POIRIER v. TOWN OF PLYMOUTH, THE HIDDEN DEFECT RULE, AND NEW PATTERNS OF TORT LAW REFORM IN MASSACHUSETTS

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I. THE POIRIER CASE

Francis Poirier, while employed by an independent contractor, suffered severe injuries when he fell from a water tower ladder owned by the defendant, town of Plymouth. The town of Plymouth had engaged the contractor to paint the tower. The accident occurred when the ladder on which plaintiff was standing sprang away from the side of the tower and threw him to the ground.1 Poirier alleged that there was a hidden defect in a bolt which secured the ladder to the tower. He claimed that this defective bolt sheared and caused the ladder to catapult him from the tower resulting in his personal injuries.2

At trial defendant challenged, in a motion for a directed verdict, the sufficiency of plaintiff's proof of a hidden defect.3 The judge denied the motion and instructed the jury that defendant owed plaintiff the same duty it owed its own employees4—to dis-

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1. Poirier v. Town of Plymouth, 78 Mass. Adv. Sh. 100, 100, 372 N.E.2d 212, 216 (1978). "The plaintiff was climbing the tank on a stationary ladder affixed to one of [the tank's] supporting legs and was thrown about thirty-five feet to the ground while attempting to continue his climb by going up onto a second ladder suspended from the top of the tank."

2. The plaintiff's co-worker testified at trial that he had returned to the accident site later in the day and discovered part of a bolt in the grass beneath the ladders. The defendant insisted that it was "sheer guesswork" to conclude that the broken bolt had ever connected the ladders. If the ladders were connected by the bolt, it was "mere conjecture" that it had broken at the time of plaintiff's ascent. Id. at 103, 372 N.E.2d at 218.

3. The plaintiff introduced evidence that the two ladders were capable of being bolted together, that defendant had not followed standards promulgated by the American Water Works Association for the inspection and repair of storage tanks, and that plaintiff had not been contributorily negligent in climbing the ladders. Id. at 104-05, 372 N.E.2d at 221.

4. The plaintiff's recovery was not barred by the Massachusetts Workman's Compensation Act. MASS. GEN. LAWS ANN. ch. 152 (West 1976). Section 15 of the Act provides that when an employee is injured under circumstances creating a legal lia-
close hidden or concealed defects on the premises of which it was aware or should have been aware through the use of reasonable care. These instructions restated a well-settled rule of law in Massachusetts, the hidden defect rule. The jury awarded the plaintiff a $60,000 verdict. On appeal, the verdict was set aside and judgment awarded to the defendant on the ground that plaintiff’s production of proof was insufficient.

In Poirier v. Town of Plymouth, the Massachusetts Supreme Judicial Court unanimously reversed, holding that the evidence reasonably warranted a jury finding that a hidden defect existed and that the defendant failed to warn the plaintiff of the defect. Thus, the jury verdict was reinstated. The court went on to abolish the hidden defect rule. A plaintiff no longer has the burden of establishing that his injury was the result of a hidden defect of which the landowner-defendant was aware or should have been aware of through the exercise of reasonable care.

bility in some person other than his own employer, the employee may bring a cause of action for negligence. At trial, the defendant maintained that he was a “common employer” and was therefore immune from tort suit under Brown v. Marr Equip. Corp., 355 Mass. 724, 247 N.E.2d 352 (1969). In part three of the opinion, the Poirier court refused to apply the common employment doctrine. MASS. GEN. LAWS ANN. ch. 152, § 15 (West Supp. 1978), was amended by 1971 Mass. Acts ch. 941, § 1, which abolished the common employment doctrine. Poirier v. Town of Plymouth, 78 Mass. Adv. Sh. 100, 113 n.4, 372 N.E.2d 212, 222 n.4 (1978).


6. Poirier v. Town of Plymouth, 76 Mass. App. Ct. Adv. Sh. 1174, 357 N.E.2d 336 (1976). The court found that “[w]hen the evidence tends equally to sustain either of two inconsistent propositions, neither of them can be said to have been established by legitimate proof. A verdict in favor of the party bound to maintain one of those propositions against the other is necessarily wrong.” Id. at 1180, 357 N.E.2d at 339 (citing Smith v. First Nat‘l Bank, 99 Mass. 605, 612 (1868)).

7. 78 Mass. Adv. Sh. 100, 372 N.E.2d 212 (1978). Reasoning for the reversal was divided (3-3-1) on two grounds. See note 10 infra.


9. Id. at 116, 372 N.E.2d at 223.

10. Justice Liacos, speaking for Justice Kaplan and Justice Abrams, held that plaintiff had met his burden by proving a hidden defect existed and, additionally, that the prior case law should be overruled. Id. at 101, 372 N.E.2d at 217. Justice Quirico, joined by Chief Justice Hennessey and Justice Wilkins, concurred in the result, but reversed on the ground that plaintiff had met his burden. Id. at 128, 372 N.E.2d at 228. Justice Braucher joined the court in overruling the Afienko doctrine. Id. at 129, 372 N.E.2d at 228.
The court, in overturning the hidden defect rule, established that the duty owed by a property owner to an employee of an independent contractor is the same duty owed to all other persons lawfully on the premises.\textsuperscript{11} Thus, \textit{Poirier} substitutes the standard of ordinary care under all circumstances\textsuperscript{12} in place of the hidden defect rule.

This article will explore the policies behind both the hidden defect rule and the shift to the ordinary care standard. The scope of the article will then expand beyond the confines of the \textit{Poirier} case to note recent trends in substantive tort law and the methodology used by the Supreme Judicial Court and the legislature to effect private law reform in Massachusetts. Finally, drawing from methods used by both the judicial and legislative branches in recent reforms, the article will describe a new model for legislative-judicial interaction in private law reform.

\section*{II. Hidden Defect—A Rule Without a Reason}

With the advent of the Industrial Revolution, courts reasoned that imposing liability on young enterprises engaged in new and innovative technologies would discourage commercial and industrial activity.\textsuperscript{13} As a consequence, common law doctrines evolved to insulate commercial and industrial enterprises from liability.\textsuperscript{14}

At early common law, the only duty of care a Massachusetts employer owed his employee was to warn him of hidden dangers which the employee could not discover by reasonable inspection.\textsuperscript{15}

\begin{itemize}
\item \textsuperscript{11} Id. at 127, 372 N.E.2d at 227.
\item \textsuperscript{12} The ordinary care standard in Massachusetts was first defined by Chief Justice Shaw in Brown v. Kendall, 60 Mass. (6 Cush.) 292 (1850), "as that kind and degree of care, which prudent and cautious men would use, such as required by the exigency of the case, and such as is necessary to guard against probable danger." Id. at 294.
\item \textsuperscript{13} James, \textit{Accident Liability Reconsidered: The Impact of Liability Insurance}, 57 \textit{Yale L.J.} 549, 549 (1948).
\item \textsuperscript{14} One commentator has recognized an additional explanation for the trend. "American judges of the Nineteenth Century were of a different breed. Many were politicians; all were living in a new land crying for exploitation; industrialists were often dominant figures in society; country gentlemen were rarely judges in industrial states." Morris, \textit{Hazardous Enterprises and Risk Bearing Capacity}, 61 \textit{Yale L.J.} 1172, 1175-76 (1952).
\end{itemize}
The employee assumed all obvious risks, even if he failed to appreciate the particular danger involved. Thus, at common law an employer did not have to bear the economic burden of eliminating obvious hazards.

The employee, on the other hand, had to meet an oppressive burden in proving the employer's negligence. The hidden defect rule required the employee to prove that the defect was not readily discoverable by the employee, and that the employer failed to disclose the existence of a concealed defect of which he was aware or should have been aware by conducting a reasonable inspection. Thus, while the plaintiff-employee went about proving he was unable to discover the defect, he had to proceed cautiously lest he prove too much. The plaintiff who too rigorously argued that the defect was hidden would prove himself out of court because the employer could then claim that the defect was not discoverable. Only in a narrow range of factual situations could the plaintiff successfully prove the danger to be "hidden" and still sustain the required burden of proof for employer negligence.

If plaintiff did establish employer negligence, a number of defenses, including assumption of risk, the fellow servant doctrine, and contributory negligence normally barred any recovery. It was because of this so-called "unholy trinity" of defenses


17. The enterprise-protecting policy of the Massachusetts court is revealed in the following passage: "It would be unreasonable to attempt to require every one hiring laborers to have the safest place and the best machinery possible for carrying on its business." Id. at 137, 32 N.E. at 1120.


20. The fellow servant rule holds that an employer is not liable for injuries caused solely by the negligence of a fellow employee. W. PROSSER, supra note 19, § 80. See, e.g., Farwell v. Boston & W.R.R., 45 Mass. (4 Met.) 49 (1842). This defense was abolished by the Massachusetts Employer's Liability Act as noted in O'Maley v. South Boston Gaslight Co., 158 Mass. 135, 136, 32 N.E. 1119, 1120 (1893).

21. "Contributory negligence is conduct on the part of the plaintiff, contributing as a legal cause to the harm he has suffered, which falls below the standard to which he is required to conform for his own protection." W. PROSSER, supra note 19, § 65, at 416. See Tenancy v. Boston Mfg. Co., 170 Mass. 323, 49 N.E. 654 (1898).

22. The practical effect of the three defenses was to relieve the employer of all liability, even though he failed to adequately protect his employees. See W. PROSSER, supra note 19, § 80, at 526-27.
that Massachusetts enacted an employer liability act and a workman's compensation act. 

In *Poirier*, the court re-examined the common law evolution of the hidden defect rule and found it to be a corollary of the doctrine of assumption of the risk. The barrier to employee recovery erected by the hidden defect rule was "almost the exact antithesis of the philosophy" underlying the workman's compensation laws. The lack of a public policy reason to retain the rule, combined with the modern philosophy underlying workmen's compensation laws, led to abrogation of the hidden defect rule. As a result of *Poirier*, industry is now forced to assume the burden of paying all damages resulting from its breach of the duty of ordinary care, regardless of the status of the injured person.

In addition to harmonizing the law governing recovery by the employee of an independent contractor with the modern view of compensation for work related injuries, *Poirier* further broadens the application of the ordinary care standard. Several years earlier, the court abandoned status distinctions which defined the duty of care landowners owed to plaintiffs. The court in *Mounsey v.*

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24. The Workman's Compensation Act was passed in response to strong public sentiment that tort remedies afforded at common law and under the Employer's Liability Act were inadequate. Greem v. Cohen, 298 Mass. 439, 443, 11 N.E.2d 492, 494 (1937). The Workman's Compensation Act abolished all three defenses. The Employer's Liability Act was retained after the enactment of the compensation law to preserve the common law rights of workers not covered by it.
26. *Id.* at 123, 372 N.E.2d at 226 (citing 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 21.4, at 1176 (1956)).
28. *Id.* at 123, 372 N.E.2d at 226.
30. The court stated, "Those of us who join in this part of the opinion feel that [the general negligence rule] is the appropriate one to be followed consistently with
Ellard\textsuperscript{31} decreed, "We no longer follow the common law distinction between licensees and invitees and, instead, create a common duty of reasonable care which the occupier owes to all lawful visitors."\textsuperscript{32} The \textit{Poirier} court applied the following rationale:

The problem of allocating the costs and risks of human injury is far too complex to be decided solely by the status of the entrant, especially where the status question often prevents the jury from ever determining the fundamental question whether the defendant has acted reasonably in light of all the circumstances in the particular case.\textsuperscript{33}

Abandonment of status distinctions in tort law represents the better view,\textsuperscript{34} as well as the currently emerging trend, even though only a minority of American jurisdictions have adopted it.\textsuperscript{35}

\textsuperscript{31} 363 Mass. 693, 297 N.E.2d 43 (1973).
\textsuperscript{32} Id. at 707, 297 N.E.2d at 51.
\textsuperscript{33} 78 Mass. Adv. Sh. at 120, 372 N.E.2d at 224-25; 363 Mass. at 707, 297 N.E.2d at 51.

Jurisdictions abolishing the distinctions between invitees and licensees, but maintaining the rule as to trespassers include Massachusetts, Mounsey v. Ellard, 363 Mass. 693, 297 N.E.2d 43 (1973), Minnesota, Peterson v. Balach, 294 Minn. 161, 199 N.W.2d 639 (1972), and Wisconsin, Antoniewicz v. Resczynski, 70 Wis. 2d 836, 236 N.W.2d 1 (1975). Two jurisdictions have done so by statute. CONN. GEN. STAT. § 52-557a (Supp. 1977); Occupiers Liability Act, 1957, 5 & 6 Eliz. 2, c. 31 (1957) (England).

The United States Supreme Court refused to apply the common law classification system in admiralty cases. The Court held that a shipowner owed a duty of
III. THE PRACTICAL EFFECT OF POIRIER

As a practical matter, overruling the hidden defect rule will expand landowner liability for accidents occurring on their premises. More plaintiffs, specifically more employees of independent contractors, will be able to sustain the less stringent burden of proof and recover damages for their injuries.\(^\text{36}\)

The burden of proof under the hidden defect rule rested with the plaintiff-employee,\(^\text{37}\) who had to show that the defect was not discoverable by him, while at the same time demonstrating that his employer knew or should have known of the defect.\(^\text{38}\) This burden of proof protected defendant-landowners by enabling them to successfully move for a dismissal, directed verdict, or judgment notwithstanding the verdict when the plaintiff failed to allege and produce evidence from which a jury could find a hidden defect.\(^\text{39}\) These dispositions judicially foreclose the liability issue. After Poirier, however, most claims will not be resolved unless the jury reaches the more important question: the reasonableness of the defendant's conduct in light of all the facts and circumstances of the case.\(^\text{40}\) By removing plaintiff's onerous burden of proof, the court has expanded landowner liability within the negligence framework.\(^\text{41}\) The change does not make the landowner an insurer but does allow his conduct to be frequently subjected to close scrutiny by the finder of fact.\(^\text{42}\) In light of the fact that, statistically, juries render verdicts for plaintiffs in two-thirds to three-quarters of

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36. The court characterized the obstacles to proving that a defect or danger was hidden as substantial. 78 Mass. Adv. Sh. at 118, 372 N.E.2d at 224.
37. Id. at 122 n.8, 372 N.E.2d at 225 n.8.
38. Id. at 118, 372 N.E.2d at 224.
39. See Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 103-04 (D.C. Cir. 1972). In Soares v. Lakeville Baseball Camp, Inc., 76 Mass. Adv. Sh. 681, 682, 343 N.E.2d 840, 841 (1976), the court called attention to the reasons contained in MASS. R. Civ. P. 50(a) for denying motions for directed verdicts at the close of the plaintiff's case and at the close of all the evidence. The court seemed to favor the granting of a motion for judgment notwithstanding the verdict or a new trial under MASS. R. Civ. P. 50(b) in cases where the evidence does not establish liability.
42. Liability could be avoided also by the third party employer placing an exculpatory clause in his agreement with the independent contractor. The clause may require that a safety inspection of the landowner's premises be made and that, in the event an employee of the independent contractor is injured, the landowner will not be held liable. 78 Mass. Adv. Sh. at 129, 372 N.E.2d at 228 (Braucher, J., concurring).
all negligence cases that survive a motion for directed verdict,43
Poirier will directly result in more verdicts in favor of plaintiffs.

The Poirier court properly reasoned that the hidden defect
rule obscured rather than illuminated the factors which should
govern the allocation of risk. Now, under Poirier, juries will allo­
cate the risk of work related injury by determining whether the
defendant, in the management of his premises, has breached his
duty of care under the reasonable person standard.44 Juries will
determine a landowner's liability according to the prevailing
standard of reasonable conduct.45 Because of the flexibility of this
standard, a substantial danger exists that juries will find liability
when landowners have not breached their duty of care.46 In
Poirier, for example, the three judges on the Massachusetts Court of
Appeals agreed that plaintiff had failed to prove negligence,47 and
yet the jury found for the plaintiff.

_DuPont v. Mount Hope Machinery Co._48 illustrates the poten-

43. See James, _Accident Liability: Some Wartime Developments_, 55 _Yale L.J._
365, 374 (1946).

44. In this context, some of the factors that will be taken into account in deter­
mining what constitutes "reasonable care in all the circumstances" include the
inherent dangers in the job, whether any warning was given, the authorization of the
employee to be on a certain part of the premises, the experience of the employee in
performing his job, the expense of avoiding the risk, the likelihood of injury, the
seriousness of the injury if one was to occur, and the chances that future harm will
be prevented. Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 105-06 (D.C. Cir.
1972); Mounsey, 363 Mass. at 708, 297 N.E.2d at 52.

sachusetts Supreme Judicial Court, in _Mounsey_, relied heavily on Judge Bazelon's
opinion in _Smith_. Judge Bazelon, cited in _Mounsey_, said, "[The reasonable person
standard] contains the flexibility necessary to allow the jury to take account of the
infinite variety of fact situations . . . and the balance of values which determines the
allocation of the costs and risks of human injury." 469 F.2d at 105.

46. For a Massachusetts case in which the jury found for plaintiff, when it ap­
ppeared from the facts that defendant was not negligent, see Vance v. Wayside Inn,
Inc., 335 Mass. 617, 141 N.E.2d 365 (1957). _Cf._ Rose v. Melody Lane of Wilshire,
39 Cal. 2d 481, 247 P.2d 335 (1952) (defendant found negligent even though defect in
barstool that collapsed could not have been found with a microscope).

47. We are of the opinion that the evidence was insufficient to warrant
a finding that any interconnection between the two ladders was designed
or intended to prevent what happened in this case. In short, the plaintiff
failed to sustain his burden of introducing evidence sufficient to warrant
a finding of a defect on the defendants premises.

339 (1976). The Massachusetts Supreme Judicial Court stated, "It is not the role of an
appellate court to substitute its judgment for that of the fact finder when reasonable
conclusions based on reasonable inferences have been made." 78 Mass. Adv. Sh. at
108, 372 N.E.2d at 220.

tial jury abuse problem under the *Poirier* standard of care. In *DuPont* an elevator door that plaintiff, an employee of an independent contractor, and his foreman raised and temporarily secured in place fell and injured the plaintiff. The jury rendered a verdict against the owner of the premises on the ground that he had breached his duty to warn the plaintiff of a hidden defect. The Massachusetts Court of Appeals ruled that the trial court erred in its denial of defendant’s motion for a directed verdict. The facts in *DuPont* indicated that it was plaintiff or his foreman, rather than the landowner, who failed to exercise due care, yet the jury found a way to compensate the plaintiff. Furthermore, this verdict was rendered under the hidden defect rule, which had been characterized by the *Poirier* court as putting a substantial obstacle to recovery in the path of the injured employee.\(^{49}\) *DuPont* illustrates the tendency of juries to allow recovery for work related injury despite an overly restrictive common law rule. Under the flexible reasonable person standard, juries can be more liberal in finding liability.

The potential extent of jury abuse is not, however, a persuasive argument for retaining an anachronistic rule of law. No doubt, prior to *Poirier* some judges had abused their discretion by taking landowner liability cases from the jury. The restrictive hidden defect rule was fraught with opportunities for judicial foreclosure of the liability issue. *Poirier* cures this deficiency, but at the same time unleashes the tendency of juries to compensate injured plaintiffs even though the defendant was in no way responsible for the injury. The effects of this tendency can be tempered by judicial dispositions in favor of defendants. If wisely used under the *Poirier* standard, the motion to dismiss, directed verdict, and judgment notwithstanding the verdict can become methods of correcting rather than creating injustice. The judiciary will have to strike the proper balance between the rights of plaintiffs who justly deserve to recover and the countervailing rights of defendants who are not at fault and who need to be insulated from an arbitrary imposition of liability.

For the practitioner, *Poirier’s* significance lies in the extended application of the *Mounsey* principle. Artificial status distinctions in tort continue to give way to the more universal standard of ordinary care. The court has clearly demonstrated its willingness to extend the *Mounsey* doctrine by analogy.\(^{50}\)


\(^{50}\) In *Poirier*, King v. G & M Realty Corp., 77 Mass. Adv. Sh. 2372, 370
An imaginative argument extending the *Mounsey* doctrine was advanced in *Paduano v. Tefft*. Counsel urged the court to extend *Mounsey* to eliminate the distinction between guest passengers and passengers for hire in actions to enforce a motor vehicle operator's duty of care. The old rule had already been changed by a statute, but the statute was given only prospective effect. The court held that the statute controlled because the accident occurred after the statute's effective date. The court went on to state that the accident's timing excluded "any possibility that might otherwise exist for bringing the *Mounsey* principle to bear. . . ." The court, although never conceding that it would apply the *Mounsey* principle in the guest statute context, was clearly tempted to apply *Mounsey* to abrogate this status distinction.

In *DiMarzo v. S & P Realty Corp.*, defendant appealed an evidentiary question in an action involving the negligent repair of leased premises. The suit was brought by an employee of a tenant at will against his employer's landlord. The court, while deciding the case on other grounds, intimated that it could have applied the reasoning of *Mounsey*. "We might well be inclined toward a reconsideration of the rules of tort liability of the lessors under a tenancy at will if the decision in this case required it." Again, in *Markarian v. Simonian*, the court said, "In light of this conclusion, we need not take the opportunity to overrule *Chelefou*. . . . Nor, need we consider the impact of *Mounsey v. Ellard*." These cases

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N.E.2d 413 (1977), and Lindsey v. Massios, 77 Mass. Adv. Sh. 381, 360 N.E.2d 631 (1977), the court used the *Mounsey* principal as its primary rational for rejecting duality of approach pertaining to duty of care.


53. *Id.*
55. *Id.* at 514, 306 N.E.2d at 434.
57. *Id.* at 2393, 369 N.E.2d at 722 (citations omitted). See *Chelefou v. Springfield Inst. for Sav.*, 297 Mass. 236, 8 N.E.2d 769 (1937). *Chelefou* held that if the injury which takes place was not a foreseeable harm within the purposes of an agreement to repair and was not the kind of risk which the landlord would be required to anticipate in undertaking the repair no liability can be found. The *Markarian* court distinguished *Chelefou* and ordered a new trial after finding that a directed verdict for defendant had been improperly granted.
indicate the breadth of circumstances in which the Mounsey principle may apply. Plaintiff's counsel may use the court's favorable disposition toward this emerging doctrine to their client's advantage.

IV. SUBSTANTIVE COMMON LAW POLICY

During the last two decades, in formulating common law tort doctrine, courts have pursued two major goals—accident reduction and risk distribution.\(^58\) In striving for these two goals, courts seek to provide incentives that will eliminate many accidents altogether,\(^59\) then spread the cost of the remaining injuries over a large number of persons.\(^60\)

The first goal, accident reduction, will be furthered by abrogation of the rule because more injured plaintiffs will recover under Poirier.\(^61\) This will provide a financial incentive for accident cost reduction. Imposing greater liability on landowners will prompt them to more thoroughly consider higher potential accident costs in maintaining their premises.\(^62\) Potential tort liability should encourage landowners to discover dangerous defects on their premises, to evaluate various means of eliminating them, and to warn potential victims. Thus, the risk has been shifted to the party who is in the best position to make the premises safe.

Leaving the accident loss on the plaintiff in the independent contractor setting will not reduce accident costs. First, unlike the regular employee, the independent contractor's employee does not normally have an effective voice in determining the safety of his

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\(^58\) Cooperrider, A Comment on the Law of Torts, 56 Mich. L. Rev. 1291 (1958). Twenty years ago Professor Cooperrider wrote in a review of F. Harper & F. James, supra note 26, "As I read their book these principles, which are for them [Harper and James] basic, can be summarized as two slogans, 'Let All Accident Victims Be Compensated,' and 'Let The Loss Be Spread.'" Cooperrider, supra at 1299. Courts have always tried to prevent the occurrence of accidents. One of the overriding principles in negligence law is to make individuals act in a safe and reasonable manner towards each other.


\(^60\) The court merely concluded that abrogation of the rule "would require the property owner to take those steps to prevent injury that are reasonable and appropriate under all the circumstances." 78 Mass. Adv. Sh. at 127, 372 N.E.2d at 227.

\(^61\) The court recognized that classifying the Afienko doctrine as a standard of care obscured the fact that, in practice, it operated as a defense. Id. at 121-22, 372 N.E.2d at 225.

\(^62\) See Ursin, supra note 34, at 829. Insurance companies will encourage landowners to minimize all risks.
working environment. Normally, the pressures of the competitive market force the independent contractor to take the premises as he finds them. Therefore, the independent contractor’s employees are not in a position to eliminate even the obvious defects they discover on the job. Furthermore, since an independent contractor’s employee works in unfamiliar surroundings, he is more likely to have an accident.\textsuperscript{63}

In \textit{Poirier}, the plaintiff relied on the appearance of safety when he climbed the ladder. A regular employee might have been more familiar with the dangers involved and might have avoided the accident and the consequential injury costs. The higher risk of injury to the employee of an independent contractor makes a common law rule which imposes on a landowner the same duty of care toward the employee of an independent contractor and a regular employee anomalous.\textsuperscript{64}

After accident reduction, the second goal courts pursue in formulating negligence policy is risk distribution. Achieving this goal spreads accident costs over the largest number of persons possible to minimize the cost impact on any one individual,\textsuperscript{65} and favors compensation of victims as an end in itself. Strict liability for manufacturing defects\textsuperscript{66} and ultrahazardous activity,\textsuperscript{67} workman’s compensation statutes,\textsuperscript{68} no-fault automobile insurance,\textsuperscript{69} and recent proposals for a national health insurance system\textsuperscript{70} illustrate the trend toward shifting risk responsibilities to no-fault recovery sys-

\textsuperscript{63} See Power, \textit{It’s Time to Bury the Borrowed Servant Doctrine}, 17 \textit{St. Louis U.L.J.} 464 (1973). Not only are the surroundings in which the employee of an independent contractor works unfamiliar, but often his reason for being on the premises is something that has gone wrong. For example, if the heating or air conditioning system on the premises fails, the independent contractor’s employee must make the necessary repairs. This may require him to enter crawl spaces, utility rooms, or other parts of the premises where regular employees rarely venture. There may be defects in these areas which no one has reason to know of and, therefore, the independent contractor’s employee will often be exposed to hazards that regular employees never encounter.

\textsuperscript{64} W. Prosser, \textit{supra} note 19, § 31.

\textsuperscript{65} See Calabresi, \textit{supra} note 59, at 500-01.

\textsuperscript{66} See Prosser, \textit{The Assault Upon the Citadel}, 69 \textit{Yale L.J.} 1099, 1120-21 (1960).

\textsuperscript{67} See Morris, \textit{supra} note 14, at 1178.


tems in which insurance provides most of the compensation.\textsuperscript{71}

The \textit{Poirier} court found that the hidden defect rule had obscured a proper allocation of such risks.\textsuperscript{72} Implicitly the court recognized that without the rule more plaintiffs would recover and more enterprises would therefore insure. The court acknowledged work-related accidents as an inevitable cost of our economic system that must be distributed among the beneficiaries of the enterprise.\textsuperscript{73} If the activity causing the loss is a business enterprise, then the cost of insurance or, alternatively, the payment of tort recoveries, will increase the cost of the goods or services produced by the enterprise. In the end, the cost increase is passed on to the enterprises' users or consumers. Distributing the cost of personal injury to an enterprise's ultimate beneficiaries spreads the cost thinly so that no one individual is inordinately burdened.\textsuperscript{74} The \textit{Poirier} decision has clearly shifted loss responsibility from an inferior to a superior risk bearer.

Insurance premium costs act as an additional incentive to landowners to make their premises safe, furthering the first policy goal of accident reduction. When making the premises safe costs less than liability insurance, landowners will presumably make their premises safe. Thus, attaining the goal of risk distribution can achieve the more desirable accident reduction goal.

Employer-employee relationships, which are controlled by the Workman's Compensation Act, are not altered by the abrogation of the hidden defect rule. The increased workman's compensation insurance premiums paid by landowner-employers with high accident rates have already given these landowners some incentive to make their premises safe.\textsuperscript{75} \textit{Poirier} gives those landowners who employ independent contractors an additional cost incentive to make their premises safe.\textsuperscript{76} Landowners and accident victims, as well as the

\textsuperscript{71} For a historical account and coverage of the modern shift away from fault concepts in tort, see Comment, \textit{supra} note 41.

\textsuperscript{72} \textit{Id.}

\textsuperscript{73} 78 Mass. Adv. Sh. at 123, 372 N.E.2d at 226.

\textsuperscript{74} Morris, \textit{supra} note 14, at 1178.

\textsuperscript{75} "It is the general rule, supported by virtually all the cases . . . , that insurance rates are based upon benefits paid on the insured's behalf to his employees." 12 W. SCHNEIDER, SCHNEIDER'S WORKMAN'S COMPENSATION § 2508 (3d ed. 1960).

\textsuperscript{76} This incentive may be substantial. "[Lawyers] will also look for someone other than the immediate employer who can be sued in tort, to avoid the dollar limitation placed on Workman's Compensation, normally the exclusive remedy against the immediate employer." Brooks, \textit{Tort Liability of Owners and General Contractors for On-The-Job Injuries to Workmen}, 13 UCLA L. REV. 99, 99 (1965).
general public, benefit from this decision because the law now approaches optimum risk distribution.

V. JUDICIAL PROCESS AS A DECISIONMAKING TOOL

The Poirier court's willingness to overrule the hidden effect doctrine, rather than allow plaintiff recovery on the narrow ground that he had met his burden of proof, reflects a fundamental change in the court's philosophy of tort law. The court's decision to abrogate the hidden defect rule is not an isolated instance of judicial reform of the traditional limitations on tort recoveries. During the twenty-year period beginning in January 1948 and ending December 1967, the Massachusetts Supreme Judicial Court overruled only two significant lines of tort precedent. In the next ten years, the court overruled at least eighteen established precedents.


dicial reform of burdens of proof, broadened concepts of compensable injuries, abrogation of immunities, expanded duties of care, and new causes of action are hard evidence of a judicial activism based on policy rather than precedent.

The extent of the Massachusetts Supreme Judicial Court's new activism may be appreciated by reference to the unique perspective of the federal district court in Massachusetts. When sitting in diversity jurisdiction the district court must apply the same substantive law,\(^79\) conflicts of law rules,\(^80\) and notions of public policy\(^81\) that the state court applies. If no state law is directly on point, the federal district court must determine how the state court of last resort would decide the case. This requires the federal court to examine state cases and, by analogy or implication, predict the state court's decision.

A quarter of a century ago, Judge Wyzanski, writing for the Massachusetts federal district court in *Pomerantz v. Clark*,\(^82\) described the Massachusetts Supreme Judicial Court as follows:

> The eminence of the Massachusetts Supreme Judicial Court, an eminence not surpassed by any American tribunal, is in large measure due to its steadiness, learning and understanding of the durable values long prized in this community . . . . The emphasis is on precedent and adherence to the older ways, not on creating new causes of action or encouraging the use of novel judicial remedies that have sprung up in less conservative communities.\(^83\)

In contrast, Judge Julian, writing for the district court, recently refused to dismiss a claim of strict products liability,\(^84\) even though at the time the motion to dismiss was made no cause of action based on this theory existed in Massachusetts.\(^85\) The district

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\(^81\) *Griffin v. McCoach*, 313 U.S. 498 (1941).


\(^83\) Id. at 346.

\(^84\) The doctrine of strict liability is defined by *Restatement (Second) of Torts* § 402A (1965) which imposes liability on one who sells any product in a defective condition, unreasonably dangerous to the user or consumer or to his property.

\(^85\) *Calhoun v. General Motors Co.*, 4 MASS. LAW. WEEKLY 69 (1975).
court based its action on the possibility that the claim might be
cognizable at the time of trial. Because Massachusetts had not ex­
pressly adopted or rejected strict products liability, the federal dis­
trict court, respecting the state court's propensity to adopt new
law, would not dismiss the claim. Thus, the shift in the court’s
approach from staunch adherence to the principle of stare decisis to
a broad-based policy-oriented activism has not gone unnoticed.86

Poirier also illustrates the decision-making methodology of the
activist court. In Poirier,87 as in Mounsey88 and Boston Housing
Authority v. Hemmingway,89 prior case law was overruled and

86. The Massachusetts Supreme Judicial Court's philosophy toward law reform
is also evident in the following description of the activist court under Chief Justice

Early in his term as Chief Justice of the Supreme Judicial Court, Chief
Justice Tauro directed his vast energies toward the modernization of the
civil law of the Commonwealth—a subject described by one observer as "too
long . . . enmeshed in a morass of artificial, archaic, and anachronistic rules
. . . a wasteland of mechanical legal rules." Addressing himself to the resolu­
tion of this problem, he wrote:

"When dealing with a rule of law originally established by judicial deci­
sion I believe that its change, when required, should come by means of a
judicial decision. In these circumstances, I do not believe that we should
look to the Legislature for change. To do so is a distortion of the concept of
judicial review whereby the legislature is invited, in effect, to reverse judi­
cial decisions. If the courts are in assent and maintain their rightful inde­
pendence and inherent powers within their proper sphere, they should not
pass on to the Legislature the task of altering by statute the holdings of prior
judicial decisions in nonstatutory matters. The mere passage of time does
not shift the burden to the Legislature."

This willingness to take a fresh look at the rationale and application of
decisional law in the light of changing social and economic conditions be­
came the benchmark of Chief Justice Tauro's decisions. "Courts, especially
courts of equity," he wrote, "should not be restricted to . . . (a) fossilized . . .
concept of what the law is or should be. The cause of justice deserves a
better fate."


Chief Justice Hennessey has written, "Precedent . . . must be respected if it is
good precedent, but it does not become good merely because it is petrified by many
years of observance." 4 MASS. LAW. WEEKLY 196 (1975). It seems likely that tort
precedents will continue to be scrutinized and overruled by the court.

87. 78 Mass. Adv. Sh. at 128, 372 N.E.2d at 228. (Quirico, J., concurring, with
Hennessey, C.J. and Wilkins, J., joining).

88. 363 Mass. at 710, 297 N.E.2d at 53 (Quirico, J., concurring in part and dis­
senting in part, with Reardon & Wilkins, JJ., joining).

89. 363 Mass. 184, 203, 293 N.E.2d 831, 845 (1973) (Quirico, J., concurring in
part and dissenting in part, with whom Reardon & Wilkins, JJ, join). The court held
that enforcement of the tenant's covenant to pay rent is dependent on the landlord's
compliance with an implied warranty of habitability. The case overruled the doctrine
of caveat emptor, as well as the common law doctrine of independent covenants
between tenant and landlord.
broad new rules of law were promulgated which had application beyond the scope and necessity of the case before the court. In these cases, Justice Quirico concurred in the result but objected strongly to the practice of making new law not required by the case at bar. While courts have no duty to follow lines of precedent which are manifestly unjust, they must control in both frequency and scope their exercise of the overruling power. Adherence to precedent should be the rule and not the exception. When overruling prior case law becomes necessary, judicial comment on fact patterns not before the court can and should be avoided. 90

The dangers inherent in the use of broad holdings—holdings which expand the scope of an opinion beyond the needs of the principal case—are described by Justice Quirico's concurring and dissenting opinion in Mounsey. He was "unable to agree with the use of the present case as the vehicle for the promulgation of such a broad new rule of law." 91 According to Justice Quirico in both Mounsey and Poirier, prior case law was overruled without the benefit of briefing or argument by either party. 92 Before an appellate court departs from established precedents, Justice Quirico feels that the court should require argument and briefs to fully illuminate all aspects of its decision. 93 In cases like Poirier, Mounsey, and Hemmingway, the court ought to temper its activism by adopting Justice Quirico's stance and refraining from a sweeping reexamination of well settled tort doctrine unless all parties are given notice of the court's intention to do so. Notice could easily be

91. 363 Mass. at 713, 297 N.E.2d at 55.

The briefs and oral arguments before this court did not concern themselves with such a rule. From that I think we may assume that the parties did not consider the case as involving the issue of extension of liability to licensees. If such a fundamental change in our law is otherwise desirable, it should more appropriately be accomplished in a case in which the issue is raised, in which the court has the benefit of briefs and arguments directed specifically thereto, and in which the court can better weigh and consider the far reaching implications and consequences of such a change.

Id.

93. "Historically the orderly development and evolution of the common law has been accomplished primarily by the judicial decision of issues actually in controversy, with due consideration for the consequences of the decision, but without trying to anticipate and simultaneously decide all possible related questions which might arise later." Boston Hous. Auth., 363 Mass. at 219-20, 29 N.E.2d at 854 (Quirico, J., concurring and dissenting).
given in a pre-hearing conference under the new Massachusetts Rules of Appellate Procedure.94

VI. DEVELOPING PATTERNS IN TORT REFORM

The court in Poirier stated that "the hidden defect rule... no longer is to be applied in cases involving tort actions against landowners."95 This raises the question whether Poirier is to have full retroactive effect. The reasonable person standard may apply either to all court proceedings conducted after the Poirier decision or only to those causes of action arising after the rendering of the opinion. By expressly delineating the cases to which Poirier will apply, the court would not have objectionably expanded the scope of the opinion beyond the needs of the case. At the same time, this delineation would have avoided wasteful litigation of the retroactivity issue.

Despite the Poirier court’s failure to decide the retroactivity issue, a pattern has developed in the court’s recent overruling decisions which suggests a presumption of full retroactivity in cases like Poirier. This pattern suggests that when the court is willing to overrule a judicially created precedent, the new rule will be given full retroactive effect. In Bouchard v. DeGagne,96 Pevoski v. Pevoski,97 and Bousquet v. Commonwealth98 previous judicial changes in substantive tort law were given full retroactive effect in later cases.

Retroactive application of the Poirier holding will not work any significant injustice on landowners because in cases potentially controlled by Poirier, it is doubtful that there has been any actual re-

94. MASS. R. APP. P. 21 provides, “The appellate court may direct the attorneys for the parties to appear before the court or a single justice for a prehearing conference to consider the simplification of the issues and such other matters as may aid in the disposition of the proceedings by the court.” According to the Reporter’s Notes, prior to the adoption of the new rules in 1974, this rule had no parallel in the Massachusetts Supreme Judicial Court.


96. 75 Mass. Adv. Sh. 1856, 329 N.E.2d 114 (1975). The court held that its elimination of the common law distinctions between licensees and invitees in Mounsey was to be given full retroactive effect.


liance by landowners on the hidden defect rule. To the extent that some landowners have relied on the hidden defect rule, the policy goal of compensating work related injury outweighs that reliance interest. The decision should be given full retroactive effect, because the law actually did not determine the conduct of most landowners.

Furthermore, the Poirier court's use of the judicial power to overrule indicates that it did not view the change in the common law as being of a magnitude which would require legislative action and result in only a prospective application of the new law. In Morash & Sons, Inc. v. Commonwealth, the court hesitated to overrule the governmental immunity doctrine because it felt that changes of great magnitude in the common law should be made by the legislature. The court favored legislation which could create a comprehensive scheme, limit liability, and affect only future transactions as the best vehicle for such a drastic or radical incursion into existing law. Legislative overruling of existing law can incorporate notice to parties effected by the change, and, thereby, avoid frustrating past transactions made in reliance on existing law. The legislature, when promulgating a new rule of law, should indicate the statute's effective date. This would give potential litigants an opportunity to adjust their conduct in advance of the change.

VII. AN EMERGING MODEL FOR PRIVATE LAW REFORM

The rapid change in Massachusetts substantive tort law has not been the exclusive work of the judiciary. Examining only the overruling opinions of the court ignores the important role of the legislature in enacting private law reform. When recent legislative actions are added to judicial activism, both the pace and the

101. Id.
103. Diaz v. Eli Lilly and Co., 364 Mass. 153, 302 N.E.2d 555 (1973). "In no serious way will an existing interest be impaired or an expectation be disappointed or a reliance be defeated . . . Accordingly there is no occasion to take full precautions to confine our decision to prospective operation." Id. at 167, 302 N.E.2d at 564 (citation omitted).
104. E.g., MASS. GEN. LAWS ANN. ch. 106, § 2-318 (West Supp. 1978) (abolished privity requirement in warranty actions); MASS. GEN. LAWS ANN. ch. 186, § 15E (West 1977) (the fact that defect existed in common area at time lease was exe-
scope of change is accelerated. Furthermore, the recent reforms in substantive law have been paralleled by change in the roles of the two branches effecting those reforms as well as in the way these branches interact. An examination of the roles and types of interaction between the Massachusetts court and legislature reveals that a new model for private law reform is emerging.

Historically, the courts viewed their role as one in which judges followed precedent and restrained themselves from remaking the law as it ought to be, and instead left to the legislature the task of improving the law. The courts made new law only interstitially, filling in gaps between established precedents and statutory schemes. The power of the court was great, but it was not a power to be confused with that of the legislature; it was not a power used to promulgate broad new rules of law. Courts exercised judicial restraint based on separation of powers and on the assumption that necessary reforms would be made by the legislature.

The absence of overruling decisions became the primary weakness in the traditional role of the Massachusetts judiciary. As precedents accumulated, the space available for interstitial creativity narrowed. Correspondingly, the need for overruling decisions increased because accelerated change in society left many of the older rules outmoded. The traditional roles assigned to the

105. See note 78 supra.
106. Leflar, Taught Law is Tough Law, 8 WAYNE L.R. 465, 478 (1962). But see note 81 supra.
judiciary and legislature required the legislature to enact needed reform. The legislature, however, has inherent institutional limitations which often prevent it from directing its attention to tort law reform. The legislature's ability to enact needed tort law reform is limited by inertia and lack of time. Until recently, no organized interest group lobbied to urge the legislature to act to bring about changes in the rights and duties which private individuals owe to each other. By assigning the responsibility for reform to the legislature, the traditional model diminished the likelihood that reform would occur.

The role of the judiciary had to change if the court was to discharge its overall public duty to make the law responsive to the society it serves. Because legislative inaction seemed certain and the need for reform was compelling, the court began to overrule its own precedents. Thus, the court evolved from merely a precedent creating institution into a precedent overruling institution. Under this intermediate model, the court made new law, if necessary, by overruling its own precedents, but only in areas traditionally reserved to the court. Other areas requiring a comprehensive scheme

109. Id.
110. Id. at 16-17.

The legislatures of the present day do not approach those of fifty years ago in their capacity to make considered decisions on proposals for law reform, wherever the proposals may have originated. Today, in state after state, the reported experience of those close to the legislative process is that inertia and lack of time are major factors determining what bills are enacted and what bills fall by the wayside.

That so few law reform bills are passed is not a weakness to be charged against legislators. Rather, it is an institutional limitation to be taken into account when we attempt to appraise realistically the potentiality for law reform of a modern state legislature. Only the most compelling needs are likely to capture its attention. In these circumstances, the aphorism that a legislature's failure to enact a change is an expression of approval of the law as it stands is a patent fallacy. Year after year the legislators fail to act on proposals for reform concerning which the majority of them individually have no view. Among these, no doubt, are proposals they would favor if their time and attention could be devoted to reaching considered judgments on the merits.

We cannot expect any improvement in this respect. In view of the continuing rise of other demands upon the legislator's limited time and energies, we must expect that the inherent institutional limitations upon the potentiality of state legislatures for reforming the law will be manifested even more severely in the future.

111. Law journal contributors, bent on reform, and numerous law professors have probably done more to convey the need for private law reform in the tort field than any other group. Id. at 13.
of reform were deemed unfit for judicial modification, and remained the exclusive province of the legislative branch. While this intermediate model allowed reform in the "judicial areas," the same legislative limitations, inertia and lack of time, still prevented reform in the areas of law reserved for the legislature.

This lingering barrier to effective tort reform in all areas has been largely overcome by a new model for interaction between the judiciary and the legislature. The traditional roles have expanded to allow action by one branch to help overcome the inertia existing in the other branch. Thus, one branch can help affect a change in an area of law concededly in the other's bailiwick, but in need of reform. In short, each branch now perceives its role as one which encompasses not only making substantive change within its area of competence, but also prompting the other institution into action when it feels a substantive change is warranted. It is this prompting function that distinguishes the institutional interaction in the emerging model for tort law reform from the traditional separate spheres of action model.

This new type of judicial-legislative interaction was demonstrated when the court chose to prompt the legislature to enact reform, rather than use the judicial power to abolish the doctrine of governmental immunity. Abrogating governmental immunity represents a major change in the common law. The court chose not to abolish the doctrine because they could not, within a single case, enact a comprehensive limited liability scheme.

In a series of four governmental immunity cases, the judiciary deferred to the legislature but urged the abolition of the doctrine. Finally, in Whitney v. City of Worcester, the court issued this ultimatum to the legislature:

Accordingly, we state our intention to abrogate the doctrine of governmental immunity in the first appropriate case decided by this court after the conclusion of the next (1978) session of the Legislature, provided that the Legislature at that time has not itself acted definitively as to the doctrine.

112. E.g., Morash, 363 Mass. at 612, 296 N.E.2d at 461.
115. Id. at 1715, 366 N.E.2d at 1212.
Further, the court expressed its intention to give retroactive effect to its overruling opinion, despite potentially disastrous fiscal consequences for governmental units. The court, while reluctant to change the law, exerted substantial pressure on the legislature to enact this tort law reform. The court had found the judicially created common law rule "logically indefensible," but had abstained from overruling. In sweeping dicta, the court outlined the major principles which it felt should be adopted, along with a deadline for legislative action. The legislature complied by abolishing governmental immunity in the closing days of the 1978 session. The new statute adopted the general principles the court had outlined in Whitney.

116. In Whitney, 77 Mass. Adv. Sh. at 1736, 366 N.E.2d at 1219-20, the court stated that after its opinion in Morash, any further reliance on the immunity doctrine was misplaced. Therefore, if the court was forced to overrule the doctrine, it would allow recovery for all injuries occurring since the publication of Morash on May 13, 1973. Id. at 1735, 366 N.E.2d at 1219-20 (1977).

117. Over four years had elapsed between the court's first suggestion in Morash that the legislature abolish governmental immunity and Whitney. The court followed a similar pattern in abolishing charitable immunity.

In Colby v. Carney Hosp., 356 Mass. 527, 254 N.E.2d 407 (1969), the court warned, "It seems likely that no legislative action in this Commonwealth is probable in the near future. Accordingly, we take this occasion to give adequate warning that the next time we are squarely confronted by a legal question respecting the charitable immunity doctrine it is our intention to abolish it." Id. at 528, 254 N.E.2d at 408. The legislature abolished the doctrine by statute. MASS. GEN. LAWS ANN. ch. 231, § 85K (West Supp. 1978).

Should it become necessary for us to bring change by judicial action we will at that time embark on the task of restructuring our law of governmental tort liability to bring it into conformity with reason and sound public policy. Therefore, we think it a useful exercise for this court to state now the major principles which we intend to recognize if and when it becomes necessary for us so to restructure the common law.

Id. at 1717-18, 366 N.E.2d at 1213.
120. 1978 Mass. Legis. Serv. 792 (West) (to be codified as MASS. GEN. LAWS ANN. ch. 258).
121. Compare Whitney with MASS. GEN. LAWS ANN. ch. 258 (West Supp. 1978). The court invited the legislature to adopt their scheme by stating:

In suggesting such limits of liability we have no wish to intrude on the prerogatives of the Legislature. Nevertheless, we are cognizant that the Legislature may wish to enact a comprehensive legislative scheme in place of the formulation we present herein. With respect to any action the Legislature may take, the principles which we express in this opinion only suggest the balance of equities we think sound. We hope, of course, that the principles we stress here will aid the Legislature in its deliberations.

In Whitney, the court interacted with the legislature in a new way. If the legislature had not enacted the statute, the court threatened to give retroactive effect to its abolition of the immunity. This would have exposed Massachusetts and its political subdivisions to millions of dollars in unanticipated tort liability. The court, by exerting substantial pressure for change, successfully overcame the legislative inertia. A willingness by the court to goad or directly prompt action in the legislative branch represents a new type of institutional interaction. In Whitney, the court, by pressing for legislative change, may have transgressed the traditional limits of the judiciary. Expressly avowed intentions to abrogate rules in the next appropriate case may, however, be justified as necessary to overcome the legislature's failure to act. In any event, the Whitney scenario—judicial pronouncement resulting in direct legislative response—demonstrates that, in revising tort liability, the court's activist role has had an impact beyond the traditional judicial sphere. The new model allows the court to act as a catalyst for legislative reform.

Just as the court has begun to prompt the legislature to act, the legislature has, in some areas, prompted long overdue reform in areas traditionally reserved to the judiciary. Despite the legislature's inability to fully re-examine these areas and enact necessary reforms, statutes have been enacted which overcome the court's reluctance to break with precedent. Even an activist court may avoid certain reforms because of judicial inertia stemming from crowded dockets or the lack of an appropriate case as a vehicle for reform.

As late as 1970, for example, the Massachusetts Supreme Judicial Court upheld the privity of contract requirement in warranty actions notwithstanding the general recognition by other jurisdictions that breach of warranty more closely resembles a tort action rather than a contract claim. Since Carter v. Yardley & Co., 319 Mass. 92, 64 N.E.2d 693 (1946), privity of contract between manufacturer and purchaser was not an essential element in a negligence case. Therefore, it seems anomalous that the court maintained the privity requirement in warranty cases.

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124. Since Carter v. Yardley & Co., 319 Mass. 92, 64 N.E.2d 693 (1946), privity of contract between manufacturer and purchaser was not an essential element in a negligence case. Therefore, it seems anomalous that the court maintained the privity requirement in warranty cases.
nate the privity requirement.\textsuperscript{125} The court responded in \textit{Hoffman v. Howmedica, Inc.},\textsuperscript{126} by dismissing the defendant’s strong argument that the legislature’s amendment did not apply to plaintiff’s cause of action and construing the statute to allow recovery. This decision indicates the court’s willingness to respond to legislative prompting.

Another example of the legislature acting as a catalyst to judicial reform is the recognition of the right to privacy as an actionable tort in Massachusetts. Although the issue was presented numerous times, the court failed to recognize the existence of an actionable tort for invasion of privacy.\textsuperscript{127} The legislature passed a general statute recognizing the right of privacy and allowing money damages for invasions of the right.\textsuperscript{128} Much room for judicial interpretation remained, however, because the legislature did not attempt to define the individual interests the statute was intended to protect. Apparently, the legislature did not feel competent to supervise the development of this area of the law, but intended

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\textsuperscript{126} \textit{77 Mass. Adv. Sh. 1488, 364 N.E.2d 1215 (1977).} The court found the legislature’s intent in amending the statute was to expand the class of plaintiffs who may claim the protection of an action based on warranty. \textit{Id.} at 1492 n.4, 364 N.E.2d at 1217 n.4. Similarly, in \textit{Wolf v. Ford Motor Co.}, 78 Mass. App. Ct. Adv. Sh. 550, 376 N.E.2d 143 (1978), the appellate court held that, for statutory purposes, the buyer’s niece was a member of the buyer’s family. The statutory amendment was broadly construed because of the legislature’s intent to liberalize the technical rules of privity. \textit{Id.} at 562-63, 376 N.E.2d at 149. \\
\textsuperscript{128} \textit{Mass. Gen. Laws Ann. ch. 214, § 1B (West Supp. 1978), is a broadly worded statute which reads as follows: “A person shall have a right against unreasonable, substantial or serious interference with his privacy. The superior court shall have jurisdiction in equity to enforce such right and in connection therewith to award damages.”}
that the court recognize the right.  

Enactment of the privacy statute and the elimination of the privity requirement in warranty actions represent independent actions by the legislature that created needed tort reform. These statutes are, therefore, useful devices in overcoming the inertia that exists in the judicial branch. The legislature has interacted in a new way with the judiciary by requiring the court, in selected areas, to increase its private law reform activity.

Just as the common law adapts to the society it serves, the processes by which the institutions responsible for law reform interact also must change. Otherwise, the institutions may fail to discharge their current responsibilities to society. A principle underlying the development of the respective roles of courts and legislatures is that each branch is to effect those reforms for which its processes are better suited. There can be little doubt that the court is the proper body to develop, on a case by case basis, the right of privacy, and that the legislature is better suited to abolish governmental immunity with a comprehensive statutory scheme. In addition to reforming tort law in their respective areas, both the legislature and the court have successfully prompted reform activity in the other branch. Thus, the historic allocation of power and responsibility for law reform in the tort field has evolved into a new model.

The problem of one branch of government overreaching the other is minimal when pressure for law reform is based on institutional self-restraint. The judiciary never doubted its power to abrogate governmental immunity but, instead, restrained itself to enable the legislature to enact a sensible, comprehensive scheme. Similarly, the legislature refrained from enacting a comprehensive right of privacy statute because it felt that the case by case approach was a superior vehicle for developing this area of the law. Thus, both institutions have deferred to the other in certain areas where the other institution was better suited to make the desired change. This deference, a new form of self-restraint, is largely responsible for the emergence of the new model for tort law reform in Massachusetts.

129. The language of the statute is "so general that the scope of the tort of invasion of privacy in Massachusetts is, as it was before the statute, a matter of judicial law." Id. at Comment—1973.

130. R. Keeton, supra note 108, at 17.

131. Id. at 17-18.
VIII. Conclusion

*Poirier* cures an injustice by allowing employees of independent contractors recovery against landowners without requiring proof of the existence of a hidden defect. Landowners are now subject to liability when they fail to exercise reasonable care in maintaining premises or alerting an employee of actual or potential hazards. Increased liability creates an additional cost incentive which should reduce the number of accidents. Through insurance, the costs of accidents which do occur will be spread over a larger number of individuals.

During the last decade, judicial activism combined with legislative action has accelerated the rate of substantive tort reform in Massachusetts. Much of the judicial reform, however, has resulted from opinions whose scope far exceeds the needs of the case at bar. The scope of overruling opinions should be limited by the facts before the court. The court should make more extensive use of procedures which will guarantee counsel an adequate opportunity to press policy against precedent whenever the court feels compelled to question existing law.

All of the judicial changes in substantive tort law have eventually been given full retroactive effect. By ruling on the issue of retroactivity in the same opinion that overrules prior case law, the court would avoid needless litigation of this issue. Express delineation of those causes of action which are affected by judicial tort reforms should facilitate negotiated settlement of many claims.

The emerging model for tort law reform incorporates a prompting function not found in the traditional institutional interaction between court and legislature. This new model allows both the court and legislature to overcome the inertia existing in the other branch. This prompting role must, however, continue to be exercised cautiously to maintain the separation of powers. Carefully used, the added dimension of the prompting function should result in more efficient private law reform in Massachusetts.

*Richard P. Boehmer*