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## Chapter 9: Civil Practice and Procedure

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## CHAPTER 9

# Civil Practice and Procedure

JOHN E. BOWMAN, JR.\*

**§ 9.1. Long-Arm Jurisdiction.** In *Carlson Corp. v. University of Vermont*<sup>1</sup> the Supreme Judicial Court extended the expansive interpretation of the Massachusetts long-arm statute given a year earlier in *Good Hope Industries, Inc. v. Ryder Scott Co.*<sup>2</sup> In *Carlson*, the Court held that jurisdiction over the person can be based on an isolated contact between the University and Massachusetts—the fact that the contract between the parties was signed in Boston.<sup>3</sup> The decision, as the Court candidly acknowledged, reaches the “outer limits”<sup>4</sup> of the restraints imposed by the due process clause<sup>5</sup> on a state’s power to exercise jurisdiction over a nonresident defendant. While *Carlson* may satisfy recent Supreme Court decisions curtailing the extraterritorial reach of state court jurisdiction,<sup>6</sup> the decision is nevertheless fraught with difficulties.

Three requirements must be met for a Massachusetts court to exercise jurisdiction over a non-consenting,<sup>7</sup> nonresident defendant. First, the defendant must be given notice that the lawsuit is pending. The notice re-

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§ 9.1 <sup>1</sup> 1980 Mass. Adv. Sh. 659, 402 N.E.2d 483.

<sup>2</sup> 378 Mass. 1, 389 N.E.2d 76 (1979). *Good Hope Industries* held that a Texas corporation was “transacting any business” in Massachusetts and thus subject to the jurisdiction of the Massachusetts courts under G.L. c. 223A, § 3(a), the same provision of the long-arm statute at issue in *Carlson*. The decision rested on reports the defendant sent to the plaintiff in Massachusetts (which were the basis for the lawsuit), telephone calls to the plaintiff, the submission of monthly invoices to the plaintiff in Massachusetts, and payment for the reports drawn from Massachusetts bank accounts. *Id.* at 9-10, 389 N.E.2d at 81-82. The case is discussed in Wodlinger & Kaplan, *Civil Practice and Procedure*, 1979 ANN. SURV. MASS. LAW § 9.1.

<sup>3</sup> 1980 Mass. Adv. Sh. at 663, 402 N.E.2d at 485.

<sup>4</sup> *Id.* at 660 n.2, 402 N.E.2d at 484 n.2.

<sup>5</sup> U.S. CONST. amend. XIV, § 1.

<sup>6</sup> See note 33 *infra*.

<sup>7</sup> The defendant’s consent satisfies all jurisdictional requirements for the exercise of jurisdiction over the person. See, e.g., *National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311 (1964). Cf. MASS. R. CIV. P. 12(h), FED. R. CIV. P. 12(h) (failure to assert lack of jurisdiction over person waives objection.)

quirement, which has both constitutional<sup>8</sup> and statutory<sup>9</sup> elements, is satisfied in most cases and consequently does not merit further discussion. Second, the case must fit within one of the categories listed in the Massachusetts long-arm statute, chapter 223A. In *Carlson*, for example, the question was whether the defendant was “transacting any business” in Massachusetts under section 3(a) of the long-arm statute.<sup>10</sup> Third, the exercise of jurisdiction must not exceed the constitutional boundaries prescribed by the due process clause. Under the widely-known decision in *International Shoe Co. v. Washington*, due process requires “minimum contacts” between the defendant and the forum state.<sup>11</sup> In most cases the attention of both counsel and the court focuses on the constitutional test to the virtual exclusion of the first two requirements. The reason the “minimum contacts” test dominates the analysis is that the Supreme Judicial Court has interpreted the “transacting any business” provision in the Massachusetts long-arm statute to extend to the “limits allowed by the Constitution of the United States.”<sup>12</sup>

The “minimum contacts” test, as the United States Supreme Court has repeatedly emphasized, is “not susceptible of mechanical application; rather the facts of each case must be weighed to determine whether the re-

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<sup>8</sup> *E.g.*, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (“An elementary and fundamental requirement of due process . . . is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”); *Kulko v. Superior Court of California*, 436 U.S. 84, 91 (1978).

<sup>9</sup> *E.g.*, G.L. c. 223A, §§ 4, 6-8; c. 227, § 1. In *Carlson*, service of process on the University was made by certified mail pursuant to G.L. c. 223A, § 6. 1980 Mass. Adv. Sh. at 659, 402 N.E.2d at 483.

<sup>10</sup> 1980 Mass. Adv. Sh. at 659-60, 402 N.E.2d at 483. G.L. c. 223A, § 3 also provides that a Massachusetts court may exercise personal jurisdiction over a nonresident defendant if the cause of action “aris[es] from . . . (b) contracting to supply services in this commonwealth; (c) causing tortious injury by an act or omission in this commonwealth; . . . (d) causing tortious injury in this commonwealth by an act or omission outside this commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this commonwealth . . . .”

<sup>11</sup> *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (“due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he [the defendant] have certain minimum contacts with it [the forum] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice’”). The Supreme Court has recently extended the minimum contacts test beyond *in personam* jurisdiction to *in rem* and *quasi in rem* jurisdiction, saying, “. . . all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.” *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977), *overruling Pennoyer v. Neff*, 95 U.S. 714 (1877). *See also* *Rush v. Savchuk* 444 U.S. 320 (1980) (state court cannot assert jurisdiction over nonresident defendant by garnishing insurance policy within forum state).

<sup>12</sup> “Automatic” *Sprinkler Corp. v. Seneca Foods Corp.*, 361 Mass. 441, 443, 280 N.E.2d 423, 424 (1972); *Good Hope Industries*, 378 Mass. at 6, 389 N.E.2d at 79; (“two questions tend to converge”); *Carlson*, 1980 Mass. Adv. Sh. at 660 n.2, 402 N.E.2d at 484 n.2.

quisite ‘affiliating circumstances’ are present.”<sup>13</sup> In *Carlson*, however, the parties did not heed this admonition about the significance of the underlying facts in determining whether the minimum contacts test was satisfied. The case, as the *Carlson* opinion pointedly remarks, was presented to the Court on an “extremely poor” record which provided “only the bare minimum of information necessary to decide the issue.”<sup>14</sup> *Carlson* thus stands in marked contrast to the extensive factual record in the *Good Hope Industries* case. The latter case was decided on the basis of affidavits, depositions, and exhibits filed in the superior court after a period of pretrial discovery limited to the jurisdictional issue.<sup>15</sup> While *Good Hope Industries* points to no single contact between the defendant and Massachusetts arguably as significant as signing a contract in the state, the “factual constellation” detailed in the opinion<sup>16</sup> makes a more persuasive case for the exercise of jurisdiction over a nonresident defendant than does the record in *Carlson*. The result in *Carlson* is thus somewhat surprising in light of the Court’s prior assertions that “plaintiffs bear the burden of establishing sufficient facts on which to predicate jurisdiction over the defendant.”<sup>17</sup> To some degree, the sparse record in *Carlson* even worked to the defendant’s detriment. The opinion disposes of a portion of the “minimum contacts” test—whether the exercise of jurisdiction would “offend ‘traditional notions of fair play and substantial justice’ ”<sup>18</sup>—by saying that the “record lacks sufficient facts bearing on the issue whether the defendant would be unduly burdened by being required to defend this suit in Massachusetts.”<sup>19</sup>

The following picture of the *Carlson* litigation emerges from the opinion. The Carlson Corporation, a Massachusetts corporation with its principal place of business in the state, sued the University of Vermont for the

<sup>13</sup> *Kulko v. Superior Court of California*, 436 U.S. 84, 92 (1978). The Supreme Court went on to say that in this area “few answers will be written ‘in black and white. The greys are dominant and even among them the shades are innumerable.’ ” *Id.* (quoting *Estin v. Estin*, 334 U.S. 541, 545 (1948)). In the *Good Hope Industries* opinion, the Supreme Judicial Court noted the exercise of long-arm jurisdictions is “sensitive to the facts of each case.” 378 Mass. at 2, 389 N.E.2d at 78.

<sup>14</sup> 1980 Mass. Adv. Sh. at 660 n.2, 402 N.E.2d at 484 n.2.

<sup>15</sup> *Good Hope Industries*, 378 Mass. at 2-3, 389 N.E.2d at 77-78.

<sup>16</sup> 378 Mass. at 6, 389 N.E.2d at 80.

<sup>17</sup> *Id.* at 3, 389 N.E.2d at 78; *Droukas v. Divers Training Academy, Inc.*, 375 Mass. 149, 151, 376 N.E.2d 548, 549 (1978). See also *Carlson*, 1980 Mass. Adv. Sh. at 661 n.4, 402 N.E.2d at 484 n.4.

<sup>18</sup> *International Shoe*, 326 U.S. at 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

<sup>19</sup> *Carlson*, 1980 Mass. Adv. Sh. at 666, 485 N.E.2d at 487. Cf. *Doe v. Roe*, 377 Mass. 616, 620, 387 N.E.2d 143, 145 (court’s conclusion that plaintiff would not be unduly inconvenienced by litigation in New Hampshire apparently based on inference from slight evidence in record). Read together, the *Carlson* and *Good Hope Industries* decisions indicate that an objection to jurisdiction over the person can rarely be decided on the basis of an unadorned motion to dismiss under MASS. R. CIV. P. 12(b)(2). Compare MASS. R. CIV. P. 12(b)(4) (insufficiency of process) and 12(b)(5) (insufficiency of service of process). 1980

balance due on a contract under which the plaintiff was constructing a university building in Burlington, Vermont. The appellate record reflected an almost complete lack of contacts between the defendant, the University, and the forum, Massachusetts. The University had no offices in Massachusetts, nor did it own any real estate or offer any courses in Massachusetts. In addition there is no reference in the opinion to the presence of any University agents or employees in Massachusetts.<sup>20</sup>

The Court relied on an isolated act in Massachusetts—the signing of the construction contract—to satisfy both the statutory “transacting any business” test and the constitutional “minimum contacts” test. Notably, the execution of the contract is devoid of other contacts between the University and Massachusetts. The University, for example, did not solicit bids for the construction contract in Massachusetts, either directly or by publication. Instead, the Carlson Corporation initiated contact with the University by a small number of telephone calls and letters. Apart from saying that the Carlson Corporation hand-delivered the “prequalification documents” in Vermont, the opinion provides no detail as to the negotiations over the contract. Apparently the final design proposal was also delivered to Vermont, and a special University review panel met in Vermont to select the contractor. The Court’s opinion, quite correctly, does not suggest that these factors associated with the solicitation or negotiation of the contract meet the “minimum contacts” standard.<sup>21</sup>

Performance of the contract also took place in Vermont. The building itself was constructed in Vermont, and circumstances related to performance which have justified the exercise of *in personam* jurisdiction over nonresident defendants in other cases were absent. The University’s construction supervisor, for example, did not meet in Massachusetts with Carlson’s representatives. Instead, daily meetings were held at the Vermont

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Shifting the burden of producing evidence to the defendant is not inappropriate if, as the Supreme Judicial Court does, one views *International Shoe* as establishing a multilayered jurisdictional test. Under this view the plaintiff must first demonstrate compliance with *International Shoe*’s threshold requirement (“minimum contacts,” or the defendant’s “purposeful activity” in the forum state). The court may then consider the balance of inconvenience between the parties under *International Shoe*’s second prong (whether the exercise of jurisdiction would “offend ‘traditional notions of fair play and substantial justice.’”). See note 11 *supra*. The defendant will, in any event, want to produce evidence on the related *forum non conveniens* issue. See text following note 63 *infra*. Note, however, that “considerations of fairness” between the parties cannot substitute for contacts between the defendant and the forum state. *Rush v. Savchuk*, 444 U.S. 320, 332 (1980). See also *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980). Cf. Note, *Long Arm Jurisdiction in Commercial Litigation: When is a Contract a Contact*, 61 B.U. L. REV. 375, 382-384 (1981) (three-step, sequential jurisdictional test).

<sup>20</sup> *Carlson*, 1980 Mass. Adv. Sh. at 659-61, 402 N.E.2d at 483-84.

<sup>21</sup> *Id.* at 660-61, 402 N.E.2d at 483-84. Cf. *Droukas v. Divers Training Academy, Inc.*, 375 Mass. 149, 153, 376 N.E.2d 548, 550 (1978).

construction site.<sup>22</sup> Carlson did not perform any of the work on the project in Massachusetts. Payment also took place in Vermont, as Carlson mailed invoices to the University and the checks were mailed from Vermont.<sup>23</sup>

Ironically, as the opinion points out, the contract between the plaintiff and defendant was signed in Boston in order to “accommodate” third parties—officials of the U.S. Department of Housing and Urban Development and U.S. Office of Education—whose involvement was limited to financing the construction. There is no suggestion, however, that the financing was pertinent to the plaintiff’s breach of contract action, and the Court did not rely on the contacts between these federal officials and Massachusetts as the basis for asserting jurisdiction over the University.<sup>24</sup>

Before it reached the constitutional issue the Court dealt summarily with the statutory coverage issue. Section 3(a) of the long-arm statute permits Massachusetts courts to exercise jurisdiction over a nonresident defendant “as to a cause of action in law or equity arising from the person’s transacting any business in this commonwealth.” Deciding that the case satisfied section 3(a)’s requirements, the opinion merely states that “[t]here can be no doubt that physically signing a contract in Massachusetts is, in literal terms, transacting business in Massachusetts, if the cause of action arises from that contract.”<sup>25</sup> Although the transacting business provision was also read expansively in the *Good Hope Industries* decision, the approach adopted by the Court in *Carlson* and *Good Hope Industries* departs from the more restrictive interpretations of section 3(a) in earlier decisions. In *Droukas v. Divers Training Academy, Inc.*, for example, the Court held that an “isolated transaction” did not satisfy the long-arm statute.<sup>26</sup> Similarly, in “*Automatic*” *Sprinkler Corp. v. Seneca Foods Corp.* the Court stated that “affirming a contract” was not transacting business within the meaning of section 3(a).<sup>27</sup> While only in *Carlson* did the contract signing ceremony take place in Massachusetts, *Droukas* and “*Automatic*”

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<sup>22</sup> Contrast *Whittaker Corp. v. United Aircraft Corp.*, 482 F.2d 1079 (1st Cir. 1973), a diversity of citizenship case where the court upheld jurisdiction under G.L. c. 223A, § 3(a), over one defendant in a breach of contract action where the plaintiff’s production took place in Massachusetts and the defendant “either actively supervised or actually participated” in production of the product, but denied jurisdiction over two other nonresident defendants who were “passive purchasers.” *Id.* at 1083, 1084. See also *Lakeside Bridge & Steel Co. v. Mountain State Construction Co., Inc.*, 597 F.2d 596, 601 (7th Cir. 1979), cert. denied, 445 U.S. 907 (1980) (performance of contract alone in forum state insufficient contact); *Anderson v. Shiflett*, 435 F.2d 1036 (10th Cir. 1971) (same). See also cases cited in note 58, *infra*.

<sup>23</sup> 1980 Mass. Adv. Sh. at 661-62, 402 N.E.2d at 484-85.

<sup>24</sup> *Id.* at 661, 402 N.E.2d at 484.

<sup>25</sup> *Id.* at 662, 402 N.E.2d at 485.

<sup>26</sup> 375 Mass. 149, 154, 376 N.E.2d 548, 550 (1978).

<sup>27</sup> 361 Mass. at 445, 280 N.E.2d at 424. See also *Vencedor Manufacturing Co. v. Gougher Industries*, 557 F.2d 886 (1st Cir. 1977); *Whittaker Corp. v. United Aircraft Corp.*, 482 F.2d 1079 (1st Cir. 1973).

*Sprinkler* do suggest that the Court's most recent interpretation of the reach of section 3(a) is not free from doubt.<sup>28</sup>

The second, and more significant, issue raised by *Carlson* is whether the result in *Carlson* satisfies the "minimum contacts" requirement imposed by the due process clause.<sup>29</sup> Whether the execution of a single contract within a state is a "minimum contact" sufficient to justify assertion of jurisdiction over a nonresident defendant is a question that has "deeply divided" both federal and state courts.<sup>30</sup> A recent "analysis of the conflicting positions of the federal courts of appeals" concluded that the "mere act of entering into a contract with a resident of the forum [state] does not constitute purposeful activity in the constitutional sense."<sup>31</sup> The Supreme Court recently declined to address this question,<sup>32</sup> and prediction of the future course of its decisions in this area is a perilous undertaking. The Supreme Court has, however, rendered four major decisions on extraterritorial assertions of jurisdiction in the past four years, each time striking down state court assertions of jurisdiction over nonresident defendants.<sup>33</sup> At the very least, the trend and tenor of these decisions cast doubt on the correctness of the constitutional conclusion reached in the *Carlson* case.

<sup>28</sup> *Good Hope Industries* distinguishes *Droukas* and "*Automatic*" *Sprinkler*. 378 Mass. at 8, 389 N.E.2d at 80-81.

<sup>29</sup> The state court's interpretation of section 3(a) is not reviewable by the Supreme Court. See 28 U.S.C. § 1257. Cf. *Fox Film Corp. v. Muller*, 296 U.S. 207 (1935) (no jurisdiction to review state court decision based on an adequate and independent state ground).

<sup>30</sup> *Lakeside Bridge & Steel Co. v. Mountain State Construction Co.*, 445 U.S. 907, 909 (1980) and cases cited (White, J., dissenting from denial of certiorari). See generally Currie, *The Growth of the Long-Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. L. F. 533, 563 (cases "frequently asserted that isolated transaction by a foreign corporation did not constitute 'doing business' within the State"); *Developments in The Law—State Court Jurisdiction*, 73 HARV. L. REV. 909, 926 (1960) (isolated contract "more difficult" jurisdictional problem because "[u]nlike a tort, which can usually be localized, a contract is likely to involve more than one state in its negotiation, execution, and performance"); Annot., 62 L. Ed. 2d 853 (1980).

<sup>31</sup> Note, *Long Arm Jurisdiction in Commercial Litigation: When is a Contract a Contact?*, 61 B.U. L. REV. 375, 384 (1981). See also Note, *Federalism, Due Process, and Minimum Contacts: World-Wide Volkswagen Corp. v. Woodson*, 80 COLUM. L. REV. 1341, 1348-49 (1980) ("gray area of single contacts").

<sup>32</sup> *Lakeside Bridge & Steel Co. v. Mountain State Construction Co.*, 445 U.S. 907 (1980).

<sup>33</sup> *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Rush v. Savchuk*, 440 U.S. 320 (1980); *Kulko v. Superior Court of California*, 436 U.S. 84 (1978); *Shaffer v. Heitner*, 433 U.S. 186 (1977). These decisions have spawned a rush of academic commentary. The more recent publications include Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77; Jay, "*Minimum Contacts*" as a Unified Theory of Personal Jurisdiction: A Reappraisal, 59 N.C. L. REV. 429 (1981); Louis, *The Grasp of Long Arm Jurisdiction Finally Exceeds its Reach: A Comment on World-Wide Volkswagen Corp. v. Woodson and Rush v. Savchuk*, 58 N.C.L. REV. 408 (1980); Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 N.W.U. L. REV. 1112 (1981). For a seminal article predating the decisions see Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241.

*Carlson*, as is customary, resorts to the Supreme Court's 1957 decision in *McGee v. International Life Insurance Co.*<sup>34</sup> to support jurisdiction based on the execution of an isolated contract in the forum state.<sup>35</sup> *McGee* must be read, however, in light of the cautionary note sounded by the Supreme Court only six months later in *Hanson v. Denckla* where the Court said that it is a "mistake to assume that this trend [of expanding personal jurisdiction over nonresidents] heralds the eventual demise of all restrictions on the personal jurisdiction of state courts."<sup>36</sup> This admonition deserves serious consideration in light of the Supreme Court's recent decisions which appear to infuse new life into *Hanson v. Denckla*.<sup>37</sup> Hence, the Supreme Judicial Court may have unduly relied on *McGee*, especially since *McGee* can be distinguished from *Carlson*. In *McGee*, the plaintiff's son, a resident of California (the forum state), purchased a life insurance policy from an out-of-state company. The defendant insurer subsequently mailed a reinsurance certificate into California which the insured accepted in California, and premium payments were mailed to the defendant from California.<sup>38</sup> Thus, *McGee* adds the elements of solicitation and payment, which were absent in *Carlson*, to the formation of the contract within the forum state.<sup>39</sup> In addition, the insurance company in *McGee* apparently conducted interstate business on a widespread basis, even though it had only isolated contacts with California. In contrast, nothing in *Carlson* suggests the University of Vermont should be treated like a nationwide enterprise.<sup>40</sup>

<sup>34</sup> 355 U.S. 220, 223 (1957) ("sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State").

<sup>35</sup> 1980 Mass. Adv. Sh. at 664, 665, 402 N.E.2d at 486.

<sup>36</sup> 357 U.S. 235, 251 (1958). The "trend" was set forth in *McGee*, 355 U.S. at 222-23.

<sup>37</sup> E.g., *World-Wide Volkswagen*, 444 U.S. at 293-94 (discussed in connection with assertion that Court has "never accepted the proposition that state lines are irrelevant for jurisdictional purposes"); *Kulko*, 436 U.S. at 93-94; *Shaffer v. Heitner*, 433 U.S. at 215-16. See also *Anderson v. Shifflet*, 435 F.2d 1036 (10th Cir. 1971).

<sup>38</sup> *McGee*, 355 U.S. at 221-22. See *Carlson*, 1980 Mass. Adv. Sh. at 664 n.7, 402 N.E.2d at 486 n.7.

<sup>39</sup> The facts in *McGee* also illustrate the difficulty in many cases of identifying a single *locus* where the contract was made. See *Droukas*, 375 Mass. at 151, 157, 376 N.E.2d at 549-50, 553; "Automatic" *Sprinkler*, 361 Mass. at 444-45, 280 N.E.2d at 425. Cf. *Rush v. Savchuk*, 444 U.S. at 328 ("fictional presence" of insurance policy within state insufficient contact).

<sup>40</sup> *McGee*, 355 U.S. 223. See *World-Wide Volkswagen*, 444 U.S. at 298. Whether *Carlson* should have been decided differently because a state university—not a business corporation—was the defendant will not be discussed because it is an infrequent situation. See "Automatic" *Sprinkler*, 361 Mass. at 446, 280 N.E.2d at 426 ("We see a distinction . . . because of the nature of interstate insurance business where such insurers commonly choose to do business across State lines.") In *Nevada v. Hall*, 440 U.S. 410 (1979), the Supreme Court held a state has no constitutional immunity from suit in the courts of a sister state. *Nevada v. Hall* was a tort action arising out of a car accident in California involving a car owned by Nevada and driven by an employee of the state university, so there was no question that sufficient "minimum contacts" existed between the defendants (which included the State of Nevada and the University of Nevada) and the forum state to exercise jurisdiction over the person.



More importantly, recent Supreme Court decisions have emphasized that a decisive factor in *McGee* was that California had expressed, by statute, a special interest in asserting *in personam* jurisdiction over nonresident insurers. These decisions also suggest that general long-arm statutes, such as the Massachusetts statute involved in *Carlson*, do not carry special weight in assaying the constitutionally required "minimum contacts."<sup>41</sup> The *Carlson* result thus may not be supported by *McGee*.

Interestingly enough, the distinction between special and general long-arm statutes drawn by recent Supreme Court decisions also accords with prior Massachusetts authority. In *Wolfman v. Modern Life Insurance Co.*<sup>42</sup> the Supreme Judicial Court upheld the exercise of jurisdiction over a New York insurer on facts analogous to those in *McGee*. *Wolfman*, furthermore, was expressly distinguished in "*Automatic*" *Sprinkler* where, as in *Carlson*, the plaintiff asserted jurisdiction under the "transacting any business" provision in the general long-arm statute, chapter 223A, section 3(a). In "*Automatic*" *Sprinkler*, the Court held there was no jurisdiction over a nonresident defendant but it justified the contrary result in *Wolfman*, which rested on "only the barest of contacts with the State," saying that the "insurance field lend[s] itself to the furthest extension of jurisdiction based on an isolated contact."<sup>43</sup> This special treatment of the insurance industry is, as the Court appeared to recognize,<sup>44</sup> reflected in the particularized interests asserted by Massachusetts in the Unauthorized Insurer's Process Act, chapter 175B, section 2, which was involved in *Wolfman*. This specificity of interests contrasts sharply with the general interest in asserting jurisdiction over nonresident defendants expressed in the long-arm statute, chapter 223A, section 3, which led to a different result in "*Automatic*" *Sprinkler*. *Carlson* thus appears not to be supported by either *Wolfman* or "*Automatic*" *Sprinkler*.

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<sup>41</sup> *Kulko*, 436 U.S. at 98 (California has not asserted "particularized interest" by enacting "special jurisdictional statute"); *Shaffer v. Heitner*, 433 U.S. at 214, 216 (Delaware legislature has not asserted interest).

<sup>42</sup> 352 Mass. 356, 367, 225 N.E.2d 598, 606 (1967).

<sup>43</sup> "*Automatic*" *Sprinkler*, 361 Mass. at 446, 280 N.E.2d at 426.

<sup>44</sup> *Id.* Nevertheless, the constitutional distinction between the two types of statutes is difficult to grasp, especially where a state's general long-arm statute extends either expressly (see CALIF. CODE CIV. PROC. § 410.10), or by judicial interpretation (see "*Automatic*" *Sprinkler*, 361 Mass. at 443, 280 N.E.2d at 424) to the limits imposed by the due process clause. *World-Wide Volkswagen's* explanation that a foreign corporation is entitled to "clear notice" that it is subject to suit in the forum state may justify the distinction but it does not fully explain why the notice must be given by the state legislature rather than by the judiciary, especially since even a particularized statutory assertion of jurisdiction can only supplement—but not replace—contacts between the defendant and the forum state. See *Rush v. Savchuk*, 444 U.S. at 322 & n.3, 324, 327-329. The distinction may also produce anomalous results. For example, if Massachusetts and California both closely regulate the insurance industry, why—as a matter of constitutional law—should a Massachusetts court be able to assert long-arm jurisdiction over a nonresident insurance company under its particularized statute, G.L. c. 175B, §2, while

It is far from clear that the United States Supreme Court would agree with the result reached in *Carlson*. Distinctions which may be drawn between *McGee* and *Carlson*—whether based on the facts, the underlying long-arm statute, or the nature of the defendant’s business—do not necessarily ordain a different result. They do, however, suggest the likelihood that a contemporary Supreme Court decision would curtail the extraterritorial reach of state court jurisdiction in *Carlson*-type fact patterns. Moreover, there are dicta in Supreme Court decisions distinguishing “continuous and systematic” contacts between a nonresident and the forum state, which justify the exercise of long-arm jurisdiction, from “single or isolated” contacts, which do not.<sup>45</sup> *Carlson* also fails to reflect the renewed emphasis in *World-Wide Volkswagen Corp. v. Woodson* that the “primary concern” under the “minimum contacts” test is the burden imposed on the defendant by being compelled to litigate in a “distant or inconvenient forum.”<sup>46</sup>

Other factors, in addition to signing the contract in Massachusetts, advanced in *Carlson* to justify the exercise of jurisdiction over the University also lose some of their force when considered in light of the Supreme Court’s renewed emphasis on the “relationship among the defendant, the forum and the litigation.”<sup>47</sup> *Carlson* refers, for example, to the “interest of the forum state,” which the *World-Wide Volkswagen* decision does include in a list of factors to be considered.<sup>48</sup> That interest has not, however, prevailed in any recent decision by the Supreme Court. In *Kulko v. Superior Court*, for example, the Supreme Court held the California courts lacked jurisdiction over the absent father to hear a suit to modify child support payments where both the plaintiff (the mother) and her children were California domiciliaries. The Court recognized that California has “substantial interests” in “protecting the welfare of its minor residents.” The Court nevertheless held that jurisdiction over the person could be

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a California court could not under its general statute, CALIF. CODE CIV. PROC. § 410.10, *supra*?

<sup>45</sup> *International Shoe*, 326 U.S. at 317. *E.g., id.* at 318, 320; *Kulko*, 436 U.S. at 92, 93, 97; *World-Wide Volkswagen*, 444 U.S. at 295, 297.

<sup>46</sup> *World-Wide Volkswagen*, 444 U.S. at 292. *World-Wide Volkswagen* then enumerates other factors considered under the “minimum contacts” test which could be used to justify an expansive assertion of jurisdiction over the person. The reach of these factors is limited by what *World-Wide Volkswagen* saw as the second function of the “minimum contacts” test: “. . . to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.” *Id.* See also *Hanson v. Denckla*, 357 U.S. at 251 (“territorial limitations”).

<sup>47</sup> *Shaffer v. Heitner*, 433 U.S. at 204. *World-Wide Volkswagen* demonstrates the relationship between the forum and the litigation is insufficient: the Oklahoma courts lacked jurisdiction even though the accident occurred in Oklahoma. 444 U.S. at 295, 299.

<sup>48</sup> *Carlson*, 1980 Mass. Adv. Sh., at 665, 402 N.E.2d at 487; *World-Wide Volkswagen*, 444 U.S. at 292. See note 46 *supra*.

predicated only on the “defendant’s activity.”<sup>49</sup> California’s interests in providing a forum in *Kulko* seem more substantial than Massachusetts’ interest in the breach of contract action against the University of Vermont, and the assertion of long-arm jurisdiction in *Carlson* is correspondingly weaker. Furthermore, caution is advisable in relying, as *Carlson* does,<sup>50</sup> on the “forum State’s manifest interest in providing an effective means of redress.” This factor is drawn from *McGee*<sup>51</sup> and, as discussed above, the underlying considerations in *McGee* are distinguishable from those in *Carlson*.<sup>52</sup>

*Carlson*’s reliance on the “substantial commercial consequence” in Massachusetts of the contract between the University and the Carlson Corporation<sup>53</sup> is also questionable in light of the *Kulko* decision. *Kulko* rejected the justification for jurisdiction advanced by the California Supreme Court: that the defendant had caused an “effect in the State by an act or omission outside the State.”<sup>54</sup> While *Kulko* did suggest that an in-state effect based on a “commercial benefit from solicitation of business from a resident” might justify a different result,<sup>55</sup> the continued viability of such a distinction was drawn into question by the later decision in *World-Wide Volkswagen*. In that case the Supreme Court assumed it was “foreseeable” that cars sold by the defendants in the New York area would end up in Oklahoma and that the sellers derived “substantial revenue” from the use of the cars in Oklahoma. Nevertheless, the Supreme Court held, the Oklahoma courts lacked jurisdiction to adjudicate products liabilities claims arising from accidents which occurred in Oklahoma.<sup>56</sup> *Carlson* is vulnerable

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<sup>49</sup> *Kulko*, 436 U.S. at 92, 86, 98, 100. Notably, however, the separation agreement between the parties in *Kulko* was executed in New York, not California. *Id.* at 87. Compare *Ross v. Ross*, 371 Mass. 439, 441-442, 358 N.E.2d 437, 439 (1976) (execution of separation agreement in forum state or use of its courts justifies long-arm jurisdiction), distinguished in *Carlson*, 1980 Mass. Adv. Sh. at 664 n.9, 402 N.E.2d at 486 n.9 (state has greater interest in separation agreements than in commercial contracts).

<sup>50</sup> 1980 Mass. Adv. Sh. at 665, 402 N.E.2d at 487.

<sup>51</sup> *McGee*, 355 U.S. at 223. See Martin, *Personal Jurisdiction and Choice of Law*, 78 MICH. L. REV. 872, 875 (1980) (“current view that state interests are simply insufficient . . . if minimum contacts with the defendant are absent”).

<sup>52</sup> *McGee* was concerned that out-of-state insurers would, in effect, be “judgment proof” because “[w]hen claims were small or moderate individual claimants frequently could not afford the cost of bringing an action in a foreign forum . . . .” It also felt “crucial witnesses” were likely to be in the insured’s state. *McGee*, 355 U.S. at 223. *Carlson*, by contrast, involved a very large contract in terms of the “time and money involved” and witnesses were likely to be in Vermont. 1980 Mass. Adv. Sh. at 664, 402 N.E.2d at 486. By comparison with *McGee*, the burdens of suing the University in a Vermont court seem slight.

<sup>53</sup> *Carlson*, 1980 Mass. Adv. Sh. at 664, 402 N.E.2d at 486.

<sup>54</sup> *Kulko*, 436 U.S. at 89, 96. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 37, 50 (1971).

<sup>55</sup> 436 U.S. at 97.

<sup>56</sup> *World-Wide Volkswagen*, 444 U.S. at 295, 298, 288. The Court did not consider these factors “wholly irrelevant” but emphasized they must “stem from a constitutionally

at this point because, like the Oklahoma court, it relied heavily on the “amount of time and money involved” under the construction contract with the University.<sup>57</sup> The presence of additional factors would, however, appear to justify the assertion of long-arm jurisdiction—for example, if performance took place in Massachusetts or if Massachusetts residents were a significant part of the work force.<sup>58</sup>

Despite these doubts, *Carlson* may have properly concluded that the “minimum contacts” test was satisfied. The opinion’s strength lies in its emphasis that signing the contract in Massachusetts was an “affirmative, intentional act” by the University which, because it required the defendant’s “physical presence” in Massachusetts, meant that it was “within the university’s power to refuse to ‘transact any business’ in Massachusetts.”<sup>59</sup> Moreover, the nexus between the purpose of the University’s presence in Massachusetts—to sign the contract—and the gravamen of the lawsuit is not attenuated. Under the circumstances it may not be unreasonable to conclude, as the Supreme Court restated the test in *World-Wide Volkswagen*, that the “defendant’s conduct and connection with the forum State are such that he should reasonably anticipate being haled into Court there.”<sup>60</sup> *World-Wide Volkswagen* indicated that a purpose of the “minimum contacts” test

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cognizable contact” between the defendant and the forum state: a “collateral relationship” is not sufficient. *Id.* at 297, 299. Of course, the element of solicitation within the forum state—adverted to in *Kulko*—was missing in *World-Wide Volkswagen*, but it is also missing in *Carlson*. See text at note 21 *supra*. See also *Kulko* 436 U.S. at 92, 94 (defendant’s “glancing presence” in forum state and “financial benefit” insufficient).

*World-Wide Volkswagen’s* citation, with apparent approval, of a decision upholding the assertion of long-arm jurisdiction in another products liability case, *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E.2d 761 (1961), may require qualification of the statement in the text. The apparent distinction is that in *Gray* the defendant’s interstate business was sufficiently substantial to warrant the conclusion that it “delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State,” while the defendants in *World-Wide Volkswagen* sold their cars only in the New York area (and the plaintiffs then drove the cars to Oklahoma). *World-Wide Volkswagen*, 444 U.S. at 298. See *Gray*, 22 Ill.2d at 440, 176 N.E.2d at 766 (use of defendant’s product in Illinois not “isolated instance”). The “stream of commerce” qualification, however, has no application to the University of Vermont.

<sup>57</sup> *Carlson*, 1980 Mass. Adv. Sh. at 664, 402 N.E.2d at 486. *Accord* *Thos. P. Gonzalez Corp. v. Consejo Nacional de Produccion de Puerto Rico*, 614 F.2d 1247, 1253 (9th Cir. 1980) (no jurisdiction in breach of contract action where out-of-state act imposed “economic burden” on forum resident). *But see* *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 222, 227 (6th Cir. 1972) (jurisdiction where stop payment on \$200,000 contract had “substantial consequences” in forum state).

<sup>58</sup> *E.g.*, *Cleverock Energy Corp. v. Trepel*, 609 F.2d 1358 (10th Cir. 1979); *Iowa Electric Light & Power Co. v. Atlas Corp.*, 603 F.2d 1301 (8th Cir. 1979). *But see* note 22 *supra*.

<sup>59</sup> *Carlson*, 1980 Mass. Adv. Sh. at 662, 665, 667, 402 N.E.2d at 485, 487. Contrast, *e.g.*, the facts in *Droukas* where the defendant (the seller) placed an advertisement in a magazine distributed in Massachusetts and sent a letter to the plaintiff in Massachusetts confirming the plaintiff’s purchase order. *Droukas*, 375 Mass. at 151, 376 N.E.2d at 549.

<sup>60</sup> *World-Wide Volkswagen*, 444 U.S. at 297.

is to allow potential defendants to structure their forums in which they can be sued.<sup>61</sup> *Carlson* may pass constitutional muster when the decision is approached from this perspective because its focal point is the presence of the University, and not of the contract in Massachusetts.<sup>62</sup> Furthermore, recent Supreme Court decisions only curtail the exercise of long-arm jurisdiction; they do not portend reinstatement of the rule that state court *in personam* jurisdiction depends on the defendant's presence within the forum state.<sup>63</sup>

In any event, doubts about the correctness of the Supreme Judicial Court's decision under the "minimum contacts" test may never be resolved because application of the doctrine of *forum non conveniens* is likely to avoid constitutionally based decisions by Massachusetts courts in such close cases in the future. In both *Good Hope Industries*<sup>64</sup> and *Carlson*<sup>65</sup> the Court addressed only the permissible reach of *in personam* jurisdiction under the state's long-arm statute and the fourteenth amendment's due process clause. It did not decide whether the Massachusetts courts should, as a matter of discretion, decline to exercise the jurisdiction. A footnote to the *Carlson* opinion firmly stated, however, that the Court would no longer countenance "piecemeal appeals" of long-arm jurisdiction questions and that lower courts should assure that any *forum non conveniens* considerations are addressed first.<sup>66</sup> Because a dismissal on *forum non conveniens* grounds is "dispositive of the question whether the plaintiff's case should be heard in Massachusetts,"<sup>67</sup> the Court's instruction to shift the order in which the two issues are taken up can avoid the need to decide the constitutional question whether there are "minimum contacts" between the defendant and the forum.<sup>68</sup>

The Supreme Judicial Court's major exposition of the doctrine of *forum non conveniens* appears in *Universal Adjustment Corp. V. Midland Bank, Ltd.* where the Court said that:

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<sup>61</sup> *Id.* The opinion's reference to "primary conduct" evokes (without citation) Professors Hart and Wechsler's comments on *Erie R.R. v. Tompkins* in their casebooks, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM*, 634-35 (1st ed. 1953); 714-15 (2d. ed. 1973) (Bator, ed.).

<sup>62</sup> Contrast *Shaffer v. Heitner*, 433 U.S. at 209 ("presence of the property alone" in forum state insufficient); *Rush v. Savchuk*, 444 U.S. at 328, 329, 324 ("fictional presence" of defendant's insurance policy in forum state was "completely adventitious"; no jurisdiction absent "voluntary activity" by defendant in forum state).

<sup>63</sup> *E.g.*, *Pennoyer v. Neff*, 95 U.S. 714 (1877). *Pennoyer* did, however, permit a state to assert jurisdiction over a foreign corporation doing business in the state. *Id.* at 735-36. See note 11 *supra*.

<sup>64</sup> 378 Mass. at 13 & n.20, 389 N.E.2d at 83 & n.20.

<sup>65</sup> 1980 Mass. Adv. Sh. at 666 n.10, 402 N.E.2d at 487 n.10.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> On the desirability of avoiding unnecessary constitutional decisions see Mr. Justice Brandeis' concurring opinion in *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936). See also *Siler v. Louisville & Nashville R. Co.*, 213 U.S. 175 (1909). For a contrary view see, *School Comm. of Springfield v. Board of Education*, 366 Mass. 315, 339, 319 N.E.2d 427, 441 (1974) (Tauro, C.J.).

Where it appears that complete justice cannot be done here, that the defendant will be subjected to great and unnecessary inconvenience and expense, and that the trial will be attended, if conducted here, with many if not insuperable difficulties which all would be avoided without special hardship to the plaintiff if proceedings are brought in the jurisdiction where the defendant is domiciled, where services can be had, where the cause of action arose and where justice can be done, our courts decline to take jurisdiction on the general ground that the litigation may more appropriately be conducted in a foreign tribunal. Stated succinctly, the principle is that where in a broad sense the ends of justice strongly indicate that the controversy may be more suitably tried elsewhere, then jurisdiction should be declined and the parties relegated to relief to be sought in another forum.<sup>69</sup>

More recently, in *Doe v. Roe*, the Court gave added impetus to resort to *forum non conveniens* by stating that the “whole trend of the law” is to pay more attention to “functional or pragmatic considerations about comparative advantages of one forum over another.”<sup>70</sup> In that case the Court declined to decide the constitutional question whether the Massachusetts courts had jurisdiction over the person and deferred to the New Hampshire courts.<sup>71</sup> If the *forum non conveniens* issue had been presented in *Carlson*, it seems likely that the Court would have concluded that similar deference to the Vermont courts was warranted.

Brief examination of the choice of law (or conflicts) question—whether Massachusetts or Vermont law will govern the Carlson Corporation’s breach of contract action—lends further perspective to the jurisdictional issue. Although this question was not before the Court, the decision of the jurisdictional issue in *Carlson* may have been unconsciously influenced by choice of law principles. To date, Massachusetts has applied the “law of the place where the contract was made.”<sup>72</sup> Accordingly, ascertaining the *locus* of the contract is important for choice of law purposes even if it is entitled to less weight under the “minimum contacts” test. Furthermore, conflation of the conflicts and jurisdiction issues would not be surprising for the pur-

<sup>69</sup> 281 Mass. 303, 313, 184 N.E. 152, 158 (1933) (quoted in full in *New Amsterdam Casualty Co. v. Estes*, 353 Mass. 90, 94-95, 228 N.E.2d 440, 443 (1967)). See also G.L. c. 223A, § 5. The latter opinion did state, however, that the plaintiff’s choice of forum should “rarely” be disturbed unless the “balance is strongly in favor of the defendant.” 353 Mass. at 95, 228 N.E.2d at 443 (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947)). See also *Universal Adjustment Corp.*, 281 Mass. at 315, 184 N.E. at 159 (apply doctrine “with caution”).

<sup>70</sup> 377 Mass. at 619, 387 N.E.2d at 145 (quoted with approval in *Murphy v. Murphy*, 1980 Mass. Adv. Sh. 1027, 1031, 404 N.E.2d 69, 72 (exercise of jurisdiction in child custody case is “in no sense mandatory”).

<sup>71</sup> 377 Mass. at 620, 387 N.E.2d at 145.

<sup>72</sup> *Choate, Hall & Stewart v. SCA Services Inc.*, 378 Mass. 535, 540, 392 N.E.2d 1045, 1048. See note 76, *infra*. The Massachusetts rule accords with the first RESTATEMENT OF CONFLICT OF LAWS § 332 (1934) (“law of the place of contracting”). But see *id.* at § 358 (“law of the place of performance”).

poses of constitutional analysis, because the federal constitutional limits imposed on the state courts in both areas are quite similar.<sup>73</sup> The Supreme Court, nevertheless, has always differentiated the two issues.<sup>74</sup> In *Kulko*, for example, the Supreme Court held that the California courts could not exercise jurisdiction over the father, a New York resident. The opinion suggested, however, that California law might apply in the New York courts.<sup>75</sup> This differentiation between the appropriate forum and the applicable law derives, in part, from the fact that when the Supreme Court reviews state court choice of law decisions it often looks to the contacts between the plaintiff and the forum. By contrast, in jurisdiction cases the focus is on the defendant-forum contacts.<sup>76</sup> Thus, execution of the contract between the University and the Carlson Corporation, a domestic corporation, in Massachusetts is a constitutionally sufficient contact to justify (but not to require) use of Massachusetts contract law, but this conclusion does not *ipso facto* justify the assertion of jurisdiction over the University.

Choice of law considerations may, however, appropriately bolster a decision to remit the parties to the Vermont courts under the doctrine of *forum non conveniens*. Under the modern "interest analysis" approach to conflicts questions it is probable that Vermont contract law will be applied to the *Carlson* case wherever it is litigated.<sup>77</sup> Although Massachusetts courts are competent to apply foreign law to cases before them, the added burden this places on the judicial system may suggest that the court should decline, as a matter of discretion, to exercise *in personam* jurisdiction and dismiss the case. In particular, the burden of applying foreign law may become a decisive factor favoring dismissal in cases where the normal burden is compounded by the difficulty of correctly ascertaining the foreign law rule. The

<sup>73</sup> The fourteenth amendment's due process clause applies to both. In addition, the full faith and credit clause, U.S. CONSTITUTION art. IV, § 1, applies to choice of law cases. See generally Martin, *Personal Jurisdiction and Choice of Law*, 78 MICH. L. REV. 872 (1980).

<sup>74</sup> The recent holding in *Allstate Insurance Co. v. Hague*, 449 U.S. 302, 320 (1981), rejects Professor Martin's argument, 78 MICH. L. REV. at 872, 883, that the "minimum contacts" test should be applied in both personal jurisdiction and choice-of-law cases.

<sup>75</sup> *Kulko*, 436 U.S. at 98 (California is "center of gravity"). See also *Hanson v. Denckla*, 357 U.S. at 254; *Shaffer v. Heitner*, 433 U.S. at 215-16; *World-Wide Volkswagen*, 444 U.S. at 294. In *Rush v. Savchuk* the plaintiff's unsuccessful effort to invoke the jurisdiction of the Minnesota courts was necessitated by the fact that Indiana's guest statute barred recovery. 444 U.S. at 322.

<sup>76</sup> See the discussion in Martin, 78 MICH. L. REV. at 874-76. However, choice-of-law clauses in a contract have been held to establish "minimum contacts" with the selected state for long-arm jurisdiction purposes. *E.g.*, *O'Hare Internat'l Bank v. Hampton*, 437 F.2d 1173, 1177 (7th Cir. 1977).

<sup>77</sup> See, *e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 188 (1971) (rights and duties in contract action determined by law of state with the "most significant relationship to the transaction and the parties").

In *Choate, Hall & Stewart*, 378 Mass. at 540, 541, 392 N.E.2d at 1048, the Supreme Judicial Court strongly indicated it was prepared to change the Massachusetts choice-of-law rule,

Massachusetts *forum non conveniens* decisions support this position,<sup>78</sup> and it also finds support in the Supreme Court's view that the "minimum contacts" test should take into consideration the "interstate judicial system's interest in obtaining the most efficient resolution of controversies."<sup>79</sup> While the Supreme Judicial Court did not address this approach to the jurisdictional problem in the *Carlson* opinion because neither the choice of law nor the *forum non conveniens* issues were presented by the appeal, it is open on remand to the trial court and in future cases.<sup>80</sup>

**§ 9.2. New Trials—Constitutionality of Additur.** Rule 59(a) of the Massachusetts Rules of Civil Procedure contains a proviso that "[a] new trial shall not be granted solely on the ground that the damages are inadequate until the defendant has first been given an opportunity to accept an addition to the verdict of such amount as the court adjudges reasonable."<sup>1</sup> In *Freeman v. Wood*,<sup>2</sup> the Supreme Judicial Court upheld the constitutionality of this "addition to the verdict"—called additur—over the plaintiff's objection that additur violates the right to trial by jury guaranteed by Article 15 of the Massachusetts Declaration of Rights.<sup>3</sup> The decision puts to rest the "possibility" adverted to in the Reporters' Notes to Rule 59 that additur violates Article 15,<sup>4</sup> even though additur and its counterpart, remit-

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noting the "awkward or arbitrary results" under the traditional place of making the contract rule where "that place had no or little other connection with the contract or the parties." Massachusetts law was applied in *Choate, Hall & Stewart* because the contract was executed in Massachusetts and, in addition, both parties were Massachusetts businesses and the contract was negotiated in Massachusetts. *Id.* at 541, 392 N.E.2d at 1049. The additional factors are missing in *Carlson*.

<sup>78</sup> *Universal Adjustment Corporation*, 281 Mass. at 318-19, 184 N.E. at 160. Massachusetts courts will take judicial notice of foreign law. G.L. c. 233, § 70. See W. LEACH & P. LIACOS, HANDBOOK OF MASSACHUSETTS EVIDENCE 25 (5th ed. 1981).

<sup>79</sup> *World-Wide Volkswagen*, 444 U.S. at 292.

<sup>80</sup> 1980 Mass. Adv. Sh. at 666 n.10, 667, 402 N.E.2d at 487 n.10.

§ 9.2. <sup>1</sup> MASS. R. CIV. P. 59(a); 365 Mass. 827 (1974).

<sup>2</sup> 1980 Mass. Adv. Sh. 405, 401 N.E.2d 108. MASS. R. CIV. P. 59(a) extends additur and remittitur to nonjury trials, but this discussion will be limited to jury trials because only cases tried to a jury present the constitutional issue. See *Bartley v. Phillips*, 317 Mass. 35, 40, 57 N.E.2d 26, 29 (1944) ("The law has been developed for the most part in jury cases, . . . [b]ut the question is the same in actions tried without jury . . .").

<sup>3</sup> Article 15 provides:

In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherwise used and practised, the parties shall have a right to a trial by jury; and this method of procedure shall be held sacred . . . .

<sup>4</sup> The Reporters' Notes are reprinted in J. Smith & H. Zobel, *Rules Practice*, 8 MASSACHUSETTS PRACTICE SERIES 436 (1977) and in 7 E. Swartz, F. Swartz, & W. Schwartz, MASSACHUSETTS PLEADING AND PRACTICE 59-4 (1979). The case relied on by the Reporters, *Dorsey v. Barba*, 38 Cal. 2d 350, 240 P.2d 604 (1952), was overruled prior to the adoption of the Massachusetts Rules of Civil Procedure. *Jehl v. Southern Pacific Co.*, 66 Cal. 2d 821, 828, 59 Cal. Rptr. 276, 427 P.2d 988, 992 (1967). The *Jehl* case supports the result in *Freeman v.*



titur, have a long lineage in Massachusetts practice.<sup>5</sup> The decision also runs counter to a 1935 decision by the United States Supreme Court, *Dimick v. Schiedt*,<sup>6</sup> which held that additur violates the Seventh Amendment's jury trial guarantee but which reaffirmed, albeit reluctantly, the constitutionality of remittitur.<sup>7</sup>

Fundamental to the decision in *Freeman* is the Supreme Judicial Court's view that "short of impairment of the vital elements of the jury," Article 15 interposes "no constitutional obstacle" to modification of jury procedures.<sup>8</sup> The opinion succinctly reviews the history of the judge's power to grant new trials where the damages awarded were excessive or inadequate, a power which was the foundation for the development of remittitur and additur as alternatives to a new trial.<sup>9</sup> Remittitur, the Court notes, has

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*Wood*, as Article I, section 7 of the California Constitution is similar to Article 15. See also CAL. CIV. PROC. CODE § 662.5 (Deering 1973).

<sup>5</sup> The remittitur proviso to Mass. R. Civ. P. 59(a) states:

A new trial shall not be granted solely on the ground that the damages are excessive until the prevailing party has first been given an opportunity to remit so much thereof as the court adjudges is excessive.

Additur, thus, permits an addition to an inadequate verdict while remittitur allows the reduction of an excessive verdict. For a further description of remittitur, see the text beginning at note 22 *infra*.

<sup>6</sup> 293 U.S. 474 (1935).

<sup>7</sup> *Id.* at 486. The seventh amendment to the United States Constitution applies only to the federal courts. *Pearson v. Yewdall*, 95 U.S. 294 (1877); *Minneapolis & St. Louis Railroad Co. v. Bombolis*, 241 U.S. 211 (1916); *State Farm Mutual Automobile Insurance Co. v. Baacsh*, 644 F.2d 94, 97 (2d. Cir. 1981). Consequently, the Supreme Judicial Court was free to disregard the holding in *Dimick v. Schiedt*. In criminal cases, however, the Supreme Court has held that the fourteenth amendment compels the states to provide a jury trial in circumstances where the sixth amendment requires a jury trial in the federal courts. *Duncan v. Louisiana*, 391 U.S. 145 (1968). See further note 8 *infra*.

<sup>8</sup> 1980 Mass. Adv. Sh. at 407-08, 401 N.E.2d at 110. See also *id.* at 407, 401 N.E.2d at 109 (Art. 15 "designed to ensure the continuance of the essentials of the civil jury"), *id.* at 409, 401 N.E.2d at 110 ("what matters is whether [additur] strikes at the fundamentals of the jury"), *id.* at 410, 401 N.E.2d at 111 (additur is not "too violent an incursion by judges on the operations of juries"), and cases cited in *id.* at 407 n.6, 401 N.E.2d at 109 n.6.

The Court's view of Article 15 means, of course, that further modifications of the jury in civil cases are possible, including the adoption of nonunanimous verdicts. See *id.* at 408 & n.7, 401 N.E.2d at 110 & n.7. In *Apodaca v. Oregon*, 406 U.S. 404 (1972), the Supreme Court held that the federal Constitution does not compel a unanimous jury verdict in state criminal trials. A state may not, however, reduce the jury to fewer than six members, *Ballew v. Georgia*, 435 U.S. 223 (1978), or sustain a conviction for a nonpetty offense on the basis of a nonunanimous verdict returned by a six-member jury. *Burch v. Louisiana*, 441 U.S. 130 (1979). Article 12 (not Article 15) of the Massachusetts Declaration of Rights secures the right to a jury trial in criminal cases.

<sup>9</sup> 1980 Mass. Adv. Sh. at 408-10, 401 N.E.2d at 110-11. The Court said, however, that the "historicity of additur is [not] of any transcendent importance." *Id.* at 409, 401 N.E.2d at 110. Cf. *Burch v. Louisiana*, 441 U.S. at 137.

been widely accepted and its constitutionality upheld.<sup>10</sup> Additur must also be constitutional, the Court concludes, because there is “no relevant analytic difference” between remittitur and additur.<sup>11</sup> The opinion also notes that additur, as well as remittitur, has been “regularly recommended by students of civil procedure,”<sup>12</sup> and that acceptance of one without the other would “create unfairness as well as anomaly.”<sup>13</sup> Finally, the opinion suggests that the Supreme Court would decide *Dimick* differently today<sup>14</sup> and that, in any event, the Seventh Amendment’s “reexamination clause” may require a more stringent federal rule than is compelled by Article 15, which has no reexamination clause.<sup>15</sup>

Three problems inherent in Rule 59(a)’s additur procedure are not resolved by *Freeman*. The principal problem is that inadequate damages may indicate the jury impermissibly returned a compromise verdict.<sup>16</sup> *Freeman* alludes to the possibility of a compromise jury verdict in its concluding paragraph, where it states that “[a]n unduly slim verdict . . . may signal the

<sup>10</sup> 1980 Mass. Adv. Sh. at 411, 401 N.E.2d at 111.

<sup>11</sup> *Id.* Other commentators have agreed. See, e.g., *Developments in the Law—Damages (1935-1947)*, 61 HARV. L. REV. 113, 114 & n.13 (1947); Carlin, *Remittiturs and Additurs*, 49 W. VA. L. REV. 1, 28-29 (1942).

<sup>12</sup> 1980 Mass. Adv. Sh. at 410, 401 N.E.2d at 111. Mr. Justice Kaplan, the author of the opinion, is himself a recognized authority on civil procedure. See, e.g., R. FIELD & B. KAPLAN, *CIVIL PROCEDURE* (3d ed. 1973); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure(I)*, 81 HARV. L. REV. 356 (1967).

<sup>13</sup> 1980 Mass. Adv. Sh. at 411, 401 N.E.2d at 111. The Court explained that otherwise “a plaintiff would have an absolute right to a new trial in the face of an inadequate jury award, but a defendant in case of an excessive award must submit to a lesser sum set by the judge and agreed by the plaintiff.” *Id.* at 411, 401 N.E.2d at 111-12.

<sup>14</sup> *Id.* at 413, 401 N.E.2d at 112. “One sign” the *Freeman* opinion says, of a likely shift in the Supreme Court’s position on the constitutionality of additur is that the Supreme Court formerly held that allowing federal judges to enter a judgment notwithstanding the verdict violated the seventh amendment, *Slocum v. New York Life Insurance Co.*, 228 U.S. 364 (1913), and later qualified that position in *Baltimore & Carolina Line v. Redman*, 295 U.S. 654 (1935). Note, however, that the latter case was decided the same year as *Dimick v. Schiedt*. The *Freeman* opinion follows closely the reasoning of Mr. Justice Stone’s dissenting opinion to the 5 to 4 decision in *Dimick v. Schiedt*.

<sup>15</sup> 1980 Mass. Adv. Sh. at 411-13, 401 N.E.2d at 112-13. The seventh amendment to the U.S. Constitution provides:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law. (emphasis added).

The text of Article 15 is reproduced at note 3 *supra*.

<sup>16</sup> *Cf. Simmons v. Fish*, 210 Mass. 563, 570, 97 N.E. 102, 105 (1912). It seems equally clear that inadequate damages could indicate jury bias against the plaintiff, even where there is no compromise on the issue of the defendant’s liability. See *Clark v. Henshaw Motor Company*, 246 Mass. 386, 140 N.E. 593 (1923). Excessive damages, on the other hand, may signal bias or

existence of other defects in the work of the jury” which would preclude a determination that the “verdict is sound except for inadequacy” of damages.<sup>17</sup> “In such a case,” the Court warns, “additur would not be appropriate, and a simple new trial would be called for.”<sup>18</sup> The concerns subsumed in the opinion’s glancing references to “slim” verdicts and the relationship of the additur to new trials are illuminated by a brief examination of the development of remittitur and additur in Massachusetts practice.

Remittitur’s development will be described first because it is both older and more widely accepted than additur.<sup>19</sup> Under the pre-rules practice, the losing party could move for a new trial on the ground that the damages awarded by the jury were excessive, and, if the judge agreed, the judge could order a new trial on the issues of both liability and damages.<sup>20</sup> Massachusetts practice also permitted the judge to limit the new trial to the issue of damages.<sup>21</sup> The advantages of limiting the new trial to damages alone were that it preserved the jury’s liability decision for the prevailing party, curtailed the expense incident to a new trial, and made more efficient use of judicial resources.

Remittitur emerged as an alternative to the new trial as a means for dealing with excessive jury verdicts.<sup>22</sup> The trial judge, acting on the defendant’s motion, would determine that the jury’s damages award was excessive and by how much. The judge would then conditionally order a new trial<sup>23</sup> and

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prejudice against the defendant. *E.g.*, *Sampson v. Smith*, 15 Mass. 365, 367 (1819) (jurors had “their passions excited on questions of personal liberty and right”).

<sup>17</sup> 1980 Mass. Adv. Sh. at 413, 401 N.E.2d at 113.

<sup>18</sup> *Id.* at 414, 401 N.E.2d at 113.

<sup>19</sup> *Cf. id.* at 408, 401 N.E.2d at 110. See generally F. JAMES & G. HAZARD, CIVIL PROCEDURE (2d ed. 1977) § 7.21 at 321-24, 332; *Dimick v. Schiedt*, 293 U.S. at 482. In Massachusetts, remittitur was codified at least as early as 1897, while additur was not codified until 1945. See notes 22 and 24 *infra*.

<sup>20</sup> *Sampson v. Smith*, 15 Mass. 365 (1819); *Taunton Mfg. Co. v. Smith*, 26 Mass. 10 (1829); *Bodwell v. Osgood*, 20 Mass. 379, 385 (1825); *Coffin v. Coffin*, 4 Mass. 1, 41-42 (1808).

<sup>21</sup> Opinion of the Justices, 207 Mass. 606, 609, 94 N.E. 46 (1911) (upholding constitutionality of proposed statute—subsequently enacted as Acts of 1911, c. 501—limiting to damages issue any new trial ordered because of excessive or inadequate damages. In *Simmons v. Fish*, 210 Mass. 563, 97 N.E. 102 (1912), the Court asserted that limiting the new trial to issues, including damages, which were “separable” from the general verdict was a matter of “inherent judicial authority” and did not depend on a statute. *Id.* at 568, 97 N.E. at 104. This rule, the Court recognized, was a modification of “[t]he ancient common law doctrine that a verdict of a jury was single and indivisible and must stand or fall as a whole.” *Id.* at 565, 97 N.E. at 103. *Accord*, *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 499 (1931) (“where the requirement of a jury trial has been satisfied by a verdict according to law upon one issue of fact, that requirement does not compel a new trial of that issue even though another and separable issue must be tried again”).

<sup>22</sup> Acts of 1897, c. 472, § 2, appears to be the first Massachusetts remittitur statute. It stated that “No verdict shall be set aside as excessive unless the prevailing party is first given an opportunity to remit so much of said verdict as the court shall adjudge to be excessive.”

<sup>23</sup> Termed a “new trial nisi” in *Freeman*, 1980 Mass. Adv. Sh. at 410, 401 N.E.2d at 111. See also *Nicklass v. City of New Bedford*, 250 Mass. 471, 473-74, 146 N.E. 41, 42 (1925).

give the plaintiff an opportunity to remit the excessive portion. If the plaintiff consented to the remittitur, judgment was simply entered for the plaintiff on the reduced verdict. If the plaintiff did not consent to the remittitur, the defendant was given a new trial on either liability and damages or on damages alone, at the judge's discretion.<sup>24</sup> This procedure is now embodied in Rule 59(a).<sup>25</sup>

Additur received a more reluctant acceptance in Massachusetts practice than its counterpart, remittitur.<sup>26</sup> Unlike some other jurisdictions, however, Massachusetts did recognize at an early date that new trials could be granted to remedy inadequate as well as excessive jury verdicts.<sup>27</sup> More than sixty years before *Freeman*, the Supreme Judicial Court declared in *Simmons v.*

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<sup>24</sup> This was the rule prior to the Acts of 1911, c. 501, § 1, which amended Rev. Laws. c. 173, § 112, the 1901 successor to the first remittitur statute. The 1911 amendment, which purported to curtail such judicial discretion, provided that if the "sole ground" for granting the new trial was either the inadequacy or excessiveness of the damages awarded, the new trial "shall be limited to the question of the amount of damages." (emphasis added). This statutory limitation on the scope of the new trial conflicted with the decision in *Simmons v. Fish*, 210 Mass. 563, 97 N.E. 102 (1912), which was decided shortly after chapter 501 was enacted. There the Court enunciated the common law discretion of the judge to order either a full or a limited retrial where damages were inadequate.

This divergence between the common law and statutory approaches was not reconciled until 1945 when G.L. c. 231, § 127 (1932) (which had repeated the 1911 provisions) was amended by the Acts of 1945, c. 578, § 2, to reflect the holding in *Simmons v. Fish*. The 1945 amendment provided for full or limited retrial in cases of inadequate verdicts, but it continued to limit the new trial to damages where the verdict was excessive. See *Twentieth Report of the Judicial Council*, Pub. Doc. No. 144 (Dec. 1944), reprinted in 29 MASS. L. Q. (No. 4) 9, at 25-27 (Dec. 1944).

The 1945 amendment was the model for the additur proviso in MASS. R. CIV. P. 59(a). See Acts of 1975, c. 377, § 109, repealing G.L. c. 231, § 127, which was superseded by Rule 59(a). See also *Freeman*, 1980 Mass. Adv. Sh. at 406 & n.4, 401 N.E.2d at 109 & n.4; *D'Annolfo v. Stoneham Housing Auth.*, 375 Mass. 650, 661, 378 N.E.2d 971, 979 (1978).

<sup>25</sup> See note 5 *supra*.

<sup>26</sup> Though one leading treatise states that "no known Massachusetts decision deals with the additur," J. Smith & H. Zobel, *supra* note 4, § 59.4 at 445, there does appear to be case law on the subject. See, e.g., *Clark v. Henshaw Motor Company*, 246 Mass. 386, 140 N.E. 593 (1923), in which the Court increased the damages awarded the plaintiff to reflect the minimum amount the jury had been instructed to award on a finding of breach of contract. The addition was held proper, against the plaintiff's motion for a new trial, because the defendant had filed a stipulation that judgment might be so entered. *Id.*, at 389, 140 N.E. 594. An earlier case, *Shanahan v. Boston & Northern Street Railway Co.*, 193 Mass. 412, 79 N.E. 751 (1907), had adopted the English rule that both plaintiff *and* defendant had to consent to the amount of additur, a requirement which was later embodied in the first Massachusetts additur statute, Acts of 1945, c. 578, § 1. The requirement of plaintiff's consent was later dropped, probably properly; the rule had been made in a case where the damages were not only "inadequate," but the liability decision had been adverse to the plaintiff as well. *Shanahan*, 193 Mass. at 413, 414, 79 N.E. at 751, 752. The principle that seems to have been espoused by the courts prior to the additur statute was the judges did not have discretion to "add" to a verdict, but could "amend" it in cases of clear jury error. *Minot v. City of Boston*, 201 Mass. 10, 86 N.E. 783 (1909).

<sup>27</sup> See *Freeman*, 1980 Mass. Adv. Sh. at 408-09, 401 N.E.2d at 110; *Simmons v. Fish*, 210 Mass. 563, 97 N.E. 102 (1912); *Taunton Mfg. Co. v. Smith*, 26 Mass. 10 (1829).

*Fish*, that there is “[n]o sound distinction . . . between a verdict in which excessive damages have been returned and one in which inadequate damages have been awarded.”<sup>28</sup> In that case the Court held that the trial judge had “inherent judicial authority” either to grant a new trial or a new trial limited to damages in both situations.<sup>29</sup> Nevertheless, concern over compromise jury verdicts caused divergence in practice (although not in theory) between the handling of excessive and of inadequate verdicts.

The divergence in practice stems from the statement in *Simmons* that in cases of inadequate damages a new trial limited to that issue is appropriate only in the “exceptional and extremely rare instances that the inadequacy of damages will not be so interwoven with liability that justice can be done without a new trial upon the whole case.”<sup>30</sup> Earlier decisions had indicated that appropriate instances were likely to arise in contract cases or in other circumstances where the damages could be ascertained with some confidence.<sup>31</sup> In tort cases, however, the question of damages was clouded by the possibility of a compromise verdict.

The problem in tort cases is illustrated by *Simmons* itself, where a nine year old boy sued for the loss of his eye. The defendant disputed responsibility for the injury, but not the extent of the resulting harm to the plaintiff. The jury returned a plaintiff’s verdict for \$200. On appeal, the Supreme Judicial Court found it “inconceivable that any jury, having agreed upon the issue of liability, should have reached such a determination as to damages.”<sup>32</sup> The Court reasoned, in effect, that either the defendant was not negligent, and owed the plaintiff nothing; or was negligent, and the damages were inadequate. Consequently, the jury’s verdict reflected an impermissible compromise between the liability and damages components of the case. The Court held that the plaintiff was entitled to a new trial, but that it would be unjust to limit the new trial to damages because the newly empanelled jury could only increase the plaintiff’s recovery. If the new jury were precluded from reexamining whether the defendant’s conduct had caused the injury, it could not cure the compromise in the first jury’s verdict.<sup>33</sup> Neither *Freeman* nor Rule 59(a) relieve the trial judge of the difficult

<sup>28</sup> 210 Mass. at 569, 97 N.E. at 105.

<sup>29</sup> *Id.* at 568, 97 N.E. at 104. See also note 24 *supra*.

<sup>30</sup> 210 Mass. at 570, 97 N.E. at 105.

<sup>31</sup> *E.g.*, *Taunton Mfg. Co. v. Smith*, 26 Mass. at 11 (1829). Generally speaking, both additur and remittitur are more easily applied in cases where damages are either liquidated or readily calculable by applying legal rules to the facts. Personal injury claims, like *Freeman v. Wood*, present difficult occasions for using additur or remittitur because of the greater discretion the jury has in fixing the amount of damages. See generally, F. JAMES & G. HAZARD, *supra* note 19, § 7.21 at 321-22. Compare MASS. R. CIV. P. 55(b)(1) and (2) (clerk may enter judgment on default for “sum certain” or “sum which can by computation be made certain”; otherwise court must assess damages).

<sup>32</sup> *Simmons v. Fish*, 210 Mass. at 571-72, 97 N.E. at 106.

<sup>33</sup> *Id.*

task of identifying cases like *Simmons* where the use of additur is inappropriate because the jury's liability decision is tainted by compromise.

The comparative negligence statute poses the second problem in using additur in tort actions where the jury's damages award seems inadequate. The difficulty stems from the statute's requirement that "any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person for whose injury recovery is made."<sup>34</sup> This requirement inextricably links the damages award to the relative degree of culpability found by the jury, thereby compounding the difficult task of ascertaining the basis for the jury's low damages award. The Supreme Judicial Court did not confront this problem in *Freeman*,<sup>35</sup> however, because the trial judge ordered the additur after the jury returned a special verdict.<sup>36</sup> Use of a special verdict removes the impediment posed by the comparative negligence statute to the trial judge's power under Rule 59(a) to determine whether the damages awarded by the jury are inadequate because the jury must tell the judge how much negligence it attributed to the plaintiff and the resulting reduction it made in the damages awarded to the plaintiff.<sup>37</sup>

A third recurring problem with the use of additur is the determination of the appropriate sum to add to the jury's verdict. This issue was not presented for decision in *Freeman* because the plaintiff addressed his objection to the trial judge's refusal to grant his motion for a new trial, not to the amount of the additur proposed by the judge and accepted by the defendant.<sup>38</sup> However, a recent decision involving the use of remittitur, *D'Annolfo v. Stoneham Housing Authority*,<sup>39</sup> made clear that the "constitutional right

<sup>34</sup> G.L. c. 231, § 85 para. 1 (West Supp. 1981).

<sup>35</sup> In *Freeman*, the jury returned a special verdict that the defendant was "wholly responsible" for the accident, so the Court did not have to address the relationship between additur and the comparative negligence statute. 1980 Mass. Adv. Sh. at 406, 401 N.E.2d at 109.

<sup>36</sup> MASS. R. CIV. P. 49(a). Alternately, the court could use a general verdict accompanied by answer to interrogatories under MASS. R. CIV. P. 49(b). See note 37 *infra*.

<sup>37</sup> To illustrate the problem further, hypothesize the steps followed by the jury in returning a general verdict under the comparative negligence statute. The jury should decide (1) whether the defendant is legally responsible for the plaintiff's injury, (2) the appropriate amount of compensation for the injury, (3) whether the plaintiff's negligence contributed to the injury, and (4) the percentage of the plaintiff's contributory negligence. For example, general verdicts for \$90,000 (if the jury finds 10% contributory negligence) and \$60,000 (for 40% contributory negligence) are exact equivalents. Both verdicts are sound if the trial judge concurs in the jury's initial assessment that \$100,000 is adequate compensation for the plaintiff's injury (assuming, of course, there are sufficient facts before the jury to support a range of conclusions on the plaintiff's contributory negligence). The problem arises because under a general verdict the trial judge does not know how the jury applied the comparative negligence statute to arrive at its damages award. If, for example, the jury returned a \$60,000 verdict but found the plaintiff did *not* contribute to her injury (0% contributory negligence), the damages are inadequate and additur (or a new trial) is called for.

<sup>38</sup> 1980 Mass. Adv. Sh. at 406, 401 N.E.2d at 109.

<sup>39</sup> 375 Mass. 650, 378 N.E.2d 971 (1978).

to a jury determination of damages” does limit the judge’s discretion—remittitur cannot be used to “substitute [the court’s] judgment in the ultimate determination of damages.”<sup>40</sup> The Court nevertheless rejected D’Annolfo’s argument that the remittitur could be used only to reduce the verdict to the “highest amount that the jury could properly have awarded,” stating that Rule 59(a) gives the judge discretion to set the damages “anywhere within the range of verdicts supported by the evidence.”<sup>41</sup>

*D’Annolfo* represents a controversial approach. One leading commentary terms this approach a “clear invasion of the jury’s sphere” because it allows the trial judge not just to trim an excessive verdict down to the highest amount the jury could legally award, but also to pressure the prevailing party into accepting a still smaller sum.<sup>42</sup> Accordingly, this commentary would permit judges to use additur only to raise the verdict to the minimum damages award legally consistent with the jury’s liability decision.<sup>43</sup>

Dictum in *Freeman*, however, rejects this limitation on the trial judge’s discretion under Rule 59(a). The opinion states that the trial judge may propose as an additur a figure “within” the “range of a just verdict.”<sup>44</sup> *Freeman* is, accordingly, subject to the same criticism as *D’Annolfo* with respect to the possible invasion of the jury’s function. One consequence which flows from the adoption of such a discretionary rule is that it becomes harder for an appellate court<sup>45</sup> to preserve the constitutional right

<sup>40</sup> *Id.* at 662, 378 N.E.2d at 979. See also *Freeman*, 1980 Mass. Adv. Sh. at 413, 401 N.E.2d at 113. (additur appropriate only when damages “descend to the level of unreasonableness”); *Minot v. City of Boston*, 201 Mass. 10, 86 N.E. 783 (1909).

<sup>41</sup> 375 Mass. at 660, 662, 378 N.E.2d at 979. The Court particularly relied on the language in the remittitur proviso to MASS. R. CIV. P. 59(a) that the prevailing party may remit the portion of the verdict that the “court adjudges is excessive.” *Id.* at 661, 378 N.E.2d at 979.

<sup>42</sup> F. JAMES & G. HAZARD, *supra* note 19, § 7.21 at 335. Other commentators question the validity of this inference. See, e.g., SCOTT, FUNDAMENTALS OF PROCEDURE IN ACTIONS AT LAW 122-26 (1922). In *D’Annolfo*, 375 Mass. at 661, 378 N.E.2d at 979, the Court acknowledged that federal court practice may more narrowly circumscribe judge’s power to fix the amount of the remittitur.

<sup>43</sup> F. JAMES & G. HAZARD, *supra* note 19, § 7.21 at 334-35.

<sup>44</sup> 1980 Mass. Adv. Sh. at 410 & n.10, 401 N.E.2d at 111 & n.10. The additur is for “such amount as the court adjudges reasonable.” See note 41 *supra*. See also *Raunela v. Hertz Corp.*, 361 Mass. 341, 280 N.E.2d 179 (1972) on the permissible range of damages adjustments.

<sup>45</sup> *Freeman* expressly eschews any discussion of appellate rights, 1980 Mass. Adv. Sh. at 410 n.11, 401 N.E.2d at 111 n.11, but it does state that the trial judge’s “traditional discretion” to decide whether a verdict should stand despite the contention it is inadequate or excessive would “generally be respected by an appellate court, at least where damages were unliquidated.” *Id.* at 409 n.9, 401 N.E.2d at 111 n.9. The federal courts do not permit appellate review of a remittitur which has been accepted under protest. *Donovan v. Penn Shipping Co., Inc.*, 429 U.S. 648 (1977). See generally *Annot.*, 16 A.L.R.3d 1327 (1967).

to a jury determination of damages.<sup>46</sup> Thus, the trial judge may pressure the defendant to pay more than the minimum damages award the jury might properly have awarded.

**§ 9.3. Preliminary Injunctions—Standards.** In *Packaging Industries Group, Inc. v. Cheney*,<sup>1</sup> the Supreme Judicial Court, drawing on an article by Professor Leubsdorf,<sup>2</sup> defined the standards for issuing a preliminary injunction for the first time since the merger of law and equity under the Massachusetts Rules of Civil Procedure.<sup>3</sup> The opinion would be important, if for no other reason, because Massachusetts appellate decisions on preliminary injunctions are rare. The significant aspect of the decision, however, is the three-stage balancing test<sup>4</sup> adopted by the Court to determine whether issuance of a preliminary judgment is warranted.

The rules of civil procedure themselves do not define the standards for issuing preliminary injunctions.<sup>5</sup> Rather, the standards are drawn from prin-

<sup>46</sup> *But see D'Annolfo v. Stoneham Housing Auth.*, 375 Mass. at 662, 378 N.E.2d at 979, where the Court observed that the prevailing party may simply reject the judge's proposed remittitur and thereby secure another jury trial. This may not be an adequate safeguard for the constitutional right to trial by jury because the plaintiff, in deciding whether to accept or reject the judge's "offer," must bear in mind the possibility that the second jury will return an adverse liability finding or, perhaps more likely, a damages award less than the reduction proposed by the judge but still within the acceptable range of verdicts so that it cannot be attacked for inadequacy. Even if the plaintiff is confident the second jury will sustain the plaintiff's view of a proper verdict, the plaintiff must still discount the verdict by the cost of securing it at the new trial. *Cf. Note, An Analysis of Settlement*, 22 STAN. L. REV. 67, 70 (1969).

A *per curiam* decision by the Appeals Court during the *Survey* year, *Silkey v. N. Eng. Tel. & Tel. Co.*, 1980 Mass. App. Adv. Sh. 31, 398 N.E.2d 508, also affected the ability to obtain a jury determination of damages. In *Silkey*, the court affirmed the trial judge's refusal to have damages assessed by a jury after the defendant defaulted. The court noted that MASS. R. CIV. P. 55(b)(2) provides for trial by jury under these circumstances "when and as required by statute" and that the only statute, G.L. c. 231, § 57, was repealed in 1974. The question whether this practice violated Article 15 was not addressed. The result is anomalous because the statute was repealed as part of the legislation implementing the new rules of civil procedure and it is unlikely the Legislature intended to alter the preexisting right to a jury. *See Acts of 1973, c. 1114, § 171; Acts of 1975, c. 377, § 87. See also Greenberg v. Greenberg*, 1980 Mass. App. Adv. Sh. 335, 406 N.E.2d 731 (jury right lost by failure to file timely demand, per MASS. R. CIV. P. 38(b) and (d); time cannot be enlarged by agreement of the parties without the court's consent, per MASS. R. CIV. P. 6(b)(3)).

§ 9.3 <sup>1</sup> 1980 Mass. Adv. Sh. 1189, 405 N.E.2d 106. The case was before the Court on an interlocutory appeal pursuant to G.L. c. 231, § 118, para. 2, added by Acts of 1977, c. 405.

<sup>2</sup> Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525 (1978).

<sup>3</sup> MASS. R. CIV. P. 1 ("These rules govern the procedure . . . in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81.") *But see Taunton Greyhound Ass'n Inc. v. Town of Dighton*, 373 Mass. 60, 62 n.3, 364 N.E.2d 1234, 1236 n.3 (1977).

<sup>4</sup> The opinion, although establishing such a test, does not employ this description of it.

<sup>5</sup> *See MASS. R. CIV. P. 65(b). But see MASS. R. CIV. P. 65(a)* (for temporary restraining



ciples of equity jurisprudence that predate the rules.<sup>6</sup> There is greater uncertainty, however, in these principles and in their application to particular cases than one would suppose.<sup>7</sup> The basic problem, as Professor Leubsdorf has stated, is that the preliminary injunction presents the “dilemma of interlocutory inaccuracy.”<sup>8</sup> The Court in *Packaging Industries* agreed with this assessment, stating that the preliminary injunction decision is, “by definition,” made on the basis of an “abbreviated presentation of the facts and laws.”<sup>9</sup> Because abbreviated presentation and the concomitant risk of error call for restraint, the Court concluded that a preliminary injunction should issue only if the plaintiff demonstrates it would suffer a “loss of rights that cannot be vindicated” at a subsequent trial on the merits.<sup>10</sup>

These considerations are taken into account in the usual formulation that a plaintiff must demonstrate both a likelihood of success on the merits and irreparable injury to obtain a preliminary injunction. On the other hand, as the Court observed in *Packaging Industries*, the “enjoined party may then suffer the same type of irreparable harm” *pendente lite* if it prevails at the trial on the merits and the preliminary injunction is, perforce, dissolved.<sup>11</sup> Accordingly, the Court stated,

[s]ince the judge’s assessment of the parties’ lawful rights at the preliminary stage of the proceedings may not correspond to the final judgment, the judge should seek to minimize the “harm that final relief cannot redress” by creating or preserving, in so far as possible, a state of affairs such that after the full trial, a meaningful decision may be rendered for either party.<sup>12</sup>

While there is nothing novel in the Court’s renewed emphasis on the defendant’s stake in the outcome of a preliminary injunction hearing,<sup>13</sup> the Court’s suggested approach to reconciling the competing interests is distinctive, at least in the Massachusetts cases.

The Supreme Judicial Court in *Packaging Industries* creates a three-stage test to use in deciding whether to issue a preliminary injunction. At the first

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order, must show “immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition”).

<sup>6</sup> See J. Smith & H. Zobel, *Rules Practice*, 8A MASSACHUSETTS PRACTICE SERIES § 65.1 (1981).

<sup>7</sup> Leubsdorf, *supra* note 2, at 525. See Wellington, *Preliminary Injunctions in the Second Circuit*, 43 BROOKLYN L. REV. 831 (1977).

<sup>8</sup> Leubsdorf, *supra* note 2, at 541. See also *id.* at 545 (“tension between speedy decision and correct decision that lies at the core of preliminary injunction analysis”), 549, 557, 565.

<sup>9</sup> *Packaging Industries*, 1980 Mass. Adv. Sh. at 1196, 405 N.E.2d at 111.

<sup>10</sup> *Id. Accord*, Canal Authority of Florida v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974) (“primary justification” for preliminary injunction is to “preserve the court’s ability to render a meaningful decision on the merits”). The *Packaging Industries* Court did not address the possible effect of the requirement in MASS. R. CIV. P. 65(c) that the preliminary injunction be conditioned on the posting of security.

<sup>11</sup> 1980 Mass. Adv. Sh. at 1196, 405 N.E.2d at 111.

<sup>12</sup> *Id.* (citation omitted) (quoting Leubsdorf, *supra* note 2, at 541).

<sup>13</sup> E.g., *Developments in the Law—Injunctions*, 78 HARV. L. REV. 994, 1056 (1965).

stage of the preliminary injunction inquiry, the judge is instructed to examine the plaintiff's "claim of injury and chance of success on the merits."<sup>14</sup> These two factors must be evaluated "in combination" to determine the "risk of [irreparable] harm in light of the party's chance of success on the merits."<sup>15</sup> If the judge concludes that there is a "substantial risk of irreparable harm" when the case is evaluated from the plaintiff's perspective, he must move on to the second stage of the preliminary injunction inquiry.<sup>16</sup> The second stage requires the judge to evaluate the same factors on the defendant's side of the case. At the third stage, the judge must "balance" the risks to both parties. A preliminary injunction should issue only if the balance tips in the plaintiff's favor.<sup>17</sup>

The Court's restatement of the purpose of a preliminary injunction and its focus on balancing the parties' competing interests is helpful. Less certain, however, is the weight to be ascribed to the two principal factors in the equation, the likelihood of success on the merits and the possibility of irreparable injury. Professor Leubsdorf's model gives equal weight to both factors,<sup>18</sup> and *Packaging Industries* appears to follow his lead. In dicta, the opinion states that it is appropriate to deny a preliminary injunction where the plaintiff is more likely than the defendant to prevail on the merits of the legal claim but the defendant will suffer greater injury, *pendente lite*, than the plaintiff.<sup>19</sup> This statement is addressed to the third stage of the analysis and is quite appropriate. At another point in the opinion the Court makes it clear that both factors do at least have to be present at the first stage of the analysis.<sup>20</sup> Absent a showing of irreparable injury, the Court states, a preliminary injunction must be denied, "no matter how likely it may be that the moving party will prevail on the merits."<sup>21</sup>

A difficult question which arises at the first stage of the *Packaging In-*

<sup>14</sup> 1980 Mass. Adv. Sh. at 1197, 405 N.E.2d at 111-12.

<sup>15</sup> *Id.* at 1197, 405 N.E.2d at 112.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* The opinion does not explicitly adopt Professor Leubsdorf's formulation but the parallels are at least sufficiently striking to warrant quoting his formulation of the standards for preliminary injunction decisions:

The court, in theory, should assess the probable irreparable loss of rights an injunction would cause by multiplying the probability that the defendant will prevail by the amount of the irreparable loss that the defendant would suffer if enjoined from exercising what turns out to be his legal right. It should then make a similar calculation of the probable irreparable loss of rights to the plaintiff from denying the injunction.

Whichever course promises the smaller probable loss should be adopted.

Leubsdorf, *supra* note 2, at 542. Leubsdorf uses percentages to illustrate the operation of his model, *id.* at 543-44, and compares it to other formulations, *id.* at 544-48.

<sup>18</sup> See note 17 *supra*. But see *Virginia Petroleum Jobbers Assn. v. F.P.C.*, 259 F.2d 921, 925 (D.C. Cir. 1958) ("But [irreparable] injury held insufficient to justify a stay in one case may well be sufficient to justify it in another, where the applicant has demonstrated a higher probability of success in the merits.').

<sup>19</sup> 1980 Mass. Adv. Sh. at 1202, 405 N.E.2d at 114.

<sup>20</sup> *Id.* at 1201, 405 N.E.2d at 114; see also *id.* at 1197, 405 N.E.2d at 112.

*dustries'* analysis is whether a certainty that the plaintiff will suffer severe irreparable injury can substitute for a virtual certainty that the plaintiff will not prevail on the merits. Under these circumstances, would a preliminary injunction be justified in a case where the defendant would suffer only minimal injury until the trial on the merits? The answer should be "no."<sup>22</sup> Here the "dilemma of interlocutory inaccuracy"<sup>23</sup> is dissipated by the lack of merit in the plaintiff's legal claim. Stated differently, absent a claim for relief recognized by the law, the plaintiff's injury, however great, must go unrectified.<sup>24</sup> This view is consistent with prior case law in Massachusetts.<sup>25</sup>

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*Accord* Canal Auth. of Florida v. Callaway, 489 F.2d 567, 576 (5th Cir. 1974). *Contra* Sonesta Int'l Hotels Corp. v. Wellington Assoc., 483 F.2d 247, 250 (2d Cir. 1973) (preliminary injunction also available upon showing of "sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the [applicant]").

The *Packaging Industries* opinion accords with the conclusion in the text, 1980 Mass. Adv. Sh. at 1197 n.12, 405 N.E.2d at 112 n.12, but simultaneously casts doubt on it in two ways. First, it appears that the Court felt the plaintiff in *Packaging Industries* had not demonstrated a likelihood of success on the merits, but the opinion regularly refers to the lack of irreparable injury as the basis for affirming the trial court's denial of a preliminary injunction. *Id.* at 1197-202, 405 N.E.2d at 112-14. Second, one of the few secondary sources cited by the opinion, *id.* at 1197, 405 N.E.2d at 112, supports the proposition that a showing of likelihood of success may be dispensed with. Note, *Probability of Ultimate Success Held Unnecessary for Grant of Interlocutory Injunction*, 71 COLUM. L. REV. 165 (1971) (discussion of *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197 (2d Cir. 1970)).

<sup>23</sup> Leubsdorf, *supra* note 2, at 541.

<sup>24</sup> Such an across-the-board proposition may have to be qualified in some cases. A preliminary injunction might be appropriate, for example, where the plaintiff's cause of action is recognized by the law, but the plaintiff's factual showing at the preliminary injunction hearing is so slight that it appears unlikely the plaintiff will prevail at the trial on the merits. Here the balance of injury to the two parties might be decisive, especially if the case is one where the facts are in the defendant's control but the plaintiff will gain access to them through discovery. (The plaintiff's failure to garner sufficient facts promptly through discovery might be grounds for later dissolution of the preliminary injunction *pendente lite.*) The public interest in the preliminary injunction combined with the difficulty of determining whether the plaintiff has a cause of action poses another possible qualification to the principle set forth in the text. Consider, for example, a suit to stop the defendant from disposing of toxic materials in interstate waters. The defendant's violation of a statutory duty as well as the resulting widespread injury may be clear, but under the Supreme Court's recent decisions rejecting implied rights of action it may not be clear whether the plaintiff can sue to enforce the duty. Here a preliminary injunction might be justified until the issue can be fully briefed and argued on a motion to dismiss under Rule 12(b)(6). *See* U.S. v. United Mine Workers, 330 U.S. 258, 290, 293 (1947) (court may restrain a labor strike pending decision whether it has jurisdiction under Norris-LaGuardia Act, unless assertion of jurisdiction is "frivolous and not substantial"). *Compare Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979) (implied private right of action for sex discrimination) with cases rejecting claims based on an implied right of action theory, e.g., *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981) (water pollution), *Middlesex Co. Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981) (same), *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979) (securities law).

<sup>25</sup> E.g., *Taunton Greyhound Association, Inc. v. Town of Dighton*, 373 Mass. 60, 62 n.3,

Several other facets of the *Packaging Industries* opinion merit brief comment. First, unlike other courts and commentators,<sup>26</sup> the Supreme Judicial Court did not include the public interest among the factors in its balancing test. This omission is not necessarily telling because the *Packaging Industries* litigation did not affect the public interest. However, the public interest is frequently affected when a preliminary injunction is sought against a government official or agency because the effects of the injunction often radiate beyond the immediate parties to the lawsuit and generally interfere with the enforcement of statutes or regulations. The public interest may also be a factor which should be weighed in the balance where the government or a private party seeks to enforce a statute or regulation or where a statute specifically authorizes interlocutory relief.<sup>27</sup> In addition, public policy may dictate that personal constitutional rights be protected *pendente lite* even absent specific evidence of irreparable harm to the plaintiff.<sup>28</sup> In an appropriate case, therefore, the Court should include the public interest as part of its balancing test.<sup>29</sup>

The Court also noted in *Packaging Industries* that a preliminary injunction is not warranted “if trial on the merits can be conducted before the injury occurs.”<sup>30</sup> Consolidation of the trial on the merits with the preliminary injunction hearing pursuant to MASS. R. CIV. P. 65(b)(2) is one avenue to this end. The Court stated, however, that a party’s request for consolidation made at the time of the hearing is not timely because the opposing party is entitled to “ ‘clear and unambiguous notice’ ” of consolidation so that it has “ ‘a full opportunity’ to present its case.”<sup>31</sup> Although *Packaging In-*

364 N.E.2d 1234, 1236 n.3 (1977) (“reasonable prospect of success on merits” is a requisite to preliminary injunction); *Garrison v. Downing*, 244 Mass. 33, 38, 138 N.E. 315, 318 (1923) (“*prima facie* appearance of ground to support the contentions of the plaintiff”).

<sup>26</sup> *E.g.*, 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 2948 at 430-31, 457-61 (1973); 7 J. MOORE, FEDERAL PRACTICE, ¶ 65.04[1] at 65-45 (2d ed. 1979); *Virginia Petroleum Jobbers Assn. v. F.P.C.*, 259 F.2d 921, 925 (D.C. Cir. 1958).

<sup>27</sup> Note, however, the general principle that violations of penal statutes will not be enjoined. *Mass. Society of Optometrists v. Waddick*, 340 Mass. 581, 585-86, 165 N.E.2d 394, 397 (1960). See also *Attorney General v. Kenco Optics, Inc.*, 369 Mass. 412, 415-16, 340 N.E.2d 868, 870 (1976). For the effect on declaratory judgments, see *Norcissa v. Selectmen of Provincetown*, 368 Mass. 161, 172-73, 330 N.E.2d 830, 836-37 (1975). See also *Consolidated Cigar Corp. v. Dept. of Public Health*, 372 Mass. 844, 845, 855, 364 N.E.2d 1202, 1204, 1209 (1977).

<sup>28</sup> *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976) (“loss of First Amendment freedoms . . . unquestionably constitutes irreparable injury”). Cf. *Kenyon v. City of Chicopee*, 320 Mass. 528, 70 N.E.2d 241 (1946).

<sup>29</sup> Professor Leubsdorf cautions, however, that consideration of the public interest “does not mean the interest of everyone affected by the grant or denial of preliminary relief should figure in the interlocutory hearing,” and that the court should determine the interests which should be taken into account “by reference to the substantive law that will apply when the case goes to trial.” Leubsdorf, *supra* note 2, at 549.

<sup>30</sup> 1980 Mass. Adv. Sh. at 1197 n.11, 405 N.E.2d at 112 n.11.

<sup>31</sup> *Id.* at 1197 n.10, 405 N.E.2d at 111 n.10. Cf. *Wohlfahrt v. Memorial Medical Center*, 658

*dustries* did not address the issue, presumably the notice principle also limits the judge's discretion to order consolidation with the merits at the commencement of the preliminary injunction hearing.<sup>32</sup>

Finally, the Court in *Packaging Industries* stated as one ground for affirming the denial of a preliminary injunction that money damages would adequately redress any harm the plaintiffs might suffer *pendente lite* because there was "no evidence that the defendant would be unable to pay any damages which the plaintiffs might be awarded."<sup>33</sup> The significance of this statement is that it evinces little interest in the traditional inadequate remedy at law test for permitting equity to displace legal remedies.<sup>34</sup> It does not, in other words, seek to determine whether a court, after a trial on the merits, will be capable of assessing money damages under the circumstances presented by the case before it or whether money damages can redress the plaintiff's injury. Instead, the question becomes whether the plaintiff will be able to collect the compensatory damages awarded at law. Although this approach is not unknown,<sup>35</sup> it is unusual, if the Court intends proof of the defendant's insolvency to establish irreparable injury for issuance of a preliminary injunction.<sup>36</sup> The Supreme Judicial Court should seek to clarify this point in a future decision.

a party may appeal an interlocutory order by a superior court or housing

**§ 9.4. Preliminary Injunctions—Interlocutory Appeals.** In addition to defining the standards for issuing preliminary injunctions, the Supreme Judicial Court in *Packaging Industries Group, Inc. v. Cheney*, confirmed the procedural incidents of an interlocutory appeal from a preliminary injunction decision.<sup>1</sup> Under the second paragraph of chapter 231, section 118,

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F.2d 416, 418 (5th Cir. 1981) ("whether the consolidation is express or implied, however, sufficient notice is required to permit the parties to develop their cases fully.").

<sup>32</sup> Note, however, that MASS. R. CIV. P. 65(b)(2) permits the court to order consolidation "before or after" commencement of the preliminary injunction hearing.

<sup>33</sup> 1980 Mass. Adv. Sh. at 1201, 405 N.E.2d at 114.

<sup>34</sup> The test is equally applicable to the decision to grant permanent equitable relief. D. DOBBS, REMEDIES, § 2.10 at 108 (1973). The "hierarchy of remedies" which prefers law over equity has been criticized. O. FISS, THE CIVIL RIGHTS INJUNCTION 1, 6 (1978). See *Curtis-Wright Corp. v. Edel-Brown Tool & Die Co.*, 1980 Mass. Adv. Sh. 1531, 1539-41, 407 N.E.2d 319, 326-27, on the relationship of damages and permanent injunctions in trade secrets litigation.

<sup>35</sup> Developments Note, *supra* note 12, at 1002. See also *American Cyanamid v. Ethicon Ltd.*, [1975] A.C. 396, 408 (H.L.). *But cf.* *Renegotiation Board v. Bannerkraft Clothing Co.*, 415 U.S. 1, 24 ("Mere litigation expense, even substantial and unrecoverable cost, does not constitute irreparable injury.").

<sup>36</sup> See Newman, *The Effect of Insolvency on Equitable Relief*, 13 ST. JOHN'S L. REV. 44 (1938) for a discussion in the context of permanent injunctions.

§ 9.4. <sup>1</sup> *Packaging Industries Group, Inc. v. Cheney*, 1980 Mass. Adv. Sh. 1189, 405 N.E.2d 106. The Appeals Court traversed this ground earlier in *Demoulas Super Markets, Inc. v. Peter's Market Basket, Inc.*, 5 Mass. App. Ct. 750, 370 N.E.2d 719 (1977). See generally

court judge “granting, continuing, modifying, refusing or dissolving a preliminary injunction, or refusing to dissolve a preliminary injunction.”<sup>2</sup> This statute, as amended in 1977, substantially conforms Massachusetts practice to the federal practice under 28 U.S.C. § 1292(a)(1)<sup>3</sup> and is an exception to the “general policy disfavoring appeals from interlocutory orders.”<sup>4</sup>

The distinguishing feature of the second paragraph of section 118, according to *Packaging Industries*, is that it provides for an appeal as a matter of right to the full bench of the Appeals Court, and not discretionary review by a single justice.<sup>5</sup> The appeal, consequently, must be perfected in the same manner as an appeal from a final judgment<sup>6</sup> and is not heard on an ex-

Henn, *Civil Interlocutory Appeals in the Massachusetts State Courts*, 62 MASS. L. Q. 225 (1977). In regard to the standards for issuing preliminary injunctions, see § 9.3 *supra*.

<sup>2</sup> G.L. c. 231, § 118 para. 2. The second paragraph was added to § 118 by Acts of 1977, c. 405. The amendment altered the prior Massachusetts practice, see *Foreign Auto Import v. Renault Northeast*, 367 Mass. 464, 468, 326 N.E.2d 888, 891-92 (1975), which did not provide for interlocutory appeals as a matter of right to the full bench of either the Appeals Court or Supreme Judicial Court.

<sup>3</sup> 1980 Mass. Adv. Sh. at 1191, 405 N.E.2d at 108. See 9 J. MOORE, FEDERAL PRACTICE, ¶¶ 110.20-110.21 (1980); 16 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE, §§ 3921-24 (1977). Note, however, that MASS. R. CIV. P. 52(a), unlike FED. R. CIV. P. 52(a), does not require the trial court judge to make findings of fact and conclusions of law when granting or denying a preliminary injunction. *Packaging Industries*, 1980 Mass. Adv. Sh. at 1191 n.6, 405 N.E.2d at 109 n.6.

<sup>4</sup> *CUNA Mutual Insurance Society v. Attorney General*, 1980 Mass. Adv. Sh. 1117, 1118, 404 N.E.2d 1219, 1221. See also *Pollock v. Kelly*, 372 Mass. 469, 470-72, 362 N.E.2d 525, 527-28 (1977) (demurrer); *Cappadona v. Riverside 400 Function Room*, 372 Mass. 167, 169, 360 N.E.2d 1048, 1050 (1977) (stay); *Nat'l Assn. of Government Employees, Inc. v. Central Broadcasting Corp.*, 1979 Mass. Adv. Sh. 2485, 2486 & n.2, 396 N.E.2d 996, 998 & n.2 (summary judgment); *Borman v. Borman*, 378 Mass. 775, 778-85, 393 N.E.2d 847, 851-54 (discovery order).

Another decision during the *Survey* year held that an order by the Appellate Division of the District Court remanding a case for a new trial is not a “final decision” which may be appealed:

The test of finality of a decision is whether it terminates the litigation on its merits, directs what judgment shall be entered, and leaves nothing to the judicial discretion of the trial court, and not whether it is the last word of the Appellate Division on the particular aspect of the litigation at the moment pending before it, directing additional proceedings before the trial judge in order that a final conclusion may thereafter be reached.

*Demirdjian v. Star Market Co.*, 1980 Mass. Adv. Sh. 2305, 2305, 412 N.E.2d 876, 876. See also *Pupillo v. N. Eng. Telephone & Tel. Co.*, 1980 Mass. Adv. Sh. 2301, 2302, 412 N.E.2d 335, 336 (Appellate Division's decision in a case transferred from the Superior Court to District Court is not final decision appealable to Supreme Judicial Court; case must be retransferred to Superior Court).

<sup>5</sup> *Packaging Industries*, 1980 Mass. Adv. Sh. at 1193, 405 N.E.2d at 109. The *Packaging Industries* case was transferred to the Supreme Judicial Court from the Appeals Court. *Id.* at 1190, 405 N.E.2d at 108. See MASS. R. APP. P. 11; G.L. c. 211A, §§ 10-12.

<sup>6</sup> *Demoulas Super Markets, Inc. v. Peter's Market Basket, Inc.*, 5 Mass. App. Ct. 750, 752,

pedited basis.<sup>7</sup> The trial court is not divested of jurisdiction during the pendency of the appeal.<sup>8</sup> *Packaging Industries* also emphasized that interlocutory review of preliminary injunction decisions is “not mandatory, but permissive”;<sup>9</sup> a party may bypass the appeal authorized by the second paragraph and still challenge the interlocutory order on appeal from the final judgment.<sup>10</sup>

The standard of review on an appeal under the second paragraph is whether the trial court “abused its discretion.”<sup>11</sup> *Packaging Industries* cautioned, however, that the appellate court is not to be a mere rubber stamp for preliminary injunction decisions made by the trial judge.<sup>12</sup> Rather, the appellate court must “look to the same factors properly considered by the judge in the first instance.”<sup>13</sup> The appellate court should subject conclusions of law to broad review and draw its own conclusions from documentary evidence.<sup>14</sup> At the same time, however, it should respect the trial court’s assessment of the credibility of other evidence.<sup>15</sup>

The vehicle provided by the second paragraph of section 118 for interlocutory review of preliminary injunction decisions is better understood against the backdrop of other means of obtaining interlocutory review. Confusion is most likely to arise from a comparison of the second paragraph with the first paragraph of section 118.<sup>16</sup> The first paragraph of section 118 permits appellate review of any interlocutory order (including, but not limited to, a preliminary injunction decision) entered by a superior court or housing court judge.<sup>17</sup> Rather than appealing to the full bench, review is obtained by filing a “petition for relief” with a single justice of the Appeals Court or Supreme Judicial Court.<sup>18</sup> The petition for relief, being

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370 N.E.2d 719, 720 (1977). See MASS. R. APP. P. 3, 8-10. The interlocutory order which is the subject of the appeal must also “grant or protect at least part of the permanent relief sought as an ultimate result of the action.” *Packaging Industries*, 1980 Mass. Adv. Sh. at 1192, 405 N.E.2d at 109 (quoting 12 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE, § 3291 at 10 (1977)).

<sup>7</sup> 1980 Mass. Adv. Sh. at 1193, 405 N.E.2d at 110. The opinion did indicate that this rule might be qualified in “exigent circumstances.” *Id.* Interim relief is available from a single justice, however, under MASS. R. APP. P. 6(a) or G.L. c. 231, § 118, para. 1. *Id.* at 1193-94, 405 N.E.2d at 110.

<sup>8</sup> *Id.* at 1193, 405 N.E.2d at 109.

<sup>9</sup> *Id.* at 1192-93, 405 N.E.2d at 109.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 1195, 405 N.E.2d at 110.

<sup>12</sup> *Id.* at 1195, 405 N.E.2d at 111.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 1196, 405 N.E.2d at 111.

<sup>16</sup> *Id.* at 1193 n.8, 405 N.E.2d at 110 n.8. This issue was addressed in an Appeals Court rescript opinion during the *Survey* year. *Ott v. Preferred Truck Leasing, Inc.*, 1980 Mass. App. Ct. Adv. Sh. 513, 401 N.E.2d 866.

<sup>17</sup> G.L. c. 231, § 118 para. 1.

<sup>18</sup> 1980 Mass. Adv. Sh. at 1193 n.8, 405 N.E.2d at 110 n.8. In *Rollins Environmental Services, Inc. v. Superior Court*, 368 Mass. 174, 175 n.1, 330 N.E.2d 814, 815 n.1 (1975), Justice

interlocutory, is addressed to the single justice's "discretionary powers."<sup>19</sup> The single justice's decision, moreover, may not be appealed to the full bench, unless the single justice authorizes an appeal.<sup>20</sup>

Other methods of obtaining immediate appellate review of interlocutory orders entered in civil cases also exist. These methods, however, are also discretionary or limited to peculiar circumstances. The principal method used to obtain immediate appellate review is a "report" pursuant to MASS. R. CIV. P. 64 by the judge who entered the order.<sup>21</sup> The doctrine of "present execution," which is analogous to the collateral order doctrine in federal court practice,<sup>22</sup> also provides a limited, nonstatutory exception to the general rule barring appellate review of interlocutory orders.<sup>23</sup> The power of superintendance over lower courts vested in the Supreme Judicial Court by chapter 211, section 3, provides a third avenue for immediate review of interlocutory orders.<sup>24</sup> However, the "discretionary relief" available from a single justice under chapter 211, section 3 can be obtained only in "exceptional circumstances when necessary to protect substantial rights."<sup>25</sup> These three avenues of securing appellate review recede in importance, however, in the numerous cases covered by chapter 231, section 118 for which the legislature has expanded the scope of interlocutory appeals. The *Packaging Industries* decision will aid practitioners because it distinguishes the review available under the first and second paragraphs of section 118.

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Quirico said the initial pleading under § 118, para. 1 is properly labeled a complaint, but the statutory term "petition" has become the dominant usage. Labels aside, the significant point is that review under the first paragraph partakes of the nature of an original action, while review under the second paragraph is obtained by filing an ordinary appeal.

<sup>19</sup> *Rollins Environmental Services, Inc. v. Superior Court*, 368 Mass. 174, 181, 330 N.E.2d 814, 818.

<sup>20</sup> 1980 Mass. Adv. Sh. at 1194, 405 N.E.2d at 110.

<sup>21</sup> *E.g.*, *Commonwealth v. Town of Andover*, 378 Mass. 370, 376, 391 N.E.2d 1225, 1229-30; *Nat'l Assn. of Government Employees, Inc. v. Central Broadcasting Corp.* 1979 Mass. Adv. Sh. 2485, 2486 n.2, 398 N.E.2d 996, 998 n.2. G.L. c. 231, § 111.

<sup>22</sup> The collateral order doctrine is derived from the decision in *Cohen v. Beneficial Industrial Loan Co.*, 337 U.S. 541 (1949).

<sup>23</sup> *Borman v. Borman*, 378 Mass. 775, 780, 393 N.E.2d 847, 852. In the *Borman* case the Court held the present execution doctrine permitted immediate appellate review of an order disqualifying the plaintiff's counsel but did not permit immediate review of an order denying defendant's claim that the privilege against self-incrimination shielded her from answering certain questions at a deposition. *Id.* at 780-82, 393 N.E.2d at 852-53. *Cf.* *Ott v. Preferred Truck Leasing, Inc.*, 1980 Mass. App. Ct. Adv. Sh. 513, 401 N.E.2d 866. Compare the more recent holding by the U.S. Supreme Court that the collateral order doctrine does not permit immediate appellate review of orders *denying* requests to disqualify opposing counsel. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981).

<sup>24</sup> G.L. c. 211, § 3.

<sup>25</sup> *Cappadona v. Riverside 400 Function Room, Inc.*, 372 Mass. 167, 168, 360 N.E.2d 1048, 1050 (1977). The *Cappadona* opinion also stated: "Future attempts to invoke our powers under G.L. c. 211, § 3, for further appellate review of interlocutory orders in any but the most



**§ 9.5 Limitation of Actions—Medical Malpractice.** Disparate applications of the statutes of limitations for medical and legal malpractice claims were eliminated by an important decision during the *Survey* year, *Franklin v. Albert*.<sup>1</sup> In both legal and medical malpractice cases, a court must determine when the cause of action accrued in order to know whether the time-bar specified by the Legislature has run. For suits against lawyers, the Court adopted the more modern “discovery” rule in a 1974 legal malpractice case, *Hendrickson v. Sears*.<sup>2</sup> For suits against physicians, however, the Court continued to adhere to the traditional “occurrence” rule adopted in its earlier medical malpractice decisions. Under the occurrence rule the cause of action was deemed to accrue “at the time of the [act of malpractice], ‘and not when the actual damage results or is ascertained.’”<sup>3</sup> *Franklin* overruled these medical malpractice precedents and substituted the discovery rule for the occurrence rule. Consequently, in Massachusetts, as in 41 other jurisdictions,<sup>4</sup> medical malpractice actions now accrue when the “patient learns, or reasonably should have learned, that he has been harmed as a result of a defendant’s conduct.”<sup>5</sup>

The facts of the *Franklin* case illuminate the difference between the discovery rule adopted by the Court and the occurrence test it replaced. A chest X-ray of the patient, *Franklin*, was taken in 1974 while he was hospitalized for oral surgery. *Albert*, the defendant, was the physician who discharged *Franklin* from the hospital. Dr. *Albert* indicated on his

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R. APP. P. 25 authorizing awards of double costs in such cases.” *Id.* at 170, 360 N.E.2d at 1051.

In *Fadden v. Commonwealth*, 376 Mass. 604, 608, 382 N.E.2d 1054, 1057 (1978), the Court said it would not delegate its powers of superintendance under G.L. c. 211, § 3 to the Appeals Court. It did countenance a procedure whereby a “single justice of this court may in a proper case exercise the power of superintendance by allowing interlocutory review of a double jeopardy claim of substantial merit and then transfer the case to a single justice of the Appeals Court for decision on the merits of the double jeopardy claims.”

§ 9.5 <sup>1</sup> 1980 Mass. Adv. Sh. 2187, 411 N.E.2d 458. See also the companion case, *Teller v. Schepens*, 1980 Mass. Adv. Sh. 2199, 411 N.E.2d 464, discussed in text at note 54 *infra*.

<sup>2</sup> 365 Mass. 83, 83-84, 310 N.E.2d 131, 132 (1974). The discovery rule dates the accrual of a cause of action from the time that the plaintiff discovers that he has been harmed by a negligent act, rather than from the time of the “occurrence” of the negligent act itself. See text at notes 5 and 24 *infra*. The Court also referred to the modernity of this trend in *Pasquale v. Chandler*, 350 Mass. 450, 456 & n.2, 215 N.E.2d 319, 322 & n.2 (1966); and in *Franklin*, 1980 Mass. Adv. Sh. at 2195, 411 N.E.2d at 463.

<sup>3</sup> *Pasquale v. Chandler*, 350 Mass. 450, 456, 215 N.E.2d 319, 322 (1966). The Court referred to the occurrence rule as the “traditional view” in *Hendrickson v. Sears*, 365 Mass. 83, 86, 310 N.E.2d 131, 133 (1974).

<sup>4</sup> *Sonenshein, A Discovery Rule in Medical Malpractice: Massachusetts Joins the Fold*, 3 W. NEW ENG. L. REV. 433, 433 & n.1 (1981); see also Annot., 80 A.L.R.2d 368, § 7(b) (1961 & Later Case Service 167 (1979)). The *Franklin* opinion noted that it was bringing Massachusetts law into line with the “vast majority” of other states, 1980 Mass. Adv. Sh. at 2195, 411 N.E.2d at 463.

<sup>5</sup> *Franklin*, 1980 Mass. Adv. Sh. at 2188, 411 N.E.2d at 460.

discharge summary that Franklin's X-ray had been normal. In fact, however, the report prepared by the hospital's X-ray department had noted an apparent abnormality and had recommended further evaluation of Franklin's condition. Four years later another chest X-ray of Franklin in the same hospital revealed a lesion which was diagnosed as Hodgkin's disease. In 1978, six months after learning of the findings of the 1974 X-ray, Franklin sued both Dr. Albert and the hospital.<sup>6</sup>

Franklin alleged in his lawsuit that the first X-ray revealed an early manifestation of Hodgkin's disease and that Dr. Albert had been negligent in failing to inform Franklin about the abnormality and in failing to prescribe the recommended further evaluation. The case was initially referred to a medical malpractice tribunal<sup>7</sup> which found that the evidence "raise[d] a legitimate question of liability appropriate for judicial inquiry."<sup>8</sup> The superior court, nevertheless, entered summary judgment for the defendants because the three year limitations period for medical malpractice actions<sup>9</sup> had expired before Franklin sued.<sup>10</sup> On appeal, the Supreme Judicial Court held that the superior court's ruling had been correct under existing Massachusetts case law defining when a medical malpractice action "accrues."<sup>11</sup> However, the Court sharply criticized these precedents, and explicitly overruled them.<sup>12</sup>

The earlier of the overruled decisions, *Capucci v. Barone*, involved a plaintiff who persistently complained about pains following abdominal surgery. Two years and two months after the first operation, another surgeon performed a second operation and discovered a left-over surgical sponge.<sup>13</sup> *Capucci* held that the plaintiff's lawsuit against the first doctor, which had been filed promptly after discovery of the sponge, was time-barred. The cause of action accrued, the opinion said, when the physician committed "[a]ny act of misconduct or negligence," not when the "actual damage results or is ascertained."<sup>14</sup> In a 1966 decision, *Pasquale v.*

<sup>6</sup> *Id.* at 2188-89, 411 N.E.2d at 460.

<sup>7</sup> See G.L. c. 231, § 60B.

<sup>8</sup> 1980 Mass. Adv. Sh. at 2188-89, 411 N.E.2d at 460.

<sup>9</sup> See G.L. c. 260, § 4 which provides, in pertinent part: "Actions of contract or tort for malpractice, error or mistake against physicians, surgeons, dentists, optometrists, hospitals and sanatoria . . . shall be commenced only within three years after the cause of action accrues."

<sup>10</sup> 1980 Mass. Adv. Sh. at 2189, 411 N.E.2d at 460.

<sup>11</sup> *Id.* at 2196, 411 N.E.2d at 464.

<sup>12</sup> *Id.* at 2188, 411 N.E.2d at 459-60.

<sup>13</sup> *Capucci v. Barrone*, 266 Mass. 578, 579-80, 165 N.E. 653, 654 (1929).

<sup>14</sup> *Id.* at 581, 165 N.E. at 654-55. The Court explained that the doctor's negligence "was a breach of his contract." *Id.* *Franklin* observed that in *Capucci* "[n]o suggestion was offered as to how an injured plaintiff could pursue his theoretical right of action before he had any chance to discover he had been injured." 1980 Mass. Adv. Sh. at 2190, 411 N.E.2d at 460. A negligence action ordinarily does not accrue before the plaintiff knew he suffered damages. See RESTATEMENT (SECOND) OF TORTS § 281 (1965). Compare *Cannon v. Sears, Roebuck & Co.*,

*Chandler*, the Court reluctantly reaffirmed the *Capucci* “occurrence” test.<sup>15</sup>

In *Franklin*, the defendants argued that the Court was bound by *Pasquale* to use the occurrence test to determine when the plaintiff’s cause of action accrued. The Court disagreed,<sup>16</sup> explaining that the rule was unfair to plaintiffs like Franklin, who had had no way of knowing about the abnormality on the earlier X-ray.<sup>17</sup> Accordingly, the Court extended to medical malpractice actions the principle that a claim should not be time-barred before a plaintiff has “notice” of its existence.<sup>18</sup>

The *Franklin* court noted that use of the occurrence test to determine when a cause of action accrues does effectuate the policy of repose embodied in all statutes of limitations.<sup>19</sup> Nevertheless the Court felt that decisions adopting the occurrence test gave undue weight to the policy of repose and did not adequately “balance the harm of being deprived of a remedy

374 Mass. 739, 742, 374 N.E.2d 582 (1978) (“A cause of action based on negligence requires that both negligence and harm be shown, . . .”) with *DiGregorio v. Commonwealth*, 1980 Mass. App. Ct. Adv. Sh. 1559, 407 N.E.2d 1323, 1324 (“A cause of action for breach of contract accrues at the time of the breach . . . even if the amount of damages is unknown at the time of the breach and even though the damages may not be sustained until later.”) See also *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1200-04 (1950); Sonenshein, *supra* note 4, at 436-44.

<sup>15</sup> 350 Mass. 450, 458, 215 N.E.2d 319, 323 (1966). *Pasquale* was a wrongful death action brought by the estate of a man who died in 1961 of multiple abscesses discovered to have been caused by a surgical clamp left in his abdomen during ulcer surgery in 1955. *Pasquale* suggested it would have overruled *Capucci* but for the Legislature’s recent failure to enact a “discovery rule” amendment to G.L. c. 260, § 4 (the statute set out at note 9 *supra*). *Id.* at 456-58. In *Franklin*, the Court again reviewed the legislative history of the failed amendment. This time the Court concluded that it was improper to place so much significance on the legislative history, since inaction was too ambiguous a fact from which to infer specific legislative intent. 1980 Mass. Adv. Sh. at 2191, 411 N.E.2d at 461. See also *Hendrickson v. Sears*, 365 Mass. 83, 88, 310 N.E.2d 131, 134 (1974).

The approach the Court used in *Franklin* to overrule its prior decisions is markedly different from the approach it used to overrule its decisions on charitable immunity, *Colby v. Carney Hospital*, 356 Mass. 527, 528, 254 N.E.2d 407 (1969), and municipal immunity, *Whitney v. City of Worcester*, 373 Mass. 208, 210, 366 N.E.2d 1210 (1977). These decisions announced the Court’s intention to overrule the immunity doctrines in the next case to come before it, giving the Legislature an opportunity to act first. See G.L. c. 231, § 85K, inserted by Acts of 1971, c. 785, § 1 and G.L. c. 258, as amended by Acts of 1978, c. 512, § 15.

<sup>16</sup> 1980 Mass. Adv. at 2190, 411 N.E.2d at 461.

<sup>17</sup> “The manifest injustice of the *Capucci* doctrine is that, rather than punishing negligent delay by the plaintiff, it punishes ‘blameless ignorance’ by holding a medical malpractice action time-barred before the plaintiff reasonably could know the harm he has suffered.” *Id.* at 2194, 411 N.E.2d at 463.

<sup>18</sup> *Id.* at 2195, 411 N.E.2d at 463.

<sup>19</sup> *Id.* at 2194, 411 N.E.2d at 463. “Repose” refers to the notion that social and economic stability is fostered by the policy that, after a certain amount of time, legal claims must be manifest or expire. The other policy promoted by statutes of limitations is to ensure that the evidence is “fresh and available.” *Id.* See generally *Developments, supra* note 14, at 1185-86.

versus the harm of being sued.”<sup>20</sup> Adoption of a “discovery” rule would, *Franklin* implied, better promote this balance. Although the Court could not extend the three-year limitations period set by the Legislature, it could modify the statute’s impact by altering its interpretation of “accrues,”<sup>21</sup> so that non-obvious injuries would not be time-barred prior to their discovery. “Absent explicit legislative direction,” the Court said, “the determination of when a cause of action accrues, causing the statute of limitations to run, has long been the product of judicial interpretation in this Commonwealth.”<sup>22</sup> Accordingly, abandonment of the occurrence test was within the ambit of judicial discretion.

The operation of the discovery rule adopted in *Franklin* can be tersely described. The statute of limitations is an affirmative defense which is waived if it is not asserted in the defendant’s Answer.<sup>23</sup> Ordinarily, a judge can decide whether the defense should be sustained simply by looking at the period of time that has elapsed between the occurrence of the event which is the basis for the plaintiff’s claim and the commencement of the lawsuit. Since most harm is obvious when it occurs, there is usually no need to resort to the discovery rule. However, if a plaintiff suffers harm which is not obvious when it occurs, use of the discovery rule may allow him to pursue a lawsuit after the statute of limitations would otherwise appear to have run. In such a case, the plaintiff can avoid dismissal of his lawsuit by showing that at the time of the incident he neither knew, nor reasonably could have known, that it would give rise to the cause of action.<sup>24</sup>

As the cases decided by the Supreme Judicial Court indicate, the situations in which long periods of time elapse between occurrence of a wrong and obvious injury to a plaintiff are frequently those in which the plaintiff has relied upon expert advice. In a series of decisions, beginning with *Hendrickson v. Sears*<sup>25</sup> in 1974 and culminating with *Franklin*, the Court has consistently applied the discovery rule where members of various professions have pleaded the statute of limitations defense. In *Hendrickson*, the Court explained its rationale for using the discovery rule in language that prefigured the *Franklin* decision:

The attorney, like the doctor, is an expert, and much of his work is done out of the client’s view. The client is not an expert; he cannot be

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<sup>20</sup> 1980 Mass. Adv. Sh. at 2193, 411 N.E.2d at 462.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* Accordingly, “[t]his court is not barred from departing from that rule if persuaded that the values in so doing outweigh the values underlying stare decisis.” *Id.*

<sup>23</sup> MASS. R. CIV. P. 8(c).

<sup>24</sup> 1980 Mass. Adv. Sh. at 2188, 411 N.E.2d at 459-60. *Hendrickson v. Sears*, 365 Mass. 83, 91, 310 N.E.2d 131, 136 (1974). On this issue, the plaintiff has the burden of proof. 1980 Mass. Adv. Sh. at 2196, 411 N.E.2d at 464.

<sup>25</sup> 365 Mass. 83, 310 N.E.2d 131 (1974). See also *Cannon v. Sears, Roebuck & Co.*, 374 Mass. 739, 374 N.E.2d 582 (1978) (products liability cause of action accrues at time of injury, not at time of negligent manufacture or sale).

expected to recognize professional negligence if he sees it, and he should not be expected to watch over the professional or to retain a second professional to do so.<sup>26</sup>

This formulation recognizes that some problems may be identified only by persons with special knowledge or expertise.<sup>27</sup>

The plaintiffs in *Hendrickson*, for example, had hired an attorney to search the title to real estate which they planned to purchase. Their attorney certified that the title was “valid, clear and marketable”; but when the plaintiffs tried to sell the property nine years later they discovered that the title was encumbered by an easement.<sup>28</sup> The defendant argued that the “legal profession in Massachusetts should be held to the same rules as the medical profession”<sup>29</sup> and urged the Court to apply the *Capucci* rule to his statute of limitations defense.<sup>30</sup> The Court declined to do so, stating that adoption of *Capucci*’s occurrence test would provide lawyers with an incentive to breach their fiduciary duties to their clients.<sup>31</sup>

A 1976 case, *Friedman v. Jablonski*,<sup>32</sup> illustrates the application of the discovery rule—and its limits—in a slightly different context. There, purchasers of real estate sued the sellers and their broker, charging that fraudulent misrepresentations had been made during the sale. The plaintiffs, who filed the action more than two years after the sale,<sup>33</sup> sought to avoid dismissal under the statute of limitations. Relying on *Hendrickson*,<sup>34</sup> the plaintiffs asserted that their cause of action did not accrue until they “knew or reasonably should have known of the misrepresentations.”<sup>35</sup> The Court analyzed how the discovery rule might apply to each of the plaintiff’s two claims: a misrepresentation that there was a right of way across neighboring property and a misrepresentation that an artesian well was located on the property.<sup>36</sup>

*Friedman* held that the plaintiffs’ right of way claim was barred by the

<sup>26</sup> 365 Mass. at 90, 310 N.E.2d at 135.

<sup>27</sup> The other situation in which courts are likely to adopt a discovery rule is when the time at which an injury occurs is “inherently unknowable.” *E.g.*, *Urie v. Thompson*, 337 U.S. 163, 169 (1949); *Haggerty v. McCarthy*, 344 Mass. 136, 145, 181 N.E.2d 562, 568 (1962) (dissenting opinion).

<sup>28</sup> 365 Mass. at 84, 310 N.E.2d at 132. *See* G.L. c. 93, § 70, as amended by Acts of 1980, c. 448, for a special rule for title certifications where the “mortgagor is required or agrees to pay . . . any fee [for] . . . an attorney acting for or on behalf of the mortgagee.”

<sup>29</sup> *Id.* at 87, 310 N.E.2d at 134.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 90, 310 N.E.2d at 135.

<sup>32</sup> 371 Mass. 482, 358 N.E.2d 994 (1976).

<sup>33</sup> *Id.* at 484, 358 N.E.2d at 996. G.L. c. 260 § 2A. The limitations period was subsequently increased to three years by Acts of 1973, c. 777, § 1.

<sup>34</sup> 365 Mass. at 91, 310 N.E.2d at 136.

<sup>35</sup> 371 Mass. at 484, 358 N.E.2d at 996.

<sup>36</sup> *Id.* at 483-84, 486-87, 358 N.E.2d at 996, 997-98.

statute of limitations “as [a] matter of law.”<sup>37</sup> Because the existence of the right of way was a recorded property interest, the Court explained, it was not “inherently unknowable.”<sup>38</sup> Consequently, the purchasers could have learned of the right of way if they had employed an attorney to perform a title search.<sup>39</sup> The discovery rule, in other words, applied only to representations which the plaintiffs, in the exercise of “due diligence,” could not have learned were false until after the sale.<sup>40</sup> However, the Court felt that the plaintiff’s second claim that the sellers falsely represented there was an artesian well on the land should be treated differently. As to this claim, the *Friedman* Court concluded that the plaintiff’s due diligence presented a question of fact, because it was unlikely that a title search would have revealed the location of the well. Hence, the plaintiffs could overcome the statute of limitations defense if they presented facts which established that “they should not have known of the location of the well until within two years of the commencement of this action.”<sup>41</sup>

The issue of fraud deserves attention in connection with the discovery rule adopted by *Franklin*,<sup>42</sup> *Friedman*,<sup>43</sup> and *Hendrickson*.<sup>44</sup> A Massachusetts statute provides that the statute of limitations shall be tolled where the existence of a cause of action is “fraudulently concealed” from the injured party.<sup>45</sup> Under the fraudulent concealment statute the “period prior to the discovery” of the cause of action is simply excluded from the limitations period.<sup>46</sup> However, this statute has not proved itself adequate to temper the harsh results obtained under the occurrence test. In the seminal decision of *Capucci v. Barone*,<sup>47</sup> for example, the plaintiff’s argument that the facts, while not showing deliberate concealment by the doctor of his malpractice, nevertheless brought the case “‘within the equity’ of the fraudulent concealment statute” did not prevail.<sup>48</sup>

The *Friedman* decision also illustrates that the fraudulent concealment statute provides a narrower tolling principle than the discovery rule. In *Friedman*, the plaintiffs charged fraudulent misrepresentations were made

<sup>37</sup> *Id.* at 486, 358 N.E.2d at 997.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* Had the purchasers relied on a misstatement of their own attorney concerning the right of way, the Court indicated that they might have a claim against their attorney which would not have been time-barred under the *Hendrickson* discovery rule. *Id.* at 486 n.4, 358 N.E.2d at 997 n.4.

<sup>40</sup> *Id.* at 486, 358 N.E.2d at 997.

<sup>41</sup> *Id.* at 487, 358 N.E.2d at 998.

<sup>42</sup> 1980 Mass. Adv. Sh. 2187, 411 N.E.2d 464.

<sup>43</sup> 371 Mass. 482, 358 N.E.2d 994 (1976).

<sup>44</sup> 365 Mass. 83, 310 N.E.2d 131 (1974).

<sup>45</sup> G.L. c. 260, § 12.

<sup>46</sup> *Id.*

<sup>47</sup> 266 Mass. 578, 165 N.E. 653 (1929).

<sup>48</sup> *Id.* at 581, 165 N.E. at 655.

in the land sale, but they could not secure the protection of the fraudulent concealment statute because they were unable to aver that the sellers and the broker made efforts to conceal their cause of action.<sup>49</sup> The *Friedman* opinion, while acknowledging there were factual allegations “constituting fraud,”<sup>50</sup> held that fraudulent concealment required “positive acts” in the “absence of a fiduciary relationship silence cannot constitute fraudulent concealment.”<sup>51</sup> There was no duty of disclosure in *Friedman* because the broker’s fiduciary duty was to the seller, not to the plaintiffs-purchasers.<sup>52</sup>

The fraudulent concealment statute did not help the plaintiffs overcome the statute of limitations in the *Franklin* and *Hendrickson* cases for a different reason. While there were fiduciary relationships between the parties in both *Franklin* (doctor-patient) and *Hendrickson* (attorney-client), there was no evidence in either case that the “silence” of the fiduciaries was based on deliberate concealment of the cause of action. Instead, the doctor’s failure to reveal the X-ray findings in *Franklin* and the attorney’s failure to uncover the title encumbrance in *Hendrickson* were negligent rather than fraudulent. Only if the fiduciaries had subsequently realized their negligence and thereafter contrived to protect themselves through nondisclosure would *Franklin* and *Hendrickson* appear to fall within the fraudulent concealment principle.<sup>53</sup>

Thus, the discovery rule adopted in *Franklin* is both preferable to the *Capucci* occurrence rule and a necessary supplement to the fraudulent concealment statute. Nevertheless, use of the discovery rule may produce

<sup>49</sup> 371 Mass. at 485 n.3, 358 N.E.2d at 997 n.3.

<sup>50</sup> *Id.* at 488-89, 358 N.E.2d at 998-99.

<sup>51</sup> *Id.* at 485 n.3, 358 N.E.2d at 997 n.3. See also *O’Brien v. McSherry*, 222 Mass. 147, 150, 109 N.E. 904 (1915).

<sup>52</sup> 371 Mass. at 485, 358 N.E.2d at 997. This case, then, illustrates the need for a discovery rule independent of G.L. c. 260, § 12. Even if the defendant-broker had a fiduciary relationship with the plaintiff-purchasers, no fiduciary relationship would exist between the principals to the transaction, the sellers and purchasers of the real estate. See further *Frank Cooke, Inc. v. Hurtwitz*, 1980 Mass. App. Ct. Adv. Sh. 1197, 1206, 406 N.E.2d 678, 684.

<sup>53</sup> See *Hendrickson*, 365 Mass. at 90, 310 N.E.2d at 135. Attorneys, at least, are held to a duty of full disclosure. *Id.* See *Frank Cooke, Inc. v. Hurwitz*, 1980 Mass. App. Ct. Adv. Sh. at 1204, 406 N.E.2d at 685 (G.L. c. 260, § 12 tolls the statute of limitations “if the wrongdoer, either through actual fraud or in breach of a fiduciary duty of full disclosure, keeps from the injured person knowledge of the facts giving rise to a cause of action and the means of acquiring knowledge of such facts.”).

The extent of physicians’ duty to make disclosures to their patients is controversial, varies widely from state to state, and is undergoing rapid judicial expansion. Several courts have held that deliberate nondisclosure to patients by physicians of negligently-caused harms tolled the statutes of limitations. *Lynch v. Rubacky*, 424 A.2d 1169 (N.J. 1981); *Garcia v. Presbyterian Hospital Center*, 593 P.2d 407 (N.M. App. 1974) See also *Johns-Manville Products Corp. v. Contra Costa Superior Court*, 612 P.2d 948 (Cal. 1980) *Simcuski v. Saeli*, 406 N.Y.S.2d 259 (1978); *State ex rel. Sperandio v. Clymer*, 563 S.W.2d 88 (Mo. App. 1978); *Haggerty v. McCarthy*, 344 Mass. 136, 145, 181 N.E.2d 562, 568 (1962) (dissenting opinion).

undesirable results. One problem is illustrated by *Teller v. Schepens*,<sup>54</sup> the companion case to *Franklin*. The plaintiff in *Teller* had three eye operations, and seven weeks after the final operation the plaintiff was informed he would not recover his vision.<sup>55</sup> Three years less two days later the plaintiff filed a malpractice action and encountered a statute of limitations defense. The decisive question was whether the cause of action accrued at the time of the third operation, which would bar the lawsuit, or at the time the plaintiff learned the results of the operation, which would allow the suit to proceed. The Supreme Judicial Court applied the discovery test it had adopted in *Franklin*. Use of the discovery rule instead of the occurrence test in *Teller* extended the limitations period by the seven week period, and thus the plaintiff's suit survived the time bar by a two day margin.<sup>56</sup> Arguably, nothing turns on the seven weeks grace the tardy plaintiff received in *Teller*, but the "balance of the harm of being deprived of a remedy versus the harm of being sued"<sup>57</sup> shifts when the *Teller* holding is applied, for example, to the facts of the *Hendrickson* litigation. In *Hendrickson*, the client first learned of his attorney's malpractice when he sought to sell real estate nine years after the attorney certified the title.<sup>58</sup> The client filed suit against the lawyer four months thereafter,<sup>59</sup> but under *Teller* the plaintiff would be allowed to tack the full statute of limitations period<sup>60</sup> onto the nine year "discovery" period. The unsettling impact that this could have on the underlying policies of repose and access to evidence is plain.<sup>61</sup>

Glancing attention was paid to this problem in the *Franklin* opinion where the Court referred to the possible creation of an "outside limit"<sup>62</sup> on the time in which an action might be brought. To illustrate, use of an out-

<sup>54</sup> 1980 Mass. Adv. Sh. 2199, 411 N.E.2d 464.

<sup>55</sup> *Id.* at 2200, 411 N.E.2d at 465.

<sup>56</sup> *Id.* at 2201, 411 N.E.2d at 466. By contrast, in *Franklin* the plaintiff filed suit within six months after discovery of the alleged malpractice. 1980 Mass. Adv. Sh. at 2189, 411 N.E.2d at 460. Thus it seemed appropriate in *Franklin*—but not in *Teller*—to say that the occurrence test "rather than punishing negligent delay by the plaintiff, punishes 'blameless ignorance' " *Id.* at 2194, 411 N.E.2d at 463.

<sup>57</sup> See text at note 20 *supra*.

<sup>58</sup> 365 Mass. at 84, 310 N.E.2d at 132.

<sup>59</sup> *Id.*

<sup>60</sup> The *Hendrickson* decision left unresolved whether the applicable limitations period for legal malpractice is six years (G.L. c. 260, § 2) or three years (G.L. c. 260, § 2A). *Id.* at 86, 310 N.E.2d at 133. See also *McStow v. Bornstein*, 1979 Mass. Adv. Sh. 1024, 1030-31, 388 N.E.2d 674 (legal malpractice sounds in contract but issue of which statute of limitations is appropriate left unresolved); *Town of Nantucket v. Beinecke*, 1979 Mass. Adv. Sh. 2623, 2626 n.4, 398 N.E.2d 458 (same). See also *Frank Cooke, Inc. v. Hurwitz*, 1980 Mass. App. Ct. Adv. Sh. 1197, 406 N.E.2d 678; Annot., 2 A.L.R.4th 284 (1980).

<sup>61</sup> See text and note at note 19 *supra*. See also *Cannon v. Sears, Roebuck & Co.*, 374 Mass. 739, 374 N.E.2d 582 (1978).

<sup>62</sup> 1980 Mass. Adv. Sh. at 2195, 411 N.E.2d at 463.



side limit—also termed a “sliding scale discovery rule”<sup>63</sup>—would require a suit to be filed three years after an injury occurred (the statute of limitations period), but no more than seven years after the transaction or occurrence which gave rise to the cause of action (the outside limit). *Franklin* did not adopt an outside limit on the discovery rule because, in the Court’s opinion, such a solution requires Legislative action.<sup>64</sup>

Although it is a salutary response to protracted extensions of the limitations period under the discovery rule, the “outer limit” approach to statutes of limitations will occasionally yield the same harsh result as the discarded occurrence test. The plaintiff in *Hendrickson*, for example, would have been time-barred by an outer limit of seven years, even though he sued promptly after learning of the attorney’s malpractice. At the same time, the “outer limit” may work to the defendant’s detriment by permitting the plaintiff to delay filing suit long after discovery of the cause of action. A possible solution is for either the Court or Legislature to require the suit to be filed within a “reasonable time” when a plaintiff invokes the discovery rule in response to a statute of limitations defense.<sup>65</sup>

**§ 9.6. Discovery—Work Product Rule.** In 1947 the United States Supreme Court held in *Hickman v. Taylor*<sup>1</sup> that the pre-trial discovery provisions in the recently adopted Federal Rules of Civil Procedure<sup>2</sup> were limited by the attorney “work product” doctrine.<sup>3</sup> Although the work product limitation on discovery in civil actions<sup>4</sup> subsequently met with widespread acceptance, the Supreme Judicial Court never had occasion to expressly adopt the work product doctrine in Massachusetts.<sup>5</sup> In 1970, however, amendments to the federal pretrial discovery rules substantially

<sup>63</sup> *Pasquale*, 350 Mass. at 458, 215 N.E.2d at 323. See, e.g., G.L. c. 260, § 2B.

<sup>64</sup> 1980 Mass. Adv. Sh. at 2195, 411 N.E.2d at 463.

<sup>65</sup> See, e.g., G.L. c. 260, § 4B (tort claims arising out of hit and run accidents may be brought within six months after the plaintiff learns the identity of the defendant but not more than three years after the accident). Although the matter is not free from difficulty, the Court should be able to use estoppel or laches principles to attain this result. See *Developments, supra* note 14, at 1184, 1222. Cf. *Commonwealth v. One 1976 Cadillac DeVille Automobile*, 1980 Mass. Adv. Sh. 985, 991, 403 N.E.2d 935.

§ 9.6. <sup>1</sup> 329 U.S. 495 (1947).

<sup>2</sup> The Federal Rules of Civil Procedure became effective in September, 1938.

<sup>3</sup> *Hickman v. Taylor*, 329 U.S. 495, 510, describes the “attorney work product” as “written statements, private memoranda and personal recollections prepared or formed by an adverse party’s counsel in the course of his legal duties.”

<sup>4</sup> The work product doctrine has more recently been extended to criminal practice. *U.S. v. Nobles*, 422 U.S. 225, 236-40 (1975). See also MASS. R. CRIM. P. 14(a)(5).

<sup>5</sup> Prior to *Ward v. Peabody*, 1980 Mass. Adv. Sh. 1395, 405 N.E.2d 973, the work product doctrine was mentioned in several other Massachusetts decisions. See, e.g., *Manganno Drywall, Inc. v. White Construction Co.*, 372 Mass. 661, 363 N.E.2d 669 (1977); *Ottaway Newspapers, Inc. v. Appeals Court*, 372 Mass. 539, 362 N.E.2d 1189 (1977); *Comm. v. Mustone*, 353 Mass. 490, 233 N.E.2d 1 (1968); *Lindsey v. Ogden*, 1980 Mass. App. Ct. Adv. Sh. 1243, 406 N.E.2d 701.

incorporated *Hickman*'s work product doctrine into Federal Rule 26(b)(3).<sup>6</sup> Hence, the work product doctrine was imported into Massachusetts practice when the text of Federal Rule 26(b)(3) was later adopted by the Massachusetts Rules of Civil Procedure.<sup>7</sup>

In a case decided during the *Survey* year, *Ward v. Peabody*,<sup>8</sup> the Supreme Judicial Court initiated its first extended discussion of the work product doctrine. In *Ward*, the Legislature's Special Commission Concerning State and County Buildings (popularly known as the MBM Commission) issued a summons to Peabody, a lawyer, seeking production of records concerning his client, McKee-Berger-Mansueto, Inc. (MBM).<sup>9</sup> MBM waived any objection to the summons based on the attorney-client privilege.<sup>10</sup> Peabody, nevertheless, resisted production of the documents, partly on the ground that the work product doctrine protected three categories of documents sought by the Special Commission: "... (3) investigation of new business possibilities for MBM and advice in connection therewith; ... (5) former investigations of MBM or its activities proposed or ongoing at the time; [and] (6) contacts by the respondent [Peabody] with elected or appointed government officials or government employees regarding MBM; . . . ."<sup>11</sup> The Special Commission overruled Peabody's objections to production of the documents and sought judicial enforcement of its summons against Peabody.<sup>12</sup> The superior court ruled against the Special Commission,<sup>13</sup> but on appeal the Supreme Judicial Court rejected Peabody's work product objection and ordered production of the documents.<sup>14</sup>

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<sup>6</sup> *Upjohn Co. v. United States*, 449 U.S. 383, 398 (1981). 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2023 (1970). Note, however, that the coverage of Rule 26(b)(3) is limited to "documents and tangible things" so resort to *Hickman v. Taylor* is still necessary if the work product is unwritten. See note 3 *supra* ("personal recollections"). FED. R. CIV. P. 26(b)(3) is not affected by the 1980 amendments to the federal discovery rules. See Federal Rules of Civil Procedure Amendments, 48 USLW 4497, (May 6, 1980).

<sup>7</sup> 365 Mass. 772-74 (1974).

<sup>8</sup> 1980 Mass. Adv. Sh. 1395, 405 N.E.2d 973.

<sup>9</sup> *Id.* at 1395, 405 N.E.2d at 973. The opinion states that "MBM had retained the respondent [Peabody] or his firm in order to assist the company to secure the award of the management contract [for the construction of the University of Massachusetts campus in Boston]. The respondent continued to represent the company during the period in which the contract and performance thereunder came into question." *Id.* at 1399, 405 N.E.2d at 976. Peabody did agree to appear personally before the Special Commission. *Id.* at 1395, 405 N.E.2d at 974.

<sup>10</sup> *Id.* at 1395, 405 N.E.2d at 974.

<sup>11</sup> *Id.* at 1400, 1401, 405 N.E.2d at 977. The superior court ruled the three categories of documents described in the text were work product; it is unclear from the opinion whether Peabody interposed a work product objection to production of the other eight categories of documents. The other objections interposed by Peabody will not be discussed. See note 14 *infra*.

<sup>12</sup> *Id.* at 1399-400, 405 N.E.2d at 976.

<sup>13</sup> *Id.* at 1401, 405 N.E.2d at 977.

<sup>14</sup> *Id.* at 1401, 1406-08, 405 N.E.2d at 977, 980-81. *Ward* also held that the Special Commission's investigatory power had not expired, that "irrelevance of any demanded material to the

Unfortunately, *Ward* was not the ideal case for explication of the work product doctrine. Indeed, the opinion does not even refer to Rule 26(b)(3). One reason for the omission of Rule 26(b)(3) from the Court's discussion of the work product doctrine is that, unlike the Federal Rules of Civil Procedure,<sup>15</sup> Rule 81(a) provides that the Massachusetts rules apply only to "civil proceedings in courts."<sup>16</sup> Peabody's objection, however, was addressed to documents sought by a legislative body, not by the opposing party in a lawsuit.<sup>17</sup> Since the civil rules did not apply in *Ward*, the Court reviewed the general concerns about the production of evidence which have arisen in the context of legislative investigations.<sup>18</sup> Based on this review, the *Ward* Court concluded that "legitimate claims of standard privileges," especially the attorney-client privilege and the privilege against self-incrimination, may apply in this context.<sup>19</sup> Nevertheless, the Court carefully refrained from deciding whether the work product doctrine applies in the context of legislative investigations.<sup>20</sup> Instead, it determined that the

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purposes of the [Legislature's] resolve [creating the Special Commission] would be a ground [for denying production of the documents], and in that connection consideration of privacy interests should play a part." *Id.* at 1401-02, 405 N.E.2d at 977.

<sup>15</sup> FED. R. CIV. P. 81(a)(3) (rules apply to "proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States."); *Upjohn Co. v. United States*, 449 U.S. 383, 398-99 (1981).

<sup>16</sup> A second reason that Rule 26(b)(3) is omitted from the Court's discussion is that the Legislature's resolve creating the Special Commission provided that compulsory process issued by the Commission to obtain witness testimony or documents should conform to the standards for criminal, not civil, cases. *Ward*, 1980 Mass. Adv. Sh. at 1408 n.13, 405 N.E.2d at 981 n.13. While Rule 14(a)(5) of the Massachusetts Rules of Criminal Procedure does preclude discovery of the opponent's work product in criminal cases, it does so in terms which are different from the civil rule. *Ward* is not an explication of Rule 14(a)(5) either; in a footnote the Court tersely states that "[f]or the reasons we have suggested, the [criminal] rule is not 'applicable' here." *Id.* Indeed, the exceptions to the work product doctrine upon which the Court bases its decision do not appear in the text of Rule 14(a)(5).

<sup>17</sup> *Id.* at 1395, 405 N.E.2d at 974.

<sup>18</sup> *Id.* at 1402-03, 405 N.E.2d at 977-78.

<sup>19</sup> *Id.* at 1403, 405 N.E.2d at 978.

<sup>20</sup> *Id.* at 1408, 405 N.E.2d at 981 ("[w]e are not to be understood as saying that the work product idea, or some implication from it, can never apply in a legislative investigation. It is fair to add, however, that we have not yet seen a decision where work product has been applied in that context."). Compare *Upjohn Co. v. United States*, 449 U.S. 383, 397 (1981) (applying work product protection to Internal Revenue Service's investigatory summons).

A case decided after *Ward v. Peabody* is relevant to the general issue of judicial supervision of the investigative power. In *re Roche*, 1980 Mass. Adv. Sh. 2203, 411 N.E.2d 466, application for stay granted, 448 U.S. 1312 (1980) (Brennan, J.), upheld an order holding a television news reporter in contempt of court for failure to testify in connection with proceedings by the Commission on Judicial Conduct, but the Supreme Judicial Court reaffirmed the judicial duty to assure that discovery is not "oppressive." 1980 Mass. Adv. Sh. at 2215, 411 N.E.2d at 475. See also *Ward*, 1980 Mass. Adv. Sh. at 1403, 405 N.E.2d at 978 (stressing Court's concern with "protection against harassing tactics unjustified by the requirements of sober investigation"); *id.* at 1408-10, 405 N.E.2d at 981-82 (privacy interest as independent bar to discovery).

documents sought by the Special Commission fell within exceptions to the work product doctrine and relied on these exceptions to overrule Peabody's objection.<sup>21</sup>

The principal reason the *Ward* Court gave for overruling Peabody's work product objection is that the work product doctrine shields only documents prepared for litigation. In this case, the Court concluded, "at least some" of the summoned documents concerned "efforts to obtain business for MBM," and bore no relationship to litigation.<sup>22</sup> This basis for the Court's decision is consistent with the terms of Massachusetts Rule of Civil Procedure 26(b)(3), which provides that, to elude discovery, documents must be "prepared in anticipation of litigation or for trial." It is also consistent with the Supreme Court's decision in *Hickman*, which derived the work product doctrine from the "public policy underlying the orderly prosecution and defense of legal claims" and from the lawyer's role in the adversary system.<sup>23</sup> The "anticipation of litigation" qualification to the work product doctrine thus explains why the Special Commission was entitled to documents concerning Peabody's efforts to develop "new business possibilities" for MBM or Peabody's contacts with "government officials" on MBM's behalf.<sup>24</sup> Even if Peabody was thrust into an adversarial role when the Special Commission inquired into MBM's affairs, the documents in question were created for a different purpose and Peabody performed a different role at the time of their creation.

The anticipation of litigation qualification does not satisfactorily explain, however, why the work product doctrine did not shield the documents concerning "former investigations of MBM" which were also sought by the Special Commission.<sup>25</sup> The opinion does not elucidate the nature of these "former investigations," but it seems unlikely the documents are fairly characterized as part of the MBM lawyers' trial preparation.<sup>26</sup> Nevertheless, documents related to an investigation might have been prepared in "anticipation" of litigation for, as *Ward* recognized, under the work product doctrine the litigation may be "pending or prospective."<sup>27</sup> In *Hickman*, for example, the Supreme Court barred discovery of an attorney's notes of in-

<sup>21</sup> *Id.* at 1407, 1408, 405 N.E.2d at 980, 981.

<sup>22</sup> *Id.* at 1407, 405 N.E.2d at 980. The Court did not determine whether Peabody was acting as MBM's attorney. See MASS. R. CIV. P. 26(b)(3) which refers to the "party's representative (including his attorney, consultant, surety, indemnitor, insurer or agent)."

<sup>23</sup> 329 U.S. at 510, 511.

<sup>24</sup> *Ward* stated "at least some" of the documents concerned efforts to "obtain business for MBM." 1980 Mass. Adv. Sh. at 1407, 405 N.E.2d at 980. See the third and sixth categories of documents sought by the Special Commission in the text at note 11 *supra*.

<sup>25</sup> See the fifth category of documents sought by the Special Commission in the text at note 11 *supra*.

<sup>26</sup> See *Ward*, 1980 Mass. Adv. Sh. at 1400 n.3, 405 N.E.2d at 977 n.3 ("Our summary of the eleven groupings [of documents sought by the Commission] omits various details.").

<sup>27</sup> *Id.* at 1407, 405 N.E.2d at 980.

interviews with witnesses to an accident which were conducted before his client was sued.<sup>28</sup> Since *Hickman*, courts have consistently held that documents prepared with a “reasonable expectation” that litigation would result are protected, and the fact that hindsight proves the forecast wrong is irrelevant.<sup>29</sup> Viewed against the express language of the rule of civil procedure and the background of the work product doctrine it seems imprudent to read *Ward* as a precedent narrowly defining what documents satisfy the anticipation of litigation test. Instead, the claim that the documents concerning former investigations were protected by the work product doctrine was rejected on the narrow ground that Peabody failed to demonstrate the “necessary relation to litigation, pending or prospective.”<sup>30</sup>

*Ward* went on to advance other reasons for rejecting Peabody’s assertion of the work product doctrine. One reason, the Court stated, is that “the occasions for the writing of these papers are long past, and as far as appears neither the papers nor their substantial equivalents are available from another source.”<sup>31</sup> The Court’s statement invokes the “substantial need” or “hardship” exception to the *Hickman* doctrine,<sup>32</sup> one that is embodied in Massachusetts Rule of Civil Procedure 26(b)(3).<sup>33</sup> In assaying the use of this exception in *Ward* it is important to note that nowhere does the opinion suggest that Peabody’s “mental impressions, conclusions, opinions, or legal theories”<sup>34</sup> were embodied in the documents sought by the Special Commission. The omission is important because protection of the attorney’s “mental impressions” is the fundamental purpose behind the qualified privilege established by *Hickman*<sup>35</sup> and documents containing mental impressions are afforded nearly absolute protection.<sup>36</sup>

<sup>28</sup> 329 U.S. at 497 (“possible litigation”); *id.* at 498 (“anticipated litigation”).

<sup>29</sup> *E.g.*, *In Re Grand Jury Proceedings*, 604 F.2d 798, 803 (3d Cir. 1979). *See* 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2024 at 198 (“Thus, the test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.”). *Cf.* *Upjohn Co. v. United States*, 449 U.S. 383, 388, 397 (protecting documents prepared by corporation’s in-house counsel in course of internal investigation).

<sup>30</sup> *Ward*, 1980 Mass. Adv. Sh. at 1407, 405 N.E.2d at 980.

<sup>31</sup> *Id.*

<sup>32</sup> *Hickman*, 329 U.S. at 511-12. *See also* *Upjohn Co. v. United States*, 449 U.S. 383, 399, 400 (rejecting government’s argument that it had made a sufficient showing of “necessity” to overcome the work product protection).

<sup>33</sup> The rule provides, in pertinent part, that “a party may obtain discovery of documents and tangible things . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.”

<sup>34</sup> MASS. R. CIV. P. 26(b)(3).

<sup>35</sup> 329 U.S. at 510, 511, 513. *See also id.* at 517 (lawyer’s memorandum of witness interview would be in the lawyer’s “language, permeated with his inferences”) (Jackson, J. concurring); *Upjohn Co. v. United States*, 449 U.S. 383, 399, 400.

<sup>36</sup> *Upjohn*, 449 U.S. at 400. (Rule 26 and *Hickman v. Taylor* accord special protection to work product revealing the attorney’s mental processes and some lower courts have adopted an

The Supreme Judicial Court's application of the substantial need or hardship exception to the facts of the case raises a more basic question, however. *Ward* states that "as far as appears" the documents are not available from another source.<sup>37</sup> If the record presented to the Court was unclear on this point, production of the records should not have been compelled. Under the terms of Rule 26(b)(3), the Special Commission, as "the party seeking discovery," and not Peabody, had the burden of demonstrating both its "substantial need" for the documents and its inability "without undue hardship to obtain the substantial equivalent of the materials by other means."<sup>38</sup>

The two remaining reasons *Ward* gave for rejecting Peabody's work product claim are more difficult to assay. First, the Court observed that MBM, "an intended beneficiary of the *Hickman* doctrine," had both waived the attorney-client privilege and had not asserted any objection to production of the documents based on the work product doctrine.<sup>39</sup> The opinion did not, however, describe what significance the Court attributed to MBM's acts. While the attorney-client privilege<sup>40</sup> and work product doctrines are closely related, they are not identical. The attorney-client privilege, for example, is personal to the client and may be waived only by the client.<sup>41</sup> Thus, Peabody could not, and did not,<sup>42</sup> base his objections on the attorney-client privilege after it had been waived by MBM. But, the fact that the documents sought by the Special Commission were not protected by the attorney-client privilege is not decisive because the work product doc-

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absolute rule precluding discovery of an attorney's notes on interviews with witnesses; Supreme Court "not prepared at this juncture to say that such material is always protected by the work-product rule," but "far stronger showing of necessity and unavailability by other means" is required).

<sup>37</sup> 1980 Mass. Adv. Sh. at 1407, 405 N.E.2d at 980.

<sup>38</sup> See also *Hickman v. Taylor*, 329 U.S. at 512 ("burden rests on the one who would invade that privacy to establish adequate reasons").

<sup>39</sup> 1980 Mass. Adv. Sh. at 1408, 405 N.E.2d at 981.

<sup>40</sup> The following definition of the attorney-client privilege, written by Judge Wyzanski in *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357, 357-58 (D. Mass. 1950) is widely quoted:

The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

Massachusetts cases on the attorney client privilege include *Peters v. Wallach*, 366 Mass. 622, 627, 321 N.E.2d 806 (1975) and *Drew v. Drew*, 250 Mass. 41, 45, 144 N.E. 763, 764 (1924). See P. LIACOS, HANDBOOK OF MASSACHUSETTS EVIDENCE 184 (5th ed. 1981).

<sup>41</sup> *E.g.*, MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1979) EC 4-4, DR 4-101 (B)(1) and (C)(1).

<sup>42</sup> *Ward*, 1980 Mass. Adv. Sh. at 1395, 405 N.E.2d at 974.

trine is broader than the attorney-client privilege in some respects.<sup>43</sup> In *Hickman*, for example, the Supreme Court concluded that the attorney-client privilege did not bar discovery of the attorney's notes but the work product doctrine did.<sup>44</sup> In general, the work product doctrine erects a qualified immunity against discovery of the lawyer's trial preparation while the attorney-client privilege absolutely protects confidential communications by the client to the attorney.<sup>45</sup> The distinctions between the two doctrines have led some courts to conclude that the lawyer alone can assert the work product objection to pre-trial discovery.<sup>46</sup> The cursory treatment of this issue in *Ward* should not preclude further consideration of the matter in a future case.

The final reason the Court held the work product doctrine inapplicable in *Ward* is that the "words and deeds of the attorney are themselves a subject of relevant inquiry by the Commission."<sup>47</sup> This principle seems correct, although it finds scant judicial support<sup>48</sup> and should be used sparingly. *Hickman* rested on the perceived need to preserve the lawyer's role as advocate as a necessary adjunct to the adversary system of justice.<sup>49</sup> Thus, *Hickman* assumed both that the client's conduct was the subject of judicial

<sup>43</sup> The work product doctrine, on the other hand, applies only in the context of litigation, see text at notes 22-24 *supra*, while the attorney-client privilege also protects confidential communications seeking legal advice which do not satisfy MASS. R. CIV. P. 26(b)(3)'s "in anticipation of litigation" requirement. See *United States v. United Shoe Machinery Corp.*, at note 40 *supra*.

<sup>44</sup> 329 U.S. at 508, 509-10. *Hickman* gave three reasons the documents sought from the defendant's attorney were not protected by the attorney-client privilege: (1) the attorney obtained the information from witnesses, not from the client, (2) the documents were prepared by the attorney, not the client, for his own use, and (3) the documents reflected the attorney's, not the client's, "mental impressions, conclusions, opinions, or legal theories." *Id.* at 508. See also *Upjohn Co. v. United States*, 449 U.S. 383, 398 (1981).

<sup>45</sup> Cf. MASS. R. CIV. P. 26(b)(1) ("Parties may obtain discovery regarding any matter, not privileged, which is relevant . . .").

<sup>46</sup> *Lohman v. Superior Court*, 81 Cal. App. 3d 90, 100-01, 146 Cal. Rptr. 171, 177-78 (1978). The policy that an attorney should not be a witness in a lawsuit in which he appears as counsel lends indirect support for the result reached in the *Lohman* case. *Borman v. Borman*, 378 Mass. 775, 785-88, 393 N.E.2d 847, 854-56 (1979); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(B), 5-102. See *Hickman v. Taylor*, 329 U.S. at 513.

<sup>47</sup> 1980 Mass. Adv. Sh. at 1408, 405 N.E.2d at 981.

<sup>48</sup> See *id.*, and the discussion in 4 J. MOORE, FEDERAL PRACTICE ¶ 26.64[4] at 443-47 (2d ed. 1979). Professor Moore concludes:

These cases indicate that when the activities of counsel are inquired into because they are at issue in the action before the court, there is cause for production of documents that deal with such activities, though they are "work product." . . . When the activities of the attorneys are not an issue, however, it is ordinarily possible to obtain the underlying factual information without raiding the attorney's file . . .

In the latter situation, Moore says, the work product should be protected from discovery. *Id.* at 447.

<sup>49</sup> *Hickman*, 329 U.S. at 510, *passim*. ("contravenes the public policy underlying the orderly prosecution and defense of legal claims").

inquiry and that the opposing party had access to the relevant information by means other than examining the attorney's files.<sup>50</sup> Under the work product doctrine the client's own papers are subject to discovery and cannot be shielded merely by transferring custody to the attorney.<sup>51</sup> However, when the attorney's personal conduct is being investigated, the policies underlying the work product doctrine are no longer applicable because the attorney is stripped of his representative role in the legal system. This does not mean, of course, that the attorney can be forced to reveal confidential communications from a client, and the judiciary should be especially vigilant to assure the opposing party is not abusing the discovery rules to undermine the attorney's legitimate role as an advocate.

**§ 9.7. Interest—Computation.** The interest to be paid on judgments entered in civil actions is an area of more modest appeal than the number of developments during the *Survey* year would suggest. The three developments which will be discussed<sup>1</sup> stem from three separate sources: a judicial decision, an amended court rule, and an amended statute. The principal development came in a judicial decision, *Bernier v. Boston Edison Co.*,<sup>2</sup> where the Supreme Judicial Court for the first time confronted the issue of when interest begins to run against a defendant who has been added to a tort suit long after the complaint is filed in court.<sup>3</sup> The relevant statute, chapter 231, section 6B,<sup>4</sup> provides that interest shall be added to judgments in tort actions from the "commencement" of the law suit. Section 6B thus gives clear guidance on how to calculate the interest to be added to a judgment against the original defendant to the lawsuit. However, the statutory language does not expressly treat the issue posed in *Bernier* relating to the subsequently added defendant. The Court's effort to fill the statutory lacuna is not altogether satisfying because the *Bernier* opinion reached different results in the two companion cases which were before the Court. The divergent outcomes, as explained below, stem from the different methods used by the two plaintiffs to add the Boston Edison Company as a defendant in the two cases.<sup>5</sup>

<sup>50</sup> *Id.* at 508, *passim*. See also *Upjohn Co. v. United States*, 449 U.S. 383, 387 (1981) (Upjohn supplied lists of all persons who answered the corporation's questionnaire).

<sup>51</sup> *Cf. Fisher v. U.S.*, 425 U.S. 391, 403-04 (1978); 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2210 (1970).

§ 9.7. <sup>1</sup> See also *Perkins School for the Blind v. Rate Setting Commission*, 1980 Mass. App. Ct. Adv. Sh. 1947, 411 N.E.2d 1317, discussed at note 22 *infra*; *D. Frederico Co. v. New Bedford Development Authority*, 1980 Mass. App. Ct. Adv. Sh. 199, 203-05, 399 N.E.2d 1103.

<sup>2</sup> 1980 Mass. Adv. Sh. 947, 403 N.E.2d 391.

<sup>3</sup> *Id.* at 962, 963, 403 N.E.2d at 401.

<sup>4</sup> Until 1974, section 6B provided interest was calculated "from the date of the writ." The terminology was changed by Acts of 1974, c. 1114, § 155 to reflect the abolition of writs by the newly adopted Massachusetts Rules of Civil Procedure.

<sup>5</sup> 1980 Mass. Adv. Sh. at 947-50, 403 N.E.2d at 393-94.



In *Bernier* litigation, two cars had collided, resulting in injuries to two pedestrians. In 1972, the pedestrians filed separate lawsuits against the drivers of the two cars. In 1974, the plaintiffs both sought to add a claim against a new defendant, the Boston Edison Company, for the negligent design, construction, and maintenance of its light pole, which had contributed to their injuries after it was struck by one of the cars. One plaintiff (Kasputys) amended her complaint to add Edison as a defendant to her original action. The other plaintiff (Bernier), by contrast, started an independent action against Edison.<sup>6</sup> Both plaintiffs recovered against Edison, and the court clerk added interest to the judgments,<sup>7</sup> calculated from the commencement in 1972 of the original actions against the drivers of the cars.

Edison then filed motions under Massachusetts Rule of Civil Procedure 60(a) to correct the judgments for clerical error,<sup>8</sup> contending the court clerk erred in treating Edison identically with the original defendant to the lawsuits.<sup>9</sup> The superior court denied relief in both the Kasputys and Bernier cases.<sup>10</sup> On appeal, the Supreme Judicial Court rejected Edison's argument in the Kasputys lawsuit.<sup>11</sup> The Court held that the calculation of interest was to be resolved under the language of section 6B, which turns on the question of whether the action against Edison was "commenced" in 1972 or in 1974. The statutory language, the opinion says, is to be taken "literally."<sup>12</sup> Consequently, "[t]he fact that a defendant against whom recovery is had was added late in the lawsuit, should not affect the matter; the plaintiff's entitlement to interest in that case also dates from the commencement of the action."<sup>13</sup> Therefore, Edison had to pay Kasputys interest from the commencement of her original action in 1972.<sup>14</sup>

In contrast to Kasputys' case, the superior court was reversed in Bernier's case. The Supreme Judicial Court held that Bernier was not owed interest by Edison until 1974, when he first asserted a claim against Edison.<sup>15</sup> Since Bernier's right to interest on the judgment in his favor is based on the same statute as in Kasputys' case, the divergent results the Court reached in the

<sup>6</sup> *Id.* at 962, 403 N.E.2d at 401. See MASS. R. CIV. P. 54(d) and (f).

<sup>7</sup> 1980 Mass. Adv. Sh. at 962, 403 N.E.2d at 401.

<sup>8</sup> The Court held Rule 60(a), which contains no time limits, is the "appropriate device for correcting a mistake in the computation of interest." The Court also held that Edison's motion pursuant to MASS. R. CIV. P. 59(e) to amend the judgments was untimely because it was not filed within ten days after the judgments were entered. *Id.* at 962 n.17, 403 N.E.2d at 401 n.17.

<sup>9</sup> In both cases, the jury returned verdicts against Edison and the operator of one car. The operator of the second car was found not liable. *Id.* at 950, 403 N.E.2d at 394.

<sup>10</sup> *Id.* at 962, 403 N.E.2d at 401.

<sup>11</sup> *Id.* at 964, 403 N.E.2d at 402.

<sup>12</sup> *Id.* at 963, 403 N.E.2d at 401.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 964, 403 N.E.2d at 402.

<sup>15</sup> *Id.*

two cases clearly rest on sources outside section 6B. The distinction, the Court indicates, lies in how Kasputys and Bernier brought Edison into their lawsuits.<sup>16</sup>

Kasputys added Edison as a co-defendant to her original action by amending her complaint pursuant to Massachusetts Rule of Civil Procedure 15(a).<sup>17</sup> While the opinion does not fully articulate the Court's reasoning, the amendment of the complaint brings Rule 15(c) into play. Rule 15(c), in turn, provides that an amendment to a pleading, "including an amendment changing a party," "relates back" to the original pleading if the claim against the new party "arose out of the conduct, transaction, or occurrence" which was the basis for the original pleading. This condition was satisfied in Kasputys' case, so Edison's status as a defendant "relates back" to 1972. Thus the Court rejected Edison's argument that it was liable for interest only from 1974 when it was added as a defendant.<sup>18</sup>

Edison's argument prevailed in Bernier's case, however.<sup>19</sup> Bernier asserted his claim against Edison by filing an independent lawsuit against Edison. The opinion conclusorily holds that, under these circumstances, interest begins to run from 1974.<sup>20</sup> The reasoning underlying the holding is readily apparent, however. Bernier's action against Edison "commenced" when the complaint was filed in 1974,<sup>21</sup> two years after Bernier sued the two drivers. Since Bernier did not resort to Rule 15(a) to add Edison as a co-defendant by amending his original complaint, Bernier could not invoke the relation-back provision in Rule 15(c). Thus, although the opinion does not say so, ultimately it is Rule 15(c), rather than section 6B, that accounts for the different outcomes in the Kasputys and Bernier cases.<sup>22</sup>

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 949, 963.

Strictly speaking, the statement in the text is not accurate. The superior court allowed the amendment several months prior to the effective date of the Massachusetts Rules of Civil Procedure, see MASS. R. CIV. P. 1A, on the authority of G.L. c. 231, § 51, as it existed prior to its amendment by Acts of 1973, c. 1114, § 169. See also Acts of 1975, c. 377, § 85. MASS. R. CIV. P. 15(c) replaced section 51 in proceedings governed by the civil rules and "codified the case law" that had developed under section 51. *Aker v. Pearson*, 7 Mass. App. Ct. 552, 554, 389 N.E.2d 428 (1979). Thus, although the text of section 51 did not contain Rule 15(c)'s relation back proviso, the two provisions are equivalent. See *Wadsworth v. Boston Gas Co.*, 352 Mass. 86, 89, 223 N.E.2d 807 (1967) (may substitute or add defendant after statute of limitations has run because "substitution relates back"); *Walsh v. Curcio*, 358 Mass. 819, 266 N.E.2d 895 (1971) (plaintiffs may be added by amendment after statute of limitations has run). *Bernier* also acknowledged the relevance of Rule 15(c), albeit tersely, while ignoring section 51. *Id.* at 963, 403 N.E.2d at 401 ("And see, now, Mass. R. Civ. P. 15(c), 365 Mass. 761 (1974)"). Accordingly, this discussion of *Bernier* will continue to refer to the contemporary authority, Rule 15(c).

<sup>18</sup> *Id.* at 964, 403 N.E.2d at 402.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> See MASS. R. CIV. P. 3 at note 25 *infra*.

<sup>22</sup> *But see* note 17 *supra*.

In *Bernier*, the Supreme Judicial Court recognized that the different results it reached in the two cases give “an appearance of anomaly.”<sup>23</sup> Nevertheless, the Court said, the outcome is “faithful to the terms” of section 6B, the interest statute.<sup>24</sup> Perhaps the anomaly is minimal when viewed from the perspective of the two plaintiffs. *Bernier*, after all, could have secured the two years’ additional interest if he had added Edison as a defendant by amending his complaint under Rule 15(a). From the defendant’s perspective, however, the anomaly is more striking. Both *Kasputys* and *Bernier* asserted the same legal claim against Edison for injuries they sustained from just one of Edison’s poles in a single accident. In contrast to *Bernier*, Edison could do nothing to shield itself against paying interest back to 1972, or before it had notice of the claim. Considering the effect of the decision on Edison may lead one to conclude that the Court reached an acceptable solution to a knotty problem, but still to question whether the result was compelled by the language of the interest statute.

Section 6B, after all, does not define the crucial statutory phrase, “from the date of commencement of the action.” *Bernier*, without saying so, appears to borrow its definition from Massachusetts Rule of Civil Procedure 3.<sup>25</sup> If one starts with Rule 3, the conclusion that Rule 15(c) requires different results in the *Kasputys* and *Bernier* cases is correct. However, section 6B itself does not incorporate the Massachusetts Rules of Civil Procedure. Accordingly, the Court was free to decide that when an action is “commenced” for the purposes of section 6B is different than the definition supplied by Rule 3. If *Bernier* had adopted this approach, it could have achieved uniform results in both cases. While this may initially appear to be the better course to have followed, it does have two drawbacks. The primary drawback is that it would introduce into the procedural system two definitions of when an action is commenced. It is doubtful that elimination

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MASS. R. CIV. P. 15(c) was an important factor in another decision concerning interest during the *Survey* year. In *Perkins School for the Blind v. Rate Setting Comm’n.*, 1980 Mass. App. Ct. Adv. Sh. 1947, 411 N.E.2d 1317, the Appeals Court upheld the Perkins School’s demand for interest on the rate increase ordered by the Commission. The tortuous path to the court’s result depended on the Commonwealth’s presence as a party before a court in a contract action for services rendered. *Id.* at 1951, 411 N.E.2d at 1320. In the case actually before the Appeals Court, however, the Perkins School was seeking judicial review under the Administrative Procedure Act, G.L. c. 30A, § 14, of the Commission’s ratemaking decision, and the Commonwealth was not a party. The court, citing *Bernier*, held this defect in the proceedings could be obviated by a remand to the superior court where the Commonwealth could be added as a defendant pursuant to Rule 15(a). *Id.* at 1957 n.5, 1958, 411 N.E.2d at 1324 & n.4. The Supreme Judicial Court subsequently accepted the *Perkins School* case for further appellate review pursuant to MASS. R. APP. P. 27.1. 1981 Mass. Adv. Sh. 75.

<sup>23</sup> 1980 Mass. Adv. Sh. at 964, 403 N.E.2d at 402.

<sup>24</sup> *Id.*

<sup>25</sup> MASS. R. CIV. P. 3 provides: “A civil action is commenced by (1) mailing to the clerk of the proper court by certified or registered mail a complaint and an entry fee prescribed by law, or (2) filing such complaint and an entry fee with such clerk.”

of the anomalous outcome in *Bernier* is sufficient to justify the attendant effort, and possible sacrifice of clarity and certainty, that would be required to formulate a separate definition for section 6B. Moreover, the adoption of different definitions for section 6B and Rule 3 may be an even greater anomaly than the *Bernier* holding, since both definitions would apply to procedural problems. The second drawback to seeking uniform results in *Bernier* is that resort to a common law definition of commencement of an action for the purposes of section 6B would be inconsistent with the spirit of the procedural reform underlying the recent adoption of the Massachusetts Rules of Civil Procedure. The rules reflect a largely successful effort to codify all procedural rules in one place for ready reference by bench and bar. The Court should, therefore, resist pressures to revert to the pre-rules system where much procedural detail could be found only in judicial decisions or in statutes.

Although *Bernier* did not rely on procedural codification to justify the decision, the opinion is consistent with this analysis. The Court first looked to the underlying justification for adding interest to the judgment which is “to compensate for the delay in the plaintiff’s obtaining his money.”<sup>26</sup> Section 6B, as the opinion notes, does not fully embrace this justification because “[i]n theory interest should run from the date of the injury,”<sup>27</sup> and not from the date the lawsuit is filed. In the Court’s view, “the statute seems to yield to the belief that a plaintiff should not be favored with interest until he has complained to the court of the injury; there may also be at work a notion of administrative convenience.”<sup>28</sup> In part, this view of section 6B supports Edison’s argument that it, unlike the original defendants, should not be charged with interest until 1974 when Kasputys and Bernier notified it of their claims.<sup>29</sup>

By “administrative convenience” the Court evidently means that section 6B permits the court clerk or judge to establish the date when interest begins to run simply by looking to the court docket (the date the action was commenced under Rule 3) rather than to the transcript of the evidence (the date of injury). Reliance on administrative convenience to justify the use of the docket date means, of course, that the defendant does not have to fully compensate the plaintiff for the loss of the use of the money from the date

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<sup>26</sup> 1980 Mass. Adv. Sh. at 963, 403 N.E.2d at 401.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* Contrast the measuring point for contract actions adopted by G.L. c. 231, § 6C: interest runs “from the date of breach or demand.” Interest runs from the “commencement of the action” only if neither of the earlier dates is established. Section 6C, in other words, manages to accommodate both “administrative convenience” and the “theory [that] interest should run from the date of the injury” *Bernier*, 1980 Mass. Adv. Sh. at 963, 403 N.E.2d at 401. See also *Jet Spray Cooler, Inc. v. Crampton*, 377 Mass. 159, 181-82, 385 N.E.2d 1349, 1362 (1979) (under G.L. c. 235, § 8 interest is awarded from the date a master files his report).

<sup>29</sup> 1980 Mass. Adv. Sh. at 962, 403 N.E.2d at 401.

of the plaintiff's injury until the entry of judgment. Perhaps, since section 6B thus works to Edison's benefit no matter how it is construed, the Court simply felt Edison had little basis for objecting to paying Kasputys interest for the two year period before receiving notice of the claim. If, as the opinion suggests, administrative convenience influenced the Legislature when it passed section 6B, considerations of convenience also lend significant support to the Court's decision to read Rule 3's definition of commencement of an action into section 6B.

The Court looked to its decisions on tolling statutes of limitations for the second justification of the *Bernier* decision. These decisions, rendered before the adoption of the rules of civil procedure, held that filing suit against one defendant tolled the running of the statute and that the plaintiff could maintain the action against a second transaction-related defendant who was added to the lawsuit after the limitations period expired.<sup>30</sup> Massachusetts' broad use of the relation-back doctrine to overcome statute of limitations defenses justifies, by inference, the lesser impingement on the defendant of using the relation-back doctrine to calculate the interest owed on judgments. More significantly, the Court's cross-look at its statute of limitations decisions manifests its desire to maintain consistency between separable, but related, parts of the procedural system. In sum, the results in *Bernier* are undoubtedly anomalous, but the decision is nevertheless a salutary one for both bench and bar.

The second development in the area of the interest payable on judgments came by the addition of a new paragraph (f) to Rule 54 of the Massachusetts Rules of Civil Procedure.<sup>31</sup> The amendment effectively reverses the

<sup>30</sup> *Id.* at 963, 403 N.E.2d at 401. *E.g.*, *Wadsworth v. Boston Gas Co.*, 352 Mass. 86, 89, 223 N.E.2d 807, 810 (1967); *Walsh v. Curcio*, 358 Mass. 819, 266 N.E.2d 895 (1971). *But see* *Berkowitz v. Nee*, 4 Mass. App. Ct. 834, 835, 351 N.E.2d 858, 859 (1976) (cannot add new plaintiffs by amendment after statute of limitations has expired).

In *Wadsworth*, the Supreme Judicial Court stated that the "running of the statute of limitations is not a reason for denying an amendment, and may furnish a reason for allowing it." The Court also acknowledged that, on this point, Massachusetts practice was "more liberal than elsewhere." 352 Mass. at 88, 223 N.E.2d at 809-10. *Compare, e.g.*, FED. R. CIV. P. 15(c). *See* *Marshall v. Mulrenin*, 508 F.2d 39 (1st Cir. 1974) (applying the Massachusetts practice, as opposed to Federal Rule 15, in a diversity action). Note that MASS. R. CIV. P. 15(c) may have further liberalized the practice. In *Wadsworth* the Court inquired into a limitation on the amendment to the pleadings, whether "the amendments resulted in the introduction of new causes of action against the added defendant." 352 Mass. at 89, 223 N.E.2d at 810. *See* G.L. c. 231, § 138 prior to its amendment by Acts of 1973, c. 1114, § 207. Rule 15(c), however, provides that the amendment relates back if it arises out of the same "conduct, transaction, or occurrence" as the original pleading.

<sup>31</sup> MASS. R. CIV. P. 54(f), which was adopted April 18, 1980 and became effective July 1, 1980, provides:

Every judgment for the payment of money shall bear interest up to the date of payment of said judgment. Interest accrued up to the date of entry of a judgment shall be computed by the clerk according to law. Unless otherwise ordered by the court, interest from the date of entry of a judgment to the date of execution or order directing the pay-

Supreme Judicial Court's decision a year earlier in *Stokosa v. Waltuck*.<sup>32</sup> In *Stokosa*, the superior court clerk added interest to a judgment in a tort action from the "date of commencement of the action"<sup>33</sup> to the "time the judgment was entered."<sup>34</sup> The plaintiff then sought, unsuccessfully, to compel the clerk to add interest for the three month period which had elapsed between entry of the judgment and issuance of the execution.<sup>35</sup> On appeal, the Supreme Judicial Court agreed that under chapter 235, section 8, the plaintiff could collect interest up to the date the defendant actually paid the judgment.<sup>36</sup> Nevertheless, the Court affirmed the trial judge's refusal to give relief to the plaintiff, because the rules and statutes governing civil practice failed to require the court clerk to calculate interest up to the date the execution was issued by the court.<sup>37</sup>

The problem exposed in the *Stokosa* case became acute only with the adoption of the Massachusetts Rules of Civil Procedure in 1974. Rule 54(a) redefined "judgment" to mean the "act of the trial court finally adjudicating the rights of the parties,"<sup>38</sup> which is a much earlier point in time than under the pre-rules practice.<sup>39</sup> By statute, however, executions cannot issue "until the exhaustion of all possible appellate review" of the judgment.<sup>40</sup> Thus, a substantial gap may now exist between the judgment and execution.<sup>41</sup>

It is clear from the *Stokosa* opinion that the Court was unhappy with the result produced by the interplay of the applicable rules and statutes, and it

ment of said judgment shall also be computed by the clerk, and the amount of such interest shall be stated on the execution or order.

Prior to its amendment, MASS. R. CIV. P. 54 governed entry of judgment and costs, but not interest. See also the 1980 amendment to MASS. R. CIV. P. 54(d).

<sup>32</sup> 378 Mass. 617, 393 N.E.2d 350 (1979). See Woodlinger & Kaplan, *Civil Practice and Procedure*, 1979 ANN. SURV. MASS. LAW, § 9.4.

<sup>33</sup> G.L. c. 231, § 6B.

<sup>34</sup> G.L. c. 235, § 8.

<sup>35</sup> 378 Mass. at 618, 393 N.E.2d at 351.

<sup>36</sup> *Id.* at 619, 393 N.E.2d at 351.

<sup>37</sup> *Id.* at 621, 393 N.E.2d at 352.

<sup>38</sup> MASS. R. CIV. P. 54(a).

<sup>39</sup> See Reporters' Notes to MASS. R. CIV. P. 54, reprinted at J. Smith and H. Zobel, *Rules Practice*, 8 MASS. PRAC. S. 302; E. Swartz, *et al.*, 6 MASS. PLEADING & PRACTICE, 54-3 to 54-4.

<sup>40</sup> G.L. c. 235, § 16, as amended by Acts of 1973, c. 1114, § 221 and Acts of 1975, c. 377, § 117. Prior to its amendment, section 16 provided that executions could issue twenty-four hours after entry of judgment.

<sup>41</sup> MASS. R. APP. P. 4(a) provides, in pertinent part, that

In a civil case, unless otherwise provided by statute, the notice of appeal required by Rule 3 shall be filed with the clerk of the lower court within thirty days of the date of the entry of the judgment appealed from; but if the Commonwealth or an officer or agency thereof is a party, the notice of appeal may be filed by any party within sixty days of such entry.

Cf. G.L. c. 235, § 27 which provides, *inter alia*, that "[a]n original execution shall not issue after the expiration of one year after a party is entitled to take it out; . . . ."

referred the problem to its rules committee for resolution.<sup>42</sup> The new Rule 54(f) is the product of that reference. Paragraph (f) directs the court clerk to include in the execution interest computed to the “date of execution or order directing the payment of said judgment.”<sup>43</sup> The amended rule thus eliminates the gap in the enforcement of the plaintiff’s right to interest which surfaced in the *Stokosa* litigation. Paragraph (f) also declares that the judgment creditor is entitled to interest “up to the date of payment” of the judgment. The amended rule does not, of course, directly assist in the collection of interest which accrues after the execution is issued by the court because this sum cannot be calculated until the defendant pays the judgment.<sup>44</sup> Presumably the plaintiff can secure enforcement of this obligation against a recalcitrant debtor under Massachusetts Rule of Civil Procedure 69, although this point has never been directly decided.<sup>45</sup>

The third development in the area of interest payable on judgments came from the Legislature, which increased the interest payable on judgments in both torts and contracts actions to ten percent.<sup>46</sup> This justifiable increase still leaves the interest paid on judgments below the contemporary cost of borrowing money, giving many defendants an unsalutary incentive to delay settlement of their disputes. The Legislature, however, has to balance this consideration against the potential unfairness of imposing higher interest costs against defendants who do not factor the marginal cost of borrowing money into their litigation decisions. More importantly, it is unfair to exact a heavy penalty from a defendant who reasonably seeks judicial resolution of a dispute at a time when our court system still cannot provide a trial promptly.

<sup>42</sup> 378 Mass. at 618, 620, 393 N.E.2d at 350-51, 352.

<sup>43</sup> The phrase “or order directing the payment” presumably refers to subsequent judicial proceedings to enforce the judgment, such as supplementary process, G.L. c. 224, §§ 14 *et seq.* See also MASS. R. CIV. P. 69.

<sup>44</sup> *Cf.* R. H. White Realty Co. v. Boston Redevelopment Authority, 371 Mass. 452, 454, 358 N.E.2d 440 (1976).

<sup>45</sup> See *Stokosa*, 378 Mass. at 621-22, 393 N.E.2d at 352 (“It will be time enough to seek the exercise of the court’s powers under Rule 69 if and when the need therefore is demonstrated. There has been no allegation and no proof in this case that the insurer will not meet its contractual and legal obligation to pay the amount of the judgment recovered against its insured, plus interest as provided by G.L. c. 235, § 8.”) See also *Geeshan v. Trawler Arlington, Inc.*, 371 Mass. 815, 817-18, 359 N.E.2d 1276 (1976).

<sup>46</sup> G.L. c. 231, §§ 6B, 6C, as amended by Acts of 1980, c. 322, § 2. Section 3 provides the increased interest rate applies only to actions commenced after the effective date of the statute.

When the Legislature increased the rate of interest payable on judgments in torts actions in 1974 (Acts of 1974, c. 224, § 1, amending G.L. c. 231, § 6B), it did not specify when the increase was to go into effect. In *Porter v. Clerk of the Superior Court*, 368 Mass. 116, 330 N.E.2d 206 (1975) the Court held the increase would apply to cases awaiting trial on the effective date of chapter 224, but that the lower interest rate would be used in pending cases for the period from the commencement of the action up to the effective date of the statutory increase. The *Porter* approach is preferable to the effective date specified by the Legislature in section 3, because it more quickly implements the increase across the board in a period of judicial backlogs when the statutory interest rate always seems to be lower than the market rate.

**§ 9.8. Waiver of Litigation Costs.** The *in forma pauperis* statute<sup>1</sup> provides for waiver by the court or payment by the state of litigation fees and costs, except attorney fees, for indigent litigants. Under the test set forth in the original *in forma pauperis* statute an indigent was:

A person who is unable to pay the fees and costs of the proceeding in which he is involved, or is unable to do so without depriving himself or his dependents of the necessities of life, including food, shelter and clothing.<sup>2</sup>

Although this subjective standard was retained, the statute was amended during the *Survey* year to add two objective tests to determine whether a litigant is “indigent.”<sup>3</sup> First, the amendment provides that any recipient of “public assistance”<sup>4</sup> is an indigent person for whom litigation costs should be waived or paid. Alternatively, the amendment provides that a person whose after tax income does not exceed one hundred twenty-five percent of the federal poverty level<sup>5</sup> is also indigent for purposes of the statute.<sup>6</sup>

The amended statute also modifies the benefits available to indigent litigants. For example, “normal fees and costs”—where waiver or payment is mandatory—now include subpoena and witness fees for depositions and trial, jury fees, and removal fees.<sup>7</sup> “Extra fees and costs”—where waiver or payment is required only if the costs are “reasonably necessary”<sup>8</sup>—now include transcription of depositions, “expert assistance,” and appeal bonds.<sup>9</sup>

The amended statute still requires that an indigent litigant “repay” the court clerk any fees or costs which have been waived or paid under its provisions.<sup>10</sup> This obligation exists, however, only in cases where the indigent

§ 9.8. <sup>1</sup> G.L. c. 261, §§ 27A-27G, as amended by Acts of 1980, c. 539, §§ 5-9. The statute applies to civil, criminal, juvenile, and divorce proceedings in both the trial and appellate courts. G.L. c. 261, § 27B, as amended by Acts of 1980, c. 539, § 6. For a statement of the law prior to enactment of the *in forma pauperis* statute, see *Blazo v. Superior Court*, 366 Mass. 141, 315 N.E.2d 851 (1974).

<sup>2</sup> G.L. c. 261, § 27A.

<sup>3</sup> Acts of 1980, c. 539, § 5.

<sup>4</sup> The amended statute defines public assistance as aid to families with dependent children (A.F.D.C.), general relief, veterans benefits, medicaid, and supplemental security income (S.S.I.) (Title XVI of the Social Security Act). G.L. c. 261, § 27A (para. 1(a)) as amended.

<sup>5</sup> Economic Opportunity Act of 1964, P.L. 88-452, § 625, 42 U.S.C. § 2971d (1976).

<sup>6</sup> G.L. c. 261, § 27A (para. 1(b)) as amended.

<sup>7</sup> G.L. c. 261, § 27A (para. 3), as amended by Acts of 1980, c. 539, § 5.

<sup>8</sup> G.L. c. 261, § 27C (4).

The court clerk is authorized to act on requests for waiver or payment of normal fees or costs “without hearing and without the necessity of appearance of any party or counsel” if the affidavit required by section 27B “appears regular and complete on its face and indicates that the affiant is indigent.” G.L. c. 261, § 27C (2), as amended by Acts of 1980, c. 539, § 7. Otherwise the matter goes before the court which may either grant the application or order a hearing. The application cannot be denied without hearing. See also G.L. c. 261, § 27D, as amended by Acts of 1980, c. 539, § 8, concerning the right to appeal a denial of an application under the *in forma pauperis* statute.

<sup>9</sup> G.L. c. 261, § 27A (para. 4), as amended by Acts of 1980, c. 539, § 5.



litigant recovers an amount which exceeds three times the amount of the benefits received under the *in forma pauperis* statute. The enforcement of the repayment obligation merits brief comment because it shifts the burden from the indigent litigant to the opposing party. The statute requires that the clerk must notify "all parties" to the lawsuit whenever the court or clerk authorizes waiver or payment of fees. Thereafter, if the indigent's recovery exceeds three times this sum, the judgment debtor must deduct the fees or costs from the judgment or settlement and deposit them with the clerk. The judgment debtor cannot pay the balance to the prevailing party (the indigent litigant) until the clerk notifies the parties that reimbursement has been made. If, however, thirty days elapse without any notification from the clerk, the judgment or settlement may be paid.<sup>11</sup>

**§ 9.9. Court Rules—Uniform Summary Process Rules.** The adoption of Uniform Summary Process Rules, effective September 1, 1980,<sup>1</sup> relieved landlord-tenant practitioners from the disparate practices which previously existed in different courts.<sup>2</sup> The need for a separate set of rules for summary process actions arose from the exclusion of these proceedings from the Massachusetts Rules of Civil Procedure.<sup>3</sup> The Uniform Rules now govern summary process actions in all departments of the Trial Court with jurisdiction over proceedings under G.L. c. 239: the District Court (including the Boston Municipal Court),<sup>4</sup> the Housing Court,<sup>5</sup> and the Superior Court.<sup>6</sup>

One important feature of the Uniform Rules is that the point at which summary process actions go to trial will no longer vary from court to court. The new rules accomplish this uniformity by reintroducing the concept of the "entry date"<sup>7</sup> as the measuring point for all steps taken under the rules by either the plaintiff or the defendant. The landlord seeking to evict a tenant first designates the entry date, which may be any Monday,<sup>8</sup> on the "Summary Process Summons and Complaint."<sup>9</sup> The summons and com-

<sup>11</sup> *Id.* Section 27E expressly provides, however, that the failure to comply with its procedures does not relieve the indigent litigant of the repayment obligation.

§ 9.9. <sup>1</sup> 406-07 N.E.2d Mass. Dec. xxi (1980). See, e.g., 1980 MASS. LEGIS. SERV. (No. 4) 803; 1981 DESK COPY: MASSACHUSETTS RULES OF COURT 349 (West 1981).

<sup>2</sup> See DIST/MUN CT. SUPP. R. 130; BOSTON HOUSING CT. R. FOR SUM. PROC.; HAMPDEN HOUSING CT. R. The Superior Court Department had no summary process rules.

<sup>3</sup> MASS. R. CIV. P. 81(a)(7).

<sup>4</sup> G.L. c. 239, § 2.

<sup>5</sup> G.L. c. 185, § 3.

<sup>6</sup> G.L. c. 239, § 2.

<sup>7</sup> UNIF. SUM. PROC. R. 2. The entry day is equivalent to the "return date" on the writs which were replaced by the Massachusetts Rules of Civil Procedure.

<sup>8</sup> UNIF. SUM. PROC. R. 2(c). The Reporters' Commentary to Rule 2 contains a succinct summary of how to commence an action.

<sup>9</sup> The rules prescribe the form of the pleadings.

plaint then must be served on the tenant no less than seven days before the entry date.<sup>10</sup> The tenant's "Summary Process Answer" is due the Monday following the entry date,<sup>11</sup> and the trial is three days later, on a Thursday.<sup>12</sup>

Two other aspects of the Uniform Summary Process Rules are worthy of note. First, the rules permit the tenant to assert counterclaims if they are set forth in the answer.<sup>13</sup> Alternatively, because the use of counterclaims is permissive under the rules, the tenant may opt to assert the claims in an independent civil action against the landlord.<sup>14</sup> The disadvantage, from the tenant's perspective, of electing an independent action is that the claims then cannot be used to defeat the landlord's right to recover possession of the property in the summary process action.<sup>15</sup> The landlord does not have to file a responsive pleading to a counterclaim,<sup>16</sup> nor does the filing of a counterclaim by the tenant postpone the trial date.<sup>17</sup>

The second noteworthy feature of the Uniform Rules is that discovery in summary process actions is permitted as a matter of right.<sup>18</sup> Either party may initiate the discovery process by filing a "demand" for discovery by written interrogatories,<sup>19</sup> by a request for admissions,<sup>20</sup> or by a request for

<sup>10</sup> UNIF. SUM. PROC. R. 2(b), which also provides service may not be made either more than 30 days prior to the entry day or until after any notice to terminate the tenancy has expired. See G.L. c. 186, §§ 11, 12. On the entry day the landlord must file the original Summary Process Complaint and return of service plus the notice of termination of the tenancy and any necessary certificates of compliance with local rent control or condominium conversion ordinances. UNIF. SUM. PROC. R. 2(d).

<sup>11</sup> UNIF. SUM. PROC. R. 3. A request to transfer the action to the Housing Court may be filed later. See text at note 26 *infra*. Transfer of the case postpones the trial date one week. UNIF. SUM. PROC. R. 4.

<sup>12</sup> UNIF. SUM. PROC. R. 2(c). The landlord must designate the trial date in the Summary Process Summons and Complaint prior to service on the tenant. In the Superior Court Department, however, the case is simply "added to the next non-jury list for assignment for trial."

<sup>13</sup> UNIF. SUM. PROC. R. 5 ("Counterclaims should be permitted in accordance with the provisions of G.L. c. 239, § 8.") Counterclaims were not previously recognized by the District Court rules, see Dist./Mun. Cts. Suppl. R. 130, but tenants could counterclaim under the Housing Court rules. BOSTON HOUSING CT. R. 3(a); HAMPDEN HOUSING CT. R. 3.

<sup>14</sup> UNIF. SUM. PROC. R. 5. Compare MASS. R. CIV. P. 13.

<sup>15</sup> See *Boston Housing Auth. v. Hemingway*, 363 Mass. 184, 202, 293 N.E.2d 831, 845 (1973); cf. G.L. c. 186, § 14.

<sup>16</sup> UNIF. SUM. PROC. R. 5. Compare MASS. R. CIV. P. 7(a) ("reply to a counterclaim denominated as such").

<sup>17</sup> See UNIF. SUM. PROC. R. 3 and 5. Compare UNIF. SUM. PROC. R. 4 (trial postponed one week by transfer to Housing Court) and 7(b) (trial postponed two weeks by discovery demand).

<sup>18</sup> UNIF. SUM. PROC. R. 7. The Housing Courts, but not the District Courts, permitted discovery under the prior rules. BOSTON HOUSING CT. R. 4 ("as a matter of course and not by leave of court"); HAMPDEN HOUSING CT. R. 8 (by order of court); DIST./MUN. CTS. SUPP. R. 130 (no reference to discovery).

<sup>19</sup> See MASS. R. CIV. P. 33.

<sup>20</sup> See MASS. R. CIV. P. 36.

production of documents<sup>21</sup> no later than the due date for the tenant's answer.<sup>22</sup> Although the Uniform Rules do not refer to oral depositions, the court should be able to allow oral depositions under the provision for "further discovery . . . on motion and for good cause shown."<sup>23</sup> An important consequence of the use of discovery is that the trial date is postponed two weeks.<sup>24</sup>

There is a lacuna in the Uniform Rules for summary process actions which fall within the geographic jurisdiction of the state's two housing courts.<sup>25</sup> By statute,<sup>26</sup> a tenant in Boston or Hampden County may, as a matter of right, transfer a summary process action filed in a district or superior court to the Housing Court. Rule 4 provides that the "transfer form" may be filed "no later than the day before the commencement of the trial," or Wednesday. A problem arises from Rule 3 which specifies that the tenant's answer must be filed on the Monday prior to the trial date, or two days before the transfer form is due. Since a default should be entered against a tenant who fails to file a timely answer,<sup>27</sup> the question arises whether a district or superior court clerk should honor a transfer request filed in compliance with Rule 4's deadline but which is not preceded by an answer under Rule 3.

Although the Uniform Rules fail to address this problem, a refusal to transfer the case to the Housing Court under these circumstances is inappropriate for several reasons. The primary reason is that the rules themselves provide that the transfer form may be filed on Wednesday—or

<sup>21</sup> See MASS. R. CIV. P. 34.

<sup>22</sup> UNIF. SUM. PROC. R. 7(a).

<sup>23</sup> UNIF. SUM. PROC. R. 7(a) para. 4. This interpretation would conform to the prior practice under HAMPDEN HOUSING CT. R. 8 (depositions by "special leave" of court). The Boston Housing Court previously allowed depositions as a matter of right. BOSTON HOUSING CT. R. 4. Under MASS. R. CIV. P. 30(a)(ii) leave of court is required for depositions only if "there is no reasonable likelihood that recovery will exceed \$5,000 if the Plaintiff prevails . . . ." The proffered interpretation may also be the only way to give meaning to the concluding sentence in Rule 7(a) para. 4. ("A request for discovery in response to an answer or counterclaim shall be deemed to establish good cause.") since the general rule is that "either party" may obtain discovery on "demand" (*i.e.*, without showing good cause). On the other hand, this sentence may simply recognize the landlord is entitled to discovery under these circumstances even where his "demand" is filed late because the need for discovery did not arise until the tenant's answer was filed.

<sup>24</sup> UNIF. SUM. PROC. R. 7(b).

<sup>25</sup> See G.L. c. 185C, §§ 1, 3.

<sup>26</sup> G.L. c. 185C, § 20. Section 20 literally provides that "any party" may transfer "[a]ny civil action within the jurisdiction of the housing court department which is pending in another court department . . . ." Thus, unlike the Uniform Rules, the statutory transfer provision is not limited to summary process actions. The discussion in the text refers to transfer by the tenant because the landlord rarely wants to remove the summary process action from the forum he originally selected.

<sup>27</sup> UNIF. SUM. PROC. R. 10(a). Rule 10(a) states that a "[d]efault shall be entered if a defendant fails to answer . . . ." The specificity of the language ("answer") precludes an interpretation that the transfer form is a responsive pleading which, if filed before the deadline set by

two days after the answer is due—and do not expressly require that an answer be filed first.<sup>28</sup> A refusal to accept the transfer form under these circumstances would be especially anomalous because the rules disfavor defaults. Under Rule 10(c) a court must remove a default for failure to answer if the tenant appears in court on the trial date. Thus, since the rules themselves do not operate to deprive a tenant of a trial on the merits for failure to file a timely answer, they should not be applied to burden the statutory right to transfer. The absence of an answer, moreover, does not impose an additional burden on the landlord, because the filing of a transfer form delays the trial date one week.<sup>29</sup> If the tenant files an answer in the Housing Court the Monday following the transfer request, the landlord will receive the same notice of the tenant's defenses that the Uniform Rules provide in non-transfer cases.<sup>30</sup>

In sum, the proffered resolution of the lacuna surrounding the transfer provision is consistent with the terms of the new Uniform Summary Process Rules as well as with the prior practice in both the Boston and Hampden County Housing Courts.<sup>31</sup> It is also preferable to the alternative approaches to the transfer imbroglio created by the Uniform Rules. An interpretation which made filing an answer a condition precedent to a transfer under Rule 4 would be an unjustified trap for the unwary litigant who relies on the deadline set by the rule. Such an interpretation would also seem inconsistent with the underlying rationale of the rules themselves, since it is difficult to define a reason for the separate deadlines set by the rules for answers and transfers apart from a desire to assure access to the Housing Court.<sup>32</sup> It

Rule 4, avoids entry of a default. Contrast MASS. R. CIV. P. 12(a) (“responsive pleading,” or Rule 12 motion, must be filed within 20 days) and MASS. R. CIV. P. 55 (default for failure to “plead or otherwise defend”). See also UNIF. SUM. PROC. R. 10(c), discussed *infra*.

<sup>28</sup> See UNIF. SUM. PROC. R. 3 and 4.

<sup>29</sup> UNIF. SUM. PROC. R. 4 (“... the clerk of the Housing Court division shall insure that the case is scheduled for the next succeeding hearing date . . .”).

<sup>30</sup> See UNIF. SUM. PROC. R. 3. Note, however, that the express terms of Rule 3 do not allow this: “The answer shall be filed with the clerk and served on the plaintiff no later than the Monday preceding the date *originally* scheduled for trial.” (emphasis added). The original trial date is the “second Thursday following the entry date,” UNIF. SUM. PROC. R. 2(c), and must be specified in the complaint. Reporter’s Commentary to Rule 2.

<sup>31</sup> BOSTON HOUSING CT. R. 7 (may transfer case which is “‘pending,’ *i.e.*, either trial has not commenced or there has been no trial and judgment has not been entered”); HAMPDEN HOUSING CT. R. 12 (may transfer “pending [case] (*i.e.*, either trial has not commenced or an outstanding *default* exists)”) (emphasis added). Accord UNIF. SUM. PROC. R. 10(a), (c), and (d) (read together, these paragraphs provide that judgment enters on a default on the Friday after the original trial date).

<sup>32</sup> There is also no purpose in requiring the landlord and tenant to appear before the district or superior court on the trial date where, by operation of UNIF. SUM. PROC. R. 10(c), the default would be removed automatically. Rule 10(c) also requires that the trial date shall be postponed one week “[i]f the defendant appears but has failed to file an answer . . .” Thus, both parties would end up in the same position as they would if the transfer had simply been allowed under Rule 4. See text at note 28 *supra*.

should be emphasized, however, that the proffered resolution is a stopgap measure until the Uniform Rules are amended to deal with this problem.<sup>33</sup>

**§ 9.10. Court Rules—Supreme Judicial Court.** The Supreme Judicial Court also revised and reorganized its own rules during the *Survey* year, effective January 1, 1981.<sup>1</sup> The need for separate procedural rules had largely lapsed since practice before both the single justice and the full bench are now governed by the Massachusetts Rules of Civil Procedure<sup>2</sup> and Rules of Appellate Procedure.<sup>3</sup> Consequently, many of the old rules have been repealed. The Supreme Judicial Court's rules are now substantially devoted to administrative matters,<sup>4</sup> including the regulation of the bar.<sup>5</sup> The revised rules also provide that the Massachusetts Rules of Civil, Criminal, and Appellate Procedure control in the event of any conflict with the Supreme Judicial Court's rules.<sup>6</sup>

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<sup>33</sup> Judicial resolution of this matter is not desirable for two reasons. First, amendment should be quicker than awaiting an authoritative decision by the Appeals Court or Supreme Judicial Court. This is significant because in the interim inconsistent decisions by lower courts and individual judges will thwart the goal of uniform practice reflected in the rules. Second, an appellate court decision will not satisfy the goal of making basic rules of practice readily available in one place to litigants, their counsel, and judges.

§ 9.10. <sup>1</sup> 408-10 N.E.2d Mass. Dec. xxxvii (1980). *See, e.g.*, 1980 MASS. LEGIS SERV. (No. 5) 1336 *et seq.*; 1981 DESK COPY: MASSACHUSETTS RULES OF COURT 195 *et seq.* (West 1981).

<sup>2</sup> MASS. R. CIV. P. 1 *But see* S.J.C. RULES c. 1 (special rules for discovery, trustee process, and attachments in proceedings not governed by Mass. R. Civ. P. or other rules); c. 2 (special rules for practice before single justice).

<sup>3</sup> MASS. R. APP. P. 1(a).

<sup>4</sup> *E.g.*, S.J.C. RULE 1:08 (form, style and size of papers).

<sup>5</sup> *E.g.*, S.J.C. RULES 3:01 (admission to practice); 3:03 (law student practice); 3:05 (contingent fees); 3:07 (canons of ethics). *See also* S.J.C. RULES c. 4 (bar discipline and clients' security protection).

<sup>6</sup> S.J.C. RULE 1:01 (final para.), which also provides that rules adopted by the Appeals Court or departments of the Trial Court shall yield in the event of a conflict with the Massachusetts Rules of Civil, Criminal, or Appellate Procedure.