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MASSACHUSETTS LAW—WORKMEN'S COMPENSATION—EXPANSION OF EMPLOYERS' LIABILITY TO SPOUSES AND CHILDREN OF INJURED EMPLOYEES—*Ferriter v. Daniel O'Connell's Sons, Inc.*, 1980 Mass Adv. Sh. 2075, 413 N.E. 2d 690

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MASSACHUSETTS LAW—WORKMEN'S COMPENSATION—EXPAN-
SION OF EMPLOYERS' LIABILITY TO SPOUSES AND CHILDREN OF
INJURED EMPLOYEES—*Ferriter v. Daniel O'Connell's Sons, Inc.*,
1980 Mass. Adv. Sh. 2075, 413 N.E.2d 690.

I. INTRODUCTION

Workmen's compensation is a system of social insurance that exists by law in every state. Under this scheme, employees are compensated for work-related injuries without proving negligence or fault and without resorting to the courts. The system benefits everyone concerned. Society benefits because injured employees who cannot successfully sue their employers do not have to become wards or dependents of the state. Employers enjoy limited, statutorily determined liability and immunity from "all claims or demands at law, if any, arising from the injury."¹

In *Ferriter v. Daniel O'Connell's Sons, Inc.*² the Massachusetts Supreme Judicial Court seriously disturbed this equilibrium by allowing an injured employee's dependents to sue his employer for loss of consortium and society and for negligently inflicted mental distress.³ As a result, Massachusetts employers no longer are immune from all common-law actions, contrary to the intent of the Massachusetts Workmen's Compensation Act (the Act).⁴

Ferriter not only disturbed workmen's compensation law; it also changed the nature of tort law recovery for the children and spouses of injured people. The court granted the employee's children the right to sue for loss of parental consortium, a right which previously had not existed in any jurisdiction.⁵ The court also held

1. MASS. GEN. LAWS ANN. ch. 152, § 23 (West 1958).

2. 1980 Mass. Adv. Sh. 2075, 413 N.E.2d 690.

3. *Id.*

4. "If an employee files any claim for, or accepts payment of, compensation . . . such action shall constitute a release to the insured . . . of all claims or demands at law, if any, arising from the injury." MASS. GEN. LAWS ANN. ch. 152, § 23 (West 1958) (emphasis added).

5. The Massachusetts Supreme Judicial Court is the first court of last resort of any state to recognize this right. 1980 Mass. Adv. Sh. at 2111, 413 N.E.2d at 710. The intermediate appellate court of only one other state has recognized a child's right to sue for loss of consortium. See *Berger v. Weber*, 82 Mich. App. 199, 267 N.W.2d 124 (1978). The claim of a right to sue on this ground was first made and denied in Massachusetts in *Nelson v. Richwagon*, 326 Mass. 485, 95 N.E.2d 545 (1950).

At common law, a child was held not to have a vested legal right to parental society. 1980 Mass. Adv. Sh. at 2081, 413 N.E.2d at 694. See also W. PROSSER, LAW OF

that emotional distress suffered by a third party as a result of another's injury is compensable even if the third party neither witnessed the accident nor rushed to the scene of the accident.⁶ Although thorough analysis of the tort issues is beyond the scope of this note, their impact on workmen's compensation will be explored.⁷

This note will focus on the workmen's compensation aspect of *Ferriter v. Daniel O'Connell's Sons, Inc.*,⁸ particularly on section 24 of the Massachusetts Workmen's Compensation Act.⁹ Section 24,

TORTS § 125, at 896-97 (4th ed. 1971). Courts refused to recognize the right for a variety of reasons including lack of precedent, fear of a multiplicity of suits, fear of double recovery, and difficulty in determining damages. *Id.* See generally Note, *Interference with Family Relation: Right of a Child to Parental Care*: *Scruggs v. Meredith*, 134 F. Supp. 868 (D. Hawaii 1955), 42 CORNELL L. REV. 115 (1956). The *Ferriter* court commented that children's rights are increasingly being recognized, as evidenced by the large number of commentaries and a Massachusetts statute on the subject. See, e.g., MASS. GEN. LAWS ANN. ch. 229, § 2(1) (West Cum. Supp. 1981). The court held that children have a viable claim for loss of parental consortium. 1980 Mass. Adv. Sh. at 2801-85, 413 N.E.2d at 694-96.

6. Fear of fraud and unlimited liability in the past discouraged recognition of claims for emotional distress. See W. PROSSER, *supra* note 5 § 54, at 329. Courts, however, began to allow emotional distress actions as long as they were accompanied by physical injury. See *Battalia v. New York*, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961); *Hunsley v. Giard*, 87 Wash. 2d 424, 553 P.2d 1096 (1976). The first Massachusetts case to allow recovery for emotional distress was *George v. Jordan Marsh Co.*, 359 Mass. 244, 268 N.E.2d 915 (1971).

Actions for emotional distress arising from harm to another were even less popular because of the greater possibility of fraud and unlimited liability. See generally 2 F. HARPER & F. JAMES, TORTS § 18.4, at 1031-39 (1956); W. PROSSER, *supra* note 5, § 55, at 333-34. To prevent unlimited liability, courts imposed arbitrary limits on the family members who could recover. See generally *Dillon v. Legg*, 68 Cal. 2d 728, 69 Cal. Rptr. 72, 441 P.2d 912 (1968) (creating the zone of danger standard); *Tobin v. Grossman*, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969) (rejecting the arbitrary limits of *Dillon*, but denying the action on policy grounds). Massachusetts first recognized emotional distress arising from harm to another in *Dziokonski v. Babineau*, 375 Mass. 555, 380 N.E.2d 1295 (1978). In the *Dziokonski* decision, a mother died from physical injuries that arose from the emotional distress that she suffered while rushing to the scene of the accident where her child was injured. The court allowed her estate to recover, stating that fear of fraudulent suits was not a reason for denying someone a valid cause of action. *Id.* at 565, 380 N.E.2d at 1301. The court also stated that legal principles, not arbitrary lines, should dictate whether or not recovery is to be had. *Id.* By allowing recovery for emotional distress, the *Ferriter* court similarly relied on principles of proximity and refused to apply any arbitrary limits. 1980 Mass. Adv. Sh. at 2086-87, 413 N.E.2d at 696-97.

7. See text accompanying notes 63-65 *infra*.

8. 1980 Mass. Adv. Sh. at 2075, 413 N.E.2d at 690.

9. "An employee shall be held to have waived his right of action at common law . . . to recover damages for personal injuries if he shall not have given his employer, at the time of his contract of hire, written notice that he claimed such right. . . ." MASS. GEN. LAWS ANN. ch. 152, § 24 (West 1958).

known as the exclusivity clause, provides that the statutory remedy is exclusive unless the employee has elected to retain his common-law rights against the employer.¹⁰ The court's interpretation of this section will be analyzed in light of the history and purpose of the compensation system and the treatment this issue has received in other jurisdictions. This note will demonstrate how the court erred in its decision by failing to grasp the legislative intent behind the compensation system. The Massachusetts Supreme Judicial Court, by disregarding the policies underlying the Act, amended the Workmen's Compensation Act and imposed liability where none was intended.

II. *FERRITER V. O'CONNELL*

A. *Facts*

On May 18, 1979, Michael Ferriter was seriously injured when a load of wooden beams fell from a hoisted nylon sling and struck him on the neck. Ferriter and all the individuals at the scene of the accident were employed by defendant, Daniel O'Connell's Sons, Inc. As a result of the accident, Ferriter was paralyzed from the neck down. Pursuant to sections 34 and 34A of the Massachusetts Workmen's Compensation Act,¹¹ Ferriter was awarded payments of \$211 per week for as long as he remained incapacitated.

On June 7, 1979, Ferriter's wife and children instituted an action against O'Connell. They alleged that O'Connell's willful and wanton recklessness was the cause of Ferriter's accident. Plaintiffs further alleged that they suffered the loss of Ferriter's consortium and society as the result of the accident. Plaintiffs prayed for damages for the emotional and physical distress they suffered from seeing Ferriter at the hospital in his injured condition.

At trial defendant moved for summary judgment,¹² asserting that the complaint failed to state a claim upon which relief could

10. For the employer, however, the act is compulsory. *See id.* § 1(4) (1958 & West. Cum. Supp. 1981).

11. "While the incapacity for work resulting from an injury is total, the insurer shall pay the injured employee . . . compensation equal to two-thirds of his average weekly wage. . . ." *Id.* § 34. Section 34A of the Workmen's Compensation Act provides that "[w]hile the incapacity . . . is both permanent and total, the insurer shall pay [the benefits prescribed in § 34] during the continuance of such permanent and total incapacity." *Id.* § 34A.

12. MASS. R. CIV. P. 56.

be granted. Defendant argued that the children's claims for loss of consortium and the children's and wife's claims for emotional distress were not valid since the Workmen's Compensation Act barred actions at common law.¹³

The trial judge granted defendant's request for summary judgment on the emotional distress claim but denied it for the loss of consortium and society claims. Plaintiffs appealed, and the Massachusetts Supreme Judicial Court granted direct appellate review.¹⁴

In a lengthy, four-to-three decision, the court affirmed in part and reversed in part. Justice Liacos, writing for the majority, stated that a child has an enforceable legal right to parental consortium.¹⁵ The court also reversed the summary judgment on the emotional distress claim.¹⁶ Most importantly, however, the court stated that the exclusivity clause of the Massachusetts Workmen's Compensation Act,¹⁷ which makes the provisions of the Act the exclusive remedy in work-related injuries, does not immunize an employer against suits by an employee's dependents.¹⁸ The court reasoned that loss of consortium and emotional distress actions are not barred because they are independent of the employee's injury and thus are unaffected by the Workmen's Compensation Act.

B. *Rationale*

Section 24 of the Massachusetts Workmen's Compensation Act states that an employee waives all common-law causes of action unless he expressly notifies his employer when he commences employment that he intends to retain them.¹⁹ If the employee fails to reserve those rights or if he accepts compensation under the Act, he is barred from suing his employer at common law.²⁰ *Ferriter* has upset this statutory scheme: employers are now subject to additional liability. In *Ferriter* the Massachusetts Supreme Judicial Court decided that section 24 gives employees full protection in the event of injury but does not guarantee employers limited liability even if they comply with the Act. The employer is not pro-

13. 1980 Mass. Adv. Sh. at 2076-77, 413 N.E.2d at 692.

14. MASS. R. CIV. P. 64.

15. 1980 Mass. Adv. Sh. at 2083, 413 N.E.2d at 695.

16. *Id.* at 2087, 413 N.E.2d at 697.

17. *See* note 9 *supra*.

18. 1980 Mass. Adv. Sh. at 2098, 413 N.E.2d at 703.

19. *See* note 9 *supra*.

20. *See* note 1 *supra*.

tected against suits by the employee's dependents even though the employee receives workmen's compensation benefits.

The *Ferriter* court's entire opinion was based on the narrow wording of the Act's exclusivity clause²¹ and on *King v. Viscoloid Co.*,²² decided by the Massachusetts Supreme Judicial Court in 1914. *King* involved an action by the mother of an injured minor-employee for loss of the child's services.²³ The court held that the child's waiver of his common-law rights under the exclusivity clause and his acceptance of benefits under the Act did not operate as a waiver of his mother's rights.²⁴ It was held, therefore, that the mother had a cause of action against the employer.²⁵ Defendant in *Ferriter* argued that *King* had been overruled implicitly by a 1945 statutory provision²⁶ which provided added compensation for dependents and parents of employees.²⁷ The *Ferriter* court replied that the Massachusetts legislature had not demonstrated an intent to overrule *King*²⁸ and, further, that section 35A was silent regarding limitations on common-law rights.²⁹

Defendant also contended that by allowing dependents of injured employees to bring suit the court reintroduced fault into the system, something that workmen's compensation was supposed to eliminate.³⁰ The court, relying steadfastly on *King*, answered that fault apparently had never been purged entirely from the Massachusetts system.³¹

21. MASS. GEN. LAWS ANN. § 24 (West 1958). See note 9 *supra*.

22. 219 Mass. 420, 106 N.E. 988 (1914).

23. The employer was insured as required by the act. *Id.* at 422, 106 N.E. at 988.

24. *Id.* A common-law right will not be held to have been repealed unless that intent is clearly expressed in a statute. *Pineo v. White*, 320 Mass. 487, 491, 70 N.E.2d 294, 297 (1946). See generally *B. & O. R.R. v. Baugh*, 149 U.S. 368 (1893) (legislature has power to legislate and change or repeal the common law).

25. See note 79 *infra*. See also *Zarba v. Lane*, 322 Mass. 132, 76 N.E.2d 318 (1947); *Slavinsky v. National Bottling Torah Co.*, 267 Mass. 319, 166 N.E. 821 (1929). Both cases support *King* in dicta but do not reach the same result.

26. 1980 Mass. Adv. Sh. at 2094-95, 413 N.E.2d at 707. See MASS. GEN. LAWS ANN. ch. 152, § 35A (West Cum. Supp. 1981).

27. *Ferriter's* dependents were eligible under § 35A but could not receive anything in this case because *Ferriter's* benefits exceeded \$150. MASS. GEN. LAWS ANN. ch. 152, § 35A (West Cum. Supp. 1981).

28. 1980 Mass. Adv. Sh. at 2095, 413 N.E.2d at 701-02.

29. *Id.* at 2095, n.27, 413 N.E.2d at 702 n.27.

30. *Id.* at 2092, 413 N.E.2d at 700.

31. *Id.* at 2092, 413 N.E.2d at 700. The court went on to say "[t]his is the legacy of . . . our unusual statute . . . whose language unambiguously limits the scope of the employee's waiver." *Id.* at 2092-93, 413 N.E.2d at 700.

Defendant's final challenge was that allowing injured employees' dependents to sue for loss of consortium would create an anomaly: dependents of injured workers would be allowed to recover while dependents of deceased workers would remain barred statutorily from recovery.³² The court, however, saw no inconsistency in this result, indicating that it was reasonable for the legislature to have set up a scheme granting the more certain remedy of workmen's compensation to dependents of deceased employees³³ while requiring dependents of surviving employees to litigate the issue of fault and prevail over employers' common-law defenses in order to recover for loss of consortium.³⁴

In conclusion, the court reiterated that the rule in *King* governed *Ferriter* and that section 24 of the Workmen's Compensation Act did not bar third-party claims³⁵ against employers.³⁶

32. *Id.* at 2096, 413 N.E.2d at 702. The Massachusetts Workmen's Compensation statute acts to bar wrongful death actions in work related deaths. MASS. GEN. LAWS ANN. ch. 152, §§ 1(4), 68 (1958 & West Cum. Supp. 1981).

At common law, there was no action for wrongful death. The right was first created by statute in 1847 in New York. 1847 N.Y. LAWS, ch. 450. Massachusetts enacted a wrongful death statute in 1881. 1881 MASS. ACTS ch. 199.

When an employee dies, a wrongful death action is barred because the employee's dependents are included in the definition of "employee" under MASS. GEN. LAWS ANN. ch. 152, § 1(4) (1958 & West Cum. Supp. 1981). This, however, does not mean that actions for emotional distress by a deceased employee's dependents will be barred. The *Ferriter* court held actions for emotional distress to be independent of the injury to the employee and of the compensation act. 1980 Mass. Adv. Sh. at 2098, 413 N.E.2d at 703. Loss of consortium actions similarly might not be barred if the employee dies, because they too are considered to be independent actions. *Id.* at 2097, 413 N.E.2d at 702. The latter situation will depend on future developments in Massachusetts tort law. One state, Georgia, has held that if an injured spouse dies, the action for loss of consortium is limited to losses sustained from the time of the injury to the time of death. *Walden v. Coleman*, 105 Ga. App. 242, 124 S.E.2d 313 (1962).

33. 1980 Mass. Adv. Sh. at 2097, 413 N.E.2d at 702. *See* note 32 *supra*.

34. *Id.* *But see* notes 71-78 *infra* and accompanying text for a discussion of the possibility that the wording of MASS. GEN. LAWS ANN. ch. 152, §§ 66 & 67 (1958 & West Cum. Supp. 1981) may eliminate the employer's common-law defenses in actions by third parties.

35. *Id.* at 2097-98, 413 N.E.2d at 703-04. O'Connell also claimed that the supreme judicial court itself, in *Diaz v. Eli Lilly & Co.*, 364 Mass. 153, 302 N.E.2d 555 (1973), held that consortium actions are derivative and hence stand or fall with the underlying claim. 1980 Mass. Adv. Sh. at 2097 n.29, 413 N.E.2d at 703 n.29. For instance, if the injured spouse was contributorily negligent, a loss of consortium action would be barred. The court summarily disposed of this point by saying that *King* and its progeny show that in such actions the defenses of workmen's compensation and contributory negligence are not treated alike. *Id.* 413 N.E.2d at 703 n.29.

36. No case since 1914 has reached the same result as *King*. *See* note 79 *infra*. The claims for emotional distress were held to be on the same footing as the claims

III. BACKGROUND

Workmen's compensation statutes came into existence in the early 1900's because of the inadequacy of the existing tort law system. The statutes were designed to provide a remedy for employees who, because of the rapid expansion of industry, were being injured with far greater frequency than preindustrial revolution employees.³⁷

Until the adoption of workmen's compensation, injured employees were forced to bring tort actions against their employers. These actions greatly favored the employers in terms of duties and defenses. At common law the employer's only duties were to provide a reasonably safe place to work, to supply tools, to provide a sufficient number of fellow workers, to warn of any latent defects, and to promulgate safety rules.³⁸ In order to receive compensation when he was hurt, the employee had to prove that the employer breached one of these duties. The employee also had to overcome the employer's three main common-law defenses: Assumption of the risk by the employee; contributory negligence by the employee; and negligence by a fellow servant.³⁹ Another obstacle an injured employee had to overcome was the cost of litigation. Finally, since there were few unions to protect employees, there was nothing to stop an employer from firing an employee who dared to file suit.

Society, as well as employees, suffered under this system. Disabled workers were unable to support themselves and their families. The only alternative to letting these people starve was for the government to provide some sort of charity.⁴⁰ This resulted not only in a loss of dignity but in an unfair burden on government as well.

Workmen's compensation statutes were enacted to remedy this situation. The system was not intended to be insurance against

for loss of consortium and, similarly, were not barred. 1980 Mass. Adv. Sh. at 2098, 413 N.E.2d at 703.

37. See generally A. LARSON, WORKMEN'S COMPENSATION LAW §§ 4.00-5.30 (1978); W. PROSSER, *supra* note 5, at § 80; 1 W. SCHNEIDER, WORKMEN'S COMPENSATION TEXT §§ 1-11 (3d ed. 1970).

38. W. PROSSER, *supra* note 5, § 80, at 526.

39. A. LARSON, *supra* note 37, § 4.30, at 25-27. The fellow servant rule was an absolute defense for employers sued by employees who were injured by fellow workers. It provided that employers were not liable for injuries caused by the negligence of fellow servants. W. PROSSER, *supra* note 5, § 80, at 528.

40. A. LARSON, *supra* note 37, § 2.20, at 5-7.

industrial accidents. Rather, workmen's compensation was viewed as a new theory of liability and relief separate from the common law.⁴¹ compensation for injured employees was to be treated as a cost of doing business.⁴² The compensation system is not based on fault but on the existence of an employment relationship.⁴³ The only requirement for compensation is that the injury arise out of and in the course of employment.⁴⁴ Workmen's compensation, therefore, can be characterized as a kind of strict liability against the employer. In accepting this assured but limited compensation, however, the employee has to relinquish his right to sue his employer at common law.⁴⁵

41. "The cost of the product should bear the blood of the workmen." See W. PROSSER, *supra* note 5, at 530 (attributing quote to Lloyd George). The employer could, therefore, treat workmen's compensation as an integral cost of business because the recoveries were statutorily fixed and not subject to the whim of juries. See, e.g., MASS. GEN. LAWS ANN. ch. 152, § 34 (West Cum. Supp. 1981). Workmen's compensation can, therefore, be characterized as a benefit to the employer as well as to the employee. W. SCHNEIDER, *supra* note 37, at §§ 3-4. See *Smither & Co. v. Coles*, 242 F.2d 220 (D.C. Cir. 1957), *cert. denied*, 354 U.S. 914 (1957).

42. W. SCHNEIDER, *supra* note 37, at §§ 4-6. See *Smither & Co. v. Coles*, 242 F.2d 220, 222 (D.C. Cir. 1957); *Meyers v. Buchman*, 7 Ill. App. 2d 385, 397-98, 129 N.E.2d 603, 609-10 (1955); *Young v. Duncan*, 218 Mass. 346, 349, 106 N.E. 1, 7 (1914); *United States Cas. Co. v. Hercules Po. Co.*, 4 N.J. 157, 165-68, 72 A.2d 190, 195-96 (1950); *Reeves v. Parker-Graham-Sexton, Inc.*, 199 N.C. 236, 239-41, 154 S.E. 66, 67-68 (1930).

43. *Cudahy Packing Co. v. Parramore*, 263 U.S. 418, 423 (1923); *Pacific Indem. Co. v. Industrial Accident Comm'n*, 86 Cal. App. 2d 726, 728, 195 P.2d 919, 920-21 (1948); *Bourgeois v. J.W. Crawford Constr. Co.*, 213 La. 991, 998, 36 So. 2d 13, 15 (1948); *Sackolowitz v. Charles Hamburg Co.*, 295 N.Y. 264, 268, 67 N.E.2d 152, 153-54 (1946).

44. This phrase has been given very liberal construction by state courts. See A. LARSON, *supra* note 37, at §§ 6.00-19.63. For examples of how far courts have been willing to go to bring an accident within this requirement, see *Laines v. Workmen's Compensation Appeals Bd.*, 48 Cal. App. 3d 872, 122 Cal. Rptr. 139 (1975) (employee was injured while on way to doctor to receive treatment for a previous work related injury); *Newell v. Moreau*, 94 N.H. 439, 55 A.2d 476 (1947) (employee was fatally injured in a fight on the job in which he was the aggressor); *In re Bletter v. Harcourt, Brace & World, Inc.*, 30 App. Div. 2d 601, 290 N.Y.S.2d 59 (1968), *aff'd without opinion*, 25 N.Y.2d 755, 250 N.E.2d 572, 303 N.Y.S.2d 510 (1969) (employee so happy with his job that he did a dance step in the elevator, fell, and was injured); *Chandler v. Industrial Comm'n*, 55 Utah 213, 184 P. 1020 (1919) (employee bitten by a dog on his way to work).

45. 2A A. LARSON WORKMEN'S COMPENSATION LAW, § 65.10, at 12-1—12-4 (1976); W. PROSSER, *supra* note 5, § 80, at 531. Part of the workmen's compensation compromise was that the employee gave up his common-law rights for the limited but definite statutory remedy and the employer gave up his common-law defenses in exchange for liability that was both limited and predetermined. The benefits were not to compensate for loss of wages or earnings but rather to compensate for loss of earning power. Thus, the employee and his family would not become burdens to so-

Workmen's compensation is fairer, more stable, and more efficient than the common-law tort system. Employers, employees, and society all benefit. Through its strict but limited liability, workmen's compensation assures relief to injured employees and protects employers from exorbitant jury verdicts. Further, it allows the employer to treat compensation costs as a cost of doing business that can be passed on to the consuming public.⁴⁶ Keeping the employee and his employer out of the courtroom, however, stands out as one of its most important functions.⁴⁷ Another key element of workmen's compensation is the exclusiveness of its remedy. Once the employer-employee relationship is established, the compensation scheme's provisions are to control exclusively.⁴⁸ *Ferriter's* disruption of this aspect of workmen's compensation is particularly disturbing.

IV. ANALYSIS

Section 24 of the Massachusetts Workmen's Compensation Act does not mention third-party actions. The *Ferriter* court thus was faced with the task of interpreting an ambiguous statutory section. If a statute's language is clear and unequivocal, its effect will be obvious.⁴⁹ If the language is not clear, it is the duty of the courts to interpret and apply the statute.⁵⁰ Prior use of terms,⁵¹ historic development of the law involved,⁵² and the mischief sought to be remedied⁵³ are factors a court should consider. The court should try to focus on the intent and purpose of the legislature in passing the particular statute.

ciety. W. SCHNEIDER, *supra* note 37, § 3, at 8. Initially, the courts were concerned that compulsory compensation statutes were unconstitutional. (See *Ives v. South Buffalo Ry. Co.*, 201 N.Y. 271, 94 N.E. 431 (1911), a case which held a workmen's compensation statute unconstitutional.) To avoid this problem, most of the early statutes were made elective rather than compulsory. A. LARSON, *supra* note 37, § 5.10, at 37-38. The Massachusetts Workmen's Compensation Act is no longer elective for the employer, except in a few limited circumstances. See MASS. GEN. LAWS ANN. ch. 152, § 1(4) (1958 & West Cum. Supp. 1981). For the employee, however, it remains elective. *Id.* § 24.

46. See note 42 *supra* and accompanying text.

47. A. LARSON, *supra* note 37, at §§ 2.00-2.70, W. SCHNEIDER, *supra* note 37, at § 4.

48. See note 42 *supra* and accompanying text.

49. *Binns v. Lawrence*, 53 U.S. 9, 17-18 (1851).

50. *Morgane v. States Marine Lines, Inc.*, 398 U.S. 375, 392 (1970).

51. *Moore v. United States*, 91 U.S. 270, 274 (1875).

52. *United States v. Wong Kim Ark*, 169 U.S. 649, 653-54 (1897); *Pereira v. New England LNG Co., Inc.*, 364 Mass. 109, 115-16, 301 N.E.2d 441, 445-46 (1973).

53. *Ferullo's Case*, 331 Mass. 635, 637, 121 N.E.2d 858, 859 (1954).

The court rejected defendant's argument that section 24 must be read in accordance with the broad purpose of the Act.⁵⁴ It instead opted for a literal interpretation of the Act's exclusivity clause. Since the Act did not bar actions for emotional distress and loss of consortium, the court reasoned that such actions must be allowed.⁵⁵ Judge Learned Hand once said that "[t]here is no surer way to misread any document than to read it literally. . . ."⁵⁶ This is precisely what the court did in *Ferriter*. The court overlooked the objectives sought by workmen's compensation: To do away with all work-related torts; and to protect both employers and employees.⁵⁷ By narrowly construing the Act's language the court failed to grasp the true purpose of the compensation scheme.⁵⁸

The substantive question presented by *Ferriter* was the extent of protection employers were to receive under the Workmen's Compensation Act. The Massachusetts Supreme Judicial Court had interpreted the same act in the 1914 case of *King v. Viscoloid Co.*⁵⁹ and held that third-party suits are permissible. The court apparently was of the opinion that employers were not meant to have absolute immunity from suits at common law. The *King* court relied heavily on the maxim that an existing common-law right cannot be waived or abrogated by statute unless the statute clearly expresses that intent.⁶⁰ Since the employee in *King* waived only his rights under the Act, his mother's right to sue for loss of services was not barred.⁶¹ The *Ferriter* court, relying on *King*, followed the same reasoning and held that suits by Ferriter's dependents were not barred because they had not been waived explicitly.⁶²

54. 1980 Mass. Adv. Sh. at 2092-94, 413 N.E.2d at 700-01. See text accompanying notes 30-32 *supra*.

55. 1980 Mass. Adv. Sh. at 2093-94, 413 N.E.2d at 700-01.

56. *Guisseppi v. Walling*, 144 F.2d 608, 624 (2d Cir. 1944) (concurring opinion).

57. Workmen's compensation schemes provide "not only for employees a remedy which is both expeditious and independent of proof of fault, but also for employers a liability which is limited and determinate." *Bradford Elec. Co. v. Clapper*, 286 U.S. 145, 159 (1932). See also *Ahmed's Case*, 278 Mass. 180, 179 N.E. 684 (1932). The court held that the compensation act established a system that was to cover all work related injuries. *Id.* at 183, 179 N.E. at 685.

58. See notes 41-45 *supra* and accompanying text.

59. 219 Mass. 420, 106 N.E. 988 (1914). See notes 22-26 *supra* and accompanying text.

60. *Id.* at 425, 106 N.E. at 989.

61. *Id.* at 424, 106 N.E. at 989.

62. 1980 Mass. Adv. Sh. at 2091, 413 N.E.2d at 699.

A. *Massachusetts Law in 1911*

King's analysis, however, is not as persuasive today as it was in 1914 since the actions allowed in *Ferriter* did not exist in 1911, when the Workmen's Compensation Act was enacted. A child's right to recover for loss of parental consortium was created by *Ferriter* itself,⁶³ and the right to recovery for emotional distress without prior physical injury was first granted in Massachusetts in 1971.⁶⁴ Further, recovery for negligently inflicted loss of spousal consortium was not firmly established as an independent right for either spouse until 1973.⁶⁵ When workmen's compensation was adopted in 1911, the Massachusetts legislature undoubtedly could not foresee that employers would be potentially liable for these actions in the future. Third-party claims like the claim in *King* may have been so insignificant that they were not even contemplated by the legislature. Regardless, without legislative approval, employers' liability should not exceed what it would have been in 1911 when the Workmen's Compensation Act was passed. The *Ferriter* court, in allowing loss of consortium and emotional distress actions, has exposed employers to liability after nearly seventy years of immunity from common-law actions. This result is clearly contrary to the policy underlying workmen's compensation.

Even if the legislators inadvertently neglected to exclude third-party actions in the 1911 Act, they may have felt that they corrected the oversight with the passage of section 35A of the Workmen's Compensation Act.⁶⁶ This section provides added compensation when an injured employee has dependents.⁶⁷ Defendant in *Ferriter* argued that section 35A overruled *King*.⁶⁸ To prove this, defendant introduced the *King* court's statement that "[t]his is not a case where the plaintiff has taken any benefit under the act,

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

64. *George v. Jordan Marsh Co.*, 359 Mass. 244, 268 N.E.2d 915 (1971).

65. A spouse's right to recover for negligently inflicted loss of consortium was firmly established in *Diaz v. Eli Lilly & Co.*, 364 Mass. 153, 302 N.E.2d 555 (1973). That is, even a husband's action for negligently inflicted loss of consortium did not exist if the wife had been fully compensated. See generally *Lombardi v. Frangioso & Co.*, 359 Mass. 589, 269 N.E.2d 836 (1971); *Witcomb v. New York, N.H. & H. R.R. Co.*, 215 Mass. 440, 102 N.E. 663 (1913); *Feneff v. New York Cent. & H. R.R. Co.*, 203 Mass. 278, 89 N.E. 436 (1909).

66. MASS. GEN. LAWS ANN. ch. 152, § 35A (West Cum. Supp. 1981). See note 27 *supra*.

67. *Id.*

68. 1980 Mass. Adv. Sh. at 2095, 413 N.E.2d at 702. See also *id.* at n.27.

which it might be contended would stop her from making any claim. . . ."⁶⁹ The *King* court thus admitted that receipt of compensation would preclude additional recovery. Since the mother in *King* had received no compensation, she was not barred. In contrast, the Act now provides compensation for dependents of injured employees. The *Ferriter* majority, however, refused to hold that section 35A made *King* inoperative or that it repealed any common-law rights. The court gave effect to *King* and allowed common-law actions because the Workmen's Compensation Act included no express language invalidating them.⁷⁰ Once again the court ignored the fact that the common-law rights which it recognized did not exist in 1911.

B. *Legislative State of Mind*

In enacting the Workmen's Compensation Act the legislature intended to immunize employers from third-party actions. Sections 66 and 67 of the Act indicate such an intent. When an employee sues an employer for personal injury, section 66 abolishes the employers' common-law defenses if he has not insured himself as required by the Act.⁷¹ Hence, if an uninsured employer is sued by an injured employee, he cannot raise the defenses of contributory negligence, assumption of risk, negligence by a fellow servant, or lack of causation. Section 67 protects employers who have secured insurance and thus have complied with the Act but who are sued by employees who have elected to retain the right to sue at common law and have rejected workmen's compensation.⁷² Section 67 makes section 66 inapplicable to actions for personal injuries if the employer has complied with the Act.⁷³ The employer's common-law defenses, therefore, remain intact.

69. 219 Mass. at 423, 106 N.E. at 989.

70. 1980 Mass. Adv. Sh. at 2095, 413 N.E.2d at 702.

71. MASS. GEN. LAWS ANN. ch. 152, § 66 (West Cum. Supp. 1981) formerly stated:

In actions to recover damages for personal injury . . . sustained . . . by an employee in the course of his employment . . . it shall not be a defense:

1. That the employee was negligent;
2. That the injury was caused by . . . a fellow employee;
3. That the employee . . . assumed . . . the risk . . . ;
4. That the employee's injury did not result from [the] . . . fault of the employer.

Id.

72. See notes 9-10 *supra* and accompanying text.

73. "Section sixty-six shall not apply to actions to recover damages for personal injuries received by employees of an insured person or a self insurer." MASS. GEN. LAWS ANN. ch. 152, § 67 (West 1958).

The interrelationship of sections 66 and 67 is best illustrated by *Zarba v. Lane*.⁷⁴ In *Zarba* an employee of a noncomplying, uninsured employer was injured by a fellow employee in the course of his work. The father of the injured employee sued the employer for consequential damages. Though different from loss of consortium and services, the court held that a cause of action for consequential damages also was an independent right of action.⁷⁵ The suit, however, was barred. Since the father's suit was for consequential damages and not for personal injuries, it was not covered by section 66; hence the employer's common-law defenses were not abolished. The employer thus was able to raise the fellow servant rule and avoid liability.

Section 66 was amended in 1971 to allow the kind of action that was barred in *Zarba*.⁷⁶ Section 67, however, was not similarly amended to include actions for consequential damages arising from personal injuries. In actions for personal injuries or consequential damages an uninsured employer still, correctly, does not have the common-law defenses at his disposal. If the employer is insured and he is sued by an employee who elected to reject workmen's compensation, section 67 reinstates the common-law defenses, but only in actions for personal injuries.⁷⁷ Consequential damages are not mentioned in section 67. The father in *Zarba*, therefore, now would have a cause of action; but the employer, even if he were insured, would not be able to raise his common-law defenses. The legislature could not have intended to make an employer who complied with the Act defenseless against a third party suing for consequential damages. There can be only one explanation: the legislature must have believed that an employer who fully complied with the Act was immune from suit.⁷⁸

74. 322 Mass. 132, 76 N.E.2d 318 (1947).

75. The father's right here was identical to the mother's in *King. Id.* at 135, 76 N.E.2d at 320.

76. "In an action to recover damages for personal injury or consequential damages sustained . . . by an employee . . . [contributory negligence, assumption of risk, the fellow servant rule, or the employer's exercise of reasonable care] shall not be a defense. . . ." MASS. GEN. LAWS ANN. ch. 152, § 66 (West Cum. Supp. 1981). The comment to that amendment states that it establishes "a right of action for consequential damages . . . where a minor child or spouse in the course of his employment sustains a personal injury. . . . *Id.* (Comment by James Smith). The amendment became necessary after cases like *Zarba* had interpreted § 66 as giving no right of action for consequential damages.

77. See note 73 *supra*.

78. It would be interesting to see how the supreme judicial court would rule if presented with this question. To prevent any unfair results, the court probably would read § 67 as implicitly including actions for consequential damages.

C. *Prior Supreme Judicial Court Policy*

In *Ferriter* the court imposed liability on employers who otherwise had been immune from suit for nearly seventy years. Justice Quirico, in his dissent, stated that the majority's decision in effect amended the statute and therefore usurped the legislature's power.⁷⁹ *Ferriter* represents a clear departure from prior court policy. In the past the court has been deferential to the legislature and hesitant to intrude upon its domain. For example, the court refused to disturb workmen's compensation law to accommodate changes in products liability law. In *Longever v. Revere Copper & Brass Inc.*⁸⁰ an employee was injured by a defective machine that was manufactured and marketed by a separate division of the company employing him. The plaintiff's theory of liability was that his employer, which manufactured a product introduced into the stream of commerce, owed him a duty separate from that arising out of the employment relationship.⁸¹ The court disallowed the suit on the basis of the Workmen's Compensation Act. Neither the recent expansion of products liability recovery nor the fact that the defective manufacturing issue was separate from the employer-employee relationship persuaded the justices. The court concluded that changes in the statutory scheme, needed because of shifts in societal values, are matters of concern for the legislature.⁸²

Another example of the Massachusetts Supreme Judicial Court's deference to the legislature is found in *Liberty Mutual Insurance Co. v. Westerlind*.⁸³ The court did not allow a third-party tort-feasor to implead an injured employee's allegedly negligent

79. 1980 Mass. Adv. Sh. at 2106-07, 413 N.E.2d at 708 (Quirico, J., dissenting). Justice Quirico states that he finds it very interesting that no Massachusetts case has ever reached the same result as *King v. Viscoloid* in the 66 years that have passed since the decision was handed down. *Id.* at 2105 n.3, 413 N.E.2d at 707 n.3.

80. 1980 Mass. Adv. Sh. 1767, 408 N.E.2d 857. *See also* *Matthews v. Liberty Mut. Ins. Co.*, 354 Mass. 470, 238 N.E.2d 348 (1968) (wife's suit against insurance company for negligent failure to inspect working conditions held barred by act.)

81. 1980 Mass. Adv. Sh. at 1768, 408 N.E.2d at 858-59. This is the so-called dual capacity doctrine. Under this theory "an employer normally shielded from tort liability by the exclusive remedy principle may become liable in tort to his own employee if he occupies . . . a second capacity that confers on him obligations independent of those imposed on him as employer." A. LARSON, *supra* note 37, §§ 72, 80, at 14-12. *See generally* Comment, *Manufacturers Liability as a Dual Capacity of an Employer*, 12 AKRON L. REV. 747 (1979); Note, *Dual Capacity Doctrine: Third-Party Liability of Employer-Manufacturer in Product Liability Litigation*, 12 IND. L. REV. 533 (1979).

82. 1980 Mass. Adv. Sh. at 1772, 409 N.E.2d at 860.

83. 374 Mass. 524, 373 N.E.2d 957 (1978).

employer for contribution even though contribution is an independent right.⁸⁴ The court reasoned that the person sought to be impleaded, the employer, had to be liable to suit by the injured party, the employee. Since the employee was barred from suing his employer by section 24 of the Workmen's Compensation Act, the third-party tort-feasor could not sue for contribution.⁸⁵ The employee's forfeiture of his common-law rights under section 24 also barred the employer from seeking contribution. *King* and *Ferriter* clearly are at odds with this logic: they rely on the maxim that a person's common-law rights will not be held to be waived or abrogated unless this intent is expressed clearly in a statute. In *Westerlind* the court again noted the inherent unfairness in denying a third party the right to sue an injured individual's employer but stated that, no matter how compelling policies might appear, any change in the law must come from the legislature.⁸⁶ In *Ferriter* the court allowed suit to be brought by an employee's family even though the claim arose from an injury that would not have been actionable by the employee.⁸⁷ This result clearly is contrary to *Westerlind* and *Longever*, which both held that any expansion or restriction of the Act's coverage was to be initiated by the

84. See MASS. GEN. LAWS ANN. ch. 231B, § 1(a) (West Cum. Supp. 1981): "[W]here two or more persons become jointly liable . . . for the same injury . . . there shall be a right of contribution. . . ."

85. 374 Mass. at 526-27, 373 N.E.2d at 959.

86. *Id.* at 527, 373 N.E.2d at 959.

87. The *Ferriter* court, when confronted with *Westerlind*, tried to limit it to its facts. 1980 Mass. Adv. Sh. at 2096 n.28, 413 N.E.2d at 702 n.28. Contribution was disallowed because the party sought to be impleaded, the employer, had to be amenable to suit by the plaintiff, the employee. The employer in *Westerlind* was not amenable to suit because of the exclusivity clause of the compensation act. MASS. GEN. LAWS ANN. ch. 152, § 24 (West 1958). In consortium actions, the person being sued must also be amenable to suit by the person who initially suffered injury. If the initially injured person cannot sue the tortfeasor, neither can the person suing for loss of consortium. *Gardner v. Boston Elevated Ry.*, 204 Mass. 213, 90 N.E. 534 (1910). See generally 36 A.L.R.3d 900, 907 (1971). In *Ferriter*, the employer similarly could not be sued by the injured employee. See also *New Bedford Gas & Edison Light Co. v. Maritime Terminal, Inc.*, 1980 Mass. Adv. Sh. 1319, 405 N.E.2d 653. The inherent unfairness in such a situation is quite evident. A third-party tortfeasor might be only 10% at fault yet be responsible for the entire judgment, while an employer who is 90% at fault would be immune from suit. Other states have reached a more equitable solution to this problem. The leading case is *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 288 (1972). See generally A. LARSON *supra* note 37, §§ 76.01-76.20, at 14-287—14-295; Note, *Employer Liability to Third-Parties Under The Workmen's Compensation and Comparative Negligence Statutes*, 26 U. KAN. L. REV. 485 (1978); Note, *Workers' Compensation—Exclusivity Provisions of the Worker's Compensation Act as a Bar to Third-Party Actions Against Employers*, 14 LAND & WATER L. REV. 587 (1979).

legislature. In *Ferriter* the court legislated by exposing the employer to liability for new causes of action.

D. Peculiarity of Section 24

Workmen's compensation exclusivity clauses can be classified into three categories: The narrow Massachusetts type;⁸⁸ the intermediate California type;⁸⁹ and the broad New York type.⁹⁰ The wording of the different statutes has caused much controversy and has prompted litigation in many states. *Ferriter* conflicts with the decisions reached by most state courts that have considered third-party actions.⁹¹ For example, in *Danek v. Hammer*⁹² the New Jersey Supreme Court considered an exclusivity clause similar to section 24.⁹³ The New Jersey court held that an action for loss of consortium was barred because workmen's compensation was a complete substitute for tort law in the area of work-related law-

88. MASS. GEN. LAWS ANN. ch. 152, § 24 (West 1958) only says that "an employee shall be held to have waived his right of action at common law. . . ." (emphasis added). See DEL. CODE ANN. tit. 19, § 2304 (West 1979).

89. California's exclusivity clause states that compensation under the act is "the exclusive remedy . . . against the employer." CAL. LAB. CODE § 3601 (West Cum. Supp. 1980). States with similarly worded exclusivity clauses are: Kansas (KAN. STAT. ANN. § 44-501 (West Cum. Supp. 1973)); New Jersey (N.J. STAT. ANN. § 34:15-8 (West Cum. Supp. 1980)); North Dakota (N.D. CENT. CODE § 65-01-08 (1960)); Ohio (OHIO REV. CODE ANN. § 4123.74 (Page 1973)); Washington (WASH. REV. CODE ANN. § 51.04.010 (West Cum. Supp. 1981)); West Virginia (W. VA. CODE § 23-2-6 (1978)); Wisconsin (WIS. STAT. ANN. § 102.03 (West Cum. Supp. 1980)).

90. New York's exclusivity clause states: "The liability of an employer . . . shall be exclusive and in place of any other liability whatsoever, to such employee, his personal representatives, spouse, parents, dependents or next of kin . . . [who are] entitled to recover . . . at common law or otherwise on account of such injury or death. . . ." N.Y. [WORK. COMP.] LAW § 11 (McKinney Cum. Supp. 1980). Other states with this type of exclusivity clauses are: Florida (FLA. STAT. ANN. § 440.11 (West Supp. 1967-80)); Georgia (GA. CODE ANN. § 114-103 (Cum. Supp. 1980)); Illinois (ILL. REV. STAT. ch. 48, § 138.4(g) (Smith-Hurd Cum. Supp. 1980-81)); Indiana (IND. CODE ANN. § 22-3-2-6 (Burns 1974)); Iowa (IOWA CODE ANN. § 85.20 (West Cum. Supp. 1980-81)); Kentucky (KY. REV. STAT. ANN. § 342.690 (1980)); Louisiana (LA. REV. STA. ANN. § 23:1032 (West Cum. Supp. 1980-81)); Michigan (MICH. STAT. ANN. § 418.131 (West Cum. Supp. 1980-81)); Minnesota (MINN. STAT. ANN. § 176.061 (West Cum. Supp. 1980-81)); Oklahoma (OKLA. STAT. ANN. tit. 85, § 12 (West 1970)); Oregon (OR. REV. STAT. § 656.018 (1979)); Tennessee (TENN. CODE ANN. § 50-908 (1977)). See also Longshoremen's & Harborworkers' Compensation Act, 33 U.S.C. § 905(a) (1976).

91. See note 95 *supra*.

92. 14 N.J. Super. 607, 82 A.2d 659 (1951), *aff'd*, 9 N.J. 56, 87 A.2d 5 (1952).

93. N.J. STAT. ANN. § 34:15-8 (West Cum. Supp. 1980). This statute was amended in 1961 and is now similar to the California statute. CAL. LAB. CODE § 3601 (West Cum. Supp. 1980).

suits.⁹⁴ States with broader exclusivity clauses, like those enacted in New York and California, also have consistently barred such third-party actions.⁹⁵ The majority in *Ferriter* was not swayed by other states' disposition of the third-party liability issue. Section 24 limits waiver of common-law rights to employees only. This aspect of section 24 was held to distinguish the Massachusetts Workmen's Compensation Act's exclusivity clause from exclusivity clauses enacted in other states.⁹⁶

Section 24, however, may not be as unique as the court claims it is. Neither the *King* nor the *Ferriter* court included section 23 of the Act in its analysis.⁹⁷ Section 23 releases employers from "all claims or demands at law, if any, arising from the injury [if the employee accepts compensation under the Act]."⁹⁸ Releasing the employer from all claims arising from the injury is equivalent to providing the employee with an exclusive remedy against the

94. 9 N.J. 56 at 60-61, 87 A.2d at 7-8. The court decided that characterizing the right of consortium upon which the plaintiff sued as an independent right was irrelevant in light of the purpose of workmen's compensation. *Id.* at 60, 87 A.2d at 7. See notes 111-13 *infra* and accompanying text.

95. The states with the California intermediate statute have disallowed third-party actions based on the policy considerations underlying workmen's compensation statutes. For a list of these states, see note 89 *supra*. See, e.g., *Casaccia v. Green Valley Disposal Co.*, 62 Cal. App. 3d 610, 133 Cal. Rptr. 295 (1976) (recent recognition of a wife's independent right for loss of consortium is irrelevant); *Williams v. Schwartz*, 61 Cal. App. 3d 628, 131 Cal. Rptr. 200 (1976) (statute evinces an unmistakable legislative policy that workmen's compensation benefits are to be the sole remedy); *Bevis v. Armco Steel Corp.*, 156 Ohio St. 295, 102 N.E.2d 444 (1951) (policy of workmen's compensation bars the wife's independent claim); *West v. Zeibell*, 87 Wash. 2d 198, 550 P.2d 522 (1976) (existence of an independent right of action is of no significance). *But see Pedrazza v. Sid Fleming Contractor, Inc.*, 94 N.M. 59, 607 P.2d 597 (1980) (common-law action might not be barred because employee's wife is a nonresident alien and, therefore, not entitled to benefits under the state's compensation act). See also *Johnson v. Lohre*, 508 S.W.2d 785 (Ky. Ct. App. 1974) (wife's action against husband's fellow employee held not barred because it is independent). The statute in *Lohre*, KY. REV. STAT. ANN. § 342.015(1) (1956), was replaced in 1973 by KY. REV. STAT. ANN. § 342.690 (1980), which is similar to the broad New York type of exclusivity clause. Statutes following the New York Model are set out in note 90 *supra*. Courts construing the New York type of statute have had a relatively easy time barring actions like the one in *Ferriter* because of the strict wording of the statutes. See *Haddad v. Justice*, 64 Mich. App. 74, 235 N.W.2d 159 (1975); *Swan v. F.W. Woolworth Co.*, 129 Misc. 500, 222 N.Y.S. 111 (Sup. Ct. 1927). The underlying policy of workmen's compensation has been relied upon as well to bar these actions. See *Bloemer v. Square D Co.*, 8 Ill. App. 3d 371, 290 N.E.2d 699 (1972); *Ellis v. Fallert*, 209 Or. 406, 307 P.2d 283 (1957); *Rosencrans v. Wisconsin Tel. Co.*, 54 Wis. 2d 124, 194 N.W.2d 643 (1972).

96. 1980 Mass. Adv. Sh. at 2092-93, 413 N.E.2d at 700.

97. See notes 22-25 *supra* and accompanying text.

98. See note 4 *supra*.

employer. This is precisely what California's exclusivity clause provides.⁹⁹ It would appear, therefore, that the Massachusetts Workmen's Compensation Act is not as unique as the *Ferriter* court claimed.

Section 23 probably was ignored because it had never been used before in the context of third-party claims. It has been discussed only in relation to suits between employers and employees. Releasing the employer from claims arising from the injury, then, has meant the release of all claims an employee might have. The section's main purpose is to prevent double recovery by the employee.¹⁰⁰ The Massachusetts courts, however, have recognized that section 23 also was meant to protect employers from double liability.¹⁰¹ An argument could be made, therefore, that when section 23 applies, that is, when the employee accepts compensation under the Act, the employer is to be released from all claims, no matter who brings them. The *King* court did not consider section 23 in its decision though, by its terms, that section seems applicable. The *Ferriter* court, in adhering strictly to *King*, similarly failed to consider the full reach of section 23. By ignoring section 23 and concentrating only on section 24 the *Ferriter* court was able to distinguish the Massachusetts Workmen's Compensation Act from the compensation acts enacted in other jurisdictions.¹⁰²

If the *Ferriter* court's reasoning was correct in allowing causes of action like loss of consortium despite the existence of the compensation statute, then it would follow that the courts of the other states have reached incorrect conclusions. According to *Ferriter*, if an employer has committed a tort against an employee's wife or child, it is immaterial that workmen's compensation exists. The wife or child should be able to recover. The courts in the rest of the country, however, disagree with this notion. Negligently in-

99. See note 89 *supra*.

100. *In re West*, 313 Mass. 146, 153-54, 46 N.E.2d 760, 765; *McDonald v. Employers' Liability Assurance Corp.*, 288 Mass. 170, 174, 192 N.E.2d 608, 609-10.

101. 313 Mass. 146, 153-55, 46 N.E.2d 760, 765 (1943).

102. The majority claims that the legislature's rejection in 1911 of a draft workmen's compensation act supports its interpretation. The draft contained the following exclusivity clause: "The right to compensation . . . shall be in lieu of all rights and remedies now in existence . . . and such rights and remedies shall not accrue to employees entitled to compensation." 1980 Mass. Adv. Sh. at 2092 n.20, 413 N.E.2d at 700 n.20. This argument is weak for two reasons. First, there is no proof that the entire draft was rejected because of this clause. Furthermore, the wording of this clause embodies the policies underlying §§ 23 and 24 of chapter 152: A rejection of double recovery for the employee and an exclusive remedy against the employer. See notes 100-01 *supra* and accompanying text.

flicted loss of consortium does not arise from a breach of duty solely toward a wife or child of an injured employee.¹⁰³ Rather, loss of consortium is a tort which arises out of another injury, which in this case happens to be a work-related injury.

When an employer has committed a tort directly against an employee's dependents and the tort is separate from the initial injury to the employee, however, some courts have allowed suit to be brought by the injured parties. Employees' dependents have been allowed to sue employers in several situations: When the employer sent the bloody body of an injured employee home to his pregnant wife, causing shock and miscarriage;¹⁰⁴ when the employer allowed a deceased employee's remains to be mutilated;¹⁰⁵ and when the employer contributed to the alcoholism of the employee.¹⁰⁶ In each of these cases the employer committed a tort against the plaintiff that was separate from the initial injury to the employee, unlike the harm Ferriter's wife and children suffered. The damage they sustained, though separate from Ferriter's injury, arose out of Ferriter's work-related injury. Workmen's compensation was created to replace the common law for this kind of work-related tort.

The majority in *Ferriter* apparently disregarded the experience the New Hampshire Supreme Court and legislature had with this same issue. Before 1971 the New Hampshire Workmen's Compensation Act had an exclusivity clause similar to section 24.¹⁰⁷ The New Hampshire Supreme Court interpreted this statute to allow husbands and wives to bring the kinds of actions recognized in *Ferriter*, loss of consortium and negligent infliction of emotional distress.¹⁰⁸ The exclusivity clause was amended in 1971¹⁰⁹ to bar such actions, apparently in anticipation of the enormous amount of

103. See A. LARSON, *supra* note 45, § 66.30, at 12-28.

104. *Price v. Yellow Pine Paper Mill Co.*, 240 S.W. 588 (Tex. Civ. App. 1922) (action by wife).

105. *Diebler v. American Radiator & Standard Sanitary Corp.*, 196 Misc. 618, 92 N.Y.S.2d 356 (1949) (action by children of deceased employee).

106. *Shell Oil Co. v. Superior Court*, 213 Cal. 596, 2 P.2d 801 (1931) (action by spouse and children).

107. "An employee . . . shall be conclusively presumed to have accepted the provisions hereof and to have waived his rights of action at common law . . . against his employer" for personal injuries. N.H. REV. STAT. ANN. § 281:12 (1977).

108. *American Asbestos Textile Corp. v. American Mut. Liab. Ins. Co.*, 114 N.H. 806, 330 A.2d 451 (1974); *LaBonte v. National Gypsum Co.*, 110 N.H. 314, 269 A.2d 634 (1970).

109. 1971 N.H. LAWS ch. 539:5.

litigation that was sure to result from the court's decision.¹¹⁰ The New Hampshire Supreme Court thus was legislatively overruled because it failed to grasp the intent of the legislature¹¹¹ and failed to promote the policy of workmen's compensation.¹¹² Massachusetts' high court, by following precisely the same path, has risked a similar legislative overruling.

V. IMPACT OF *FERRITER*

Ferriter will return work-related torts to the courtroom, contrary to the purpose of workmen's compensation.¹¹³ Justice Quirico stated in his dissent that "it is not enough to determine whether the legal theories can be extended to cover the cases before us. The question is whether they should be."¹¹⁴ In work-related injury cases no one benefits. Lawsuits generate bad feelings between management and labor and impose tremendous costs on both sides. The main results of litigation are not large awards to the injured, but increased costs to the system and wasted court time.¹¹⁵ Work-related lawsuits, whether they are brought by employees or by third parties, only increase the burden on an already overburdened system.¹¹⁶

In the past decade, Massachusetts has significantly increased the benefits and protections provided to injured employees and their families.¹¹⁷ Industry bears the initial cost, but the increased

110. See *O'Keefe v. Associated Grocers of New England*, 117 N.H. 132, 134, 370 A.2d 261, 262-63 (1977) (citing N.H.S. Journal 2004 (1971)). The 1971 amendment added a sentence to N.H. REV. STAT. ANN. § 281:2 (1978) which stated that a spouse of an employee could not bring a common-law action against the employer. Loss of consortium for a wife, however, was not a common-law action. This technical error soon came to light and was amended by replacing "common-law" with "no direct right of action."

111. *Id.* 1973 N.H. LAWS ch. 481:3.

112. See text accompanying notes 37-52 *supra*. The act was further amended in 1978 to include "any other person who might otherwise . . . recover damages . . . at common law or . . . otherwise. . . ." N.H. REV. STAT. ANN. § 281:12 (1978). *Ransmeier v. Camp Cody, Inc.*, 117 N.H. 736, 378 A.2d 752 (1977) (administrator of deceased employee's estate held not barred from bringing suit) probably prompted this amendment.

113. See text accompanying notes 41-45 *supra*.

114. 1980 Mass. Adv. Sh. at 2107, 413 N.E.2d at 703.

115. See O'Connell, *Bargaining for Waivers of Third-Party Tort Claims: An Answer to Product Liability Woes for Employers and Their Employees and Suppliers*, 1976 U. ILL. L.F. 435. This article discusses the costs that the economy incurs as a result of employees suing third-party manufacturers. The author's concerns are applicable in the context of third parties suing employers.

116. *Id.*

117. For example, the amendments to MASS. GEN. LAWS ANN. §§ 33, 34, 34A, 35 and 36.

expenses are passed on to the consuming public. Society in general ultimately supports workmen's compensation. Nationwide workmen's compensation costs have grown at over twice the rate of the increase in the consumer price index and national disposable income.¹¹⁸ Actions like those allowed in *Ferriter* impose liability on industry above and beyond the strict liability it already incurs under workmen's compensation. This additional liability will only work a greater economic detriment to labor, industry, and society as a whole.¹¹⁹

Remedies in work-related injury cases should be provided through the statutory scheme devised seventy years ago for the benefit of all. The tort system was replaced by workmen's compensation because the former was an inefficient and unjust method of compensating individuals who suffered work-related injuries. The tort system should not be resurrected unless workmen's compensation proves to be a greater evil.¹²⁰ One puzzled commentator laments that he cannot understand why the tort system, "which is such a monster of insensitivity when it is *replaced* by workers' compensation, becomes so morally upright and desirable when it *supplements* workers' compensation."¹²¹ The answer is obvious:

118. The cost that workmen's compensation imposes on society is by no means insignificant. Some national statistics should be enlightening. Between 1971 and 1978, benefits for permanent total disability increased at a rate of 141%, twice the increase of the Consumer Price Index (62%), and twice the increase in spendable earnings (65%). *Statement of the Alliance of Am. Insurers Nat'l Workmen's Comp. Standards Act of 1979: Hearings on S.420 before the Senate Comm. on Labor and Human Resources*, 96th Cong., 1st Sess. 261, 296 (1979). In 1979, it was estimated that the 1980 workmen's compensation costs per employee would rise 851% over the 1970 level while wages per employer would rise only 124%. *Id.* at 715, 734 (statement of the Nat'l Ass'n of Mfrs.). For a general overview of the workmen's compensation systems in this country, see de Leon, *Workers' Compensation: A Legal System in Jeopardy*, 29 FED'N INS. COUN. Q. 337 (1979).

119. Justice Quirico cited some dismal statistics. In 1979, there were 249,404 work-related injuries in Massachusetts. Of these, 14,217 cases were completed; 6,880 lump sum settlements were approved under Mass. Gen. Laws. Ann. ch. 152, § 48; and \$73,515,218 was paid out in benefits. 1980 Mass. Adv. Sh. at 2108, 413 N.E.2d at 708 (citing Ann. Rep. of the Division of Industrial Accidents (1979)).

Ironically, when *Ferriter* was decided a statewide business promotion campaign was in existence entitled "Make it in Massachusetts." The *Ferriter* decision might not only keep new businesses out, it may drive existing ones, especially small ones, out.

120. It is conceded that workmen's compensation is not the panacea it was intended to be, but it is a tremendous improvement over the tort system. See REP. OF THE NAT'L COMM'N ON STATE WORKMEN'S COMPENSATION LAWS 119 established pursuant to the Occupational Safety and Hazards Act, 29 U.S.C. § 676 (1976).

121. O'Connell, *supra* note 115, at 452-53 (emphasis in original). See also Egner, *Personal Injury Awards and Workmen's Compensation*, 18 U.W. ONT. L.

once compensation is assured under the Act, the risks of the common law are worth taking.

The *Ferriter* court refused to consider the effect its decision might have on industry, inflation, and the economy, not to mention small business. The maladies that workmen's compensation was meant to remedy were not thoughtfully considered. The court decided that any hardships employers might face as a result of *Ferriter* could be remedied by additional insurance.¹²² Therefore, in addition to insurance for products liability and workmen's compensation, employers now will have to insure themselves against potential suits for loss of consortium, emotional distress, and any other kind of third-party action that eventually may come into being.

VI. SUGGESTIONS

The Massachusetts legislature might overrule *Ferriter* by rewording section 23 or section 24 to bar third-party claims against employers. By doing this the legislature would align Massachusetts with the majority of jurisdictions. Massachusetts' recent increase in benefits, coupled with an inflationary economy, probably will prompt the legislature to overrule *Ferriter* before it causes an additional financial drain on industry and society.

If the legislature does choose to disallow third-party claims in the workmen's compensation setting, it should amend the Act to incorporate the new causes of action and provide some sort of compensation, just as it amended the state's wrongful death statute to include compensation for loss of consortium.¹²³ Strict adherence to the original provisions of the Act is not necessarily desirable. When the need for compensating a new kind of harm arises, a remedy should be provided. When this remedy has to fit within an existing statutory scheme like workmen's compensation, however, a careful balance must be struck by weighing all rights and interests involved. Clearly, this is a legislative function.¹²⁴

REV. 269 (1978). The concept of fault seems inappropriate in an advanced industrial society as a means of determining compensation. *Id.* at 271.

122. 1980 Mass. Adv. Sh. at 2092, n.19, 413 N.E.2d at 700, n.19.

123. See O'Connell, *supra* note 100, at 435.

124.

The unwritten law possesses capacity for growth; and has often satisfied new demands for justice by invoking analogies or by expanding a rule or principle. . . . [b]ut with the increasing complexity of society, the public interest tends to become omnipresent; and the problems presented by the new demands for justice cease to be simple. Then the creation or recogni-

If the legislature chooses not to act, it is the duty of the courts to reconcile the competing interests involved.¹²⁵ The courts must not ignore the economic consequences of *Ferriter*. In 1979 there were approximately 250,000 work-related injuries in Massachusetts.¹²⁶ The number of consortium actions brought by spouses or children could be tremendous. To minimize the potential economic harm, actions for emotional distress should be defined carefully and should be restricted to prevent unlimited liability.¹²⁷ The value of someone's consortium should be quantified. In this way it can be treated as a determinative and actuarially predictable cost of doing business and thus should not work too great a burden on employers.

VII. CONCLUSION

Workmen's compensation was enacted to benefit both employees and employers. Employees were given limited but assured compensation for their injuries. Employers benefited because their liability was both limited and predictable so that it could be treated as a cost of production. In *Ferriter*, however, the Massachusetts Supreme Judicial Court demonstrated that employers in Massachusetts gained very little under the Massachusetts Workmen's Compensation Act. Employers are not immune from suit by third parties for loss of consortium or for infliction of emotional distress, even when the harm arises from an injury to an employee. This decision, which is contrary to the law in most states, was based primarily on the narrow wording of the exclusivity clause of the Massachusetts Workmen's Compensation Act, which states that employees waive only their own common-law rights. The rights of *Ferriter's* spouse and children, therefore, were held to be preserved.

tion by courts of a new private right may work serious injury to the general public, unless the boundaries of the right are definitely established and wisely guarded. [When so many rights and interests need to be balanced, the legislature is the one that should act.]

International New Serv. v. Associated Press, 248 U.S. 215, 262-63 (Brandeis, J. dissenting).

125. In *Liberty Mut. Ins. Co. v. Westerlind*, 374 Mass. 524, 373 N.E.2d 957 (1978) and *New Bedford Gas & Edison Light Co. v. Marine Terminal, Inc.*, 1980 Mass. Adv. Sh. 1319, 405 N.E.2d 653, notes 110-113 *supra*, the court hinted that if an express contract to indemnify or contribute existed, the action might be allowed. The *Ferriter* decision recognizing certain third party actions as independent of the work shop is analogous support for this proposition.

126. See note 119 *supra*.

127. See note 6 *supra*.

This decision most likely will lead to a flood of lawsuits based on derivative claims brought by families of injured employees. The costs that industry and society as a whole will incur can be expected to be very high unless the legislature acts to limit the effects of this decision.

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