

## FOREWORD

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In the endeavor to promote and maintain an ideal relation among men in the social order the law seeks to promote and maintain satisfaction of the reasonable expectations of individuals in life in civilized society. Such expectations are taken to be reasonable so far as they may be satisfied consistently with like satisfactions of the expectations of others. In the beginnings of law, what threatens satisfaction of these expectations is intentional aggression of individuals upon each other. If the individual cannot devote his undisturbed energies to his day's work but must be on guard against attack continuously there cannot be the division of labor which is at the foundation of the economic order; there cannot be the experiment, investigation and research through which men find what to do and how to do it in order to live a civilized life. Hence the first task of the law is to repress intentional aggression. It begins by seeking to put down private war, private avenging of injuries and self-redress and to regulate self-help. The law grew up about an idea of redress of a wrong done to one individual by another. This idea gave shape to our thinking about legal liability.

With the development of the social and economic order the general security was threatened no less, and in the event much more, by increasing lines of contact of individual activities where, without intentional aggression, there is subjection of others to unreasonable risk of injury through want of care by some one in the course of doing something which if done with care would work no injury. In consequence the law, safeguarding the general security, comes to put negligence along with intentional aggression as a ground of legal liability to repair resulting injury. In what we came to call maturity of law in the nineteenth century we gave this legal development a moral cast. Philosophical jurists held that the legal order was a regime of putting the force of politically organized society behind a body of moral precepts for the adjusting of men's relations with each other and the ordering of their conduct, and that imposing of legal liability to repair injuries was a matter of righting what were moral wrongs. Intentional aggression and negligence were faults. One whose fault caused injury to another was morally and therefore legally bound to repair the injury. This conception of legal liability as a corollary of fault was in line with the moral thinking of the nineteenth century which put stress upon the idea of willed action of free willing men. If in the outward manifestation of their free wills men failed to take care not to impose unreasonable risks—risks unreasonable because not consistent with like free exercise of their wills by others—upon their fellowmen, there was felt to be the moral equivalent of aggression. There was fault which called for imposition of legal liability. This typical mode of stating the ground of

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liability for tort may be seen in Spencer's Justice, §§284-288 (1892). Such was the mode of thought behind the law of torts as it stood in the nineteenth century.

In addition to the doctrine of liability for fault and only for fault this mode of thinking had three corollaries: The fellow-servant rule, the doctrine of assumption of risk (and the form known as the simple-tool rule), and the doctrine of contributory negligence.

Under the theory of liability only for moral fault one who chose his servants or agents with reasonable care, gave them reasonable instructions, and exercised reasonable supervision could not be said to be morally at fault and so legally liable for unreasonable imposition of risks upon others by his reasonably chosen, instructed, and supervised servants. But in the kin-organized society of the beginnings of law the head of a household was bound to buy off the vengeance of any one injured by a dependent member of his household or else surrender the offending servant to the vengeance of the injured person. As the idea of surrender of the servant to vengeance of the injured person became abhorrent, an idea of liability of the master remained and was justified by identifying the servant with the master. It was held in the common law as a general proposition that what the servant did in the course of his employment was done by the master himself. Thus the master became liable for injuries caused by the faults of his servants in the course of their employment. But this was at variance with the accepted theory of liability for moral fault and was confined by the common-law courts to injuries to persons outside of the employer-employee relation. *Respondeat superior* was considered not to be an absolute rule of universal justice but a rule applicable only between the master and third persons. It did not apply as between the master and his servants. He was not liable to one of them for a fault of one of his fellow-servants. Although a number of qualifications grew up in the course of decision, this seemed to the jurists of the nineteenth century a proper holding down of an anomalous liability.

Again, when men thought of full free assertion of the individual will as the ideal relation among men it was felt eminently just and proper that one who chose freely to enter into an employment involving risk of injury should bear the burden of the risk of injury involved. It was no fault of the employer if some incident of the employment caused a grave injury to an employee. He knew or ought to have known of the risk and voluntarily subjected himself to it. There was no fault in the person operating the enterprize where the known risk was freely undertaken by the person injured.

Likewise, when the ground of liability was taken to be moral fault in causation of injury, one who was himself at fault in contributing to the injury to himself in any degree was felt to be in no position to complain of the fault of another which, concurring with his fault, resulted

in the injury done him. His own contributing fault was a complete bar to liability.

These three settled and far-reaching exceptions to liability for negligence were in harmony with the moral ideas, economic conditions, and every-day activities of the rural, agricultural and largely pioneer society of the formative era of our American law. They are wholly at variance with the moral, economic and social ideas of today.

In a crowded world, in which activities are carried on by organizations instead of by single individuals, in which every type of activity is carried on by means of increasingly complicated machinery, and the risks of injury from the mechanical operation of apparatus worked with are increasingly multiplied and increasingly unpredictable by the average individual, the primary threat to the general security is no longer moral fault. It is the tendency of mechanism to get out of hand, of agencies and instrumentalities to go beyond and get outside of the boundaries of their normal use and do injury. Hence the general security requires a high degree of pressure upon those maintaining and getting the benefit of organized activities to do the most that can be done to keep them within the bounds of their proper use and prevent their getting out of hand and doing injury. Moreover, in the social and economic order of today the rise of the service state has been changing our conception of the role of the law. We now hold that the task of law is more than to keep the peace and assure a maximum of free individual self assertion. The general security involves very much more than it did in the formative era of our law. The idea that a concept of justice as the maximum of free self assertion would of itself develop a body of legal precepts adequate to promote and maintain the general security has had to be given up. The philosophical theory of development of law by the progressive self-unfolding of a moral idea is not the mode of thought of today. Legislation is called for. It is no longer possible to postulate that the worker has a full and free choice to associate or decline to associate with other workers in a body of freely undertaking co-employees. He must work where and with whom the industrial order of today affords him a place. It is no longer true that the worker can freely estimate the risks of employments open to him or tools provided for him and make a free choice. It is no longer true that one who in some degree contributes to an accident in which he is injured has been so at fault that he ought to be denied all reparation. As between concurring negligences there may be degrees of threat to the general security which call for comparison and for at least an apportionment of liability.

Today the law must take account of the enormous increase of threats to the general security in the highly mechanized conditions of life. We are now told that in 1954 one in every seventeen persons in the United States suffered some injury sufficient to get into the statistics. To the perils of the sea, from which the prayer books pray deliverance, we have added a host of new perils of land and of air.

In the past the chief perils of the highway were from bandits. Today the general use of motor vehicles of every sort has made a profound change. Horse drawn vehicles involved relatively few dangers to few people. Motor vehicles are clogging the dockets of the courts with personal injury litigation. They threaten injury not only to their users and to all users of the highways but even to those of us in our homes and shops abutting on the highways. Railroads have added to the perils of land transportation from the middle of the last century. But in the days when fast trains ran thirty miles an hour it was impossible to have the multiplied accidents and horrible injuries of these days of stream-lined trains running up to one hundred miles an hour on five or six-track roads and of huge switching yards with every kind of complicated and electrified apparatus and machinery and endless opportunities for injury to employees. Perils of the shop and factory came in with the industrial revolution. But the shops of that time had few of the perils that haunt the factory of today. The old time blacksmith shop rarely had an accident. The law reports are full of cases of injuries in the operation of garages and automobile repair stations. A huge and growing category of industrial diseases, unknown to the law of the past, has raised problems for which the juristic ideas of the last century were inadequate. Closely connected are perils of the job. Even the simplest jobs now involve contacts with machines, or electricity, or chemicals or tools which get out of order, or work upon scaffolds at dizzy heights quite unknown to the past. Then, too, there are now perils of the home. The Anglo-Saxon law speaks of the security of the home-sitting man and his household. But he and they are now threatened by a continually increasing number of mechanical contrivances, convenient but disposed to get dangerously out of order. We read in the law reports of injuries in the household from electric lights, electric stoves, electric refrigerators, electric washing machines and electric dishwashers. Also we read of exploding bottles of soft drinks and of injuries from processed foods. More and more the farm of today is coming to be something of a big industrial establishment, raising questions of a safe place to work, of the simple tool doctrine, and of risk of the employment. Tractors, bulldozers, mechanical hay-stackers and hay-balers, and machines for picking fruit make a category of perils of the farm. Also in every occupation and activity and location multiplying of high voltage electric wires creates a condition to which the classical theory of liability is not adapted. Such wires are stretched over or across city streets, highways, parks, and farms. The books tell us of cranes, derricks, hay-stacking machines and ladders coming in contact with them. They are vulnerable to storms and often get out of order. They are an exceptional menace to all who come in their neighborhood, causing terribly crippling injuries. Likewise today there are dangers of the air. When anything goes wrong in air transportation the results in death and injury are likely to be very serious. Finally, who shall say what new and terrible dangers atomic energy

shall bring forth?

The Federal Employer's Liability Act is part of the inevitable legislative response to some of the features of the situation sketched above.

As has been true of all of the legislation which has been called for by the multiplied threats to the general security in the life of the time, the administration and application of the FELA has had to contend with serious obstacles. One has been the lingering of obsolete doctrines of strict construction of statutes in derogation of the common law. This statute and like statutes of the present century are in their true nature remedial. They have been enacted to provide much needed remedies for injuries under conditions quite unknown to the formative era of our law and the society in which it was received from England and reshaped to pioneer and frontier America. They call for interpretation and application with reference to the conditions for which they were enacted.

Another obstacle has been reluctance to give up the fault idea as the basis of legal liability and so a feeling that denial of reparation where there has been any contributing negligence is a part of the legal order of nature and is to be read into the statutes except where clearly and expressly excluded.

Especially there has been an attempt to find a ground of exception in the common-law immunities of the government, something which has been given up in every connection in the rest of the world and has no place in the service or welfare state of today.

Likewise interpretation and application of the statute have been affected by theories of causation which, indeed, have embarrassed the law of workmen's compensation and legislation as to contributory negligence. This is quite out of place in dealing with legislation which seeks to give effect to the reasonable expectations of those who are exposed to risk of injury in the crowded society, mechanized activities, and organizationally controlled industry of today.

In a complex social and economic order there is much more to be thought of than full and free individual self assertion. There is a lifting of burdens incident to the working of the industrial and economic regime from those upon whom the injuries, inseparable from instrumentalities of social existence, chance to fall and a placing upon all of us, so far as may be, the maintenance of the security of each. As the fault theory of legal liability spoke from the moral ideas of the nineteenth century, the theory of legal liability behind the FELA and kindred statutes speaks from the morality of today.

Reconciliation of that idea with individual freedom, with individual political independence, and with attaining and maintaining an ideal relation among men is the problem of the legal order in the service state of the twentieth century.

We are dealing with one item of that problem in considering the FELA.