and there was sufficient time for the employees to remove it.<sup>39</sup> The ice cream cone was left on the floor right next to the exit door, where many customers passed through and where it was in plain sight to three cashiers for a period of at least thirty minutes.<sup>40</sup>

It is often difficult to determine how long something has been on the floor, so the jury looks to “its character, its consistency, . . . and general appearance” as a guide.<sup>41</sup> For this reason, the courts and juries look to see whether an item was dirty or walked on.<sup>42</sup> In cases involving organic matters, the courts also look to whether the thing is rotten or decayed.<sup>43</sup> However, the appearance of the substance is not conclusive: the plaintiff often loses these slip-and-fall cases<sup>44</sup> even though it is claimed that the thing looked dirty or old.<sup>45</sup>

---

38. See *White v. Mugar*, 181 N.E. 725, 725-26 (Mass. 1932). There is also a unique approach taken for “self-service” stores, such as grocery stores. *Sheehan v. Roche Bros. Supermarkets, Inc.*, 863 N.E.2d 1276, 1286 (Mass. 2007). For self-service stores, the notice requirement is met “if a plaintiff proves that an unsafe condition on an owner’s premises exists that was reasonably foreseeable, resulting from an owner’s self-service business or mode of operation, and the plaintiff slips as a result of the unsafe condition.” *Id.*

39. *Gallagher v. Stop & Shop, Inc.*, 126 N.E.2d 190, 192 (Mass. 1955). *But see Kelleher v. Dini’s, Inc.*, 118 N.E.2d 77, 78 (Mass. 1954) (no constructive notice of carrot left on floor where “[i]t did not appear that . . . employees of the defendant had reason to be in that portion of the premises where the plaintiff fell”).

40. *Gallagher*, 126 N.E.2d at 192.

41. *Foley v. F. W. Woolworth Co.*, 199 N.E. 739, 740 (Mass. 1936).

42. See, e.g., *Hastings v. Boston & Maine R.R.*, 123 N.E.2d 211, 211 (Mass. 1954) (holding that the defendants could have been found liable to plaintiff because the “greasy substance” on the stairs at railroad station was covered with dirt, showing that the grease had been there for a long time); *Berube v. Economy Grocery Stores Corp.*, 51 N.E.2d 777, 779 (Mass. 1943) (holding the jury’s finding was not erroneous when it found the plaintiff slipped on squash that was on for floor for a long period of time because of its “sticky mass, its grimy, dirty color, its size and general appearance”); *Anjou v. Boston Elevated Ry. Co.*, 94 N.E. 386, 386 (Mass. 1911) (judgment for plaintiff where banana peel “felt dry, gritty, as if there were dirt upon it, as if trampled over a good deal, [and] as flattened down”) (internal quotation marks omitted).

43. See, e.g., *Connair v. J. H. Beattie Co.*, 11 N.E.2d 499, 499 (Mass. 1937) (noting “dirty brown” wax beans and “black” strawberries that were rotten).

44. *Webber v. Shaw’s Supermarkets, Inc.*, No. 1464, 2003 WL 139780, at \*2 (Mass. App. Ct. 2003) (“[C]ases which found there were sufficient circumstances to affix liability are not as numerous . . . [as] cases denying liability.”).

45. See, e.g., *FINE v. F. W. WOOLWORTH CO.*, 178 N.E.2d 501, 501 (Mass. 1961) (summary judgment for defendant where plaintiff testified that the plastic bag she tripped on was “‘dirty, semiopaque and ground’ and you could not see through it”); *Mandigo v. Hamid Amusement Co.*, 57 N.E.2d 553, 553 (Mass. 1944) (summary judg-

### C. Premises Liability for Snow and Ice: The Rise and Fall of the Natural Accumulation Rule

Contrary to all other foreign substances, snow and ice in Massachusetts were not traditionally considered defects that the property owner had a duty to remove.<sup>46</sup> This exception, known as the “natural accumulation” rule, was developed over a century ago and persisted until *Papadopoulos v. Target Corp.* in 2010.<sup>47</sup>

#### 1. Landlord-Tenant Law

The “natural accumulation” rule was introduced almost one hundred and thirty years ago, in *Woods v. Naumkeag Steam Cotton Co.*, in connection with landlord-tenant law.<sup>48</sup> There, the tenant slipped and fell on granite steps, which formed the entrance into her house.<sup>49</sup> Snow and ice had accumulated on the steps, which the landlord never removed.<sup>50</sup> In declaring that it was the tenant’s duty to clear the steps, the court stated, “there was no duty on the part of the [landlord] to the [tenant] to remove from the steps the ice and snow which *naturally accumulated* thereon.”<sup>51</sup>

Two years later, in *Watkins v. Goodall*, the Supreme Judicial Court made a distinction between a “natural” accumulation and an “artificial” accumulation.<sup>52</sup> The court distinguished *Watkins* from *Woods* because the fall occurred on ice that had developed due to water spilling from a broken water pipe.<sup>53</sup> The pipes were “arranged . . . so that they would divert the water from its natural course and carry it away from the platform,” and the pipe was broken such that “the water was discharged artificially in one place

---

ment for defendant where mass of candy and paper was “dark”, “dirty”, and had “marks ‘like print of foot’”).

46. See *Aylward v. McCloskey*, 587 N.E.2d 228, 230 (Mass. 1992), *overruled by Papadopoulos v. Target Corp.*, 930 N.E.2d 142 (Mass. 2010).

47. See generally *Papadopoulos*, 930 N.E.2d at 156 (abolishing the natural accumulation rule).

48. *Woods v. Naumkeag Steam Cotton Co.*, 134 Mass. 357, 357 (Mass. 1883); see also *Papadopoulos*, 930 N.E.2d at 146 (“Many commentators and out-of-state courts declare . . . that the Massachusetts rule that property owners owe no duty to remove natural accumulations of snow and ice originated with this court’s 1883 decision in *Woods*.”).

49. *Woods*, 134 Mass. at 358-59.

50. *Id.* at 358 (“[The landlord] never undertook to remove any snow or ice . . . from any part of the premises . . .”).

51. *Id.* at 361 (emphasis added).

52. *Watkins v. Goodall*, 138 Mass. 533 (Mass. 1883). See also *Papadopoulos*, 930 N.E.2d at 147.

53. *Watkins*, 138 Mass. at 534.

upon the platform.”<sup>54</sup> The court described this as “an *artificial* formation of ice, resulting directly from the negligent omission of the [property owner] . . . .”<sup>55</sup>

This early distinction between “natural” and “artificial” accumulations would become the cornerstone upon which the natural accumulation rule was based and the central concern in most cases.<sup>56</sup>

## 2. Extending and refining the natural accumulation rule

For most of the twentieth century, it was unclear whether the natural accumulation rule applied only to landlord-tenant situations or whether it also extended to general premises liability.<sup>57</sup> However, the confusion was settled in the early 1990s when the First Circuit and subsequently the Supreme Judicial Court, concluded that in Massachusetts the natural accumulation rule applied not only to tenants, but also to all lawful visitors.<sup>58</sup>

In 1990, *Athas v. United States*, a First Circuit case, found no duty to remove ice from a covered outdoor entrance to a commercial establishment.<sup>59</sup> In reaching this conclusion, the court relied upon two Massachusetts cases where business visitors fell on slippery flooring.<sup>60</sup> The court affirmed the notion that a slippery floor, and correspondingly a slippery outdoor entrance, alone does not result in negligence for the landowner; rather, there must also be “evidence that the injury was caused by a defect, or wear, or other

---

54. *Id.* at 537.

55. *Id.* (emphasis added).

56. *See infra* Part II.A.

57. This fact is evidenced by *Athas* and *Aylward*, finding that the natural accumulation rule applied, while *Papadopoulos* held that the *Aylward* holding was unfounded. *See Athas v. United States*, 904 F.2d 79, 82 (1st Cir. 1990); *Aylward v. McCloskey*, 587 N.E.2d 228, 230 (Mass. 1992). *But see Papadopoulos*, 930 N.E.2d at 149 (Mass. 2010) (finding that the *Aylward* holding was unfounded and stating that when *Aylward* adopted the natural accumulation rule, “a relic of abandoned landlord-tenant law was resurrected as an exception to the governing standard of reasonable care”).

58. *See Athas*, 904 F.2d at 82-83; *Aylward*, 587 N.E.2d at 230.

59. *Athas*, 904 F.2d at 81.

60. *Id.* (citing *Lowe v. Nat’l Shawmut Bank of Boston*, 292 N.E.2d 683, 685 (Mass. 1973)).

condition *not natural* to the flooring.”<sup>61</sup> Because the ice had naturally accumulated on the porch, there was no duty to remove it.<sup>62</sup>

Two years later, in *Aylward v. McCloskey*, the Massachusetts Supreme Judicial Court adopted and reinforced *Athas* in state law, making clear that the natural accumulation rule applied to all slip-and-falls on residential and commercial property.<sup>63</sup> In granting summary judgment against a plaintiff who slipped on a residential driveway, the court plainly stated the general rule: “[L]andowners are liable only for injuries caused by defects existing on their property and . . . the law does not regard the natural accumulation of snow and ice as an actionable property defect . . . .”<sup>64</sup> The natural accumulation rule, broadly applied to all “landowners,” was indisputably an exception to the general duty of reasonable care by 1992.<sup>65</sup>

#### D. *Abolishing the Natural Accumulation Rule: Papadopoulos v. Target Corp.*

In July 2010, in *Papadopoulos*, the Massachusetts Supreme Judicial Court unanimously decided to abolish the natural accumulation rule and instead require the same duty of reasonable care to snow and ice removal as is applied to all other foreign substances.<sup>66</sup> The court declared, the factors to consider in determining the reasonableness of snow removal are: “[1] the amount of foot traffic to be anticipated on the property, [2] the magnitude of the risk reasonably feared, and [3] the burden and expense of snow and ice removal.”<sup>67</sup> A question for the jury, this determination must be made

61. *Id.* (quoting *Lowe*, 292 N.E.2d at 685) (emphasis added); see also *Policronis v. Jordan Marsh Co.*, 129 N.E.2d 913, 913 (Mass. 1955) (customer slipped on muddy step); *Di Noto v. Gilchrist Co.*, 125 N.E.2d 239, 239-40 (Mass. 1955) (customer tripped on step that was worn down); *Grace v. Jordan Marsh Co.*, 59 N.E.2d 283, 283-84 (Mass. 1945) (customer slipped on muddy step). *Contra Risk v. City of Boston*, 59 N.E.2d 184, 185 (Mass. 1945) (rounded curbing did not constitute “defect”).

62. *Athas*, 904 F.2d at 82.

Since the traditional rule in Massachusetts is that a landowner’s liability for injuries incurred on his premises depends, *inter alia*, on the existence of a defect or hazard other than a natural accumulation of water, or ice, or snow, that is the rule we must apply until the Massachusetts courts decide differently.

*Id.*

63. *Aylward*, 587 N.E.2d at 230 (affirming the trial court, which relied on *Athas*).

64. *Id.*

65. *Id.*; see also *Papadopoulos v. Target Corp.*, 930 N.E.2d 142, 149 (Mass. 2010).

66. *Papadopoulos*, 930 N.E.2d at 154.

67. *Id.* These factors are the same as those applied for the general reasonableness standard, however merely particularized to snow removal. See *Mounsey v. Ellard*, 297 N.E.2d 43, 52 (Mass. 1973) (citation omitted).

on a case-by-case basis.<sup>68</sup> With this decision, the court discarded nearly a hundred thirty years of reliance on the natural accumulation rule.<sup>69</sup>

## II. THREE APPROACHES TO SNOW AND ICE

*Papadopoulos* opted to apply the duty of reasonable care;<sup>70</sup> however, to understand the implications and practical effects of this decision, we must look carefully at the different options available. There are essentially three legal approaches to snow and ice removal. One approach, exemplified by *Papadopoulos*, is to apply the duty of reasonable care generally to every situation, without any exceptions.<sup>71</sup> The second approach is to apply the “natural accumulation” rule as an exception to the general duty of reasonable care.<sup>72</sup> The third approach, which will subsequently be explained, is to apply a different exception, known as the “storm-in-progress” rule, to the duty of reasonable care.<sup>73</sup> This Part will take a close look at the purpose and application of these three options.

### A. *The Natural Accumulation Rule*

The natural accumulation rule is based upon the general premise that snow, ice, sleet, and freezing rain are not defects, and, therefore, the property owner has no duty to remove them.<sup>74</sup> How-

---

68. *Papadopoulos*, 930 N.E.2d at 154 (“[A] fact finder will determine what snow and ice removal efforts are reasonable in light of the expense they impose on the landowner and the probability and seriousness of the foreseeable harm to others.”) (citation omitted).

69. *See id.* at 154 (abolishing the natural accumulation rule in Massachusetts); *Woods v. Naumkeag Steam Cotton Co.*, 134 Mass. 357, 361 (Mass. 1883) (first establishing the natural accumulation rule in Massachusetts).

70. *See Papadopoulos*, 930 N.E.2d at 154.

71. *Id.*

72. *See, e.g., Athas v. United States*, 904 F.2d 79, 82-83 (1st Cir. 1990); *Aylward v. McCloskey*, 587 N.E.2d 228, 230 (Mass. 1992).

73. New England states that have applied the storm-in-progress rule are Connecticut, Vermont, and Rhode Island. *See Kraus v. Newton*, 558 A.2d 240, 243-44 (Conn. 1989); *Terry v. Cent. Auto Radiators, Inc.*, 732 A.2d 713, 717 (R.I. 1999); *Turmel v. Univ. of Vermont*, No. S0980-01 Cncv, 2004 WL 5460386 (Vt. Super. Ct. Apr. 20, 2004) (citing *Wakefield v. Tygate Motel Corp.*, 640 A.2d 981, 982 (Vt. 1994)).

74. *See supra* note 64 and accompanying text; *see also Swann v. Flatley*, 749 F. Supp. 338, 341, 342 (D. Mass. 1990) (freezing rain is a natural accumulation), *aff'd*, 953 F.2d 632 (1st Cir. 1991); *Palmer v. Stop & Shop Supermarket Co., LLC*, No. 09-P-1196, 2010 WL 1752599, at \*1 (Mass. App. Ct. May 4, 2010) *review denied* 939 N.E.2d 786 (Mass. 2010), *rev'd* 2011 WL 488686 (Mass. App. Ct. 2011); *Goulart v. Canton Hous. Auth.*, 783 N.E.2d 864, 866 (Mass. App. Ct. 2003). *Contra Zanfanga v. SBK Assocs. LLC*, No. ESCV-2005-146, 2007 WL 1300962, at \*2 (Mass. Super. Ct. Mar. 30, 2007)

ever, in some situations, these natural accumulations may become an “artificial accumulation,” which is considered a defect that the property owner has a duty to remove.<sup>75</sup> Thus, the crux of the natural accumulation rule lies in the determination of *when* or *how* an “artificial accumulation” is formed.

The guidelines for distinguishing between “natural” and “artificial” accumulations were established in *Aylward*.<sup>76</sup> According to the court, an artificial accumulation is formed if “some act or failure to act has changed the condition of naturally accumulated snow and ice, and the elements alone or in connection with the land become a hazard to lawful visitors.”<sup>77</sup> Differently put, a duty to remove the snow or ice is found only upon a showing of evidence that, as a result of the landowners “act or failure to act,” the natural accumulation has been sufficiently altered to the point that it can be labeled as “artificial.”<sup>78</sup> As these guidelines have been applied, the case law has addressed the most common scenarios related to the accumulation and removal of snow and ice, and has clarified when an “artificial” accumulation is formed.

#### 1. Accumulation Redirected from its Natural Course onto a Public Way Due to the Physical Structure of Property

Similar to other foreign substances,<sup>79</sup> a property owner may “create” an artificial accumulation of snow or ice if the physical property itself is designed or altered in a way that redirects snow or water such that it accumulates dangerously in an area trafficked by pedestrians.<sup>80</sup> A property owner is not negligent for merely “chang[ing] the surface of his lot, or improv[ing] it by the construction of buildings or by other means” in a manner which alters the “natural course of [the] surface water.”<sup>81</sup> However, a property owner may be negligent for “collect[ing] water into a *definite channel* by a spout or otherwise and pour[ing] it upon a *public way* . . . [if] through the operation of natural causes the water freezes

---

(freezing rain can become an unnatural accumulation if it is combined with snow that was shoveled into a pile).

75. See *Watkins v. Goodall*, 138 Mass. 533, 537 (Mass. 1885).

76. See *Aylward*, 587 N.E.2d at 230.

77. *Id.* at 230 n.3 (citations omitted).

78. See *id.*

79. See *supra* notes 29-31.

80. See *Field v. Gowdy*, 85 N.E. 884, 885 (Mass. 1908).

81. *Baker v. Cummings*, No. 98297, 2000 WL 33170696, at \*2 (Mass. Super. Ct. Mar. 15, 2000) (quoting *Field*, 85 N.E. at 885).

...”<sup>82</sup> For example, a property owner may be liable for angling a roof gutter such that it redirects water onto a public walkway<sup>83</sup> or designing a parking lot with increased pitch for water drainage purposes such that it redirects more water towards the center of the parking lot.<sup>84</sup> Liability may also ensue from a broken water pipe, where the water leaks onto a walkway and then freezes.<sup>85</sup>

To prove liability, it must be shown that the plaintiff slipped on ice that was clearly formed by the snow or water that was channeled in a particular direction by the property owner. For example, no liability was found where a roadway in an apartment complex was “constructed for water to run from the center of the road to the sides to the curbing and eventually into the catch basin,” which was located near the plaintiff’s vehicle in the parking lot.<sup>86</sup> In granting summary judgment for the property owner, the court stated that the run-off water was not “channeled” as it is by a roof gutter, nor was there sufficient evidence that the ice the plaintiff slipped on was formed from the run-off water from the road.<sup>87</sup>

## 2. Snow that Has Been Shoveled, Plowed, or Salted

Generally, shoveling or plowing snow will not result in liability for the property owner; however, there are exceptions. Snow that has been shoveled or plowed from an area and placed into a pile

---

82. *Id.* (quoting *Field*, 85 N.E. at 885) (emphasis added).

83. *See, e.g., Field*, 85 N.E. at 885 (gutters on roof redirected water onto a public way).

84. For instance, where a parking lot that was designed with a “one-half inch per foot, or twice the degree of recommended pitch,” which gave the lot a “bowl shape” so everything slanted towards the middle for drainage purposes, the ice that accumulated in the middle was an artificial accumulation. *Reardon v. Parisi*, 822 N.E.2d 748, 751-53 (Mass. App. Ct. 2005). Also, as a rule, the more sloped a lot is, the more vigilant the owner is expected to be. *See id.* at 753 (expert stating that “[t]he degree of danger and hazard of the iced-over slope increases with the degree of pitch”); *see also Sullivan v. Ross*, No. 9762, 2002 WL 500342, at \*1 (Mass. App. Div. Mar. 27, 2002) (judgment notwithstanding verdict denied where defendant’s failure to repair the roof and gutters allowed the water to accumulate on the porch unnaturally). *Contra Dipersio v. TX Planning Trust*, No. 08-P-2004, 2009 WL 3350136, at \*2 (Mass. App. Ct. Oct. 20, 2009) (no liability for parking lot at zero grade); *Dionisio v. Levin*, No. 08-P-777, 2009 WL 1011060, at \*2 n.2 (Mass. App. Ct. Apr. 16, 2009) (distinguishing from *Reardon*, summary judgment granted for property owner even though the parking lot was slanted, because no “evidence that the defendant had deliberately pitched the parking lot for drainage purposes”).

85. *See, e.g., Watkins v. Goodall*, 138 Mass. 533, 537 (1885).

86. *Baker v. Cummings*, No. 98297, 2000 WL 33170696, at \*2 (Mass. Super. Ct. Mar. 15, 2000).

87. *Id.* at \*2-3.

remains a natural accumulation.<sup>88</sup> And, any snow that falls off of the pile or melts off of the pile and refreezes is also a natural accumulation.<sup>89</sup> Also, putting salt or sand down, which then melts the snow or ice, does not change the accumulation from natural to artificial.<sup>90</sup> Indeed, even snow that is piled directly “uphill of a walkway onto which it then melts and refreezes” remains a natural accumulation.<sup>91</sup> Along these lines, it has been acknowledged that liability does not ensue even though the “human act or failure to act . . . foreseeably increase[s] the risk of mishap.”<sup>92</sup>

Furthermore, “incomplete shoveling”<sup>93</sup> does not lead to an artificial formation.<sup>94</sup> For instance, in *Sullivan v. Brookline*, the property owner shoveled an entrance ramp to the building and by doing so, exposed an icy layer underneath.<sup>95</sup> The court rejected the plaintiff’s argument that the defendant should be liable because of “bad

88. See, e.g., *Lopes v. SSB Realty, Inc.*, No. 04-P-272, 2005 WL 2400894, at \*2 (Mass. App. Ct. Sept. 29, 2005) (“Plowing a roadway and leaving a ridge formed by the plowing does not transform the plowed snow into an unnatural accumulation.”).

89. See *Palmer v. Stop & Shop Supermarket Co., LLC*, No. 09-P-1196, 2010 WL 1752599, at \*1 (Mass. App. Ct. May 4, 2010); *Papadopoulos v. Target Corp.*, 930 N.E.2d 142, 144 (Mass. 2010). For other instances of snow melting off of a snow pile, upon which the plaintiff slipped, that resulted in no liability, see *Cooper v. Braver, Healey & Co.*, 67 N.E.2d 657, 657 (Mass. 1946); *Leary v. Mall at Liberty Tree LLC*, No. 07-323-B, 2008 WL 4415118, at \*2-3 (Mass. Super. Ct. Sept. 25, 2008); *Godden v. Stoughton Plaza, LLC*, 2007 Mass. App. Div. 98, 99 (Mass. Dist. Ct. June 19, 2007); *Taylor v. Mass. Flora Realty, Inc.*, 840 A.2d 1126, 1130 (R.I. 2004).

90. See *Goulart v. Canton Housing Auth.*, 783 N.E.2d 864, 867 (Mass. App. Ct. 2003) (“[T]he application of salt to an icy surface [was not] the introduction of a new hazard.”); see also *Dionisio v. Levin*, No. 08-P-777, 2009 WL 1011060, at \*2 n.2 (Mass. App. Ct. Apr. 16, 2009) (“The fact that the area had not been salted or sanded is alone not enough, particularly where, as here, the storm had only just ended at the time of the plaintiff’s fall.”).

91. *Dipersio v. TX Planning Trust*, No. 08-P-2004, 2009 WL 3350136, at \*1 (Mass. App. Ct. Oct. 20, 2009) (citing *Cooper v. Braver, Healey & Co.*, 67 N.E. 2d 657, 657 (Mass. 1946)); see also *Sternbane v. Worcester Jewish Cmty. Hous. for the Elderly, Inc.*, No. 082427D, 2010 WL 653965, at \*2 (Mass. Super. Jan. 28, 2010) (no liability when parking lot plowed and no evidence of tire tracks, footprints, or packed snow). *Contra Reardon v. Parisi*, 822 N.E.2d 748, 751 (Mass. App. Ct. 2005) (finding liability for sloped parking lot).

92. *Goulart*, 783 N.E.2d at 867.

93. *Id.*

94. See *Dipersio*, 2009 WL 3350136, at \*2 (“[I]ncomplete shoveling” “is not grounds for a finding of negligence in Massachusetts.”); see also *Ippolito v. Bradford Vill. Condo. Trust*, No. 08-00042, 2009 WL 3490953, at \*2 (Mass. Super. Ct. Oct. 27, 2009) (snow had been shoveled the night before, leaving the ice underneath, and then new thin layer of snow fell on top); *Sanderson v. Fineberg Cos.*, No. 0304980, 2005 WL 1683774, at \*2 (Mass. Super. Ct. May 20, 2005) (snow shoveling that revealed icy surface did not create the condition).

95. *Sullivan v. Town of Brookline*, 626 N.E.2d 870, 872 (Mass. 1994).



shoveling.”<sup>96</sup> The court declared that the property owner could not be liable because he did not “create” the ice on the ramp, but rather merely “exposed ice that was already there.”<sup>97</sup> This rule extends from the general premise that snow that is left undisturbed is natural; the layer underneath was left undisturbed and thus remained natural.

However, snow moved into a pile may become an artificial accumulation if the composition of the snow is altered during the process of moving it or the snow is piled in a trafficked area.<sup>98</sup> For instance, snow that was “compacted by a plow,” creating a hard, icy block in the middle of a pile otherwise made of normal snow, was an artificial accumulation.<sup>99</sup> Additionally, a snow pile may be artificial if it is moved into a dangerous place, such as onto the walkway, as opposed to off of it.<sup>100</sup>

### 3. Snow that Has Been Altered by Human Traffic

Snow that is altered by human traffic of some kind, either walking or driving, can become an artificial accumulation;<sup>101</sup> however, the size of the marks in the snow and the amount of time that they need to remain there is less clear. *Seidlitz v. Beverly Enterprises* illustrates this point.<sup>102</sup> In *Seidlitz*, the court found that holes in ice created by human traffic, which were the size of “divots on a golf course,” were too small to change the accumulation from

---

96. *Id.* at 872 n.1.

97. *Id.* at 872.

98. *See infra* notes 99-100.

99. *Barrasso v. Hillview West Condo. Trust*, 904 N.E.2d 778, 780 (Mass. App. Ct. 2009) (issue of material fact found where plaintiff stepped on “hardened compacted snow and ice”); *see also Arnold v. Woods Hole, Martha’s Vineyard & Nantucket S.S. Auth.*, No. 04-00279, 2006 WL 4119676, at \*1 (Mass. Super. Ct. Sept. 26, 2006) (finding an issue of material fact when “ridges 8 to 10 inches high on both sides of the travel lane [were] caused by the plows going through” and “plaintiff described the snow as ‘crusty and hard and icy’”).

100. *Plante v. Town of Blackstone*, No. 092632, 2010 WL 2764696, at \*2 (Mass. Super. Ct. May 11, 2010) (“Snow plows removing snow from the road and pushing it onto the sidewalks, or other human activity, may have contributed to the formation of the snow banks. Such circumstances may render the snow banks an unnatural accumulation of snow.”) (citing *Phipps v. Aptuxet Post # 5988 V.F.W. Bldg. Ass’n*, 389 N.E.2d 1042, 1042 (Mass. App. Ct. 1979)).

101. *See, e.g., Delano v. Garrettson-Ellis Lumber Co.*, 281 N.E.2d 282, 284 (Mass. 1972) (“‘muddy ice,’ with tire marks and ruts”); *Phipps*, 389 N.E.2d at 1042 (Mass. App. Ct. 1979) (footprints and tire tracks); *Brooks v. Manzano*, No. 062501A, 2008 WL 5146863, at \*2 (Mass. Super. Ct. Dec. 1, 2008).

102. *Seidlitz v. Beverly Enters., Inc.*, No. 08 P 1123, 2009 WL 902113, at \*1 (Mass. App. Ct. Apr. 6, 2009).

natural to artificial.<sup>103</sup> Artificial accumulations, the court argued, have only been found where larger hazards were created, such as “an ice crusted rut of approximately three inches in depth, and six to eight inches in width . . . [which had lasted for] over two days,” and “ice ruts [that] were three to four inches in depth, [with] holes [that] were obscured by a one-half inch overlay of snow.”<sup>104</sup> This distinction between small, golf-course-sized divots and larger holes that are several inches in depth or width is inherently difficult.

#### 4. Passage of Time

A natural accumulation may turn into an artificial accumulation simply “by virtue of the *passage of time*.”<sup>105</sup> This rationale is based upon the notion “that when a dangerous condition has existed for a sufficient time, the landowner has been afforded the opportunity to become aware of it and, in the exercise of reasonable care, to correct it.”<sup>106</sup> Although the case law is rather scarce on this topic, *Dionisio v. Levin* provides the best available guidance.<sup>107</sup> In *Dionisio*, the court granted summary judgment for the property owner when it snowed about ten inches the day before and the parking lot was plowed that same night.<sup>108</sup> The court noted that, “the ruts were new; this is not a case where deep, frozen ruts were allowed to remain for several days.”<sup>109</sup>

103. *Id.* (internal quotation marks omitted).

104. *Id.* (citing *Phipps*, 389 N.E.2d at 1042; *Delano*, 281 N.E.2d at 283-84). For an example of a court finding no liability where there were no holes or ruts that could be an artificial accumulation, see *Philips v. Earle W. Kazis Assocs., Inc.*, No. MICV200603466C, 2008 WL 2895904, at \*1 (Mass. Super. Ct. June 6, 2008), *aff'd*, No. 08 P 1452, 2009 WL 1851149, at \*1 (Mass. App. Ct. June 30, 2009) (allowing summary judgment where ice was flat with no ruts). For examples of holes or ruts that were sufficient enough to be considered an “artificial” accumulation, see *Dalbec v. Am. Polymers, Inc.*, No. 0400514A, 2005 WL 2373853, at \*3 (Mass. Super. Ct. Aug. 12, 2005) (denying summary judgment because jury could find that the “vehicles, routinely create tracks though [sic] the five- to six-foot expanse of snow” and “that such constant foot and vehicular tracks froze into ruts of slippery ice,” which could have “created an unnatural accumulation of hard, compacted snow and ice.”); *Wahle v. Arturo’s Rest., Inc.*, No. 010056, 2003 WL 1963223, at \*1 (Mass. Super. Ct. Feb. 19, 2003) (observing that ice was “rutted” and “thick”).

105. *Dionisio v. Levin*, No. 08-P-777, 2009 WL 1011060, at \*2 (Mass. App. Ct. Apr. 16, 2009) (emphasis added); see also *Rayburn v. Minuteman Grp., Inc.*, No. 04 P 1640, 2005 WL 3005712, at \*1 n.2 (Mass. App. Ct. Nov. 9, 2005) (two hours insufficient to create artificial accumulation).

106. *Dionisio*, 2009 WL 1011060, at \*2.

107. See *id.*

108. *Id.* at \*1.

109. *Id.* at \*2; see also *Walsh v. Akbarian*, No. MICV200504104C, 2007 WL 3317771, at \*2 (Mass. Super. Ct. Oct. 20, 2007) (granting summary judgment when snow

To clarify, *time* alone is insufficient to create an artificial accumulation and hence impose a duty to remove the snow or ice; for a duty to exist, the passage in time must have caused a change in the *composition* of the snow or ice.<sup>110</sup> It is still true that snow and ice are not a defect, unless they become an artificial accumulation.<sup>111</sup> Thus, snow that sits for a few days, but remains in the same state, cannot be the basis for liability.<sup>112</sup> Probably due to practical and logical difficulties, there are no cases finding that weather conditions, natural occurrences, have created an “artificial” accumulation due to the passage of time.<sup>113</sup>

## B. *Storm-in-Progress Rule*

The storm-in-progress rule is a bright-line rule that a property owner is not expected to remove snow or ice *during* a snow-storm.<sup>114</sup> The rule was introduced to New England by the Connecticut Supreme Court in 1989.<sup>115</sup> Prior to this, Connecticut applied the duty of reasonable care for several decades without any exceptions.<sup>116</sup> However, Connecticut eventually decided to give property owners more protection from liability by adopting the storm-in-progress rule as an exception to the duty of reasonable care.<sup>117</sup> The rule was laid down in *Kraus v. Newton*:

[I]n the absence of unusual circumstances, a property owner, in fulfilling the duty owed to invitees upon his property to exercise reasonable diligence in removing dangerous accumulations of snow and ice, may await the end of a storm and a reasonable time

---

cleared two-and-a-half hours earlier and there were no complaints that the snow was slippery in that time span).

110. Otherwise, the notion of an exception for “passage of time” negates the natural accumulation rule. Under the natural accumulation rule, the property owner never has a duty to remove natural accumulations, so long as they remain “natural.” See *Aylward v. McCloskey*, 587 N.E.2d 228, 230 (Mass. 1992). The case law shows that a transition to an “artificial” accumulation requires a change in the composition or shape of the snow. See *supra* Part II.A.

111. See *Aylward*, 587 N.E.2d at 230.

112. See *id.*

113. This conclusion is based upon the fact that no subsequent cases have cited to *Dionisio v. Levin*, No. 08-P-777, 2009 WL 1011060 (Mass. App. Ct. Apr. 16, 2009).

114. See *Kraus v. Newton*, 558 A.2d 240, 243-44 (Conn. 1989). Like the natural accumulation rule, it acts as an exception to the general duty of reasonable care for snow removal. See *infra* notes 116-120.

115. *Id.*

116. *Reardon v. Shimelman*, 128 A. 705, 706-07 (Conn. 1925).

117. See *Kraus*, 558 A.2d at 243-44.

thereafter before removing ice and snow from outside walks and steps.<sup>118</sup>

In essence, absent “unusual circumstances,” the duty to use reasonable care to remove snow and ice is suspended during the storm, as well as “a reasonable time thereafter.”<sup>119</sup> After this time has ended, the duty to use reasonable care to remove snow and ice returns.<sup>120</sup> Put differently, a property owner has the duty to use reasonable care to remove snow and ice at all times, except while the storm is ongoing and a reasonable time thereafter.

The storm-in-progress rule, though most entrenched in Connecticut, has begun to spread to other states in New England as well. Vermont and Rhode Island have begun to incorporate the ongoing storm rule, while New Hampshire has yet to decide upon it.<sup>121</sup> Among the New England states, Maine is the only one that specifically does not apply the ongoing storm rule.<sup>122</sup>

The storm-in-progress rule has been applied rather strictly in Connecticut. The rule applies even when the snowfall is “extremely light”<sup>123</sup> and even though others may have been able to clear snow.<sup>124</sup> Furthermore, the rule also applies when the snow is “packed down and slippery because of cars traveling over it.”<sup>125</sup> Although there may be exceptions made for “unusual circumstances,”<sup>126</sup> the duty to remove snow is typically not triggered until the last snowflake has dropped.<sup>127</sup>

118. *Id.* at 243.

119. *Id.*

120. *See id.* at 243-44.

121. *See supra* note 5 and accompanying text.

122. *Budzko v. One City Ctr. Assocs. Ltd. P’ship*, 767 A.2d 310, 314 (Me. 2001). The extent of the duty in Maine depends on how many people are reasonably expected to go through the area. *Id.* For instance, the owner “has a duty to reasonably respond to a foreseeable danger” during the storm if it is expected that “500 to 1000 invitees may enter and leave its premises during a snow or ice storm”; however, “[t]he duty to respond may be less rigorous for an entity that does not reasonably anticipate the comings and goings of significant numbers of invitees while a storm is in progress.” *Id.* at n.2.

123. *Cafarelli v. First Nat’l Supermarkets, Inc.*, 741 A.2d 1010,1013 (Conn. Super. Ct. 1999) (“[I]t is whether the storm has stopped, not whether the precipitation was severe or light.”).

124. *Id.* (“[W]hether the local streets and some of the driveways and sidewalks of a number of other properties had been plowed and/or cleared of snow and ice is irrelevant to the rule set down in *Kraus* . . .”).

125. *Id.*

126. *See Kraus v. Newton*, 558 A.2d 240, 243 (Conn. 1989).

127. *See Cafarelli*, 741 A.2d at 1013.

In application, the storm-in-progress rule may require some fact determinations. First, because the landowner has no duty to remove the snow or ice until “the end of a storm and a reasonable time thereafter,”<sup>128</sup> it must be determined when a storm actually ends. As a question for the jury, a finding of when the storm has ended is often a dispute between conflicting testimonies.<sup>129</sup> To make the determination, affidavits of meteorologists, affidavits of anyone at the scene of the accident, and weather reports are admitted.<sup>130</sup>

Second, when there are numerous intermittent storms, the jury must determine whether the plaintiff slipped on “old” or “new” ice.<sup>131</sup> For instance, in *Sinert v. Olympia and York Development Co.*, when “the snow storm ended around 12:15 p.m., and . . . the freezing rain began approximately one hour later at 1:15 p.m.,” there was a jury question as to whether the plaintiff slipped on the accumulation of snow or freezing rain.<sup>132</sup> The property owner had no duty to remove ice from the ongoing freezing rain, however there was a duty to remove snow from the prior storm, which ended earlier in the day.<sup>133</sup>

This determination of “old” versus “new” ice often depends on whether the plaintiff slipped on the snow that was on top or the snow that was underneath. *Cooks v. O’Brien Properties, Inc.* demonstrates this.<sup>134</sup> In *Cooks*, a snowstorm left three to four inches of snow on January 3.<sup>135</sup> On January 6, a second snowstorm began which continued through January 8, when the plaintiff fell.<sup>136</sup> The court found that the jury could have reasonably concluded that the

---

128. *Id.* at 1012.

129. *See, e.g.*, *Haig v. Cumberland Farms, Inc.*, No. 3:06CV254, 2008 WL 707325, at \*1 (D. Conn. Mar. 14, 2008); *Bundy v. Ryefield II, Ass’n, Inc.*, No. TTDCV075001189S, 2008 WL 642681, at \*2 (Conn. Super. Ct. Feb. 20, 2008); *DeSimone v. New Haven Hous. Auth.*, No. CV045000155S, 2006 WL 3411041, at \*3 (Conn. Super. Ct. Nov. 13, 2006).

130. *See, e.g.*, *Rapp v. Casey*, No. FSTCV065001333S, 2007 WL 3261541, at \*2 (Conn. Super. Ct. Oct. 17, 2007) (affidavits of meteorologists and anyone at the scene of the accident); *Leonard v. G&W Mgmt., Inc.*, No. CV055000179S, 2007 WL 2570459, at \*1 (Conn. Super. Ct. Aug. 28, 2007) (weather reports).

131. *Kraus v. Newton*, 558 A.2d 240, 243-44 (Conn. 1989) (“Our decision, however, does not foreclose submission to the jury . . . of the factual determinations of whether a storm has ended or whether a plaintiff’s injury has resulted from *new ice* or *old ice* when the effects of separate storms begin to converge.”) (emphasis added).

132. *Sinert v. Olympia & York Dev. Co.*, 664 A.2d 791, 794 (Conn. App. Ct. 1995).

133. *Id.*

134. *Cooks v. O’Brien Props., Inc.*, 710 A.2d 788, 794 (Conn. App. Ct. 1998).

135. *Id.*

136. *Id.*

snow the tenant slipped on was “old” snow from the first storm because of the tenant’s testimony that, when going down the stairs, she stepped in footprints made by other tenants.<sup>137</sup> In finding for the plaintiff, the court stated, “the underlying ice and snow left on the steps from [the first storm] may have been exposed by the footprints left in the snow of [the second storm] by tenants who had descended the stairs prior to the plaintiff.”<sup>138</sup>

Although liability cannot ensue from a property owner’s complete inactivity during a storm, a property owner may be found liable for any snow removal efforts taken during a storm that foreseeably increases the risk of injury.<sup>139</sup> For instance, in *Victoria v. Wilson*, the property owner was found liable when the plaintiff slipped in a post office parking lot during a storm.<sup>140</sup> On the way into the post office, while walking across the icy parking lot, the plaintiff used the thin layer of snow for traction.<sup>141</sup> A contractor then plowed the snow, leaving the icy layer underneath.<sup>142</sup> When the plaintiff was returning to his car, he no longer had the traction from the snow and slipped on the underlying ice.<sup>143</sup> The court accepted the argument that although “there is no duty to engage in snow removal activities, there is liability in a situation where during a snowstorm a landowner or snow removal contractor does attempt to remove snow and ice and, by such actions, makes the conditions for invitees worse and more dangerous.”<sup>144</sup>

Rhode Island has affirmed the notion that a “positive act” by a property owner during a storm may result in liability, while inactivity by the property owner during a storm is not punished.<sup>145</sup> In *Terry v. Central Auto Radiators*, the plaintiff left her car at a car repair shop and when she returned to pick it up, the employees had parked her car a hundred feet away in the parking lot.<sup>146</sup> When the

137. *Id.*

138. *Id.* For other examples of difficult distinctions between “old” and “new” snow, see *Sullivan v. Nationwide Postal*, No. CV065001931S, 2007 WL 3010806, at \*3 (Conn. Super. Ct. Oct. 2, 2007); *Horbelt v. Ledges Ass’n, Inc.*, No. CV030483717S, 2005 WL 941409, at \*1 (Conn. Super. Ct. Mar. 16, 2005); *Philippi v. Graveline*, No. CV020279745S, 2004 WL 1664090, at \*2 (Conn. Super. Ct. June 30, 2004).

139. *See infra* notes 140-150.

140. *Victoria v. Wilson*, No. 543819, 1999 WL 786356, at \*2 (Conn. Super. Ct. Sept. 21, 1999).

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *See infra* notes 146-150.

146. *Terry v. Cent. Auto Radiators, Inc.*, 732 A.2d 713, 717 (R.I. 1999).

plaintiff crossed the icy lot to retrieve her vehicle, she slipped and fell.<sup>147</sup> Despite the fact that the storm was ongoing, a jury question existed because the shop essentially forced the plaintiff to traverse the icy conditions to get to her car.<sup>148</sup> However, in *Benaski v. Weinberg*, the court contrasted the “positive act of relocating the plaintiff’s vehicle over dangerous terrain” with a case where the defendant property owner simply failed to do anything to remove the snow.<sup>149</sup> The court found that doing nothing did not constitute an “unusual circumstance” that would warrant an exception to the general rule of non-liability during a storm because it cannot be shown to have “exacerbated the risk.”<sup>150</sup>

### C. *The Duty of Reasonable Care*

The approach to snow removal adopted by *Papadopoulos* is an all-encompassing standard of “reasonable[ness],” which is to be determined by a jury based on the specific facts of each case.<sup>151</sup> First, unlike the natural accumulation rule, the duty of reasonable care to remove snow and ice remains for all accumulations, including “natural accumulations.” For instance, liability can result when snow that was shoveled or plowed into a pile, melts or falls off the pile, and then refreezes onto an area that has foot traffic.<sup>152</sup> Also, “insufficient shoveling,” where the top layer of snow is removed leaving a layer of ice or snow underneath, may be grounds for liability. For instance, in *Dubreuil v. Dubreuil*, a New Hampshire case, the court found negligence where a landlord plowed the driveway, but did not remove or put sand down on the ice underneath the snow.<sup>153</sup> Second, unlike the storm-in-progress rule, the reasonable-ness standard is not suspended during a storm. Rather, whether or

---

147. *Id.*

148. *Id.*

149. *Benaski v. Weinberg*, 899 A.2d 499, 503 (R.I. 2006) (citations omitted); *see also Berardis v. Louangxay*, 969 A.2d 1288, 1293 (R.I. 2009) (holding that the after-the-storm rule also applies to the entranceway to a restaurant, even though the restaurant shoveled and applied ice melt, it did not “increase any risk” to the plaintiff).

150. *Benaski*, 899 A.2d at 503-04.

151. *Papadopoulos v. Target Corp.*, 930 N.E.2d 142, 154 (Mass. 2010).

152. *See, e.g., Smith v. Town of Greenwich*, 899 A.2d 563, 574 (Conn. 2006) (property owner held liable when snow pile melted onto a sidewalk); *Lisa v. Yale Univ.*, 191 A. 346, 347 (Conn. 1937) (verdict for plaintiff upheld where snow melted from pile onto walkway). The rationale for this result is “that there [is] more snow in the area . . . than there would have been if [the property owner] had not acted.” *Smith*, 899 A.2d at 574; *see also Isaacson v. Husson Coll.*, 297 A.2d 98, 102-03 (Me. 1972).

153. *Dubreuil v. Dubreuil*, 229 A.2d 338, 339 (N.H. 1967).

not a property owner should clear snow and ice during a storm is a factual determination to be made by the jury in each case.<sup>154</sup>

Perhaps the most important aspect of the reasonableness standard is a shift from a question of law for the judge to a question of fact for the jury.<sup>155</sup> Under the natural accumulation rule, if it was evident that the accumulation in question was natural, the judge had the authority to grant summary judgment for the property owner.<sup>156</sup> If, and only if, the accumulation might have been artificial, the case would then proceed to the jury for the ultimate determination of whether there was negligence.<sup>157</sup> Similarly, under the storm-in-progress rule, if it is evident that there was an ongoing storm at the time of the plaintiff's fall, the judge had the authority to grant summary judgment for the property owner.<sup>158</sup> The case would only proceed to the jury if there were a legitimate question regarding when the storm ended.<sup>159</sup>

154. See *Papadopoulos*, 930 N.E.2d at 154 (“[A] fact finder will determine what snow and ice removal efforts are reasonable in light of the expense they impose on the landowner and the probability and seriousness of the foreseeable harm to others.”) (citation omitted).

155. Fleming James, Jr., *Functions of Judge and Jury in Negligence Cases*, 58 YALE L.J. 667, 667 (1949) (“[Q]uestions of law are for the court and questions of fact for the jury.”).

156. There are numerous examples cited throughout this Note in which summary judgment has been granted for the defendant on the basis of natural accumulations, meaning that the case never made it to the jury. See, e.g., *Seidlitz v. Beverly Enterprises, Inc.*, No. 08-P-1123, 2009 WL 902113, at \*1-2 (Mass. App. Ct. Apr. 6, 2009) (summary judgment granted for property owner); *Goulart v. Canton Hous. Auth.*, 783 N.E.2d 864, 867 (Mass. App. Ct. 2003) (same).

157. See, e.g., *Reardon v. Parisi*, 822 N.E.2d 748, 751 (Mass. App. Ct. 2005); *Plante v. Town of Blackstone*, No. 092632, 2010 WL 2764696, at \*2 (Mass. Super. Ct. May 11, 2010); *Garand v. Worcester Hous. Auth.*, No. 051000D, 2009 Mass. Super. LEXIS 36, at \*3-9 (Mass. Super. Ct. Feb 6, 2009).

158. See, e.g., *Leon v. DeJesus*, 2 A.3d 956, 959 (Conn. App. Ct. 2010); *Valagic v. Inline Plastics Corp.*, No. CV044000841, 2006 WL 1075147, at \*2 (Conn. Super. Ct. Apr. 4, 2006); *Barile v. Edison House, LLC*, No. CV010506111S, 2003 WL 22786284, at \*1 (Conn. Super. Ct. Nov. 7, 2003); *Uhelsky v. One Research Drive Associates, Inc.*, No. CV010075247S, 2002 WL 31928610, at \*1 (Conn. Super. Ct. Dec. 20, 2002); *Fryer v. Farmington Square, LLC*, No. CV010804593S, 2002 WL 31415043, at \*2 (Conn. Super. Ct. Sept. 30, 2002).

159. See, e.g., *Haig v. Cumberland Farms, Inc.*, No. 3:06CV254, 2008 WL 707325, at \*1 (D. Conn. Mar. 14, 2008); *Bundy v. Ryefield II, Ass’n., Inc.*, No. TTDCV075001189S, 2008 WL 642681, at \*2 (Conn. Super. Ct. Feb. 20, 2008); *DeSimone v. New Haven Hous. Auth.*, No. CV045000155S, 2006 WL 3411041, at \*3 (Conn. Super. Ct. Nov. 13, 2006).



### III. *PAPADOPOULOS v. TARGET CORPORATION*: THE COURT'S RATIONALE

*Papadopoulos* abolished the natural accumulation rule because it found the rule to be flawed in both its justification and its application.<sup>160</sup> The two primary justifications for an exception to the duty of reasonable care for snow and ice, as acknowledged in *Papadopoulos*, are (1) the snow and ice constitute an open and obvious danger and (2) it is impractical to give property owners a duty to clear snow and ice, given the nature and scope of these conditions.<sup>161</sup> The court dismissed both of these justifications.<sup>162</sup>

The court rejected the traditional notion that snow and ice are “open and obvious” and can thus be avoided, and opted to take the modern Restatement approach.<sup>163</sup> The “open and obvious” doctrine states that a property owner has no duty to warn of, or remove, a danger that is open and obvious, because visitors are able to recognize the danger and avoid it.<sup>164</sup> The underlying rationale is that “it is not reasonably foreseeable that a visitor exercising (as the law presumes) reasonable care for his own safety would suffer injury from such blatant hazards.”<sup>165</sup> Traditionally, it was argued that snow and ice are open and obvious hazards and thus it should be expected that people would notice them and avoid injury.<sup>166</sup> The court disagreed with this concept and opted to take the modern, amended version of the open and obvious doctrine, which can be found in the Restatement (Second) of Torts.<sup>167</sup> Under the new Restatement approach, despite the fact that the danger is open and obvious, property owners may be liable if they “can and should anticipate that the dangerous condition will cause physical harm to the [lawful visitor] notwithstanding its known or obvious danger.”<sup>168</sup> Furthermore,

---

160. See *Papadopoulos v. Target Corp.*, 930 N.E.2d 142, 150-56 (Mass. 2010).

161. *Id.* at 151-52.

162. *Id.* at 151.

163. *Id.*

164. *Id.* (“The open and obvious doctrine provides that a property owner has no duty to warn of an open and obvious danger, because the warning would be superfluous for an ordinarily intelligent plaintiff.”) (citation omitted).

165. *O’Sullivan v. Shaw*, 726 N.E.2d 951, 954-55 (Mass. 2000).

166. *Id.* at 954 (“[A] landowner’s duty to protect lawful visitors against dangerous conditions on his property ordinarily does not extend to dangers that would be obvious to persons of average intelligence.”).

167. *Papadopoulos*, 930 N.E.2d at 151 (citing *Soederberg v. Concord Greene Condo. Ass’n*, 921 N.E.2d 1020, 1024 (Mass. App. Ct. 2010); RESTATEMENT (SECOND) OF TORTS ch. 13, § 343A cmt. f, at 220 (1965)).

168. RESTATEMENT (SECOND) OF TORTS ch. 13, § 343A cmt. f, at 220 (1965).

“[O]ne of the specific circumstances where harm to others is foreseeable is ‘where the [property owner] has reason to expect that the [lawful visitor] will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk.’”<sup>169</sup>

The court believes “it is reasonable [for property owners] to expect that a hardy New England visitor would” decide to walk through the snow rather than turn back or go around it.<sup>170</sup> Also, the court notes that an open and obvious danger does not always preclude liability and, anyway, it is not related to the question of whether the accumulation is natural or artificial.<sup>171</sup>

The court then addressed the second argument in favor of the natural accumulation rule, “that enforcement of an affirmative obligation to remove natural accumulations of snow and ice would be *impractical*, if not impossible, given the nature of the winter climate in the Commonwealth.”<sup>172</sup> The Court rejected this argument by pointing out that all of the other New England states have already abolished the natural accumulation rule.<sup>173</sup> The court relied, in particular, on the Rhode Island Supreme Court’s reasoning “that today a landlord, armed with an ample supply of salt, sand, scrapers, shovels and even perhaps a snow blower” can adequately remove all types of precipitation.<sup>174</sup>

In addition to attacking its justification, the court criticized the natural accumulation rule for producing arbitrary results that permit property owners to act negligently and ignore the ultimate goal of ensuring the safety of all lawful visitors.<sup>175</sup> First, the court reasons that the natural/artificial distinction is similar to the arbitrary invitee/licensee distinction, which was abolished in Massachusetts

169. *Papadopoulos*, 930 N.E.2d at 151 (citations omitted).

170. *Id.*

171. *Id.* Note, however, that the open and obvious doctrine is still applicable. It is relevant to the question of the plaintiff’s negligence. See *Goldman v. United States*, 790 F.2d 181, 183-84 (1st Cir. 1986) (applying Massachusetts law in a Federal Tort Claims Act action to find that when a parking lot was mostly cleared, but there was one small patch of snow and ice that was noticeable, the open and obvious doctrine applied to preclude liability).

172. *Papadopoulos*, 930 N.E.2d at 151 (emphasis added).

173. *Id.* at 151-52 & n.15 (citing *Reardon v. Shimelman*, 128 A. 705, 706 (Conn. 1925); *Isaacson v. Husson Coll.*, 297 A.2d 98, 104 (Me.1972); *Dubreuil v. Dubreuil*, 229 A.2d 338, 340 (N.H. 1967); *Fuller v. Hous. Auth. of Providence*, 279 A.2d 438, 441 (R.I. 1971); *Smith v. Monmaney*, 255 A.2d 674, 676 (Vt. 1969)).

174. *Id.* at 152 (quoting *Fuller*, 279 A.2d at 440).

175. *Id.* at 150.

several decades ago.<sup>176</sup> *Mounsey v. Ellard* abolished the invitee/licensee distinction because it produced arbitrary results with no legal basis.<sup>177</sup> The distinction often became the focal point in the litigation, even when it was not relevant to the particular case.<sup>178</sup> Thus, in *Mounsey v. Ellard*, the court abandoned these categories in favor of a general duty of reasonable care that could be molded to fit any situation.<sup>179</sup> *Papadopoulos* pointed out that, similar to the invitee/licensee distinction, the natural/artificial distinction “obscure[s] rather than illuminate[s] the relevant factors which should govern determination[s] of the question[s] of duty” and should likewise be abolished.<sup>180</sup>

Second, the court stated that snow and ice are similar to other foreign substances and should likewise be considered actionable defects.<sup>181</sup> As previously mentioned, under Massachusetts law, other foreign substances dropped or left on the ground by unknown third parties (i.e. customers) are considered defects that the property owner has a duty to remove.<sup>182</sup> The court noted that snow and ice accumulations are similar to foreign substances dropped by people and, therefore, the same duty to remove them should apply.<sup>183</sup> The court asserted that the purpose of placing a duty on the property owner was to keep the lawful visitors safe, and “[this] rationale has no greater force when the source of the danger is an act of nature rather than an act of another person.”<sup>184</sup>

Third, the court observed that the natural accumulation rule is very difficult to apply and often contrary to other fundamental concepts.<sup>185</sup> For examples, the court pointed out that the determination of whether snow and ice are natural or artificial accumulations often turned upon fine distinctions regarding the size of ruts in the ice or the physical composition of a snow pile.<sup>186</sup> Furthermore, these conditions can be quickly altered by people, cars, or even the

---

176. *Id.* at 150; *see supra* Part I.A.

177. *Mounsey v. Ellard*, 297 N.E.2d 43, 49, 51 (Mass. 1973); *see supra* Part I.A.1.

178. *Mounsey*, 297 N.E.2d at 46-49; *see supra* Part I.A.1.

179. *Mounsey*, 297 N.E.2d at 51-52; *see also* *Papadopoulos*, 930 N.E.2d at 151-52.

180. *Papadopoulos*, 930 N.E.2d at 152 (citing *Mounsey*, 297 N.E.2d at 51).

181. *Id.* at 150-51 (citations omitted).

182. *See supra* notes 34-45 and accompanying text; *see also* *Papadopoulos*, 930 N.E.2d at 150-51 (citing *Sheehan v. Roche Bros. Supermarkets, Inc.*, 863 N.E.2d 1276, 1286-87 (Mass. 2007); *Anjou v. Boston Elevated Ry.*, 94 N.E. 386, 386 (Mass. 1911)).

183. *See Papadopoulos*, 930 N.E.2d at 150.

184. *Id.* at 150-51.

185. *Id.* at 152-53.

186. *Id.*; *see supra* Part II.A.

passage of time.<sup>187</sup> Also, the court noted that property owners that remove snow are free from liability even if the efforts “foreseeably increase the risk of mishap.”<sup>188</sup> For instance, the court pointed to property owners that avoided liability when they shoveled a pile uphill of a walkway or shoveled only the top layer of snow while leaving the more dangerous ice underneath.<sup>189</sup> The court asserted that allowing this conduct is contrary to one of the major tenets of tort law that someone who voluntarily “acts to mitigate a potential hazard” has a duty “to exercise reasonable care, even where no pre-existing duty to act was owed.”<sup>190</sup>

In the end, the court found that the natural accumulation rule cannot be justified.<sup>191</sup> In the court’s opinion, it is an arbitrary standard that is based upon faulty logic, it is difficult to apply, and it produces unfavorable results.<sup>192</sup> Ultimately, property owners are not properly held accountable to clear snow and do so safely, and, therefore, the general public suffers.<sup>193</sup>

#### IV. LOOKING AHEAD: THE REASONABLENESS STANDARD AND THE STORM-IN-PROGRESS RULE

##### A. *Snow and Ice are a Larger Burden to Remove from a Property than Other Foreign Substances and thus Deserve Unique Treatment*

*Papadopoulos* held that snow and ice are similar to other foreign substances and likewise should be governed by the catch-all reasonableness standard;<sup>194</sup> however, snow and ice are fundamentally unique from other foreign substances, because, first, their removal is a much larger burden on the property owner and, second, unlike other foreign substances their presence is known to the general public.<sup>195</sup>

First, in terms of sheer quantity, the removal of snow and ice that covers an entire property is a far greater burden on the prop-

187. *Papadopoulos*, 930 N.E.2d at 152; see *supra* Part II.A.

188. *Papadopoulos*, 930 N.E.2d at 153 (quoting *Goulart v. Canton Hous. Auth.*, 783 N.E.2d 864, 867 (Mass. App. Ct. 2003)).

189. *Id.* at 153.

190. *Id.* (citing *Davis v. Westwood Grp.*, 652 N.E.2d 567, 571 (Mass. 1995)).

191. *Id.* at 156.

192. *Id.* at 150-56.

193. See *infra* Part IV.

194. *Papadopoulos*, 930 N.E.2d at 154; see *supra* text accompanying notes 181-184.

195. See *infra* notes 196-203 and accompanying text.

erty owner than the removal of other foreign substances that are dropped onto a floor. The typical foreign substance case involves something dangerous being left on the floor in an establishment such that an innocent patron may trip or slip upon it.<sup>196</sup> Common examples of items dropped or left on the floor are banana peels, water that remained after mopping, piles of dirt that were swept up, or other small things left on the floor by either employees or patrons.<sup>197</sup> These situations are occasional mishaps that take minimal effort to fix. Once the danger is noticed, either the item must be picked up or the mess must be cleaned up within a reasonable time,<sup>198</sup> a responsibility that no doubt is expected of the average janitor or cleaning service in any commercial establishment. This minimal duty to clean up a small mess is in stark contrast to the sometimes enormous duty to remove snow and ice from an entire property, the extent of which includes shoveling or plowing the parking lots, the driveways, and the walkways.<sup>199</sup> For sure, picking up a banana peel cannot be compared to removing a foot or more of snow from an entire parking lot. Indeed, the removal of snow and ice is often too large of a burden for a property owner to handle alone and thus requires the hiring of an independent contractor.<sup>200</sup>

In addition to the greater quantity that must be removed, the unpredictable manner in which snow and ice can change in composition and shape through melting, freezing, or otherwise, makes it more difficult to ensure safe conditions for human traffic at all times. Indeed, the Supreme Judicial Court has recognized this fact.<sup>201</sup> Highlighting the unpredictable manner in which a safe condition can rapidly turn into a dangerous condition, the court stated, “a number of conditions might exist which within a very short time could cause the formation of ice . . . without fault of the owner and without reasonable opportunity on his part to remove it or to warn against it or even to ascertain its presence.”<sup>202</sup>

---

196. See *supra* Part I.A.2.

197. See *supra* note 27 (providing examples of various foreign substances that have been left on the floor).

198. See *supra* note 34.

199. See *supra* Part II (highlighting multiple cases of property owners clearing snow from parking lots, sidewalks, and any other area on the property that the public has access to).

200. See *supra* note 15.

201. See *Collins v. Collins*, 16 N.E.2d 665, 665 (Mass. 1938).

202. *Id.*

Second, when there is snow and ice on a property, in contrast to other foreign substances, their presence is usually known to the general public. In the case of a foreign substance left in a store aisle, the unlucky patron who comes upon it has no way to know of its existence and thus cannot avoid it or, at least, proceed with caution. On the other hand, snowstorms, and the consequent accumulation of snow, are plainly visible to the public at large. In some situations, the snow or ice can be avoided altogether. And, where the only way to a destination is through the snow or ice, it is at least known to approach the situation with caution. To the average person in Massachusetts, crossing this terrain is a common occurrence.<sup>203</sup>

Overall, snow and ice are a unique hazard because, (a) from the property owner's perspective, it is a very large and difficult burden to constantly monitor its presence and ensure its removal, and (b) from the public's perspective, it is typically a hazard that they are aware of and that they unavoidably traverse frequently throughout the winter. It is not a coincidence that snow and ice, and not any other foreign substance, have repeatedly been given special treatment by states throughout New England.<sup>204</sup>

B. *Due to the Unique Nature of Snow and Ice, the Duty of Reasonable Care, Alone, is Not Appropriate and the Storm-in-Progress Rule Should be Incorporated*

1. *Due to the Difficulties Involved in Snow Removal, Courts Have Avoided Using the Malleable Duty of Reasonable Care in Order to Prevent Overburdening Property Owners*

Recognizing the difficulties involved in snow removal, courts in Massachusetts, and throughout New England, have consistently been uncomfortable applying the malleable duty of reasonable care for fear that they will over-burden property owners. Evidence of

---

203. See *Papadopoulos v. Target Corp.*, 930 N.E.2d 142, 151 (Mass. 2010) (“[I]t is reasonable to expect that a hardy New England visitor would choose to risk crossing the snow or ice rather than turn back . . .”).

204. See *supra* Part II.B. and Part I.A.3; see also *Kraus v. Newton*, 558 A.2d 240, 243-44 (Conn. 1989) (adopting the storm-in-progress rule in Connecticut); *Woods v. Naumkeag Steam Cotton Co.*, 134 Mass. 357, 357 (Mass. 1883) (establishing the natural accumulation rule for the first time in Massachusetts); *Terry v. Cent. Auto Radiators, Inc.*, 732 A.2d 713, 717 (R.I. 1999) (applying the storm-in-progress rule); *Turmel v. Univ. of Vt.*, No. S0980-01 Cncv., 2004 WL 5460386, at \*2 (Vt. Super. Ct. Apr. 20, 2004) (applying the storm-in-progress rule).

this fact is found in the existence of the natural accumulation rule for one hundred thirty years in Massachusetts<sup>205</sup> and Connecticut's adoption of the storm-in-progress rule, which has begun to appear in other New England states as well.<sup>206</sup>

Unwilling to treat snow and ice like every other hazard, Massachusetts decided in 1883 to experiment with the notion that there is no duty to remove "natural accumulations" of snow and ice.<sup>207</sup> Unfortunately, as the case law developed, this approach proved to be difficult in application. The distinction between "natural" and "artificial" accumulations, a difference that was based on the composition and shape of the snow and ice, proved to be arbitrary and confusing.<sup>208</sup> Cases were decided based upon small differences in the size of divots in ice or the amount of foot tracks or tire tracks on the snow.<sup>209</sup> Also, the rule produced some results that were contrary to fundamental tort concepts, such as the allowance, in some situations, of negligent snow removal.<sup>210</sup>

Underlying the natural accumulation rule is the notion that it would be *impracticable* to place upon property owners an affirmative duty to remove snow and ice.<sup>211</sup> Although the rule proved unsavory in application, this underlying purpose always has, and still does, remain firm. In fact, due to its allegiance to this purpose, Massachusetts was unwilling to let go of the natural accumulation rule, despite its drawbacks, for over a century.<sup>212</sup>

*Papadopoulos* found that the impracticability argument did not justify the natural accumulation rule<sup>213</sup>; however, this does not

---

205. See *supra* Part II.

206. See *supra* Part III.B.

207. *Woods*, 134 Mass. at 357.

208. See *supra* Part II.A.

209. See *supra* Part II.A.; see, e.g., *Delano v. Garrettson-Ellis Lumber Co.*, 281 N.E.2d 282, 284 (Mass. 1972) ("muddy ice," with tire marks and ruts"); *Seidlitz v. Beverly Enterprises, Inc.*, No. 08-P-1123, 2009 WL 902113, at \*1 (Mass. App. Ct. Apr. 6, 2009) (evaluating the size of ruts in the ice); *Phipps v. Aptucxet Post No. 5988 V. F. W. Bldg. Ass'n, Inc.*, 389 N.E.2d 1042, 1042 (Mass. App. Ct. 1979) (footprints and tire tracks).

210. See *supra* Part II.A.; see, e.g., *Sullivan v. Town of Brookline*, 626 N.E.2d 870, 872 (Mass. 1994) (insufficient shoveling did not result in liability); *Dipersio v. TX Planning Trust*, No. 08-P-777, 2009 WL 1011060, at \*1 (Mass. App. Ct. Oct. 20, 2009) (citation omitted) (stating that piling snow uphill from a walkway would not result in liability).

211. See *Papadopoulos v. Target Corp.*, 930 N.E.2d 142, 150-52 (Mass. 2010).

212. See *supra* Part I.A.3; see also *Papadopoulos*, 930 N.E.2d at 154 (abolishing the natural accumulation rule in Massachusetts); *Woods*, 134 Mass. at 357 (establishing the natural accumulation rule for the first time in Massachusetts).

213. See *Papadopoulos*, 930 N.E.2d at 150-52; see also *supra* Part III.

mean that it cannot justify the storm-in-progress rule. In support of *Papadopoulos*'s denial of the impracticability argument, the court pointed out that the other New England states had already abolished or refused to adopt the natural accumulation rule.<sup>214</sup> The court also referred to a quote from the Rhode Island Supreme Court to make the point that owners have sufficient supplies to address snow removal concerns.<sup>215</sup> It may be true that the impracticability of removing snow and ice from a property may not warrant the natural accumulation rule, which completely removes the property owner's duty to remove "natural" accumulations. However, it certainly warrants the storm-in-progress rule, a less extreme rule that does not eliminate the duty to remove accumulations, but rather merely gives the property owner more time to do so.

Furthermore, the concern of impracticability of snow and ice removal remains firm in other courts. The most glaring example is *Krywin v. Chicago Transit Authority*, a case that was decided by the Illinois Supreme Court about one week prior to *Papadopoulos*.<sup>216</sup> There, the court held that the natural accumulation rule, despite its faults, was better than placing an excessive burden on property owners.<sup>217</sup> In fact, the court held that the natural accumulation rule was so strong that it applied even to "common carrier[s]," which have the highest "duty of care."<sup>218</sup> The court stated:

[W]e recognize the dangers posed by natural accumulations of snow and ice. The absence of a duty to remove them "does not rest upon the notion that the conditions presented by such accumulations are safe. To the contrary, the hazards presented have always been acknowledged, but the imposition of an obligation to remedy those conditions would be so unreasonable and impractical as to negate the imposition of a legal duty to do so."<sup>219</sup>

---

214. *Papadopoulos*, 930 N.E.2d at 151-52 n.15 (citing *Reardon v. Shimelman*, 128 A. 705, 706 (Conn. 1925); *Isaacson v. Husson Coll.*, 297 A.2d 98, 104 (Me. 1972); *Dubreuil v. Dubreuil*, 229 A.2d 338, 340 (N.H. 1967); *Fuller v. Hous. Auth. of Providence*, 279 A.2d 438, 441 (R.I. 1971); *Smith v. Monmaney*, 255 A.2d 674, 676 (Vt. 1969)).

215. *Id.* at 152 (citing *Fuller v. Hous. Auth. of Providence*, 279 A.2d 438, 441 (R.I. 1971)).

216. *Krywin v. Chicago Transit Auth.*, 938 N.E.2d 440, 450 (Ill. 2010).

217. *Id.* The plaintiff in *Krywin* requested a rehearing on the matter after the *Papadopoulos* decision, but this request was denied. *Id.* at 457 (Freeman, J., dissenting).

218. *Id.* at 450.

219. *Id.* (quoting *Trevino v. Flash Cab Co.*, 651 N.E.2d 723, 728 (Ill. App. Ct. 1995)).



The natural accumulation rule is certainly used in a minority of states for general and business premises liability,<sup>220</sup> but it is far from gone. Including Illinois, at least thirteen states continue to apply the rule.<sup>221</sup>

Connecticut learned through experience that the duty of reasonable care, on its own, places an unreasonable burden on property owners, and, as a result, Connecticut eventually created the storm-in-progress rule.<sup>222</sup> In 1925, Connecticut explicitly rejected the natural accumulation rule and adopted the duty of reasonable care.<sup>223</sup> However, that decision did not last. After applying the reasonableness standard for over sixty years, Connecticut carved out an exception from the general standard in the form of the storm-in-progress rule.<sup>224</sup> There, the Connecticut Supreme Court held that property owners had no duty to remove snow until “the end of a storm and a reasonable time thereafter.”<sup>225</sup> Subsequently, the storm-in-progress rule has developed in Vermont and Rhode Island.<sup>226</sup>

---

220. See Michael J. Polelle, *Is the Natural Accumulation Rule All Wet?*, 26 *LOX. U. CHI. L.J.* 631 app. at 656-62 (1995).

221. See *id.* (citing states that apply the rule to general/business premises: *Ferguson v. J. Bacon & Sons*, 406 S.W.2d 851, 852 (Ky. Ct. App. 1966) (Kentucky); *Miller v. New Amsterdam Cas. Co.*, 164 So.2d 676, 682 (La. Ct. App. 1964) (Louisiana); *Willis v. Springfield Gen. Osteopathic Hosp.*, 804 S.W.2d 416, 419 (Mo. Ct. App. 1991) (Missouri); *Brandert v. Scottsbluff Nat'l Bank & Trusts Co.*, 235 N.W.2d 864, 866 (Neb. 1975) (Nebraska); *Herndon v. Arco Petroleum Co.*, 536 P.2d 1023, 1024-25 (Nev. 1975) (Nevada); *Nevins v. Great Atl. & Pac. Tea Co.*, 559 N.Y.S.2d 539, 540 (N.Y. App.Div. 1990) (New York); *Strandness v. Montgomery Ward*, 199 N.W.2d 690, 691 (N.D. 1972) (North Dakota); *Weaver v. Standard Oil Co. of Ohio*, 572 N.E.2d 205, 207 (Ohio Ct. App. 1989) (Ohio); *Sullins v. Mills*, 395 P.2d 787, 789 (Okla. 1964) (Oklahoma); *Meadows v. Heritage Vill. Church & Missionary Fellowship, Inc.*, 409 S.E.2d 349, 351 (S.C. 1991) (South Carolina); *Hodge v. Quik-Pik Icehouse*, 445 S.W.2d 266, 268 (Tex. Civ. App. 1969) (Texas); *Watts v. Holmes*, 386 P.2d 718, 719 (Wyo. 1963) (Wyoming)). Since 1995, Montana is the only state other than Massachusetts to abolish the natural accumulation rule in general/business premises liability. See *Richardson v. Corvallis Pub. Sch. Dist. No. 1*, 950 P.2d 748, 755-56 (Mont. 1997) (abolishing the natural accumulation rule and adopting “a duty to use ordinary care in maintaining the premises in a reasonably safe condition and to warn of any hidden or lurking dangers”).

222. See *Kraus v. Newton*, 558 A.2d 240, 243-44 (Conn. 1989) (adopting the storm-in-progress rule); *Reardon v. Shimelman*, 128 A. 705, 706 (Conn. 1925) (adopting a reasonableness standard).

223. See *Reardon*, 128 A. at 706 (adopting a reasonableness standard and noting that “we are wholly unable to justify the Massachusetts rule”).

224. See *Kraus*, 558 A.2d at 243-44; *supra* Part II.B.

225. *Kraus*, 558 A.2d at 243.

226. See *Terry v. Cent. Auto Radiators, Inc.*, 732 A.2d 713, 716-17 (R.I. 1999); *Turmel v. Univ. of Vt.*, No. S0980-01 Cncv, 2004 WL 5460386, at \*2 (Vt. Super. Ct. Apr. 20, 2004).

Overall, New England states have consistently recognized the large burden involved in snow removal and has accordingly provided exceptions to the duty of reasonable care to give some protection to property owners. With *Papadopoulos*, the natural accumulation rule is now virtually extinct.<sup>227</sup> However, the underlying concern that property owners may be over-burdened led to the development of the storm-in-progress rule in its place.

2. The Storm-in-Progress Rule is the Best Available Alternative Because it Provides Some Protection to Property Owners, But Also Ensures that Property Owners Remain Accountable and the General Public Remains Safe

The storm-in-progress rule, similar to the natural accumulation rule, is based upon the sound justification that the removal of snow and ice is a unique and large burden. However, in application, the storm-in-progress rule avoids the major problems that were caused by the natural accumulation rule. The storm-in-progress rule better fosters predictability for the general public and accountability for the property owners. And, while the storm-in-progress rule does have potential difficulties, they remain minimal due to the open and apparent nature of snow and the limited scope of the storm-in-progress rule.

Under the general reasonableness standard alone, the determination of liability must always be made by a jury;<sup>228</sup> in contrast, the storm-in-progress rule, just as the natural accumulation rule before it, gives the judge more power to grant judgment as a matter of law for the property owner.<sup>229</sup> Under the storm-in-progress rule, if it is found that a storm was ongoing when the plaintiff fell, then summary judgment can be granted for the property owner.<sup>230</sup> Without the storm-in-progress rule, the ongoing storm is not conclusive and

---

227. It is only “virtually” extinct, because “Maine has not abandoned the natural accumulation rule as a limitation on a landlord’s liability to a tenant.” *Papadopoulos v. Target Corp.*, 930 N.E.2d 142, 152 n.16 (Mass. 2010) (citing *Rosenberg v. Chapman Nat’l Bank*, 139 A. 82, 83 (Me. 1927)).

228. See *supra* notes 155-59 and accompanying text.

229. See *supra* notes 155-59 and accompanying text.

230. See *supra* notes 158-59 and accompanying text; see, e.g., *Leon v. DeJesus*, 2 A.3d 956, 959 (Conn. App. Ct. 2010); *Valagic v. Inline Plastics Corp.*, No. CV044000841, 2006 WL 1075147, at \*2-3 (Conn. Super. Ct. Apr.4, 2006); *Barile v. Edison House, LLC*, No. CV010506111S, 2003 WL 22786284, at \*2-3 (Conn. Super. Ct. Nov. 7, 2003); *Uhel-sky v. One Research Drive Assoc., Inc.*, No. CV 010075247S, 2002 WL 31928610, at \*1, \*3 (Conn. Super. Ct. Dec. 20, 2002); *Fryer v. Farmington Square, LLC*, No. CV010804593S, 2002 WL 31415043, at \*2-4 (Conn. Super. Ct. Sept. 30, 2002).

the jury will determine, based upon the totality of the circumstances, whether the property owner's removal efforts were reasonable.<sup>231</sup>

This sole reliance on the jury, and its inherent unpredictability, is a serious concern in New England. Among the New England states, Maine is the only state to specifically reject the storm-in-progress rule, a decision that was articulately criticized by a Vermont superior court.<sup>232</sup> The Vermont court stated that due to Maine's refusal to adopt the storm-in-progress rule, it "is . . . guarantee[d] that slip-and-fall cases will almost always be decided by juries and that owners are left with a nebulous, perpetual potential for liability without any judicial guidance about the limit of their duty of care during the storms."<sup>233</sup> Indeed, the storm-in-progress rule provides a necessary avenue for the judge to ferret out the most unsubstantiated claims, and relieve the property owners of an overwhelming, excessive burden.

Also, in stark contrast to the natural accumulation rule, the storm-in-progress rule is a relatively narrow exception to the duty of reasonable care, and provides the minimal amount of protection that property owners should be given. The storm-in-progress rule does not remove the duty of reasonable care, but rather it gives the property owner a grace period where the duty to remove snow is suspended while the storm is ongoing.<sup>234</sup> However, after the storm ends and "a reasonable time thereafter," the duty of reasonable care returns and the property owner is expected to clear all of the snow and ice to ensure that the property is safe.<sup>235</sup> Therefore, under the storm-in-progress rule, the snow and ice will be cleared just the same as they would be without the storm-in-progress rule, except the property owner is given more time to do so. The natural accumulation rule provided much more protection to property owners. If an accumulation was deemed "natural," the property owner

---

231. See *supra* notes 155-59 and accompanying text; *Papadopoulos*, 930 N.E.2d at 154 ("[A] fact finder will determine what snow and ice removal efforts are reasonable in light of the expense they impose on the landowner and the probability and seriousness of the foreseeable harm to others.") (citations omitted).

232. *Turmel v. Univ. of Vt.*, No. S0980-01 Cncv, 2004 WL 5460386 (Vt. Super. Ct. Apr. 20, 2004) (citing Jennifer Williams, Note, *Budzkov v. One City Center Associates Limited Partnership: Maine's Unique Approach to Business Owner's Duty to Remove Ice and Snow*, 55 ME. L. REV. 517, 540-41 (2003)).

233. *Id.*

234. See *supra* text accompanying note 119; see also *Kraus v. Newton*, 558 A.2d 240, 243-44 (Conn. 1989).

235. *Kraus*, 558 A.2d at 243.

had no duty whatsoever to remove it.<sup>236</sup> Unless the snow was altered in some way such that it became “artificial,” there would never be a duty to remove the snow.<sup>237</sup> The storm-in-progress rule recognizes that public safety concerns require that a duty to remove snow and ice should always exist. However, the storm-in-progress rule merely states that property owners can, without fear of potential liability, wait until a storm ends to clear the accumulations.

Also in contrast to the natural accumulation rule, the storm-in-progress rule ensures accountability of the property owners, because it does not permit negligent snow removal at any time, whether or not a storm is ongoing.<sup>238</sup> Under the natural accumulation rule, the property owner is often held not liable for negligent snow removal.<sup>239</sup> For instance, “incomplete shoveling,” i.e. where the top layer of snow is removed leaving only an icy layer underneath, or piling snow uphill on a walkway does not result in liability even though they “foreseeably increase the risk of mishap.”<sup>240</sup> Therefore, under the natural accumulation rule, property owners feel free to remove snow at any time; however, there is nothing that holds them accountable to do so in a safe manner. *Papadopoulos* properly deemed this to be contrary to the fundamental tort principle, that someone who removes a hazard has a duty to use reasonable care in doing so.<sup>241</sup> The storm-in-progress rule, in contrast, is consistent with this principle, because negligent shoveling is punished no matter when it is done.<sup>242</sup> While it is clear that making no attempt to remove snow and ice during a storm cannot result in liability, it is equally clear that negligent removal of snow during a storm (or not during a storm) can result in liability. In fact, the property owner can be liable for any “positive act” that foreseeably increases the risk of injury.<sup>243</sup> This can include, as discussed earlier, an auto shop worker moving the plaintiff’s car to a location such that the plaintiff was forced to cross an icy terrain to get to the

---

236. See *supra* note 74 and accompanying text and Part II.A.

237. See *supra* note 75 and accompanying text and Part II.A; see also *Watkins v. Goodall*, 138 Mass. 533, 537 (1885).

238. See *supra* notes 140-50 and accompanying text; see also *Kraus*, 558 A.2d at 243-44.

239. See, e.g., *Goulart v. Canton Hous. Auth.*, 783 N.E.2d 864, 867 (Mass. App. Ct. 2003); see Part II.A.

240. *Goulart*, 783 N.E.2d at 867.

241. See *Papadopoulos v. Target Corp.*, 930 N.E.2d 142, 151 (Mass. 2010).

242. See *supra* notes 140-50 and accompanying text.

243. See *Benaski v. Weinberg*, 899 A.2d 499, 503 (R.I. 2006) (citations omitted); see also *Terry v. Cent. Auto Radiators, Inc.*, 732 A.2d 713, 717-18 (R.I. 1999).

car.<sup>244</sup> Overall, the storm-in-progress rule promotes competent and safe snow removal.

The storm-in-progress rule also better promotes predictability for the general public than the natural accumulation rule. First, an ongoing storm is something the public can easily notice. If people are aware of the law and they see that it is snowing, then they should at least be aware of the possibility that snow has not been cleared. Second, because the storm-in-progress rule does not tolerate negligent snow removal,<sup>245</sup> any member of the public that approaches snow can expect that either (1) the snow removal has been done in a safe manner and in accordance with the duty of reasonable care or (2) the snow has not been touched because the storm is ongoing. On the other hand, under the natural accumulation rule, there is nothing to provide the public with any type of expectation regarding what they are approaching. The snow and ice may be completely untouched, it may be completely shoveled, or it may have been negligently shoveled.<sup>246</sup>

On a related note, any possible injuries that result from a lack of snow removal during a storm will be minimal because those who decide to traverse snowy or icy terrain during a storm are at least aware of what they may be approaching, and thus they can use appropriate caution. *Papadopoulos* rejected the open and obvious doctrine as a justification for failing to remove snow and ice,<sup>247</sup> and for good reason. Relying on the Restatement, the court reasoned that liability for a property owner should not be precluded by the open and obvious doctrine, if it was still foreseeable that others would walk through the dangerous terrain despite its open and obvious danger.<sup>248</sup> Because it should be expected that people will traverse through the snow despite its known danger, the snow should be removed. And, under the storm-in-progress rule, the snow will be removed—once the storm has ended. While the open and obvious nature of snow and ice does not warrant a property owner to avoid removing snow completely, it is a factor that supports the notion of delaying the duty to remove snow until after the storm has ended.

---

244. *Id.*

245. *See supra* notes 140-150 and accompanying text; *see also Kraus*, 558 A.2d at 243-44.

246. *See supra* Part II.A.

247. *Papadopoulos v. Target Corp.*, 930 N.E.2d 142, 151 (Mass. 2010).

248. *Id.*; *see supra* notes 163-71 and accompanying text.

Lastly, while the storm-in-progress rule does, in some cases, have challenging factual determinations as to when a storm has ended or whether a plaintiff slipped on “old” or “new” ice, these issues are much less complicated than under the natural accumulation rule and are outweighed by the positive effects of the storm-in-progress rule. First, while these may be difficult determinations, they do not necessarily favor the property owner—they are just difficult. The natural accumulation rule, on the other hand, clearly favored the property owner, as the accumulations were presumed “natural” unless proven otherwise.<sup>249</sup> Second, determinations regarding the composition of the snow, such as the size of divots or whether or not a snow pile had an icy block in it, are typically proven by only the plaintiff’s own testimony.<sup>250</sup> However, in addition to the plaintiff’s testimony, there are meteorologist reports that anyone in the public can use to prove when a storm has ended.<sup>251</sup> Third, while the natural accumulation rule applied to any snow or ice that a plaintiff fell upon at any time of the day, the determinations under the storm-in-progress rule will be limited to the small time frames at the beginning and end of a storm in which the two sides could possibly dispute the storm’s presence.

Overall, the storm-in-progress rule gives property owners a limited exception that allows them to wait until a storm has ended to clear snow and ice from their property. Property owners are required to be non-negligent, and are thus held accountable. The public is on notice as to the rule and can easily identify when it is in progress, so they can choose to either avoid the snow during the storm or proceed with caution. Because the public will be aware of what they will be approaching, injuries will be minimal. And, while the storm-in-progress rule does include occasional difficult determinations, it is much less difficult than the natural accumulation rule, and overall is outweighed by its positives. The storm-in-progress rule is a practical rule that properly gives some legal protection to

---

249. See *supra* Part II.A and note 74.

250. See, e.g., *Barrasso v. Hillview W. Condo. Trust*, 904 N.E.2d 778, 780 (Mass. App. Ct. 2009) (issue of material fact found where plaintiff stepped on what witness described as “hardened, compacted snow and ice”); *Seidlitz v. Beverly Enter., Inc.*, No. 08-P-1123, 2009 WL 902113, at \*1 (Mass. App. Ct. Apr. 6, 2009) (issue regarding plaintiff’s description of tire tracks and grooves).

251. See *supra* note 130 and accompanying text; see, e.g., *Rapp v. Casey*, No. FSTCV065001333S, 2007 WL 3261541, at \*2 (Conn. Super. Ct. Oct. 19, 2007) (affidavits of meteorologists and anyone at the scene of the accident); *Leonard v. G&W Mgmt., Inc.*, No. CV055000179S, 2007 WL 2570459, at \*1 (Conn. Super. Ct. Aug. 28, 2007) (weather reports).

property owners while still retaining a commitment to the safety of the general public.

### CONCLUSION

It is clear that the common law has recognized the general point that snow and ice are fundamentally different from every other hazard and, thus, deserve unique treatment. Unlike other foreign substances, snow and ice are a very large burden to remove and their presence is open and obvious to the general public. Keeping this in mind, it is not surprising that Massachusetts courts had been tentative for so long about imposing an affirmative duty on property owners to clear ice and snow.

However, the court's first attempt to ease the burden on property owners, by way of the natural accumulation rule, eventually proved unsuccessful because it produced arbitrary results and ultimately did not benefit society, as there was no emphasis on public safety.<sup>252</sup> Because the sole focus when applying the natural accumulation rule was on the composition or shape of the snow or ice in question, thereby rendering the property owner's conduct irrelevant, the results were too often inconsistent with common sense and sound legal policy.<sup>253</sup> Property owners got away scot-free without making any snow removal efforts or having negligently removed snow. In addition, the legal determinations were difficult for courts and often led to unclear precedent.<sup>254</sup>

Looking forward, Massachusetts should adopt the storm-in-progress rule as soon as possible, because it properly balances the interests of both property owners and the general public. The rule simply allows property owners to wait until a snowstorm has ended before removing the snow and ice from the property.<sup>255</sup> It does not reduce the property owner's duty—it merely delays when the duty is triggered. And it does not provide absolute immunity during a snowstorm—negligent conduct can result in liability no matter when it is committed, storm or not.

---

252. See *supra* Part II.A. & Part III. Part II.A. explains how the natural accumulation rule was applied. Part III provides *Papadopoulos's* reasoning for abolishing the natural accumulation rule.

253. See *supra* note 252.

254. See *supra* Part II.A. (providing examples that demonstrate how, under the natural accumulation rule, there were often difficult factual determinations based on the shape and composition of the snow and ice at the time of the fall).

255. See *supra* notes 118-20 and accompanying text; see also *Kraus v. Newton*, 558 A.2d 240, 243-44 (Conn. 1989).

The storm-in-progress rule establishes a very minimal level of non-liability: there is no liability to a property owner if no snow removal efforts are taken during a snowstorm. Also, because the window for non-liability is small and because a snowstorm and the subsequent accumulations are visible to the public, the public will be able to predict what type of conditions they are approaching and any injuries that occur during a storm will be minimal. Most importantly, if the storm-in-progress rule is adopted, property owners will have a legal standard they can take to the courtroom to dismiss the most unsubstantiated claims at the summary judgment level, thereby avoiding the jury.

As it will continue to snow in Massachusetts and snow and ice will likely remain slippery, the burden of keeping all areas on a property safe will remain, as always, quite extraordinary. Keeping this in mind and recognizing that we should only place burdens on property owners that can realistically be met, they should be given the gift of a little more time. It cannot be denied that snow is unique and, as it has been historically, it should be given unique treatment. For these reasons, Massachusetts should take the next logical step and adopt the storm-in-progress rule.

*Connor Fallon\**

---

\* J.D., Western New England University School of Law, 2012. I would like to thank Adele Jasperse, my note editor, for providing thoughtful feedback on each draft of this note and the *Western New England Law Review* staff for diligently fine-tuning my writing and citations. Of course, special thanks goes to my father, who helped me to choose this note topic and who is undoubtedly the inspiration for my legal career.



