Chapter 4: Workmen's Compensation Law

Laurence S. Locke

Follow this and additional works at: http://lawdigitalcommons.bc.edu/asml

Part of the Workers' Compensation Law Commons

Recommended Citation
CHAPTER 4

Workmen's Compensation Law

LAURENCE S. LOCKE*

§4.1. Introduction. In the Survey year of June 1, 1977, to May 31, 1978, the appellate courts of Massachusetts reviewed fourteen cases involving work-related injuries. Of these, one was a personal injury action at law against an employer who had not provided coverage under the Workmen's Compensation Act,1 four involved tort actions against third parties for negligence resulting in a compensable injury,2 and nine were workmen's compensation cases under chapter 152 of the General Laws.3 Eight of the fourteen were decided by the Appeals Court, including seven workmen's compensation cases4 and one personal injury case.5 The other six were decided by the Supreme Judicial Court, including four of the five personal injury cases6 and two compensation cases.7 Where the Industrial Accident Board had awarded compensation, the appellate court either upheld the award8 or, in one case, recommitted for further find-

* LAURENCE S. LOCKE is a partner in the law firm of Petkun & Locke, Boston and is the author of the Massachusetts Practice Series volume on workmen's compensation.

4 Wajda's Case; Casey's Case; DaSilva's Case; Gioiosa's Case; Audette's Case; Pena's Case; Bagge's Case, note 3 supra.
6 See notes 1 and 2 supra.
7 Fitzgibbons' Case; Anderson's Case, note 3 supra.
8 Fitzgibbons' Case; Casey's Case; DaSilva's Case; Gioiosa's Case; Audette's Case; Bagge's Case, note 3 supra.
§4.2. Personal Injury Arising out of Employment: Suicide Resulting from Acute Psychotic Reaction to Dramatic Work Incident: Wear and Tear Distinguished.* The Massachusetts Supreme Judicial Court had previously held that mental and nervous injuries are included within the concept of "personal injury" under the Massachusetts Workmen's Compensation Act, either when mental, emotional, and nervous disorders resulted from physical trauma, or when physical and organic disorders resulted from psychic trauma, such as nervous tension, fear, fright, excitement, or anxiety. At last presented with a suitable case, the Court ruled that "the term 'personal injury' also permits compensation in cases involving mental disorders or disabilities casually connected to mental trauma or shock arising 'out of the employment looked at in any of its aspects.'" In doing so, our Court has placed Massachusetts in line with the growing majority of jurisdictions.

9 Pena's Case, note 3 supra.
10 Anderson's Case; Wajda's Case, note 3 supra.
13 See § 4.7 infra.

* AUTHOR'S NOTE. The text of this article was written before the decision in Albanese's Case, 1979 Mass. Adv. Sh. 1171, 389 N.E.2d 83. In that case, the Supreme Judicial Court upheld as a personal injury a mental breakdown caused by a series of specific stressful emotional episodes at work, but refused to reconsider the doctrine of wear and tear as it applies to mental injury cases. Albanese's Case will be the subject of further comment in the 1979 ANNUAL SURVEY OF MASSACHUSETTS LAW.
The employee, Fitzgibbons, was a supervisory corrections officer at the Billerica House of Correction. He ordered several officers to remove an inmate to a segregated area in an effort to quell an inmate disturbance. During the removal, a scuffle ensued. One officer became ill, was dispatched to an infirmary and then to a hospital, where he was pronounced dead. On being informed of the officer’s death, Fitzgibbons began to cry and became very shaky and upset. A diagnosis of acute anxiety reaction was made of Fitzgibbons. After the incident, he never worked again. He became withdrawn and talked mostly of the officer’s death and his personal responsibility for it. Three weeks after the incident, he was found at home bleeding from the head due to a gunshot wound, from which he later died.  

The Industrial Accident Board, adopting the findings of the single member, found that the employee became obsessed with guilt over his subordinate’s death and as a result shot himself. The Board concluded:

[T]he employee sustained a personal injury on August 24, 1973, as evidenced by his immediate emotional reaction following the dramatic incident at work . . . . As a result of said injury, i.e., psychotic depression, the employee committed suicide and . . . said suicide was the result of the employee being of ‘such unsoundness of mind as to make him irresponsible for his act of suicide.’ [G.L. c. 152 §26A].

On the insurer’s appeal, the superior court entered a judgment affirming the decision of the Board. The Supreme Judicial Court granted an application for direct appellate review.

In deciding the case, the Court dealt first with the self-insurer’s contention that there was insufficient evidence to sustain the Board’s finding of causal connection between the prison incident of August 24, 1973, and the employee’s suicide. The Court considered this a case where expert testimony was required. The probative value of this testimony is to be weighed by the fact-finding tribunal, whose decision is to be accepted as final if supported by the evidence, including all rational inferences which could be drawn therefrom. The Court held that it was within the province of the Board to accept the medical testimony of the claimant’s psy-
The claimant's psychiatrist testified that the employee suffered from a psychotic depressive reaction caused by the incident and that the psychotic depressive reaction was responsible for the unsoundness of mind that resulted in suicide. This evidence, the Court held, constituted more than the mere possibility or chance of the existence of a causal connection between the employee's work experience and condition. The Court reasoned that the claimant's expert gave reasons for his opinion and explained that the employee's medical history and background were more consistent with a diagnosis of psychotic depressive reaction resulting from the prison incident than with a diagnosis of involutional melancholia, as the self-insurer's expert had suggested.

In dealing with the primary issue in the case, namely the self-insurer's contention that the term "personal injury" does not include mental or emotional disorders resulting from purely mental trauma or shock, the Court first observed, "Personal injury has been broadly defined to include 'whatever lesion or change in any part of the system produces harm or pain or a lessened facility of the natural use of any bodily activity or capability.'" The Court then reviewed the existing case law, under which the term "personal injury" has been held to include mental and nervous disorders arising out of employment where such injuries are the result of physical trauma, no matter how slight the impact. Additionally, the Court noted that it is established that physical and organic disorders resulting from mental trauma are compensable personal injuries where there is a causal relationship between the mental trauma, the physical or organic injury, and the employment. Accordingly, the Court concluded that "there is no valid distinction which would preclude mental or emotional disorders caused by mental or emotional trauma from being compensable."

10 Id. The opinion of an expert may be phrased in terms of medical certainty or reasonable probability and still be construed by the court as amounting to little more than a guess, where the subordinate facts do not give adequate support to the conclusion reached and his opinion is not based upon a sound foundation. See Locke, supra note 4, at § 521, esp. note 1 on 644. The cases cited include two suicide cases, Oberlander's Case, 348 Mass. 1, 200 N.E.2d 288 (1964) and Ruschetti's Case, 299 Mass. 426, 431, 13 N.E.2d 34, 37 (1938), making it necessary for the Court to deal explicitly with this issue.


http://lawdigitalcommons.bc.edu/asml/vol1978/iss1/7
The self-insurer argued to the Court that its decision in *Begin's Case*\(^\text{15}\) foreclosed recovery. That case, previously discussed and criticized by this author,\(^\text{16}\) held that the emotional disturbance sustained by an employee resulting from the stress of his employment over a three and one-half year period was not a personal injury within the meaning of the Act. However, *Begin's Case* relied on *Maggelet's Case*\(^\text{17}\) and other cases which established the doctrine of wear and tear. As set forth in *Maggelet's Case*, under that doctrine the "gradual breaking down or degeneration of tissues caused by long and laborious work is not the result of a personal injury within the meaning of the Act."\(^\text{18}\) The Court did not see *Maggelet's Case* as controlling; the "wear and tear" doctrine was simply inapplicable to *Fitzgibbon's Case*. Here, the Court noted, the claimant's expert testified that the injury—Fitzgibbon's psychotic depression reaction—was caused by a single traumatic event. The Court thus saw present a "mental injury resulting from a stress greater than the ordinary stresses of everyday work."\(^\text{19}\)

The self-insurer also contended that since the injury was caused by the employee's unwarranted guilt feelings, the subjective nature of these feelings made claimant's reaction a "personal idiosyncracy," and not work-related. The self-insurer was relying on *Korsun's Case*.\(^\text{20}\) The Court minimized the significance of *Korsun's Case*,\(^\text{21}\) stating that its holding there was based on a lack of evidence to connect the alleged precipitating events to the claimant's employment. The Court forthrightly said that "[t]he fact that the guilt feelings might be subjective is insufficient . . . since the event triggering the guilt feelings is the relevant criterion in determining whether the injury is compensable."\(^\text{21}\) It is submitted that by this comment the Court has effectively overruled any precedential value in *Korsun's Case*.

The decision of the Court in *Fitzgibbons' Case*, though predictable, is of great significance. It places all personal injuries, whether physical or mental, on the same plane and eliminates the need to differentiate between them on the basis of mental or physical stimulus and mental or physical effect. Thus the decision should remove any hesitation that an

---


\(^{17}\) 228 Mass. 57, 116 N.E. 972 (1917).

\(^{18}\) Id. at 61, 116 N.E. at 974.


\(^{20}\) 354 Mass. 124, 128, 235 N.E.2d 814 (1968) (the mere unexplained presence of a whiskey bottle in an employee's desk, in a situation in which he was apprehensive over losing his job, held not to be a compensable personal injury, but to have arisen from the common necessity of earning a living and a personal idiosyncracy).


Published by Digital Commons @ Boston College Law School, 1978
injured employee might previously have had to bring a claim for compensation where a mental or emotional trauma has caused a mental or emotional disability. It is still necessary, however, for the claimant to establish that an employment-related event or events caused, aggravated, or precipitated the mental or emotional disorder or disability.

The decision does not, however, answer all questions concerning the legal treatment of mental disability caused by mental stimulus. Will the Court's use of the term "mental trauma or shock" be taken to imply that mental disability, to be compensable, must be caused by discrete, identified events, as distinct from protracted stress? Such an implication seems warranted from the language, particularly in light of the Court's reliance on the fact of a "single traumatic event" in Fitzgibbons' Case as the basis for distinguishing Begin's Case. However, no comparable requirement exists for physical impairments under the Massachusetts Act, and such a distinction would be inconsistent with the Court's broad statement of the comparability of physical and mental injury cases.

Several decisions in other jurisdictions have upheld the compensability of mental impairment brought on gradually by strain or worry. The leading case is Carter v. General Motor Corp., which involved strain and worry suffered by an assembly line worker who, unable to keep up with the line, found himself constantly berated by his foreman, became filled with a dread of losing his job, and ended up with a disabling psychosis. In American National Red Cross v. Hagen a Red Cross worker's acute schizophrenic reaction, paranoid type, was found to have been causally related to the stresses of his job, including his location in Japan, personnel problems, extra work during his superior's illness, and conflict with the local military chaplain over who was to advise servicemen of death in their families. In Butler v. District Parking Management Co. the Court of Appeals for the District of Columbia Circuit upheld compensation to a parking lot attendant who developed a schizophrenic reaction after twenty years. In Yocom v. Pierce, the Kentucky Supreme Court affirmed a compensation award for an employee who suffered a nervous breakdown while working on a production job for a clothing manufacturer.

The prestigious New York Court of Appeals in a carefully reasoned and significant decision accepted the compensability of mental injuries result-

---

22 See text at note 19 supra.
23 See Jarvis' Case, 274 Mass. 305, 174 N.E. 485 (1931) (back sprain during night's work); Mill's Case, 258 Mass. 475, 155 N.E. 423 (1927) (porter injured from heavy work over period of several months).
26 327 F.2d 559, 560-61 (7th Cir. 1964).
27 363 F.2d 682, 683-84 (D.C. Cir. 1966).
28 534 S.W.2d 796, 798-99 (Ky. 1976).
ing from mental stress over a period of time.\textsuperscript{29} The claimant was secretary to the security director of a department store and was drawn more and more into her boss’s problems as a confidante as he became increasingly agitated and withdrawn over the pressure of his work. The security director’s condition continued to deteriorate and one day the secretary found him dead of a self-inflicted gunshot wound. The shot plunged the claimant into a severe depression, which the Court of Appeals held compensable, declaring that “[t]here is nothing talismanic about physical impact.”\textsuperscript{30} Another significant case arose in Wisconsin. \textit{Swiss Colony v. Dept. of ILHR} \textsuperscript{31} involved a purchasing agent for a mail order cheese business who suffered a schizophrenic mental breakdown, which she attributed to nervewracking seasonal business and harassment by her supervisor.

A second unanswered question in \textit{Fitzgibbons’ Case} arises from the Court’s stipulation of a standard of severity of mental cause, the standard being “stress greater than the ordinary stresses of everyday work.”\textsuperscript{32} Can this serve as a viable standard susceptible to common law application and clarification, or is it so vague and unmeasurable that it cannot serve as a legal guidepost? What is “everyday work?” What are its “ordinary stresses?” Indeed, that the Court would propose any standard at all is troubling. The proposition has long been axiomatic, with respect to physical injuries, that no physical trauma, however “ordinary” or however “slight,” is too ordinary or too slight to be barred as a matter of law from being considered the cause of a compensable disability. The issue in each case is simply whether the trauma did, in fact, cause the disabling impairment.\textsuperscript{33} Thus, here again, the Court’s specific language is inconsistent with its broad statement of principle, and leaves application of the decision problematical.

It is submitted that if the mental stress producing the mental or emotional breakdown can be attributed to any aspect of the claimant’s employment \textsuperscript{34} then a case of compensable mental or emotional disorder arises and should be treated no differently than a case of physical disorder. This accords with the broad view taken by the Supreme Judicial Court in a number of recent cases that have eliminated distinctions in the law of personal injury previously erected on the basis of status and

\footnotesize{30} Id. at 510, 369 N.Y.S.2d at 642, 330 N.E.2d at 606.
\footnotesize{31} 72 Wis.2d 46, 240 N.W.2d 128 (1976).
\footnotesize{33} Brzozowski’s Case, 328 Mass. 113, 115, 102 N.E.2d 399, 400 (1951); McManus’ Case, 328 Mass. 171, 173, 102 N.E.2d 401, 402 (1951); Madden’s Case, 222 Mass. 487, 493, 111 N.E. 379, 382 (1916).
\footnotesize{34} See Caswell’s Case, 305 Mass. 500, 502, 26 N.E.2d 328, 330 (1940).
special fact patterns. Moreover, since the Court has emphasized that a physical injury resulting from prolonged physical exertion may constitute a personal injury under the Act, then it would be unseemly for the Court to erect a new distinction between physical and mental injuries, based upon the length of stress.

How do we deal, then, with the "wear and tear" doctrine? This author has frequently argued that this doctrine is an anomaly, a vestigial remnant of the period of compensation jurisprudence when the courts required that an injury, to be said to have arisen out of the employment, must have resulted from a condition "peculiar to the employment." In Caswell's Case, the Supreme Judicial Court held that the proper test is whether there is a causal relationship between the mental or physical injury and "the nature, conditions, obligations, or incidents of the employment; in other words, out of the employment looked at in any of its aspects." Thus, in determining whether a claimant's disability is the result of a personal injury arising out of the employment or is instead the result of "mere wear and tear," the question is primarily whether on the facts of the employment and the medical evidence on causal relationship, it can properly be found that the injury, whether mental or physical, is the result of a stress of the employment, or of the ordinary stresses of everyday life.

It is highly desirable that the Supreme Judicial Court overrule explicitly the wear and tear doctrine. However, the concept of judicial parsimony normally adopted by appellate tribunals in dealing with matters before it, namely to decide no issue broader than that required to dispose


37 Locke, supra note 4 at § 176; Locke, Workmen's Compensation Law, 1968 ANN. SURV. MASS. LAW § 16.5 at 413-14.

38 Caswell's Case, 305 Mass. 500, 502, 26 N.E.2d 328, 330 (1940) (emphasis added).

39 In Fitzgibbon's Case, the Court speaks, mistakenly as I believe, of "a stress greater than the ordinary stresses of everyday work." 1978 Mass. Adv. Sh. at 682, 373 N.E.2d at 1177 (emphasis added). This harks back to the archaic "condition peculiar to the employment" doctrine. A back injury resulting from repeated bending and twisting, which is the ordinary stress of everyday work, was held compensable in Trombetta's Case, note 36 supra. No higher standard should be involved in a mental disability case.
of the case, will probably exclude that course. In most cases which will arise specific facts and circumstances can be adduced which indicate an aggravation of chronic stress in the period immediately preceding the mental or physical breakdown. A showing of this specific and localized stress should then take the matter out of the wear and tear problem. It is more likely that future cases will see the Court further confine Begin's Case 40 or by-pass it entirely, as the Court did with Korsun's Case 41 in the Fitzgibbons' decision.

None of this means that the Pandora's Box has been opened. The burden of proof and the burden of persuasion still remains on the claimant to show that the claimed mental or emotional disability was indeed the result of either a sudden traumatic event at work or such work stress over a limited period of time as to overcome the claimant's normal adjustment processes. The comment of the Court in Brzozowski's Case 42 is apropos:

The occupational strain which gives rise to injury need not be an unusual one or the result of heavy work. Doubtless where it occurs in cases of unusual exertion it is easier to find that the employee's condition was attributable to his work, but strains resulting from work that is neither heavy nor unusual may also form the basis of a finding that the employee has sustained a personal injury. 43

A similar difficulty will confront the claimant in a psychological injury case.

§4.3. Third Party Actions: Liability of Employer for Contribution or Indemnification. For the second time in this Survey year the Supreme Judicial Court has ruled on a previously unsettled workmen's compensation issue. Aligning Massachusetts with the vast majority of jurisdictions, the Court in Liberty Mutual Ins. Co. v. Westerlind 1 held that a third party tort-feasor has no right to receive contribution from a covered employer 2 whose negligence contributed to the employee's injury. 3 The Court also refused to permit the third party to implead the employer on an indemnity count, on the factual ground that there was no contractual basis, either express or implied, on which the employer

40 See text at notes 15-19 supra.
41 See text at notes 20-21 supra.
43 Id. at 115, 102 N.E.2d at 400.

2 An employer becomes "covered" under the Workmen's Compensation Act becoming an insured or self-insurer. See G.L. c. 152, § 1(b).
3 This issue has been described by the present author as "open in Massachusetts." See L. Locke, Workmen's Compensation, 29 Mass. Prac. § 651 at 120 (1977 Supp.) (hereinafter cited as Locke).

Published by Digital Commons @ Boston College Law School, 1978
could be held liable to indemnify the defendant.\footnote{1978 Mass. Adv. Sh. at 529, 373 N.E.2d at 959.} The issue of whether, in a proper case, an employer could be held liable to a third party defendant for indemnification still remains open.\footnote{Locke, \textit{Workmen's Compensation Law}, 1971 ANN. SURV. MASS. LAW, § 4.2 at 57.} In both instances, the issue posed was whether the immunity granted to the employer under sections 23 and 24 of the Workmen's Compensation Act \footnote{G.L. c. 152.} operates to insulate the employer from what would be, absent the Act, a liability for contribution or indemnification. But the Court decided the case on the state of current Massachusetts law on liability of a joint tortfeasor for contribution and indemnity.

The facts in \textit{Westerlind} are particularly interesting in the analysis of this problem. Samuel DeFinnis was an employee of Brisk Waterproofing Co., Inc. which had a contract with State Mutual Life Insurance Co. to waterproof its building in Worcester. Westerlind was a visitor at the State Mutual building. DeFinnis was working without a safety belt on a scaffold. As Westerlind drove his car out of the building's garage, the car hooked onto a rope dangling from the scaffolding and DeFinnis fell to the ground, receiving fatal injuries. Liberty Mutual paid workmen's compensation benefits and then, under chapter 152 section 15, commenced this action against Westerlind, alleging that Westerlind's negligence caused the death and conscious suffering of DeFinnis. Westerlind filed a motion to implead Brisk, as a third party defendant, for both contribution and indemnification, on the ground that Brisk allowed the rope to dangle from the scaffolding, failed to require DeFinnis to wear a safety belt, did not properly hook the scaffolding to the wall of the building, and in various other ways failed to follow safety requirements, thereby contributing to the cause of the accident.\footnote{1978 Mass. Adv. Sh. at 527, 373 N.E.2d at 958.}

The superior court judge ruled that Westerlind could not press his claim for either contribution or indemnification since the proposed third party defendant was an employer who had paid workmen's compensation benefits to an employee. He filed a comprehensive memorandum of decision detailing the reasons for his ruling and reserved and reported the question of the correctness of his ruling.\footnote{Mass. R. Civ. P. 64; G.L. c. 231, § 111.} The Supreme Judicial Court allowed direct appellate review on its own motion and affirmed the ruling below.
The decision is remarkably clear and brief. Although it is apparent from its references to Larson's treatise\(^9\) that the Court was aware of the policy considerations and the development of the law elsewhere, the Court decided the case in the light of Massachusetts law. It gave a literal reading to the language of the joint tort-feasor statute, which states: "Where two or more persons become jointly liable in tort for the same injury to person or property, there shall be a right of contribution among them."\(^{10}\) In a motor vehicle tort case, the Court had previously barred contribution unless the potential contributor was directly liable to the plaintiff.\(^{11}\) The Court followed the same reasoning in Westerlind. The exclusive remedy provisions of the Massachusetts Workmen's Compensation Act\(^{12}\) gave Brisk a release from all tort claims which DeFinnis might have as a result of this accident. Since Brisk could not be directly liable to DeFinnis, it was held that Westerlind enjoyed no right of contribution against Brisk.\(^{13}\)

The Court then dealt with the question of indemnity. On this, no statute covering indemnification barred the action, but Massachusetts case law at most has "assumed" indemnity will be allowed in cases of express or implied contract or vicarious liability.\(^{14}\) The Court alluded to the problem of the employer's exclusive liability in compensation. It recognized that the majority position nationwide is that a third party tort-feasor may recover indemnity from an employer where the employer had expressly or impliedly contracted to indemnify the third party "or if the employer and third party stand in a relationship which carries


\(^{10}\) G.L. c. 231B, § 1(a).

\(^{11}\) O'Mara v. H. P. Hood & Sons, Inc., 359 Mass. 235, 236-38, 268 N.E.2d 685, 687 (1971), cited in this connection at Locke, supra note 3. The present author had predicted, "If a third party against whom a tort suit has been brought under section 15 of the Workmen's Compensation Act were to seek contribution from the employer as a joint tort-feasor under the contribution statute, the O'Mara case suggests that recovery would be denied on the ground that the employer was not directly liable to the plaintiff-employee by virtue of sections 23 & 24 of the Act." Locke, Workmen's Compensation Law, 1971 Ann. Surv. Mass. Law § 4.2 at 57. But see Hayon v. Coca Cola Bottling Co. of New England, 1978 Mass. Adv. Sh. 1888, 378 N.E.2d 442, where the Court, in an opinion written by Justice Liacos, allowed interpleader of husband as driver of wife's vehicle, for contribution as a joint tort-feasor.

\(^{12}\) G.L. c. 152, §§ 23 & 24.


with it the obligation to indemnify the third party.” 15 While the Court assumed that Massachusetts permits a third party to recover indemnification from an insured employer if the latter has expressly or impliedly contracted to do so, it was unable to find that Brisk was under such a contractual obligation toward Westerlind. The Court noted that Westerlind was a complete stranger to Brisk, and therefore held that Westerlind had no right of indemnification from the insured employer, Brisk. 16

The next paragraph of the Court’s decision deserves quotation in full. It explains why the decision is so brief and to the point; why it does not attempt to deal with the conflicting equities of the other parties or the schemes developed in other jurisdictions to deal with such conflicting equities. The Court stated:

Our decision denying Westerlind a right of contribution or indemnity is based on the present statutory schemes governing workmen’s compensation and contribution. We are aware of the strong criticism of the rules that a third party may not recover contribution from an insured employer and that only in limited circumstances may a third party recover indemnification from an insured employer. See 2A A. Larson, Workmen’s Compensation § 76.52 (1976); Locke, Workmen’s Compensation Law, 1971, Ann. Survey Mass. Law 50, 52-57. We also note that strong policy arguments exist on both sides of the issue whether a third party should have a right of recovery on the basis of contribution or indemnification. See 2A A. Larson, Workmen’s Compensation § 76.51 (1976). Such conflicting policy considerations are best resolved in the Legislature where the resolution can be based on full consideration of the competing interests and the ramifications involved with any change of the legislative scheme of G.L. c. 152. See 2A A. Larson, Workmen’s Compensation § 76.53 (1976). 17

The decision has the virtue of definiteness and clarity. It upsets none of the assumptions on which the parties to the compensation system have operated over the years. It ventures on no new ground and imposes no burden on litigants and courts to work out a complex balance of interrelations between plaintiffs, compensation insurers, third party defendants, and employers, on a case by case basis. The Court leaves this task to the legislature.

The issue of the third party wrongdoer’s right to contribution or indemnification from the employer is beset with much unnecessary con-

15 1978 Mass. Adv. Sh. at 529, 373 N.E.2d at 959. See Larson, supra note 9, at §§ 76.40 - 76.43.
17 Id.
fusion and complexity in the case law developed in other jurisdictions and discussed by textwriters. Resort to basic principles should be helpful. Let us visualize a triangle with three sets of relationships: Side 1. The right of the employee to compensation, and the immunity of the employer from common law liability to the employee, based on the Workmen’s Compensation Act, Side 2. The employee’s common law right for redress of injury caused by a third party, in a personal injury action at law against the wrongdoer, Side 3. The right of action over by the third party tort-feasor against another for contribution or for indemnification.

Two sources of uncertainty can be seen at the outset. The first is a “semantic” problem which has been pointed out by Greaney. The employee’s action against the tort-feasor is called, in compensation parlance, a “third party action,” while that tort-feasor’s action to implead the defendant under Mass. R. Civ. P. 14 is, in procedural parlance, also called a third party action. This tends to confuse ultimate rights and duties through an idle repetition of the word “employer,” when speaking of this party in its relationship to the third party defendant, on the third side of the triangle. We will refer to it there as the interpleader defendant.

A second source of uncertainty arises from the presence of insurance. In order to be covered under workmen’s compensation, an employer must become an insured person under the Act or qualify as a self-insurer. Similarly, it will often be the case that the third party wrongdoer will be insured for general liability, and the employer itself may have a general liability carrier (frequently the same insurance company as writing workmen’s compensation) to spread its loss. Reference to these loss spreading mechanisms blurs the significance of the result reached, whether contribution and/or indemnification is permitted or barred. It is more revealing to disregard the fact that the employer, third party defendant, and interpleader defendant, may be insured.

To resume our analysis: We start with the relationship of the employee and the employer under the Workmen’s Compensation Act. It is commonly said, “Where it applies, the Workmen’s Compensation Act is the exclusive remedy available to an employee to secure reparation from his employer for an injury arising out of and in the course of employment. In return for providing compensation to his employees regardless of fault, an employer who becomes an insured person under the Act obtains immunity from actions at law by his employees.”

---

19 See note 1 supra.
20 Locke, supra note 3, § 651 at 762 n.1.
However, the Massachusetts compensation act contains no specific statement to this effect. The exclusiveness concept must be extrapolated from several sections of the Act. An employer becomes an insured person by providing for the payment to his employees by an insurer of the compensation provided for, or becomes a self-insurer under subsections 2(a) or 2(b) of section 25A. By so doing, he obtains an immunity from actions at law under section 66; by the terms of section 67. By section 24 an employee is held to have waived his right of action at common law to recover damages for personal injury if he shall not have given his employer at the time of the contract of hire written notice that he claimed such right. Therefore, even if an employee does not claim compensation for an injury, he has no right to sue his employer for such injury. By section 23, in addition, if an employee files any claim for, or accepts payment of, compensation on account of personal injury under the Act, or makes any agreement or submits to a hearing before a member of the Industrial Accident Board, that action is held to "constitute a release to the insurer or self-insurer of all claims or demands at law, if any, arising from the injury." In other words, chapter 152 speaks only to the immunity of the employer from actions at law by the employee and only to the release or waiver by the employee of actions at law against the employer and gives no broad grant of immunity to the employer against persons other than the employee or those standing in his shoes. In this respect the exclusiveness language of the Massachusetts act is more limited than that of other states. The typical wording provides that the liability of an employer shall be exclusive and in place of any other liability whatsoever to such employee, his personal representatives, spouse, parents, dependants or next of kin, or any one otherwise entitled to recover damages at common law or otherwise on account of such injury or death. We will return later to the effect that should be given to the narrower scope of the exclusive remedy provision of the Massachusetts act.

We next turn to the employee-third party tort-feasor side of the triangle. The employee's right of action against the third party tort-feasor is not defined by the Workmen's Compensation Act, and the grounds of liability rest upon common law or statute. Section 15 of chapter

21 C.L. c. 152, § 25A.
22 Id. § 66.
23 Id. § 67.
24 Id. § 24.
25 Id. § 23.
26 LARSON, supra note 9, at § 76.30.
152 governs only the relation between the employee and the employer in such action.\textsuperscript{28} The concept underlying the third party provisions of the Act is to insure, first, that the loss caused by the wrongdoing ultimately falls on the wrongdoer, while preserving the employee’s right to compensation, and, second, that the employee should not at the same time have double recovery for the injury, once by way of compensation and again by way of damages.\textsuperscript{29}

Third, we examine the relationship between the third party defendant and the employer in his capacity as an interpleader defendant for contribution or indemnity. Putting to one side for the moment the effect of the Workmen’s Compensation Act on these relations, we can immediately see that there can be several different situations. At one extreme, there may have been no prior relationship between the third party defendant and the interpleader defendant, as where a truck driver is involved in a collision with a third party vehicle, and the third party defendant seeks to implead the truck driver’s employer as a contribution defendant because of his negligence in maintaining the vehicle. There it is the collision that creates whatever relationship will then exist between parties who previously had none at all. This seems to be the situation present in \textit{Westerlind}. At the opposite extreme, there may have been a close contractual relation, as where an employer has contracted with the third party defendant to provide a service which will be performed on the employer’s premises, or, in the reverse, where the third party defendant has contracted with the employer to provide a service to be performed on the third party’s premises.\textsuperscript{30} Between these extremes any number of intermediate situations can be postulated.

The relationship between the parties may also be analyzed in terms of whether the third party defendant and the employer had anticipated the possibility of an injury and had made prior arrangements to share the burden. At one extreme, we have again the situation of the accidental injury between strangers, who had no opportunity to make prior arrangements and are therefore left to the tender mercies of the law to adjust their rights and responsibilities. At the opposite extreme,

\textsuperscript{28} Section 15 was radically amended by Acts of 1971, c. 888, which became effective on January 12, 1972. Third party suits and statutory subrogation is discussed generally in chapter 33 of Locke, \textit{supra} note 3. The 1971 revision of § 15 is specifically described at \textit{id.}, § 661 at 123 (1977 Supp.).


\textsuperscript{30} In \textit{Westerlind}, the plaintiff also brought a personal injury action against State Mutual, which had contracted Brisk to provide waterproofing services to State Mutual’s building. State Mutual was not involved in the interpleader of Brisk, and played no part in the present case.
the employer and the third party may have had extensive business relationships and have made detailed provisions in the form of indemnification contracts or save-harmless clauses to regulate the loss sharing. Closer to this latter end of the scale would be an implied contract of indemnification, based on the facts as they appear to the court. But the large middle ground between these extremes is at present untouched. This is the area in which the courts are asked to fill in what the parties themselves had failed to arrange. It is in this area, it is submitted, that the courts have gone astray, confusing the relationship that the interpleader defendant has with his employee and the obligations that the law would otherwise impose on this wrongdoer for his share in the harm done to the plaintiff and, indirectly by his wrongful act, on the joint tort-feasor.

By making a distinction between contribution and indemnification, the courts give substance to the loss sharing mechanisms arranged by parties in close business relationships. It is generally held that the exclusive remedy provision of a compensation act does not prevent an action for indemnification based upon express contract in which the employer agrees to indemnify the third party for the type of damages the third party has been required to pay the employee.  

The rationale in states having the usual exclusive remedy clause is that the recovery is not "on account of" the injury, but rather "on account of" the contract of indemnity itself. One advantage of the narrower exclusive remedy language of the Massachusetts compensation act is that the issue as to whether the recovery is on account of the injury or on account of the contract does not even arise, since the phrase being distinguished does not appear in the Massachusetts act. The case law on the employer's obligation to indemnity under an express contract derives from the United States Supreme Court's decision in Ryan Stevedoring Co., Inc. v. Pan-Atlantic Steamship Corp. Although that decision arose under admiralty law, and carries many of its hallmarks, its influence extends into state decisions.

State courts differ, however, when the relationship between the parties is based on contract and the third party seeks to read in an obligation of care with an accompanying implied obligation of indemnification, which may survive the exclusiveness defense. Again, the cases seem

---

31 See Larson, supra note 9, § 76.41 at 14-324 n.37. Larson characterizes this as "the clearest exception to the exclusive liability clause." Id.
33 See Larson, supra note 9, at § 76.43(d). Larson lists the following decisions as permitting such implied indemnification to overcome the exclusiveness doctrine: American Dist. Tel. Co. v. Kittleson, 179 F.2d 946 (8th Cir. 1950); Burris v. American Chicle Co., 120 F.2d 218 (2d Cir. 1941) (applying New York law); http://lawdigitalcommons.bc.edu/asml/vol1978/iss1/7
to stress the difficulty in overcoming the exclusive remedy provisions of the respective state laws. Such difficulty would not present itself in Massachusetts, which contains no such all-inclusive exclusive remedy clause. The problem in Massachusetts is the other half of the equation, namely whether state law would imply an indemnity, in the absence of an express contract, in favor of the third party defendant. On this, Westerlind says merely, "Assuming that in Massachusetts a third party may recover indemnification from an insured employer if the employer expressly or impliedly contracted to hold the third party harmless...." 34 But an assumption in a decision is a far cry from a rule of law, and as yet no Massachusetts case has allowed an action for indemnification on a contract expressed or implied, where the impleader was against an employer covered under the compensation act.

The third situation, in which the third party defendant seeks to enforce a non-contractual right to indemnification against a covered employer, has found little support as yet in the decisions.35 An action for non-contractual indemnity against the wrongdoing employer would probably not be frustrated in Massachusetts on the exclusiveness principle, the main basis on which such actions have failed in other jurisdictions.36 In these cases the courts never reach the rights of the parties for indemnification based upon relative degree of fault, as in any event the case is barred by the exclusive-remedy provision. Of more interest, therefore, in Massachusetts are the cases involving the minority rule.

The leading case of Dole v. Dow Chemical Co.37 arose in New York. An employee of Urban Milling Co. had died as a result of exposure to a poisonous fumigant manufactured by Dow. The widow of the employee sued Dow, charging failure to give sufficient warning of the fumigant's danger to potential users. In turn, Dow made a claim as a third party plaintiff against Urban, alleging negligent failure to follow precautions on the label and the accompanying literature, and other


36 See General Electric Co. v. Cuban American Nickel Co., 396 F.2d 89, 97 (5th Cir. 1968) (per Wisdom, J., applying Louisiana law); Slattery v. Marra Bros., 186 F.2d 134, 139 (2d Cir. 1951) (per L. Hand, J., applying New Jersey law). See also Larson, supra note 9, § 76.44 at 14-394 to 14-395 n.81.
negligent acts in the use of the chemical.\textsuperscript{38} The prestigious New York Court of Appeals held that Dow’s claim would lie and launched a new rule that the right to indemnity “should rest on relative responsibility and may be apportioned on the facts.”\textsuperscript{39} While the Court’s interpretation of the relationship between the third party and the employer was couched in terms of the exclusiveness-provision of the New York statute, its general comment is apropos: “Plaintiff [Dow] asserts its own right of recovery for breach of alleged independent duty or obligation owed to it by the defendant.”\textsuperscript{40} The \textit{Dole} case is clearly not yet authority in Massachusetts.

Where does fairness lie, in this complex of relations? On the first side of the triangle, employee-employer in the compensation situation, there is no longer any unfairness, since the legislature has eliminated the requirement, previously insisted upon in section 15, that an employee elect between his right to compensation under chapter 152 and his pursuit of a personal injury action at law against the third party tortfeasor.\textsuperscript{41} There is, similarly, little unfairness on the second side of the triangle, the personal injury action at law against the third party tortfeasor, subject to the procedural requirements of section 15, as amended. Whatever problems still exist in balancing the right of the employee himself to bring the third party action against the right of the insurance carrier, or in the role of the employee or insurer as the case may be when the other brings the action, such problems are beyond the scope of this article.\textsuperscript{42}

Unfortunately, the bulk of the unfairness attaches on the third side of the triangle, and there the unfairness largely burdens the third party defendant who has been effectively barred of his right of contribution and indemnification from the employer, with the sole possible exception of an express (or less likely, implied) contract of indemnification. The happenstance that his victim was an employee of a wrongdoer whose fault contributed to the accident serve to deprive him of contribution or indemnification. The defendant as a complete stranger to the compensation scheme could well feel that he is being unfairly asked to subsidize a compensation system from which he receives no

\textsuperscript{38} Id. at 146, 282 N.E.2d at 290, 331 N.Y.S.2d at 385.
\textsuperscript{39} Id. at 153, 282 N.E.2d at 295, 331 N.Y.S.2d at 391-92, \textit{quoted by Larson}, \textit{supra} note 9, § 76.44 at 14-403 n.94.1.
\textsuperscript{40} 30 N.Y.2d at 152, 282 N.E.2d at 294, 331 N.Y.S.2d at 390.
\textsuperscript{41} See Acts of 1971, c. 888, \textit{amending G.L. c. 152, § 15}, applying to causes of action arising on or after January 12, 1972. For a discussion of the problem of election of remedies, see \textit{Locke}, \textit{supra} note 3, at § 668.
\textsuperscript{42} Some problems still remain after the amendment of § 15 referred to in note 41 \textit{supra}. The subject is discussed at length in \textit{Larson}, \textit{supra} note 9, § 74 at 14-180 to 14-256. \textit{See also Babitsky}, \textit{supra} note 27 at 16-21.
benefit. Not only is there unfairness in the third party defendant's loss of contribution, but there is a more serious unfairness in the benefit additionally conferred on the employer: not only is he relieved of the obligation to contribute to the results of his wrongdoing, but he will be reimbursed in full for the compensation he has been required to pay. He comes out completely clean from a situation in which his wrongdoing was a contributing part.

This result conflicts with the public policy underlying both the Workmen's Compensation Act and the tort law of damages for injury. As a means of providing income support and medical care to the victim of industrial injury, the compensation scheme is justified as a loss-sharing mechanism and as an encouragement to industrial safety. Reimbursement of the employer whose fault contributed to the injury upsets both the loss-sharing mechanism and the incentive to industrial safety. Depriving the third party tort-feasor of his contribution or indemnity, on the other hand, distorts the loss-sharing mechanism of the tort law of damages by placing the whole cost on that defendant. In those cases where his liability is vicarious, or where the employer created the dangerous situation which the third party defendant merely has failed to detect, it removes the incentive for safety by making lack of care irrelevant to the distribution of loss.

As it now stands, the law is anomalous in its result: the third party defendant least able to anticipate the accident and least able to protect himself from its consequences is deprived of his right of contribution or indemnification, while the defendant who anticipates the possible consequences of his negligence is able to guarantee that a share of the resulting loss will be borne by the employer, by exacting a contract of indemnification. The further removed from the compensation scheme the third party defendant is, the more clearly is he prevented from obtaining a share of his loss from the employer.

If we now return to Westerlind, we can be permitted some disappointment that the Court did not undertake an analysis of the issue, especially as it applies to contribution. The Court regards its holding as an inevitable consequence of the language of chapter 231B, section

43 See generally Report of the Commission on Compensation for Industrial Accidents (1912) for a history of the movement for a compensation law in Massachusetts, the text of the original 1911 Massachusetts Compensation Act, commentary on the Act, and other supplementary material. See also Locke, supra note 3 at chapter 2 (entitled "History and Development"); Somers & Somers, Workmen's Compensation (1954). Apart from the obligation to provide for insurance coverage, the employer's only direct financial obligation based on fault occurs when the injury is the result of his serious and willful misconduct, in which case the amounts of compensation payable are doubled under G.L. c. 152, § 28.
§4.3 WORKMEN'S COMPENSATION LAW

That statute was designed to overcome the common law rule barring contribution among tort-feasors. It is written in terms of the liability of each defendant to the plaintiff, but in essence it seeks to define the relations between the two wrongdoers themselves. It does not seem inevitable to believe that the legislature when it gave a right of contribution among “two or more persons [who had] become jointly liable in tort for the same injury to person or property,” intended to provide an immunity to an employer because of its workmen’s compensation coverage. Could not it reasonably be held that by the phrase “jointly liable in tort for the same injury,” the legislature was attempting to define the grounds of a contributor’s fault on which the right of contribution should be based? Thus, in O'Mara, the operator of the car in which the plaintiff had been a passenger would not have been liable to the plaintiff in the absence of gross negligence. The requisite degree of fault was not present on which a right of contribution could be based. But in Westerlind, apart from the provisions of the Workmen’s Compensation Act granting an immunity to the employer from suits by his employee, the third party complaint for contribution alleged a sufficient degree of wrongdoing to have made the contributor liable for personal injuries to the plaintiff.

Pennsylvania has followed this line of reasoning in allowing a third party action over against the employer in contribution, using the rationale that the definition of tort-feasor does not require that they have a common liability toward the injured party, but only that their combined

44 W. Prosser, The Law of Torts, § 47 at 274 (3d ed. 1964) states, “The great majority of our courts ... refused to permit contribution even where independent, although concurrent, negligence had contributed to a single result.” Prosser relates that the obvious lack of sense and justice in this rule resulted in unanimous criticism and led to the passage of statutes which, to a greater or lesser extent, permitted contribution among tort-feasors.

45 See G.L. c. 231B, § 1(a).


“... it is plain that the evil to be remedied was the unfairness of allowing a disproportionate share of the plaintiff’s recovery to be borne by one of several joint tortfeasors, and the object to be accomplished was a more equitable distribution of that burden among those liable in tort for the same injury. ... The term “liable in tort” ... is broad in scope and not suitable language for implying a narrow or restricted range of application within the framework of potential tort defendants.

In Hayon the Court held that the subsequent abrogation of the doctrine of interspousal immunity should be applied in construing the 1963 joint tort-feasors statute, and permitted interpleader of the host husband. That was as far as the Court had to go to allow the interpleader, but the cited language would support broader applications.

conduct be the cause of the injury.\textsuperscript{48} We have recently seen that statutes of major import can be considered as establishing a policy carrying “significance beyond the particular scope” of the statute involved.\textsuperscript{49} Once the concept of contribution among joint tort-feasors has been enacted as public policy,\textsuperscript{50} it is submitted that courts can develop their own doctrine of a “common law” contribution among joint tort-feasors, not strictly limited by the terms of the statute.\textsuperscript{51}

In other contexts employers are not immune to suit by parties who do not stand in the employee’s shoes. Thus, parents of a minor child retain their common law right of action for medical expenses and loss of services resulting from a compensable injury.\textsuperscript{52} The employee’s waiver of common law rights has been held not to apply to other persons who have independent rights against the employer.\textsuperscript{53} Similarly, where two older children of a deceased employee were statutory beneficiaries under chapter 229, section 5, but were not entitled to dependency benefits under the compensation act, the administrator of the estate of a deceased employee was held entitled to bring action against the negligent third party under the death act on behalf of a widow and all six children, despite the fact that the widow and four youngest were receiving dependency benefits under the compensation act.\textsuperscript{54} The 	extit{Reidy} case points in the direction of allowing an independent right of action against the employer where the persons on whose behalf the action is brought have no rights as dependents under the compensation act. The reasoning in both 	extit{Reidy} and 	extit{King} is similar. Since the parents of the minor child and the non-dependent next of kin waive no rights under section 23 of chapter 152 by claiming or accepting benefits under the Act, they are not within the ambit of the employee’s waiver under section 24; their separate and independent rights are not subject to the Act and should not be affected by its provisions. As 	extit{King} emphasized, “... another rule of statutory construction is that a, existing common law remedy is not to be taken away by statute unless by direct enactment or necessary implication.”\textsuperscript{55} In the \textit{Westerling} situation, it is

\textsuperscript{48} See Elston v. Industrial Lift Truck Co., 216 A.2d 318, 320 (Pa. 1966); Larson, \textit{supra} note 9, § 76.22 at 14-307, 14-308.


\textsuperscript{50} See G.L. c. 231B, § 1(a).

\textsuperscript{51} See Gaudet v. Webb, 362 Mass. 60, 71, 284 N.E.2d 22, 229 (1972). The Court, per Justice Quirico, discussed the wrongful death act, G.L. c. 229, § 2, stating, “Consequently, our wrongful death statutes will no longer be regarded as ‘creating the right’ to recovery for wrongful death.”

\textsuperscript{52} King v. Viscoloid Co., 219 Mass. 420, 422, 106 N.E. 988, 988 (1918).

\textsuperscript{53} Id.


\textsuperscript{55} 219 Mass. at 425, 106 N.E. at 989.
§4.3 WORKMEN'S COMPENSATION LAW

the insurer who is in the employee's shoes, not the third party defendant. An interpretation of the joint tort-feasor statute allowing interpleader of the employer to enforce the third party's claim for a share of damages for the employer's wrongdoing would thus not violate any immutable principle of Massachusetts compensation theory.

After Westerlind, it is apparent that the only route available for the third party defendant to secure a share of his loss lies in development of the law of indemnity. At present, we "assume" that an employer could be impleaded on an express contract—or perhaps even an implied contract—of indemnity.56 The more elaborate concepts of indemnity being developed elsewhere are still to be developed in this commonwealth. But unless the legislature sees fit to set up a "Blue Ribbon Committee" to review this entire subject and come up with a balanced statute, it is likely that pressure will be brought through the courts for loss-sharing along the lines of implied contracts of indemnification, indemnification based upon degrees of fault, of active and passive negligence, of primary and secondary wrongdoing, and similar theories now being developed elsewhere.57 Third party defendants will not sit by idly and accept peaceably a situation in which they are deprived of a share of reimbursement for injuries which may be partly the result of the employer's negligence or indeed of his primary wrongdoing.

It is unlikely that the New York rule enunciated in Dole will find immediate support in Massachusetts, which has not yet adopted doctrines of active and passive negligence or degrees of wrongdoing as a basis for indemnification between wrongdoers. But if there is to be judicial development of the doctrine of indemnification as a solution to the problem of loss-sharing by the employer or other primary wrongdoer, the Dole case seems to point in the right direction. As Larson said, "It may well be the fairest compromise yet achieved in the tangled skein of conflicting equities and policies."59

It would be best if the legislature were to confront squarely the issue of the relative rights and responsibilities of the employee, employer, and third party defendant in this situation, and not leave it to judicial development. Having said that, it must be recognized that it is unlikely the matter will be given serious legislative attention at a time when other issues are more pressing and seem more deserving of legislative concern. It must also be recognized that when attention is

56 See text at note 34 supra.
57 See Larson, supra note 9, at § 76.43(d) (actions under state law to enforce employer's contractual right to indemnity); § 76.44 (actions based on non-contractual indemnity).
58 See text at notes 37-40 supra.
59 Larson, supra note 9, § 76.44 at 14-405 n.94.6, http://lawdigitalcommons.bc.edu/asml/vol1978/iss1/7
given, considerations other than those of policy and equity may well
prevail. Therefore, it is probably inevitable that the matter will again
and again be presented to our courts. The policy issues will not just

go away and must eventually be confronted and resolved in the painful
course of judicial construction.

§4.4. Personal Injury: Aggravation of Sensitive Respiratory Tract by
Exposure to Anti-Freeze Fumes While Operating Company Vehicle. In
an interesting rescript opinion, Casey's Case,1 the Appeals Court re-
instated an award of compensation for periods of total incapacity which
resulted from the plaintiff-employee's inhalation of ethylene glycol
fumes. The employee's injury was caused by vaporization of anti-freeze
fumes released through a crack in the engine block of a company vehicle
that he had been operating. The single member of the Industrial Ac-
cident Board found that the fumes resulted in "aggravating [the em-
ployee's] sensitive underlying respiratory condition causing sore throat,
runny nose, nausea, coughing spells, and colds."2 The Board affirmed
this award, but was reversed by the superior court. In reversing the
superior court and reinstating the award, the Appeals Court found
ample basis for the Board's decision in the testimony of a medical
expert.3

The case is interesting in that the exposure and resulting injury
occurred between September, 1962 and April, 1963, but disability first
began in June of 1963. The disability resulted in loss of occasional
days, with a single continuous period of disability of sixteen days from
November 2 to November 17, 1963. The employee's testimony ap-
parently had been "rather vague" as to exposure and periods of dis-
ability, and the court held that it was therefore "not irrational" for the
single member to look to the company records and attribute to toxic
exposure those absences which the records indicated were generally
due to symptoms connected with the injury.4

It is settled law that "[w]here personal injury results from the gradual
impairment of the body because of the absorption of fumes, gases, dirt
or other harmful foreign matter, the date of injury is the day of the
last exposure bearing a causal relation to the incapacity or death."5
Usually this is the last day of employment prior to the commencement
of disability. But this is not necessarily so. In many cases, there is
a period of "latency" following the last date of exposure, with the actual

2 Id. at 287, 374 N.E.2d at 333.
3 Id.
4 Id.
See id. at n.70 for extended list of such cases.
disability occurring only months or years later. Prominent examples are disabilities caused by asbestosis,\(^6\) berylliosis,\(^7\) and a host of diseases caused by chemical insult which only now are beginning to be identified. In *Casey's Case* the period of exposure was between September, 1962 and April, 1963, and apparently three months elapsed before the first disability attributable to this exposure. The case is thus controlled by *Steuterman's Case*,\(^8\) which was cited by the court. In *Steuterman's Case* the Court upheld a decree which was based on findings that the personal injury to the employee from exposure to fumes was complete in the early part of 1944 although it only resulted in disability starting January 4, 1946, about two years later.\(^9\) The Appeals Court also cited *Trombetta's Case*,\(^10\) a case involving aggravation of a back injury from the ordinary physical activities of a laborer's job. The analogy between injury resulting from exposure to a toxic substance and a back injury resulting from repeated manipulations of the back in the course of ordinary work is highly suggestive.

§4.5. Non-Insured Employer: Personal Injury Action Allowed, Though Employer Insured in New Hampshire and Compensation Paid Under New Hampshire Law: Chapter 152, Sections 66 and 67. To obtain coverage under the Massachusetts Workmen's Compensation Act and thereby obtain immunity from a common law action for personal injuries based on its negligence, an employer must become an insured person under the Massachusetts Act or qualify as a self-insurer.\(^1\) If the employer fails to obtain insurance under the Act, it is liable in a personal injury action at law by its employee, who need only show that the injury arose out of and in the course of employment, and would otherwise be payable under the Massachusetts Workmen's Compensation Act.\(^2\) The employer loses his possible defenses that the employee was contributorily negligent, that he had assumed the risk of injury, or that the injury was the result of a fellow employee's neglect. Moreover, the employee need not even prove that the employer was negligent. It is sufficient if he establishes that the employer had an obligation to insure under the Act, that he failed to do so, and that the injury would otherwise have been compensable.\(^3\)

\(^{6}\) Brek's Case, 335 Mass. 144, 138 N.E.2d 748 (1956).
\(^{7}\) Beausoleil's Case, 321 Mass. 344, 73 N.E.2d 461 (1947).
\(^{8}\) 323 Mass. 454, 82 N.E.2d 601 (1948).
\(^{9}\) Id. at 457, 82 N.E.2d at 602.
\(^{10}\) 1 Mass. App. 102, 105, 294 N.E.2d 484, 485 (1973).

\(^{4.5.1}\) G.L. c. 152, §§ 1(b), 25A-25D.
\(^{2}\) Id. §§ 66, 67.

http://lawdigitalcommons.bc.edu/asml/vol1978/iss1/7
It is the Massachusetts law with which we are concerned. The obligation to become an insured person under the Massachusetts Act arises as soon as an employee engages in employment in Massachusetts that would be covered under the Massachusetts Workmen's Compensation Act were he to be injured. At that point the employer is burdened with the obligation to provide Massachusetts compensation coverage. That he may have coverage under the law of another state, where the employee normally conducts his business, is of no significance and provides him with no defense. This is so, even if compensation was offered and accepted under the law of this other state. Such is the holding of the Massachusetts Supreme Judicial Court in Barrett v. Transformer Service, Inc. The insurer's "backfield running" in an attempt to evade a personal injury action was clearly noted by the Court and held to be of no avail.

Barrett was employed by Transformer Service, Inc., a New Hampshire corporation. Transformer Service re-circulated and re-conditioned oil in transformers while the transformers were receiving electrical current and remaining in operation. It performed this on site work under contract for various companies in Massachusetts as well as in New Hampshire. A superior directed Barrett to carry out an assignment at the plant of Foster Grant Co., Inc., in Leominster, Massachusetts. While working at the Foster Grant plant, Barrett unwittingly touched a bare wire leading to the transformer and suffered extreme shock and burns which resulted in the amputation of his right forearm. Transformer Service filed the usual accident report with the New Hampshire Workmen's Compensation Authority. It was liable under the New Hampshire compensation statute, and it took out a policy with Employers Mutual Liability Ins. Co. of Wisconsin to cover this liability. Toward the end of February, 1968, Barrett's attorney called the New England office of Employers Mutual and inquired whether they would pay Massachusetts rather than New Hampshire compensation rates and benefits, the Massachusetts rates being more favorable. Compensation was paid at New Hampshire rates. Barrett then filed a claim with the Massachusetts Division of Industrial Accidents, to which the insurer replied that the policyholder had no Massachusetts coverage and that the case came under the New Hampshire law. Only after Barrett commenced a personal injury action in superior court on December 4, 1968 did the insurer concede that it had Massachusetts coverage. Barrett's counsel replied that he could not accept this concession in view of the insurer's often reiterated position that it had no coverage in

5 Id. at 774, 374 N.E.2d at 1326.
6 Id. at 775, 374 N.E.2d at 1326.
Massachusetts. He “suggested that the insurer had been trying to maneuver Barrett into the cheapest schedule of payments and that its present tactic was due to the filing of the tort action.” The opinion relates a series of internal actions between Transformer Service and Employers Mutual regarding various “riders” in a belated attempt to provide valid coverage in Massachusetts.

The Court held, firstly, that the Massachusetts act gave protection for the accident on the work performed in Massachusetts, even though the employer was a New Hampshire company and the employee himself lived there. The Court cited Lavoie's Case as dispositive of this issue. Since there was Massachusetts jurisdiction over the work, the employer was bound to take steps to become an insured under the Massachusetts act or suffer exposure to a personal injury action under sections 66 and 67. The Court reviewed the ex post facto efforts of the insurer to provide Massachusetts coverage, but concluded that it had not succeeded in doing so. Nothing would be gained in reviewing this aspect of the decision, since it deals primarily with the intricacies of insurance law.

Of more interest is the Court's comment that the superior court judge thought the insurer should be taken at its word in its repeated representations that there was no such coverage. He concluded that the insurer was estopped vis-a-vis Barrett. Barrett's reliance could be seen in his resort to the § 66 action. The judge, however, thought the insurer should not be considered to have been acting for Transformer Service when it made the representation. The Court commented, however, that although the superior court judge had felt that theestoppel did not extend from the insurer to the employer, Transformer Service, the defendant in the section 66 action, a question might still be raised whether the estoppel should apply to Transformer Service to the extent of any duty the insurer might owe Transformer Service in the case of a judgment against it under section 66, on a general liability policy. The Court intimated no opinion on that issue.

The Court in Barrett exhibited particular concern for the unfairness to injured employees that would result if insurers and employers were

---

allowed to reverse their positions as to coverage after the occurrence of an accident. It appeared willing to entertain employee tort actions when employers have not timely complied with the compensation act. Thus the case highlights the more substantial damages available to an injured employee in the personal injury tort action, as compared to the benefits of the compensation act. It should serve as an encouragement to counsel to investigate and analyze their cases carefully to bring to their clients the maximum monetary recovery.

§4.6. Common Employment Defense Inapplicable Where Subcontractors' Work is "Ancillary and Incidental": When Question of Fact or Matter of Law. The common employment defense to actions at law for personal injuries was abolished by legislative amendment in 1971. As was stated in these pages, "[s]ince injuries occurring before that date are still affected by the common employment doctrine, lawyers and courts will still be obliged to deal with its intricacies, and injured workmen and their dependents will still suffer from its inequities for a few more years."  

In the Survey year, the common employment issue arose in two cases. In Bulpett v. Dodge Assoc., Inc., the Appeals Court reversed a jury verdict in favor of the plaintiff, reasoning in part, that the common employment defense barred his action as a matter of law. In Poirier v. Town of Plymouth, the Supreme Judicial Court affirmed the ruling of the trial judge that as a matter of law the common employment defense did not apply and refused to put the issue to the jury.

The doctrine of the common employment defense is based on sections 15, 18, and 24 of the Workmen's Compensation Act. As was stated in Clark v. M.W. Leahy Co.:

These three sections in combination have resulted in the establishment of a rule, governing common law actions for personal injuries suffered by employees of the contractor and of subcontractors where the work is done under a general contractor who is an "insured person," that might not be apparent from a mere reading of the statute. The insurance of the general contractor or "common employer"... throws its shadow over the whole work. In that

---

1 G.L. c. 152, § 15, amended by Acts of 1971, c. 941 § 2, effective January 24, 1972, applies to injuries occurring after that date.
2 Locke, Workmen's Compensation Law, 1971 ANNUAL SURVEY OF MASSACHUSETTS LAW, § 4.1 at 50.

Published by Digital Commons @ Boston College Law School, 1978
§4.6 WORKMEN'S COMPENSATION LAW

shadow . . . a cause of action for negligence causing a compensable personal injury cannot grow . . . .\(^6\)

Since section 18 of the Workmen's Compensation Act\(^7\) does not apply unless work performed by an independent contractor or subcontractor is a "part of or process in" the work of the common employer, the defense explicitly does not apply where the work performed is "merely ancillary and incidental to" a principal contractor's business.\(^8\) Much litigation has revolved around the question whether a given contract falls on one side or the other of this line. Such cases arise not only in connection with the common employment defense, but also in connection with claims for compensation by employees of uninsured contractors. "The process of decision is largely dependent upon an analysis of the facts of the business enterprise in question, although factual precedents have emerged in cases dealing with construction and repair and with transportation."\(^9\)

Although ordinarily the existence of common employment is a question of fact for the jury, the Bulpett court stated that where the circumstances of a particular case indicate that the independent contractor or subcontractor's work is plainly part of the principal contractor's business, then the question is one of law and should not be submitted to the jury.\(^10\) In both Bulpett and Poirier the courts felt that the subcontractor's work was plainly a part of or process in the principal employer's work.

In Bulpett, two workers were seriously injured in falls from two "buckets" of an hydraulic aerial mechanism called a sky-worker when the boom suspending the buckets collapsed. Bulpett was employed as an electrician by an electrical contractor engaged in the erection and insulation of a power sub-station for the Boston Edison Company. The accident occurred when the steel piston rod holding the upper boom of the sky-worker aloft pulled out of the aluminum block into which it was screwed.\(^11\) Bulpett's action was brought for negligence against Dodge Associates, Inc., owner of the sky-worker, among other defendants. At the trial evidence was introduced as to the negligence of a maintenance man employed by Dodge, and the jury returned a verdict

---

\(^6\) Id. at 568-69, 16 N.E.2d at 58. The common employment doctrine is described in detail in L. Locke, Workmen's Compensation, 29 Mass. Prac. § 663-665 (1968).

\(^7\) G.L. c. 152, § 18.

\(^8\) Locke, supra note 6, § 664.3 at 788.

\(^9\) Id. The cases and the rules emerging from them are discussed at id., §§ 154 & 155.


\(^11\) Id. at 1000-01, 365 N.E.2d at 1249.

http://lawdigitalcommons.bc.edu/asml/vol1978/iss1/7

28
against Dodge in favor of Bulpett. On Dodge's appeal the only issue raised was whether it was error for the judge to deny Dodge's motion for a directed verdict on the basis of the common employment defense. Dodge contended that as a matter of law it was engaged in common employment with the electrical contractor. The court accepted this contention. The court said, "Dodge furnished a specialized form of vehicle and an operator to Foster [the electrical contractor] for use on a construction project, and the operator worked under the general direction of a Foster supervisor. . . . [T]he operation of the sky-worker was an integral part of the . . . work." The court held the cases cited by the plaintiff to be inapposite, stating, "In none of these cases were the plaintiffs 'plainly' engaged in work that was 'part of or process in' the defendant's normal business."

In *Poirier*, the plaintiff was employed by an independent contractor engaged by the Town of Plymouth to paint the defendant's water tank. He was climbing the tank on a stationary ladder affixed to one of its supporting legs and was thrown about thirty-five feet to the ground while attempting to continue his climb by going up a second ladder suspended from the top of the tank. Based on evidence that the Town had failed to disclose hidden or concealed defects on its premises which it either knew or should have known existed from the exercise of reasonable care, the jury found for the plaintiff for $60,000. This verdict was set aside by the Appeals Court, but the Supreme Judicial Court reinstated the verdict. This decision is primarily of interest because of its precedent-setting holding that the hidden defect rule is no longer to be applied in cases involving tort actions against landowners. In reaching this decision, however, the Court had to address the defendant's contention that the judge should have submitted the case to the jury on the common employment issue. The Court considered the crucial question whether the work carried on by the plaintiff was "merely ancillary" to the business carried on by the Town Water Dept. Citing Locke, Workmen's Compensation, section 154 at 188 (1968), the Court noted that "maintenance and repair work 'which [is] required only occasionally and involve[s] extensive alterations or the

12 Id. at 1001, 365 N.E.2d at 1249-50.
13 Id. at 1002, 365 N.E.2d at 1250.
16 Id. at 1005, 365 N.E.2d at 1251.
18 Id., 372 N.E.2d at 217.
servicing of specialized equipment beyond the competence of [the insured employer's] regular staff, may be found to be 'merely ancillary and incidental' to the business of the insured employer.' 21 The Court reasoned that the work of sanding and grinding rough spots and painting a water tank at a height of between 35 and 50 feet obviously calls for a specially equipped crew and is easily distinguishable from the type of routine painting of hydrants and pipes, painting over graffiti, and other maintenance carried on by the defendant's own employees. 22 On this basis, the Court concluded that it could not be found that the plaintiff's work constituted a "branch or department" of the defendant's business of selling and distributing water to Plymouth customers, and the judge did not err in deciding this question as a matter of law. The Court stated, "[The question] is one of law where the record supports the conclusion either that the work plainly is, or plainly is not, part of the principal employer's trade or business." 23

Little would be gained in these pages to analyze in further detail the detailed fact patterns which might be considered to distinguish Bulpett from Poirier and thereby to explain the different results—that in Poirier, the ruling of a trial judge to keep the issue from the jury was upheld, whereas in Bulpett, the determination of a jury on special question that the work of Dodge Associates was similarly merely ancillary and incidental was overturned by the Appeals Court as "plainly" within the common employment. The law that defined or sought to define the distinction between work which was "part of or process in" the work of the general employer and work which was ancillary and incidental to the general employer's work, and the further law which sought to define which situations were matters of fact for the jury and which were matters of law for the court was "beset with distinctions so delicate that chaos is the consequence." 24 No lawyer could say with assurance when a court would find the work to be "part of or process in," or "ancillary and incidental." This confusion and unpredictability was one of the reasons for the action of the legislature in abolishing the common employment defense. Fortunately, courts will not be plagued, nor litigants burdened, much longer with the inequities and confusions of the common employment defense.

§4.7. Legislation. Although the cases discussed in this chapter relate to the Survey year, June 1, 1977, through May 31, 1978, the legislative changes discussed are those enacted by the Massachusetts General Court during the legislative year of 1978.

21 Id. at 114, 372 N.E.2d at 222.
22 Id. at 115, 372 N.E.2d at 222.
23 Id.
A. Benefit Payments

Where an employee dies as a result of a compensable injury, the benefits paid to his dependents under section 31 are not based on a percentage of his average weekly wages, as in the case of incapacity compensation; rather they are a "pension" at a set rate, regardless of the income level of the wage earner. The benefits have been notoriously low: $45 per week from November 29, 1970, to October 31, 1974, and $55 per week from November 1, 1974, to November 1, 1978. The benefits have now been raised to $110 weekly by chapter 461 of the Acts of 1978, effective for injuries occurring on or after November 1, 1978. An additional $6 is added for each dependent child as defined in section 32 of the Act. The total amount of payments under section 31 shall not be more than $32,000 nor be continued for more than 400 weeks, with the provision, however, that benefits shall be paid beyond the $32,000 maximum if the Board finds that a widow is not, in fact, fully self-supporting. A similar provision is now also made for a widower. Prior to the 1978 amendment, the maximum amount payable to a dependent spouse was $16,000.

Chapter 461 also increased the benefits payable to other persons totally or partially dependent upon the deceased worker. The weekly benefit was based on a percentage of the weekly wages, but subject to a modest $40 maximum and $24 minimum. The aggregate maximum was increased from $8,500 to $17,000. In a further amendment applicable to death cases, chapter 424 of the Acts of 1978 increased the burial allotment from the previous limit of $1,000 to a more reasonable amount of $2,000, effective July 13, 1978.

Chapter 474 of the Acts of 1976 had provided that while an employee is totally incapacitated he shall be paid a weekly compensation equal to two-thirds of his average weekly wage but, for cases arising after October 1, 1978, not more than 100% of the average weekly wage in the commonwealth as determined by the Division of Employment Security. In accordance with this provision, the maximum under section 34 of the Act for temporary total disability for the year beginning October 1, 1978 has been set at $211.37 per week. This is also the maximum permitted under section 35 for partial incapacity, and section 34A for permanent and total incapacity. However, chapter 474 had set the maximum for all benefits under section 34 and section 35 at $45,000. This represents only 213 weeks of compensation at the maximum rate.

§4.7. There was a substantial question as to whether the previous differentiation in favor of a widow, to the disparagement of a widower, was constitutional under the recent Equal Rights Amendment to the Massachusetts Constitution.

Published by Digital Commons @ Boston College Law School, 1978
Consider the history: when the maximum was set at $25 per week back in 1946, the aggregate maximum was $10,000. When the maximum was raised to $30 in 1949, the aggregate maximum was retained at $10,000 reducing the number of weeks for which compensation was payable to 333.33 weeks. On December 13, 1955, the weekly maximum was raised to $35, but the aggregate maximum was retained at $10,000. This reduced the number of weeks to 285.71. On January 15, 1959, the maximum was raised to $40, and again the maximum amount was retained at $10,000, bringing to 250 the number of weeks for which the maximum benefits could be paid. Although 250 weeks became the norm after November 1, 1972, another thirteen years of varying rates and varying maximums remained before this norm was set at so low a level. On December 7, 1959, when the rate was increased to $45, the maximum went to $14,000, or 311.11 weeks. On August 29, 1961, the rate was increased to $50 and the maximum to $16,000, or 320 weeks. The $16,000 limit remained until November 1, 1971. For two years prior to that, the maximum was $70, or only 228.57 weeks. When the rate was increased to $77 on November 1, 1971, the maximum was increased to $20,000, or 259.74 weeks, but the $20,000 was retained when, on November 1, 1972, the maximum was set at $80, or the magic multiple of 250 weeks. This multiple has been retained until the current year, when for the first time again it has fallen below, to the remarkably short period of 213 weeks. Legislative action is required to increase the overall maximum so that benefits will not be cut off in the middle of a period of medical treatment, convalescence or vocational rehabilitation, as will be the fate of many persons subject to this limit.

Another restrictive feature of the 1976 Act is now becoming manifest. Additional dependency compensation is allowed up to $150 weekly for employees whose weekly compensation is below that amount. One hundred and fifty dollars was the maximum weekly benefit for all employees for the year immediately preceding October 1, 1978. When

---

11 Id.
13 Id. §§ 3, 4, 8.
the maximum was increased to $211.37, however, the cut-off for dependency was kept at $150. Employees entitled to compensation over $150 get no additional dependency compensation. Again, legislative amendment is needed to overcome this defect.

B. PROCEDURAL AMENDMENTS

Prior to the enactment of chapter 348 of the Acts of 1978, a party had only ten days in which to claim a review of a decision of the single member under section 10 or enter a decision of the reviewing board in the superior court under section 11 for judicial review or enforcement. The 1978 amendment extended the time from ten days to thirty days, a welcome relief to parties who no longer will have to scramble to meet the unduly short deadline. However, the period within which to request a hearing as a party aggrieved by an order of a single member following a conference under section 7 is still kept at ten days. A similar modification is required to extend that period also to thirty days.

By chapter 424 of the Acts of 1978, the Industrial Accident Board is empowered to rule on claims for attorneys' fees and medical services at a conference under section 7, but only in cases which have previously been determined to be compensable under the Act. The power has not been extended in cases where liability is an issue.

C. COST OF LIVING ADJUSTMENT

Under the Massachusetts Compensation Act, the date of injury governs the rate of compensation benefits. No provision is made in the Massachusetts Act, comparable to that introduced into the laws of many other states, to adjust the weekly benefit in accordance with increases in the cost of living. Such amendments have been presented to the legislature for many years under a variety of schemes, but have continuously been rejected. The present focus on inflation might well provide a more favorable environment in which to accomplish this long overdue improvement in the compensation act. The present system merely forces employees and their survivors to bear unaided the ravages of inflation, or to resort to charity or public welfare. The burden should not be thus shifted from the insurance carrier, considering the fact that under workmen's compensation the insured person has been deprived of a common law remedy for his injuries.

15 Id. § 5, amending G.L. c. 152, § 11.
17 Steuterman's Case, 323 Mass. 454, 82 N.E.2d 601 (1948); Locke, supra note 2, § 302 at 358.