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Chapter 8: Workmen's Compensation

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CHAPTER 8

Workmen's Compensation

SURVEY Staff*

§ 8.1. Introduction. During the *Survey* year, the Supreme Judicial Court considered three cases[1] concerning the limits of workers' compensation as an exclusive remedy for an industrial injury. One case considered what types of harm are included in the definition of "personal injury."[2] Another considered the validity of the "dual capacity" doctrine,[3] which permits an employer to be sued in tort for acts, committed in a capacity other than as an employer, which cause an employee to be injured.[4] The third case considered the right of an employee's family members to sue an employer for injuries which they suffer as a result of an employee's compensable injury.[5] Although the decisions generally maintained narrow limits on employer immunity, the Court failed to identify any general principles which should be controlling in determining the extent of employer immunity in future Massachusetts workmen's compensation cases. The practitioner handling future cases which present questions of first impression, therefore, is advised to pay special attention to the specific situation, statute, and case law relevant to each case, as prediction in this area is uncertain.

The general provisions governing worker's compensation as an exclusive remedy are found in chapter 152, sections 23 and 24 of the General Laws. The statutes literally bar an injured employee from bringing the common law claims for damages based on personal injury unless the employee has not claimed compensation[6] and has given written notice to his employer that he claims the right.[7] Even if these requirements are not met, the Supreme Judicial Court has noted that the statute does not bar all common law ac-

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§ 8.1. [1] Foley v. Polaroid Corp., 1980 Mass. Adv. Sh. 2113, 413 N.E.2d 711; Longever v. Revere Copper and Brass, Inc., 1980 Mass. Adv. Sh. 1767, 408 N.E.2d 857; Ferriter v. Daniel O'Connell Sons, Inc. 1980 Mass. Adv. Sh. 2075, 413 N.E.2d 690.

[2] 1980 Mass. Adv. Sh. at 2117, 413 N.E.2d at 714.

[3] 1980 Mass. Adv. Sh. at 1769, 408 N.E.2d at 859.

[4] *Id.*

[5] *See* 1980 Mass. Adv. Sh. at 2088, 413 N.E.2d at 698.

[6] G.L. c. 152, § 23.

[7] G.L. c. 152, § 24.

tions which may arise out of the injury causing incident.[8] In the *Survey* year the Court identified specifically some of the actions which may be maintained by an employee and his family without violating the terms of the statute.

In addition to the three cases on the limits of employer immunity to actions arising out of personal injury to an employee, the Court also considered the related issue of when an employer's insurer for workmen's compensation, who pays benefits upon the employee's death, can claim reimbursement from monies received by the beneficiaries and others. The specific issue facing the Court was whether such an insurer could be reimbursed where the beneficiaries and others win a money judgment in a suit for wrongful death and loss of consortium against a third party actually liable for the wrongful death.[9]

There were also important developments in workmen's compensation law during the *Survey* year outside the courtroom. The legislature amended section 15 of chapter 152 of the General Laws to give the injured employee a period of time with the exclusive right to sue any third party responsible for his or her injuries.[10] At the federal level, new health and safety regulations, requiring that certain records be kept on employee health and exposure to toxic substances,[11] may give employees claiming work-related injuries improved access to important information.

§ 8.2. Personal Injury—Injury to Dignity—Compensation Not an Exclusive Remedy. The Workmen's Compensation Act (the "Act") appears, in sections 23 and 24, to bar employees who do not meet the specific requirements of those sections[1] from maintaining any action against an employer based on personal injury. Nevertheless, the Court has, through dicta and implication, long taken the view that the statutory term "personal injury" had limited meaning.[2] A case decided during the *Survey* year, *Foley v. Polaroid Corp.*[3] helped to clarify this issue.

In 1916, the Supreme Judicial Court, by way of dicta, remarked upon the distinction made between "personal injury" as used in its broadest sense, and "personal injury" for the purposes of the Workmen's Compensation Act.[4] The Court noted that an act such as libel, malicious prosecution and

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[8] See text and notes at notes 1-6 *infra* at §5.2.

[9] Eisner v. Hertz Corp., 1980 Mass. Adv. Sh. 1667, 1668-69, 407 N.E.2d 1286, 1287-88.

[10] Acts of 1980, c. 488.

[11] *See* 29 C.F.R. §1910.20 (1980).

§ 8.2. [1] Chapter 152, section 23 requires the employee to refuse compensation in order to be able to sue. In addition, section 24 still prevents suit unless the employee has notified the employer in writing of his intention not to waive.

[2] See text and notes at notes 4-19 *infra* for a review of cases implying a limited scope for the term "personal injury."

[3] 1980 Mass. Adv. Sh. 2113, 413 N.E.2d 711.

[4] *In Re Madden,* 222 Mass. 487, 492, 111 N.E. 379, 381 (1916).

false imprisonment, invasion of privacy, alienation of affection of husband and wife, seduction, and false arrest are all personal injuries, but that such injuries would not be personal injuries under the Workmen's Compensation Act.[5] The Court made this observation, however, in the context of a wide ranging discussion on whether physical impact was necessary for there to be injury.[6] The case provided a clue as to where the law might lie in these situations, but it had little legal merit as precedent.

In *Zygmuntowicz v. American Steel & Wire Co.*,[7] the plaintiff, after being discharged by the employer, was assaulted by co-employees and thrown to the ground.[8] Upon finding a revolver on the plaintiff, the watchmen handcuffed him and the police took him to jail.[9] He was prosecuted and acquitted.[10] The plaintiff then brought suit against his employer claiming assault and battery, false arrest and imprisonment, and malicious prosecution,[11] and received a favorable jury verdict on each count.[12]

On appeal, the Supreme Judicial Court explicitly found an assault on the job to be a personal injury within the meaning of the Act.[13] It therefore held that the trial court erred in denying the defendant a directed verdict on that issue.[14] Nevertheless, without even discussing the exclusivity of the workmen's compensation remedy, the Court affirmed the superior court's denial of the defendant's motion for a directed verdict with regard to the allegations of false arrest and imprisonment and malicious prosecution.[15] The only error which the Court found regarding those allegations related to the lower court's instructing that it was irrelevant whether the defendant's employees were acting as the defendant's agents.[16] There was a strong implication that, if the jury found the employees to be agents of the defendant, the injuries allegedly sustained by the employee due to false imprisonment and malicious prosecution would not be personal injuries under the Workmen's Compensation Act.[17]

More recently, in 1978, the Supreme Judicial Court reinstated a jury verdict for a plaintiff-employee against the employer and a co-employee for

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[5] *Id.*
[6] *Id.* at 491-92, 111 N.E. at 381.
[7] 240 Mass. 421, 134 N.E. 385 (1922).
[8] *Id.* at 423, 134 N.E. at 386-87.
[9] *Id.* at 423, 134 N.E. at 387.
[10] *Id.*
[11] *Id.* at 423, 134 N.E. at 386.
[12] *Id.*
[13] *Id.* at 424, 134 N.E. at 387.
[14] *Id.*
[15] *Id.* at 425, 111 N.E. at 388.
[16] *Id.* at 425-26, 134 N.E. at 388.
[17] *See id.*

slanderous statements made at a grievance board hearing.[18] The Court analyzed the case as presenting a question of whether statements by witnesses at such a hearing are absolutely privileged.[19] The case gives no indication that any of the parties raised the issue of workmen's compensation as an exclusive remedy, nor did the Court bring up that issue on its own.

Thus, when *Foley* was decided, there was some precedent by dicta and implication that the term "personal injury" in the Act was to be construed narrowly. Nevertheless, the supportive reasoning for the limits of what constitutes a personal injury under the Workmen's Compensation Act, was left to be developed by creative lawyering.

Foley, a Polaroid employee, was charged by a co-employee with assault and rape during a midnight shift.[20] Polaroid conducted a private investigation during which they were alleged to have gone beyond the scope of proper investigation to the point of instigating the filing of criminal charges against Foley.[21] Foley was indicted, tried, and acquitted on both charges.[22] He lost time at work, allegedly due to the emotional and physical distress and injury.[23]

Thereafter, Foley sued Polaroid for intentional infliction of emotional distress, malicious prosecution, injury to his reputation, and violation of his civil rights.[24] Foley's wife claimed that Polaroid's acts had caused damage to the marriage resulting in a loss of consortium.[25] The superior court dismissed Foley's complaint based on Polaroid's argument that the tort action and the action for loss of consortium were barred by the Workmen's Compensation Act.[26]

The Supreme Judicial Court affirmed the superior court's dismissal of so much of the complaint as alleged intentional infliction of emotional distress.[27] Citing *Fitzgibbons's Case,*[28] the Court noted that "emotional distress arising out of employment [is] a personal injury under the act."[29] In response to Foley's argument that in *Fitzgibbons's Case,* the claimant's distress did not result from the employer's conduct,[30] the Court stated that *Albanese's Case*[31] made such distinctions invalid.[32] *Albanese's Case,* the

[18] *Ezekiel v. Jones Motor Co., Inc.,* 374 Mass. 382, 384, 372 N.E.2d 1281, 1283 (1978).

[19] *Id.* at 385, 372 N.E.2d at 1284.

[20] 1980 Mass. Adv. Sh. at 2113-14, 413 N.E.2d at 712.

[21] *Id.* at 2114, 413 N.E.2d at 712.

[22] *Id.*

[23] *Id.*

[24] *Id.* (quoting 2A A. LARSON, WORKMEN'S COMPENSATION LAW, § 72.80 at 154 (Supp. 1979)).

[25] 1980 Mass. Adv. Sh. at 1770, 408 N.E.2d at 859.

[26] *Id.* at 1772, 408 N.E.2d at 860.

[27] *Id.* at 1771 n. 7, 408 N.E.2d at 860 n. 7.

[28] *Id.* at 1769, 408 N.E.2d at 859.

[29] *Id.* at 1770, 408 N.E.2d at 859.

[30] 1 R. HURSH, AMERICAN LAW OF PRODUCTS LIABILITY § 1.6 at 15 (2d ed. 1974).

[31] 1 *See* Riley v. Davison Const. Co., Inc., 1980 Mass. Adv. Sh. 1995, 2001, 409 N.E.2d 1279, 1283.

[32] *See* 1980 Mass. Adv. Sh. at 1772, 408 N.E. 2d at 860.

Court noted, made it clear that "recovery may be had under the compensation act when such injury results from specific incidents involving friction with co-workers over the implementation of company policy."[33] The Court thus concluded that Foley's "severe emotional distress resulting from defendant's conduct relative to the charges of rape and assault, is compensable under the act. . . ."[34] The tort action for intentional infliction of emotional distress was therefore barred.[35]

Foley fared better in the other elements of his case. Citing the distinction between personal injuries in general and those covered by the Act[36] the Court held that "the employee's claim for injury to his reputation [defamation] is not the type of personal injury contemplated by G.L. c. 152."[37] The gist of a defamation action, the Court noted, was injury to reputation regardless of the physical or mental harm which may be alleged as elements of damage in the claim.[38] Such damages were deemed "peripheral" to the main thrust of the action.[39] The Court noted that compensation differed from tort damages in that its goal was to provide relief from the inability to earn wages.[40]

In regard to Foley's claim for malicious prosecution, the Court once again noted that the "essence of the tort is not physical or mental injury."[41] Rather, the Court said, such an action deals primarily with interference with the plaintiff's right to be free from unjustifiable litigation.[42] Thus, the Court reversed the superior court's dismissal of the malicious prosecution claim.[43]

The Court also held that the alleged violation of Foley's civil rights was not a compensable injury under the Act.[44] It stated that it "would, of course, be reluctant to hold that civil rights violations were a hazard of employment in the Commonwealth."[45] The Court explained this comment by ruling that the Act protects an employee only in regard to injuries arising out of the " 'nature, conditions, obligations, or incidents of the employment.' "[46] Accordingly, the lower court's dismissal of Foley's civil rights claim was reversed.[47]

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[33] 1980 Mass. Adv. Sh. at 2118, 413 N.E.2d at 714-15.

[34] *Id.*, 413 N.E.2d at 715.

[35] *Id.*

[36] *Id.* at 2119, 413 N.E.2d at 715.

[37] *Id.*

[38] *Id.* at 2119-20, 413 N.E.2d at 715.

[39] *Id.* at 2120, 413 N.E.2d at 715.

[40] *Id.*

[41] *Id.* at 2120, 413 N.E.2d at 716.

[42] *Id.*

[43] *Id.*

[44] *Id.* at 2121, 413 N.E.2d at 716.

[45] *Id.*

[46] *Id.* at n.8, 413 N.E.2d at 716 n.8 (quoting Caswell's Case, 305 Mass. 500, 502, 26 N.E.2d 328, 330 (1940)).

[47] *Id.* at 2121-22, 413 N.E.2d at 716.

Finally, the Court considered Mrs. Foley's claim for loss of her husband's society and companionship. Citing *Ferriter v. Daniel O'Connell Sons, Inc.*,[48] the companion case issued on the same day as *Foley*, the Court held that the compensation act does not bar such claims.[49]

In summing up its position, the Court noted that the distinction between claims for malicious prosecution or defamation versus a claim for intentional infliction of emotional distress should be clear: the essence of the former torts was not physical or mental injury—although such injury might be incidental—while mental harm is the essence of the tort of intentional infliction of mental distress.[50] To further clarify its position, the Court also noted that the central issue in determing whether the Act precludes a common law right of action is the nature of the injury for which the plaintiff makes a claim, not the nature of the defendant's act.[51] *Foley's Case* established clearly that defamation, malicious prosecution, and civil rights violations stand outside the definition of personal injury for purposes of the Workmen's Compensation Act. What is deemed to be at stake in such claims is the injury to a defined right, such as the right to be free from unjustifiable litigation,[52] rather than mental or physical injury, alone.[53]

The Court's distinction between injury to a defined right, with an incidental mental or physical injury, and torts which have mental or physical injury as their essence, begins a trend. This trend allows the employee to sue the employer both under the Act and at common law for a mental or physical injury. An original intent of the Workmen's Compensation Act was to relieve the employee of rebutting the employer's common law defenses in suits based on an injury on the job.[54] The Act, therefore, was not meant to create for the employer a vast immunity from liability for various other losses which it may have caused the employee. There appears, therefore, to be a trend to afford the employee an array of remedies appropriate to the various forms of losses she or he may have suffered at the employer's hands.

§ 8.3. Dual Capacity Doctrine—Separate Divisions of One Employer—Compensation as Exclusive Remedy. During the *Survey* year, the Supreme Judicial Court held that an employee injured in the course of using the employer's machinery may not maintain a products liability suit against

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[48] 1980 Mass. Adv. Sh. 2075, 413 N.E.2d 690. *Ferriter* is discussed at § 5.3 *infra*.

[49] 1980 Mass. Adv. Sh. at 2121, 413 N.E.2d at 716.

[50] 1980 Mass. Adv. Sh. at 2120, 413 N.E.2d at 716.

[51] *Id.* at 2120-21, 413 N.E.2d at 716 (citing Gambrell v. Kansas City Chiefs Football Club, Inc., 562 S.W.2d 163, 168 (Mo. App. 1978)).

[52] *See id.* at 2120, 413 N.E.2d at 716.

[53] *See id.*

[54] *See* Longever v. Revere Copper & Brass, Inc., 1980 Mass. Adv. Sh. 1767, 1770, 408 N.E.2d 857, 859.

the employer, even if the machinery was manufactured by a wholly separate and distinct division of the corporate employer.[1] In this instance, the Court rejected the approach of several other states allowing common law actions against an insured employer under the "dual capacity" doctrine.[2] As explained by Larson,

> [u]nder this doctrine, an employer normally shielded from tort liability by the exclusive remedy principle may become liable in tort to his own employee if he occupies, in addition to his capacity as employer, a second capacity that confers on him obligations independent of those imposed on him as employer.[3]

This doctrine, has been held to include the employer as a landowner,[4] as shipowner or bareboat charterer,[5] or, in a notable case, as a treating physician of the doctor's own injured employee.[6] In California and Ohio the doctrine has been interpreted to allow suit against the employer as manufacturer or distributor of the product causing injury.[7] Nevertheless, the first attempt in Massachusetts to bring suit based on the theory that the employer also functioned in a second capacity failed.[8]

In *Longever v. Revere Copper and Brass, Inc.*[9] the plaintiff was an employee of the Edes Division of the defendant, Revere Copper and Brass, Inc.[10] In March 1977, while operating a casting machine, Longever sustained a severe and permanent injury.[11] The casting machine was manufactured by the defendant's Rome Division.[12] Edes and Rome are wholly separate and distinct, and Revere treated each as an entity unto itself.[13] Rome sold its machinery to the general public as well as to the Edes Division.[14]

The plaintiff brought a products liability suit for defective machinery against Revere.[15] The superior court dismissed the complaint and the

§ 8.3. [1] Longever v. Revere Copper and Brass, Inc., 1980 Mass. Adv. Sh. 1767, 1767-71, 408 N.E.2d 857, 858-59.

[2] *Id.* at 1771, 408 N.E.2d at 860.

[3] 2A A. LARSON, WORKMEN'S COMPENSATION LAW, § 72.80 (1976).

[4] *State v. Luckie,* 145 So. 2d 239, 241, 243 (Fla. 1962).

[5] *Reed v. Yaka,* 373 U.S. 410, 414-16 (1963).

[6] *Duprey v. Shane,* 39 Cal. 2d 781, 792-93, 249 P.2d 8, 15 (1952); *accord* Guy v. Arthur H. Thomas Co., 55 Ohio St. 2d 183, 189-90, 378 N.E.2d 488, 492 (1978).

[7] Douglas v. E. & J. Gallo Winery, 69 Cal. App. 3d 103, 107 Cal. Rptr. 797, 799 (1977); Mercer v. Uniroyal Inc., 49 Ohio App. 2d 279, 283, 285-86, 361 N.E.2d 492, 495, 496 (1977).

[8] 1980 Mass. Adv. Sh. 1767, 1770, 408 N.E.2d 857, 859.

[9] 1980 Mass. Adv. Sh. 1767, 408 N.E.2d 857.

[10] *Id.* at 1768, 408 N.E.2d at 858.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.* at n.3.

Supreme Judicial Court affirmed.[16] In support of his position, the plaintiff expressly relied on the dual capacity doctrine.[17] He argued that Revere was liable based on obligations imposed on it as a manufacturer, and therefore the suit was not barred by the Workmen's Compensation Act.[18]

The Court disagreed. It held that the duties of an employer who also manufactures the equipment used by the employees are not separate and distinct from the general obligations owed to the employee by the employer.[19] The Court rested its opinion on the fact that one of the common law duties of the employer was the responsibility to provide safe and suitable tools and appliances.[20] Before enactment of the Workmen's Compensation Act, an employee could sue the employer in tort for failure to provide safe tools.[21] According to the Court, the Workmen's Compensation Act, in substituting a fixed compensation for injuries occurring at work for the common law right of action, did not alter the employer's duty to provide safe machinery.[22] Rather, the Court found the remedy for the employer's failure to comply with that common law duty is now embraced by the provisions of the Workmen's Compensation Act.[23]

The Court went on to state the proposition that " '[d]ual capacity requires a distinct separate legal *persona,* not just a separate theory of liability. . . .' "[24] In the Court's opinion, the existence of separate divisions was insufficient to establish dual capacity.[25] Any dissatisfaction, the Court stated, with the inadequacies of the Workmen's Compensation Act as the exclusive remedy to this type of injury would best be brought to the legislature and not the courts.[26]

It is important to note, however, that in rejecting Longever's dual capacity claim, the Court explicitly left open the possibility of the doctrine's application in other circumstances.[27] The door is not yet closed, therefore, on all possible dual capacity claims.

The analysis and result in *Longever* are neither well-reasoned nor good policy. The Court itself noted that the employer still owes a duty to provide its employees with safe machinery.[28] This obligation, the Court ruled, is sub-

[16] *Id.* at 1768, 408 N.E.2d at 858.
[17] *Id.* at 1769, 408 N.E.2d at 858-59.
[18] *Id.* at 1768, 408 N.E.2d at 858.
[19] *Id.* at 1770-71, 408 N.E.2d at 859.
[20] *Id.* at 1769, 408 N.E.2d at 859.
[21] *Id.* at 1770, 408 N.E.2d at 859.
[22] *Id.*
[23] *Id.*
[24] *Id.* (quoting 2A A. LARSON, WORKMEN'S COMPENSATION LAW, § 72.80 at 154 (Supp. 1979)).
[25] 1980 Mass. Adv. Sh. at 1770, 408 N.E.2d at 859.
[26] *Id.* at 1772, 408 N.E.2d at 860.
[27] *Id.* at 1771 n. 7, 408 N.E.2d at 860 n. 7.
[28] *Id.* at 1769, 408 N.E.2d at 859.

sumed under the Workmen's Compensation Act.[29] The duties of a manufacturer, however, are clearly distinct from those of the employer. The manufacturer must manufacture a product which is not harmful or defective.[30] It is important to note that had Revere not been able to manufacture its own machinery, it would have had to purchase the casting machine from a third party. In that case, the employee would clearly have had a viable third party suit. An employee's rights should not depend arbitrarily on the choice (based on wealth, business acumen or chance) made by the employer to purchase rather than manufacture, at least through a separate division, its equipment and machinery. In the current era of corporate conglomerates, business mergers, and product diversification, employees will be working in ever greater numbers for employers who maintain various divisions which serve and supply one another. *Longever* places a significant restriction on the remedies available to the employee.

The decision will be a disincentive to the employer to create a safe working environment. An employer shielded from liability has little fiscal or legal pressure to maintain or increase the care used in the design and manufacture of tools and appliances to be used in another corporate division. Immunity breeds irresponsibility.

An underlying policy of the law disfavors immunity from suit and an equally strong policy disfavors deprivation of common law rights without clear statutory authority.[31] In *Longever,* the Court has broadened the employer's immunity without clear statutory authority. It would have been more logical for the Court to view the manufacturing division in question as a manufacturer liable for all harm caused by its products. Following this more logical course would show that any decision to grant immunity from such liability is a major broadening of the Workmen's Compensation Act, and thus the very sort of judicial legislation which the Court claimed to be avoiding.[32]

§ 8.4. Waiver of Common Law Rights—Suit by Family Members of Injured Employee. The most publicized workmen's compensation case of the *Survey* year was *Ferriter v. Daniel O'Connell's Sons, Inc.*[1] In this case the Supreme Judicial Court, by 4 to 3 decision,[2] held that the Act does not bar a suit by a spouse and minor dependent children against an insured employer for their claims for negligent infliction of emotional distress, loss of consor-

[29] *Id.* at 1770, 408 N.E.2d at 859.

[30] 1 R. HURSH, AMERICAN LAW OF PRODUCTS LIABILITY § 1.6 at 15 (2d ed. 1974).

[31] *See* Riley v. Davison Const. Co., Inc., 1980 Mass. Adv. Sh. 1995, 2001, 409 N.E.2d 1279, 1283.

[32] *See* 1980 Mass. Adv. Sh. at 1772, 408 N.E. 2d at 860.

§ 8.4. [1] 1980 Mass. Adv. Sh. 2075, 413 N.E.2d 690.

[2] *Id.* at 2099, 2110, 2111, 413 N.E.2d at 703, 709, 710.

tium, and loss of parental society, even though the injured employee himself was collecting benefits under the Act.[3]

Michael Ferriter, working for the defendant as a carpenter, was seriously injured when a load of beams fell from a hoist, striking him in the neck.[4] Ferriter was hospitalized and has been paralyzed from the neck down since the accident.[5] Ferriter's wife and young children first saw him in this condition in the hospital shortly after the accident.[6] Ferriter received benefits under the Act for the injury.[7]

Mrs. Ferriter and the two children brought suit for negligent infliction of emotional distress,[8] loss of consortium,[9] and loss of parental society.[10] The defendant contended that all of the claims were barred by the Workmen's Compensation Act, in that workers' compensation was the exclusive remedy for Ferriter's injury.[11] The Supreme Judicial Court held that none of the claims was barred by the Act.[12]

The Court's analysis of the workmen's compensation issue was straightforward: it first recognized that the Workmen's Compensation Act required an employee to give up his common law rights against the employer.[13] The Court observed, however, that an employee could give notice that he or she wished to preserve common law rights and reject compensation.[14] The Court then noted that the employee in *Ferriter* had both failed to give notice that he wanted to preserve his rights under chapter 152, section 24, and had accepted compensation, which constituted a release under chapter 152, section 23.[15] Thus, according to the Court, there was no

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[3] *Id.* at 2075, 2097-98, 413 N.E.2d at 691, 703.

[4] *Id.* at 2076, 413 N.E.2d at 691.

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.* at 2085, 413 N.E.2d at 696. The claim for negligent infliction of emotional distress was based on an extension of the principles announced in *Dziokonski v. Babineau*, 375 Mass. 555, 380 N.E.2d 1295 (1978). *Dziokonski* established the right of a parent to sue for negligent infliction of emotional distress where the parent either witnessed the accident to his or her child or came on the scene while the child was still there, and where the parent suffered substantial physical injury as a result. *Id.* at 568, 380 N.E.2d at 1302. In *Ferriter*, the Court agreed with the plaintiff that recovery can be had for substantial physical injury when such injury arises from first seeing the injured spouse/parent in the hospital, so long as the shock followed "closely on the heels of the accident." 1980 Mass. Adv. Sh. at 2086, 413 N.E.2d at 697. See § 6.1, *infra*.

[9] 1980 Mass. Adv. Sh. at 2077, 413 N.E.2d at 692.

[10] *Id.* The dependent children's claim for loss of parental society was based on an extension of the right of a spouse to sue for loss of consortium which was established in *Diaz v. Eli Lilly & Co.*, 364 Mass. 153, 167-68, 302 N.E.2d 555, 564, (1973). In a careful discussion of *Diaz* and numerous other cases, as well as the array of scholarly commentary on the topic, the Court agreed that the children's claim was viable. 1980 Mass. Adv. Sh. at 2077-85, 413 N.E.2d at 692-96. See § 6.2, *infra*.

[11] 1980 Mass. Adv. Sh. at 2076-77, 413 N.E.2d at 692.

[12] *Id.* at 2098, 413 N.E.2d at 703.

[13] *Id.* at 2087-88, 413 N.E.2d at 697-98.

[14] *Id.* at 2088, 413 N.E.2d at 698.

[15] *Id.*

dispute that the employee had waived his rights.[16] The Court characterized the issue at hand as whether the employee's waiver barred his family from recovering against the employer for damage suffered by them.[17]

To decide the issue, the Court first pointed out that, only three years after the 1911 enactment of the progenitor of chapter 152, section 24,[18] it held in *King v. Viscoloid Co.*[19] that a son's waiver under the statute could not waive his parent's independent right to recover for her own injuries.[20] In quoting the old statute, the *Ferriter* Court added emphasis to support its view that the language appeared to expressly limit waiver to the employee only: " '[a]n employee of a subscriber shall be held to have waived *his* right of action....' "[21] The Court then ruled that neither the *King* rule nor the pertinent language of the statute had changed since 1914.[22] After reviewing cases since 1914,[23] the Court concluded that the limited language of chapter 152, section 24 would make it unfair to hold that an employee can waive any person's common law rights but his or her own.[24]

In his majority opinion, Judge Liacos considered *King* a binding precedent in view of its prominence in scholarly discussion, its progeny in later Massachusetts cases, and the legislature's failure to alter the provisions of section 24 since its passage.[25]

The Court went on to make two further clarifications. First, the fact that the family members were dependents under section 35A of the Act was held not to bar their common law suit.[26] Although not explained fully in the opinion, it appears that the employer in *Ferriter* tried to base an argument on chapter 152, section 23, which states that an employee who accepts compensation payments is held to have released all common law claims against his or her employer.[27] Under chapter 152, section 35A, dependents of an injured employee can receive compensation in certain situations.[28] Apparently, the employer argued that the eligibility of dependents to receive compen-

[16] *Id.*

[17] *Id.*

[18] *Id.* at 2088-89, 413 N.E.2d at 698. The old statute was Acts of 1911, c. 751, Part I § 5. The pertinent parts of chapter 152, section 24 are as follows: "[a]n employee shall be held to have waived his right of action at common law ... if he shall not have given his employer written notice that he claimed such right. . . ." *Id.*

[19] 219 Mass. 420, 106 N.E. 988 (1914).

[20] 1980 Mass. Adv. Sh. at 2089, 413 N.E.2d at 698.

[21] *Id.* (citing Acts of 1911, c. 751, Part I, § 5).

[22] 1980 Mass. Adv. Sh. at 2090, 413 N.E.2d at 699.

[23] *Id.* at 2090-91, 413 N.E.2d at 699.

[24] *Id.* at 2091, 413 N.E.2d at 699.

[25] *Id.* at 2092-94, 413 N.E.2d at 700-01.

[26] 1980 Mass. Adv. Sh. at 2095 n.27, 413 N.E.2d at 702 n.27.

[27] *See Id.* The pertinent part of chapter 152, section 23 is as follows: "[i]f an employee files any claim for, or accepts payment of compensation ... such action shall constitute a release. . . ." *Id.*

[28] The pertinent part of chapter 152, section 35A is as follows: "[w]here the injured employee has persons conclusively presumed to be dependent upon him or in fact so dependent, the sum of six dollars shall be added to the weekly compensation payable. . . ." *Id.*

sation under section 35A should trigger a release of the dependents' claims, under section 23.[29] After first agreeing with the employer that it was irrelevant whether the dependents in question actually received benefits,[30] the Court ruled against the employer on the main issue.[31] The Court's position was based on the statutory language of section 23 that receipt of compensation by the employee releases the employer from liability.[32] Family members of injured employees are not, the Court held, employees under the Act.[33]

The Court, in a further effort to clarify its decision, acknowledged that in cases where the employee dies, family members may not pursue their claims for loss of consortium against the employer.[34] This is because chapter 152, sections 1(4) and 68[35] do not allow actions under the wrongful death statute[36] by dependents of employees covered by the Workmen's Compensation Act.[37] In spite of this rule, the Court rejected the defendant's claim that the differing treatment afforded family members of injured employees, who could recover for loss of consortium, and those of a deceased employee, who could not, created an anomalous situation.[38] The Court noted that the two categories of dependents have historically been considered separately by the legislature.[39]

Finally, it should be noted that the Court observed that further proceedings in *Ferriter* may necessitate determining the vitality of the fellow servant rule[40] in Massachusetts.[41] It chose not to consider the issue at that time because neither party had briefed it.[42]

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[29] *See* 1980 Mass. Adv. Sh. at 2095 n.27, 413 N.E.2d at 702 n.27.

[30] *Id.* If the employee's own benefits are high enough, as Mr. Ferriter's were, there can be no dependent's benefits under section 35A. *Id.*; G.L. c. 152, § 35A.

[31] 1980 Mass. Adv. Sh. at 2095 n.27, 413 N.E.2d at 702 n.27.

[32] See note 27 *supra* for the relevant text of chapter 152, section 23.

[33] 1980 Mass. Adv. Sh. at 2095 n.27, 413 N.E.2d at 702 n.27.

[34] *Id.* at 2096, 413 N.E.2d at 702.

[35] The pertinent part of chapter 152, section 1(4) states: "any reference to an employee who has been injured shall, when the employee is dead, also include his legal representatives, dependents and other persons to whom compensation may be payable." G.L. c. 152 § 1(4).

The pertinent part of chapter 152, section 68 states: "sections two B and six C to six F, inclusive, of chapter two hundred and twenty-nine shall not apply to employees of an insured person or a self-insurer. . . ." G.L. c. 152 § 68. The general title of chapter 229 is "Actions for Death and Injuries Resulting in Death."

[36] Chapter 229, section 2B sets out the general rule allowing dependents of employees who die through their employer's negligence to recover damages, unless there is a contrary provision in chapter 152. G.L. c. 229, § 2B.

[37] 1980 Mass. Adv. Sh. at 2096, 413 N.E.2d at 702.

[38] *Id.* at 2096, 2097-98, 413 N.E.2d at 702, 703.

[39] 1980 Mass. Adv. Sh. at 2097, 413 N.E.2d at 702.

[40] In certain situations, an employer can defend against an action arising from an employee's injury by proving that the injury was caused by the negligence of a fellow employee. *See Zarba v. Lane*, 322 Mass. 132, 136, 76 N.E.2d 318, 320-21 (1947). An employer's ability to use this defense is regulated by chapter 152, sections 66 & 67. *See also* Ferriter v. Daniel O'Connell's Sons, Inc., 1980 Mass. Adv. Sh. at 2091 n.18, 413 N.E.2d at 699 n.18.

[41] *Id.* at 2098 n.30, 413 N.E.2d at 703 n.30.

[42] *Id*

While premised on an early case, the Court's decision in *Ferriter* is much in line with the developing modern principles of tort and compensation law. Actions for the loss of consortium were held valid in this state in *Diaz v. Eli Lilly & Co.*[43] With *Ferriter*, the right of action for loss of parental society, a logical extension of *Diaz*, is now firmly established in this commonwealth. To deny these claims to family members of employees injured on the job because of the existence of workers' compensation would be to deny them to some of those most in need of such protection.

The Court's reaffirmation of the independent rights of family members brings to bear some of the fiscal and legal pressure needed to help promote health and safety on the job. Such pressure is largely absent in the relatively low-cost compensation scheme and is attenuated by the Court's decision to reject the dual capacity doctrine in *Longever.*[44] At the same time, *Ferriter* has raised fears of opening the floodgates of litigation. Justice Quirico's dissent expressed concern for the decision's impact on clogged court dockets, on the financial risks to which employers would now be subject and even on the future viability of Massachusetts industry.[45] Judge Quirico even went so far as to cite the number of claims now handled before the Industrial Accident Board and the monetary amount of lump sum settlements as evidence for his position.[46]

Such discussion is a departure from the usual rule of statutory construction that consideration of expenses resulting from a court's reading of the statute should not be allowed to influence the court in reaching its result.[47] If there exists a backlog, solutions should focus on preventing the dilatory tactics of attorneys, expanding the number of judges, and preventing industrial injuries with strong health and safety law. Those suffering from the results of industrial injuries should be the last to bear the brunt of an ineffective court system.

§ 8.5. Third Party Actions—Wrongful Death—Reimbursement of Insurer. As can be seen from the above sections, the Supreme Judicial Court was confronted with a variety of issues this past *Survey* year which dealt only indirectly with the substantive claims and procedures of an employee against an insured employer for an injury occurring on the job. Another major case, also decided this *Survey* year, which falls into a similar category is *Eisner v. Hertz Corporation.*[1] In *Eisner* the Court addressed the complex issues concerning the workmen's compensation insurer's right to reimburse-

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[43] 364 Mass. 153, 167-68, 302 N.E.2d 555, 564 (1973).

[44] 1980 Mass. Adv. Sh. 1767, 1770, 408 N.E.2d 857, 859 (1980). Section 5.3, *supra*, is devoted to the *Longever* case.

[45] 1980 Mass. Adv. Sh. at 2108, 413 N.E.2d at 708.

[46] *Id.* at 2108, 413 N.E.2d at 708.

[47] *In Re Madden*, 222 Mass. 487, 496-97, 111 N.E. 379, 383-84 (1916).

§ 8.5. [1] 1980 Mass. Adv. Sh. 1667, 407 N.E.2d 1286.

ment from monies received by the employee's widow and children as a result of a suit against a third party for wrongful death and loss of consortium.

Chapter 152, section 15 governs suits against persons other than the employer who are liable for injuries for which workmen's compensation is payable.[2] Subject to certain restrictions, section 15 allows either the workmen's compensation insurer or the injured employee to sue the third party liable for the employee's injury.[3] No matter who brings the suit, any recovery up to the amount which the insurer has paid the employee is for the benefit of the insurer.[4] Another key statutory provision is chapter 152, section 1(4), which defines "employee" to include the employee's legal representatives, dependents, and other persons to whom compensation may be paid, if the actual employee is dead.[5] Based on these two provisions as applied to a wrongful death action, the *Eisner* Court held that the language of section 15 governing distribution of proceeds applied to those beneficiaries of a wrongful death action who meet the section 1(4) after-death definition of "employee."[6] The Court held that section 15 controls distribution even where there are other death action beneficiaries who are outside the after-death definition of "employee," which status puts them outside the control of section 15 and therefore on equal footing with the insurer to claim the proceeds of the death action.[7] The Court also held that the insurer was not entitled to reimbursement from that portion of the settlement allocated to loss of consortium.[8]

The employee, Robert Eisner, was injured in the course of his employment as a truck driver.[9] Eisner died 6 days later, leaving a widow, one dependent minor child, and three children over eighteen years of age.[10] Mr. Eisner received compensation benefits for his injuries until his death and thereafter his widow and minor child received death benefits from the insurer.[11]

Mrs. Eisner, as administratrix, brought suit under the provisions of chapter 152, section 15 in the United States District Court, District of Massachusetts, against Hertz Corporation, the lessor of the truck, and International Harvester, the manufacturer of the truck.[12] It also appears that Mrs. Eisner sued as an individual for loss of consortium.[13] The suit was set-

[2] G.L. c. 152, § 15.
[3] *Id.*
[4] *Id.*
[5] G.L. c. 152, § 1 (4).
[6] 1980 Mass. Adv. Sh. at 1671-72, 407 N.E.2d at 1289.
[7] *Id.*
[8] *Id.* at 1673-74, 407 N.E.2d at 1290.
[9] *Id.* at 1667, 407 N.E.2d at 1287.
[10] *Id.*
[11] *Id.* at 1667-68, 407 N.E.2d at 1287.
[12] *Id.* at 1668, 407 N.E.2d at 1287.
[13] *Id.* at 1668, 1673, 407 N.E.2d at 1287, 1290.

tled by an agreement of the parties, which allocated various amounts of the proceeds to the claims for personal injury, loss of consortium, and wrongful death.[14] The insurer joined in the agreement.[15] The statutory beneficiaries of the death action included the three children of the employee over legal age, who did not receive compensation benefits.[16] The insurer sought reimbursement of compensation payments from the amounts recovered by the widow and dependent child.[17]

The United States District Court awarded the insurer reimbursement only from the proceeds of the employee's personal injury claim and denied reimbursement from the death action and action for loss of consortium.[18] The insurer appealed and the United States Court of Appeals for the First Circuit certified two questions to the Supreme Judicial Court for a decision.[19] The first question was whether a workmen's compensation insurer is entitled to be reimbursed under section 15 from those portions of the net proceeds of a third party settlement allocated to recipients of workmen's compensation benefits from wrongful death where the statutory beneficiaries in the death action also included three children who were not recipients of compensation benefits.[20] The second question was whether a workmen's compensation insurer is entitled to be reimbursed under section 15 from those portions of the net proceeds of a third party settlement allocated to the loss of consortium of the widow.[21]

In answering the first question, the Supreme Judicial Court initially had to decide whether section 15 applied to actions for wrongful death.[22] Section 15 generally allows insurers to be reimbursed for any compensation benefits they have paid where the employee recovers from a negligent third party.[23] Based on the reasoning that Mrs. Eisner was an employee within the meaning of §1(4) of the Act,[24] that wrongful death actions have traditionally been considered within section 15,[25] and that since 1971 wrongful death actions have been specifically mentioned in section 15,[26] the Court held that section 15 was applicable to the case at hand.[27]

The Court went on, however, to point out that some of the beneficiaries of the wrongful death action in *Eisner* were not dependents and therefore

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[14] *Id.* at 1668, 407 N.E.2d at 1287.
[15] *Id.*
[16] *Id.* at 1668-69, 407 N.E.2d at 1288.
[17] *Id.* at 1671, 407 N.E.2d at 1289.
[18] *Id.* at 1668, 407 N.E.2d at 1287.
[19] *Id.*
[20] *Id.* at 1668-69, 407 N.E.2d at 1287-88.
[21] *Id.* at 1669, 407 N.E.2d at 1288.
[22] *Id.*
[23] G.L. c. 152, § 15.
[24] 1980 Mass. Adv. Sh. at 1669-70 & n.4, 407 N.E.2d at 1288 & n.4.
[25] *Id.* at 1670, 407 N.E.2d at 1289.
[26] *Id.*
[27] *Id.*

not employees as defined in section 1(4).[28] In such a situation, the Court observed, the share of the proceeds going to the nondependent children was not subordinate to the insurer's right to reimbursement.[29] Indeed, the insurer did not seek reimbursement from the nondependents' shares.[30] The question facing the Court was whether the insurer could still seek reimbursement from the death action shares of the "employees" (the widow and dependent child) under section 15, or whether the presence of nondependents among the death action beneficiaries made section 15 wholly inapplicable.[31]

The primary principle governing the Court's resolution of this question was that an employee "should not recover both workmen's compensation benefits and damages at law for the same injury."[32] The widow and dependent child had received compensation benefits and thus the Court held that the insurer was entitled to reimbursement.[33]

The plaintiff argued the presence of nondependents among the beneficiaries rendered the reimbursement provisions of section 15 entirely inapplicable.[34] The plaintiff's reasoning was based on *Reidy v. Old Colony Gas Co.*[35] which held that the workmen's compensation insurer did not have a right to commence a death action unless all of the beneficiaries to such an action received compensation benefits.[36] Without this right to initiate a section 15 action, plaintiff argued, the insurer has no corresponding right to reimbursement.[37]

The Court rejected plaintiff's position by looking to the language of section 15 which it felt distinguished between those entitled to sue, from which the insurer was concededly excluded, and those entitled to receive proceeds from the suit.[38] "[W]e think," the Court stated, "that the clause, 'the sum recovered shall be for the benefit of the insurer,' applies to any 'employee' action within § 15."[39] Reasoning that there is no connection between the insurer's right to sue and its right to reimbursement,[40] the Court held that the insurer was entitled to proceeds from the widow's and the minor dependent child's share of the settlement.[41]

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[28] *Id.* at 1671, 407 N.E.2d at 1289.
[29] *Id.* at 1671, 407 N.E.2d at 1289 (citing Reidy v. Old Colony Gas Co., 315 Mass. 631, 634-35, 53 N.E.2d 707, 710 (1944)).
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] 315 Mass. 631, 53 N.E.2d 707 (1944).
[36] *Id.* at 634, 53 N.E.2d at 710.
[37] 1980 Mass. Adv. Sh. at 1671, 407 N.E.2d at 1289.
[38] *Id.* at 1672, 407 N.E.2d at 1289.
[39] *Id.*
[40] *Id.*
[41] *Id.* at 1673, 407 N.E.2d at 1290.

The plaintiff also maintained that double recovery was not an issue since the compensation claim and the death action had different elements.[42] In support of this position, plaintiff pointed to the difference between the limited $51.00 weekly benefits received by the widow and her child and the monies available in a death action.[43] The Court was not persuaded. It stated that determination of whether an employee had received double recovery did not focus on the dollar amounts recovered but upon the nature of the injury asserted.[44] The insurer's right to reimbursement would attach, according to the Court, if the injury is compensable.[45] The compensable injury must also create the liability for damage which the plaintiff seeks to enforce, the Court observed.[46] In the instant case, the Court ruled, the compensable injury, death, was the very essence of the plaintiff's claim.[47] Unless the insurer was allowed reimbursement, the Court found, the widow and dependent child would receive double recovery.[48] The Court further noted that the insurer could set off future payments against the sums recovered by the widow and dependent child.[49]

Plaintiff also argued that it would be unfair to award the insurer reimbursement when it did not participate in the risk of the litigation.[50] If she had lost, the plaintiff maintained, the insurer would not have been liable for any of the litigation costs.[51] The Court felt, however, that since section 15 required the insurer to bear its share of the litigation costs when the plaintiff succeeded, the inequity was not unreasonable.[52]

Thus, the *Eisner* Court read section 15 to require a deceased employee's dependents to pay certain proceeds received in personal injury and wrongful death claims to the workmen's compensation insurer, even in those cases where the presence of nondependent wrongful death beneficiaries would have prevented the insurer from initiating the suit. This holding raises a question as to whether the court considered the purpose of section 15, which is to ensure that the wrongdoer bear the ultimate burden of the harm he caused.[53] Assuming that the nondependent children do not have the resources to maintain a suit, unless the widow initiated the third party suit and shouldered its costs and risks, the wrongdoer would escape untouched. The negative effect of modifying the rule against double recovery in this

[42] *Id.* at 1672, 407 N.E.2d at 1289.
[43] *Id.*
[44] *Id.* at 1672, 407 N.E.2d at 1290.
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.* at 1673, 407 N.E.2d at 1290.
[49] *Id.* (citing Richard v. Arsenault, 349 Mass. 521, 524-25, 209 N.E.2d 334, 336 (1965)).
[50] *Id.* at 1673 n.8, 407 N.E.2d at 1290 n.8.
[51] *Id.*
[52] *Id. See* G.L. c. 152, § 15.
[53] *See* Furling v. Cronan, 305 Mass. 464, 467, 26 N.E.2d 382, 385 (1940).

type of case would be slight, compared to the encouragement that adoption of the plaintiff's proposal would give widows and dependent children to pursue the tortfeasor causing their decedent's injury.

The Court then addressed the second question certified by the First Circuit: whether the insurer's right of reimbursement extended to proceeds recovered by Mrs. Eisner for loss of consortium. Section 15 requires reimbursement of the insurer only for injuries for which compensation is payable.[54] The Court pointed out that Mrs. Eisner did not receive compensation payments for loss of consortium, and that chapter 152 nowhere suggests that loss of consortium is a compensable injury.[55] Therefore the insurer was held not to be entitled to reimbursement for the damages paid for loss of consortium.[56]

From a practical point of view, it should be noted that the Court in *Eisner* rendered its decision based on the stipulation of the parties as to the allocation of proceeds as settlement of the various injuries suffered. The Court concluded that the parties were bound by the allocation of $5,000.00 to the widow's loss of consortium and thus the insurer had no claim on that portion of the settlement.[57] It is therefore clearly to the plaintiff's advantage to allocate a reasonable amount to loss of consortium claims in order to shield those monies from the insurer's claims for reimbursement.[58]

§ 8.6. Rights of Employee and Insurer to Initiate Third Party Actions—Section 15 Amended. As discussed with regard to the case of *Eisner v. Hertz Corp.*,[1] chapter 152, section 15 generally allows either an employee with a compensable injury caused by a person other than the insured employer, or the employer's insurer, to bring an action against the third party.[2] Under the 1972 version of section 15, "either the employee or insurer may proceed to enforce the liability of such person, but the insurer may not do so unless compensation has been claimed or paid under an agreement."[3] The employee could maintain complete control over the right to initiate the third party action by bringing the action at law before he claimed or accepted compensation. His right to receive the benefits of the compensation act thereafter was not diminished, since the first sentence of section 15 eliminated any necessity of election between compensation and third party action.[4] If, however, the employee had not already brought the

[54] G.L. c. 152, § 15.

[55] 1980 Mass. Adv. Sh. at 1673, 107 N.E.2d at 1290.

[56] *Id.*

[57] 1980 Mass. Adv. Sh. at 1673, 407 N.E.2d at 1290.

[58] For a discussion of the mechanics of settling a third party claim, see Sugarman, *The Third Party Claim,* WORKER'S COMPENSATION: PRACTICE, SUBSTANCE & PROCEDURE, MCLE-NELI, Inc. (1980 ed.) at 91-98.

§ 8.6. [1] 1980 Mass. Adv. Sh. 1667, 407 N.E.2d 1286. *Eisner* is described in § 5.4 *supra.*

[2] G.L. c. 152, § 15.

[3] Acts of 1971 c. 888, § 1. This version was applicable to cases arising on and after its effective date, January 12, 1972.

[4] G.L. c. 152, § 15.

action against the third party, his filing a claim for compensation or accepting compensation under a voluntary agreement blew a whistle for a race to the courthouse. There was no time within which one party or the other was given the exclusive right to bring the action, but either the employee or the insurer could initiate the action and gain control over the proceeding against the third party.

This situation was corrected by the 1980 amendment, passed this *Survey* year. The following language was added to section 15, "[e]ither the employee or insurer may proceed to enforce the liability of such person, but the insurer may not do so unless compensation has been paid in accordance with sections six, seven, eight, ten or eleven nor until seven months following the date of such injury."[5] The employee therefore has complete control of the right to initiate the third party suit, even if he has brought a compensation claim, for the first seven months after the injury, and even after that date the insurer has no right to bring the action unless it has paid compensation under an agreement,[6] an order of compensation,[7] a decision of a single member,[8] a decision of a reviewing board,[9] or a judgment of the superior or appellate court.[10] The employee thus has unrestricted power to initiate the third party suit, but the insurer has a reserve right to do so if the employee, receiving compensation, fails to take the initiative.

§ 8.7. Federal Health and Safety Regulations—Access by the Employee to Exposure Data And Medical Records. The Massachusetts Industrial Accident Board has the power to issue rules expanding the injured employee's rights to pre-trial discovery in a compensation case.[1] In practice, however, there are no discovery mechanisms available beyond the depositions and interrogatories for which the statute provides.[2] This restriction may be a significant handicap where certain facts essential to an employee's claim of injury are in the exclusive possession of the employer or insurer. Knowledge of the chemical composition and strength of ingredients used in an employer's work process for example, may be vital to the proof of a claim for industrial disease. Yet, the Board has created no direct means whereby the employee can obtain such information prior to a hearing. Ultimately, the employee must rely on the discretion of the single member hearing the case in allowing him or her latitude in overcoming this handicap through cross-examining company experts which he or she has called, through subpoenas, or through taking medical testimony *de bene*.[3]

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[5] Acts of 1980, c. 488, applicable to injuries on or after October 9, 1980.
[6] G.L. c. 152, § 6.
[7] G.L. c. 152, § 7.
[8] G.L. c. 152, § 8.
[9] G.L. c. 152, § 10.
[10] G.L. c. 152, § 11.

§ 8.7. [1] G.L. c. 152, § 5.
[2] *Id.*
[3] *See id.*

In this *Survey* year, however, amendments were made to federal health and safety regulations which aid the employee in obtaining this needed information. 29 C.F.R. § 7 1910.20, effective August 21, 1980, requires employers to give workers and their representatives access to their medical records, exposure data and research studies on toxic substances they work with, and any other files their company keeps on health and safety.[4] The new regulation requires employers to save medical records for 30 years after an employee leaves work, and also to save exposure data and research studies for 30 years.[5] This may prove to be a valuable new rule, especially in the context of the continual weakening of the federal health and safety regulations which have taken place in recent years.

[4] 29 C.F.R. § 1910.20 (a), (b) (1980).
[5] 29 C.F.R. § 1910.20 (d).