DEFENSES UNDER THE F.E.L.A.

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In order to place defenses under the F.E.L.A. in their proper perspective, it is helpful to consider their historical background as well as their present status.

Before the F.E.L.A., the claims of injured workmen, whether employed by railroads or other industries, were controlled by the law of master and servant, as developed under the common law. Along with the advent of the railroads themselves, the law was embellished with the judicial brain children of the era. These new concepts came to be known as the fellow-servant doctrine, assumption of risk, and contributory negligence. They were originated and developed in common ground. Not entirely identical in conception, they conjoined and overlapped in many applications. The overlapping areas first concealed, then created a state of confusion which, in turn, created more.[1] In time, the three defenses were used almost interchangeably. As the establishment of any one of the three had the effect of defeating liability, it was not important to distinguish the defenses sharply or carefully, so long as the facts would sustain one of them.

FELLOW-SERVANT DOCTRINE

The rule that an employer is not liable to his (or its) employee for the negligent acts or omissions of another employee was apparently first announced by Lord Abinger in *Priestly v. Fowler*,[2] decided in 1837. There an employee[3] of a butcher went along with the driver of the butcher's van to help make deliveries for his employer. Following an accident, he complained that the employer was negligent in not having the van in a proper state of repair, and in overloading it. After a verdict for plaintiff, the judgment was set aside (arrested). The court said, first, that the employee could have quit his job,[4] and, second, that to permit liability would encourage the employee to become careless.[5] Soon there-

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[1] Rutledge, J., in Owens v. Union Pacific R. Co., 319 U.S. 715, 720.

[2] 3 M. & W. 1.

[3] "Servant" was the term used, and carried with it the implication of servitude, as distinguished from the present day relationship of employer and employee.

[4] "The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself; and in most of the cases in which danger may be incurred, if not in all, he is just as likely to be acquainted with the probability and extent of it as the master."

[5] "In fact, to allow this sort of action to prevail would be an encouragement to the servant to omit that diligence and caution which he is duty bound to exercise on the behalf of his master, to protect him against the misconduct or negligence of others who serve him, and which diligence and caution, while they protect the master, are a much better security against any injury the servant may sustain by the negligence of others engaged under the same master, than any recourse against his master for damages could possibly afford."

after, it was held in *Murray v. South Carolina R. Co.*[6] that a railroad company was not liable to a fireman who lost a leg[7] due to the negligence of his engineer. Only a year later, in 1842, the fellow-servant doctrine was accorded the dignity of authority in *Farwell v. Boston & Worcester R. Co.*[8] Chief Justice Shaw there held that the responsibility of the master under *respondeat superior* applied only to strangers, but that the servant's claim must be maintained, if at all, upon contract. The court cited the *Priestly* and *Murray* cases, and thus began a line of authorities,[9] each having the cumulative effect of entrenching the doctrine more deeply and firmly. In 1850 the rule was first applied to the case of a railroad employee in England,[10] where it was known as the doctrine of common employment.[11]

As industry expanded and our economic structure changed accordingly, individual employers were succeeded by corporations, which grew and sometimes consolidated with or were replaced by even larger corporations. The personal employer had given way to the inanimate corporation.

Injury to an employee by corporate negligence could occur only by a breach of duty by some person, an employee or agent, who in turn must have been a fellow-servant of the injured employee. Thus, the larger the shop or plant, the less the liability because each person was a fellow-servant of each other employee about him.

The injustice of the rule became obvious as the burden of shop casualties caused by negligence was thrown upon the one least able to bear it, the employee.[12] Courts rarely abrogate rules of law as deeply embedded as the fellow-servant doctrine. The alternative has been to construe strictly and to establish exceptions, sometimes ingeniously contrived.[13] These included exceptions based upon the employer's selection

[6] 1 McMullan (S.C.) 385 (1841).

[7] A verdict of $1,500 was set aside.

[8] 4 Metc. (Mass.) 49. Railroad was held not liable to engineman for negligence of switchman.

[9] Brown v. Maxwell, 6 Hill (N.Y.) 592 (1844). Hayes v. Western R. Corp., 3 Cushing (Mass.) 270 (1849). Coon v. Syracuse & Utica R. Co., 1 Selden (N.Y.) 492 (1851). Gillshannon v. Stony Brook R. Corp., 10 Cushing (Mass.) 288 (1852). Ryan v. Cumberland Valley R. Co., 23 Pa. (11 Harris) 384 (1854). Sullivan v. Mississippi, Missouri, etc. R. Co., 11 Iowa 421 (1860).

[10] Hutchinson v. York, Newcastle & Berwick Ry. Co., 5 Exch. 343.

[11] Waller v. South Eastern Ry. Co., 32 L.J. (Ex.) 205 (1863). Lovegrove v. London & Brighton Ry. Co., 33 L. J. (C.P.) 329 (1864). Morgan v. The Vale of Neath Ry Co., Law Rep. 1 Q.B. 149 (1865). Tunney v. Midland R. Co., L.R. 1 C.P. 296 (1866).

[12] Decades later, Workmen's Compensation Laws codified the view that the State should undertake responsibility to spread the financial loss among employers for all industrial accidents rather than attach liability upon a particular employer for each individual accident.

[13] Agnew, J., in O'Donnell v. Allegheny Valley R. Co., 59 Pa. 239, 247. (1868) ". . . But human life is too precious to force the doctrine beyond its reasonable bounds. . . ."

or employment of incompetent co-employees, violation of duties imposed by law, non-delegable duties, superior and subordinate employees. A refinement of the last exception was where the same or equivalent work was performed in separate departments.

Interestingly, Ohio courts took the lead in the trend from the stringent fellow-servant rule. In *Little Miami R. Co. v. Stevens*[14] a railroad was held liable to one of its engineers for the negligence of his superior, the conductor. Caldwell, J., delivering the opinion of the court, sought to meet the issue head on and to disregard the *Farwell*[15] and *Murray*[16] cases and the reasoning upon which they were based. Hitchcock, C. J., in a concurring opinion, adopted a more conservative approach and distinguished the decided case from the earlier authorities, while Spaulding, J. dissented, substantially on the ground of *stare decisis*. Soon thereafter in another Ohio decision, the same subject was treated extensively and thoroughly in *C. C. & C. R. Co. v. Keary*,[17] where recovery was again allowed to a brakeman for injury caused by negligence of his superior co-employee, the conductor.[18] Warden, J., in a concurring opinion, cut through the niceties of subtle distinctions to challenge the basis of the rule,[19] and with tongue in cheek chided its

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[14] 20 Ohio 415 (1851).

[15] See note 8, *supra*.

[16] See note 6, *supra*.

[17] 3 O. S. 201 (1854).

[18] Ranney J., *Id.* at page 218:

"But they (employees) cannot be made to bear losses arising from carelessness in conducting the train, over which their employer gave them no power or control, either separately or collectively, until we are prepared to say that justice and public policy require the consequences of duty omitted by one party to be visited upon the other, although stripped of all power to prevent such consequences."

[19] *Id.* at p. 226:

"But, leaving room for the ascertainment of all necessary exceptions, I would certainly hold the employer to his common liability for the negligence of one into whose hands he has put the power of doing hurt, as well when the plaintiff was also in his employment as when the wrong was done to a stranger, and wholly without reference to the superiority, the equality, or the inferiority of the plaintiff, relatively to the negligent employee. I would not except the case of a conductor (for instance), because he happened to be in command. He is no more the representative or organ—in other words, the agent—of the railroad company than the *brakeman,* or any other subordinate. The conductor is an agent appointed to command; the brakeman is appointed to obey; but commandment and obedience are alike acts of agency. The fact of superiority or subordination in the position of the agents can, in my opinion, be important only in a case which shows the inferior to have sustained the hurt through his obedience to some order of the superior. But where the hurt is not a necessary consequence of the subordination, and is not otherwise connected with it than by the necessary presence of the inferior in his place, I see no peculiar warrant of recovery in the fact that the person negligent was in a place of command. I look upon every officer of the railroad company, no matter how high in trust, or low in responsibility, as its agent and nothing but its agent. None of them is the corporation; all of them are

author.[20]

Ultimately, Congress abolished the fellow servant rule by enactment of the Federal Employers' Liability Act.[21] Although the fellow-servant rule has not been a defense under the F.E.L.A. its philosophy was not easily dispelled from the thinking of the courts. After 1908 assumption of risk remained as the only complete defense to the railroader's claim for redress for injuries negligently inflicted, and that had already become subject to some limitations.[22]

Assumption of Risk

The rule that a servant assumed the risk of certain dangers of injury during his employment was first given judicial expression, along with the fellow-servant doctrine, in *Priestly v. Fowler*.[23] The two defenses were often confused; but, as previously stated, it made little difference upon which theory recovery was denied. However, it did become a matter of serious consequence when exceptions were made to the fellow-servant rule, and particularly when the fellow-servant doctrine was abolished by the F.E.L.A.

Assumption of risk was based on the theory that it was part of a contract of employment, express or implied,[24] that the employee agreed that the dangers ordinarily incident to the discharge of his duty should be at his own risk. It proceeded on the theoretical, but fictitious, assumption that the added hazards were taken into consideration in arriving at the basis of wage payments; hence, the employee's agreement to assume additional risks was supposedly reflected in increased compensation. Further, the employee had the "right" to quit when he pleased.

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its representatives for some purpose, and to some extent. The conductor of a railroad, for instance, does not select his subordinates. He does not, in fact, agree to stand all the risks of their negligence; he merely agrees to be faithful himself in holding them to their respective duties. If he be faithful—if no negligence of his particular duty can be imputed to him—I can find something much better than a precedent of an action by him against the company for the negligence of one under him in employment."

[20] *Id.* at p. 222:

". . . We begin now to appreciate the ludicrous alarm of Lord Abinger, at what he supposes to be some of the consequences of allowing a servant to sue his master for the negligence of a fellow-servant. We can discover whose interests he has in mind, and what is the source of his anxiety, when he says: 'The master, for example, would be liable to the servant for the negligence of the chambermaid in putting him into a damp bed!' etc."

[21] 35 Stat. 65, c. 1949 (1908), 45 U.S.C. 51 *et seq.*

"Every common carrier . . . shall be liable . . . for such injury or death resulting in whole or in part from the negligence of *any* of the officers, agents, or employees of such carrier . . ." Similar language was also used in the first Federal Employers' Act, 34 Stat. 232, c. 3073 (1906), which had been held invalid on other grounds in Employers Liability Cases, 207 U.S. 463 (1908).

[22] See footnote 29, *infra.*

[23] See footnotes 2 and 4, *supra.*

[24] Almost invariably implied.

Assumed risk derives from the maxim *volenti non fit injuria.*[25] The assent (volenti) has been interpreted as extending even further than under the contract theory. Although the employee under his contract of employment did not assume the risk that his employer would violate a statute enacted for his safety, it was held that if he was consciously aware of such violation he assented, and hence assumed the risk.[26] However, there was a trend away from this stringent view.[27]

This far reaching use of the defense of assumption of risk by the courts to deny recovery to railroad employees received attention from Congress. As early as 1893 assumption of risk was eliminated as a defense to an action under the Safety Appliance Act,[28] and under the F.E.L.A. as originally enacted there was no assumed risk where violation of a statute enacted for the safety of employees contributed to the injury or death.[29] The 1939 Amendment of the F.E.L.A. finally obliterated from that law "every vestige of the doctrine of assumption of risk."[30]

Some of the similarities and distinctions between assumption of risk and contributory negligence will be discussed under the latter heading.[31]

Basically, in a negligence action, the plaintiff must first establish negligence of the defendant; otherwise the problem of a defense is not reached. Consequently, the defense of assumption of risk presupposes that there had been negligence by the defendant. This is especially true under the F.E.L.A. where it has been repeatedly held that negligence is the basis of liability and that the railroad is not an insurer.[32] Under the Safety Appliance Acts, however, negligence need not be shown to

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[25] "To the consenting no injury is done." "A person who consents to a thing cannot complain of it as an injury." Bouvier's Law Dictionary, Porter v. Toledo Terminal R. Co., 152 Ohio S. 463, 90 N. E. 2d 142 (1950). "That to which a person assents is not esteemed in law an injury." 44 Words and Phrases 368. Milliken v. Heddesheimer, 110 Ohio S. 381, 144 N.E. 264 (1924).

[26] Denver, R. G. R. Co. v. Norgate, C.C.A. 8th, 141 Fed. 247 (1905). Martin v. Chicago, R.I. & P.R. Co., 118 Iowa 148, 91 N.W. 1034 (1902).

[27] Narramore v. Cleveland, C.C.&St.L. Ry. Co., C.C.A. 6th, 96 Fed. 298 (1899).

[28] 27 STAT. 532, c. 196, sec. 8, 45 U.S.C. 7.

[29] 35 STAT. 66, c. 147, sec. 4 (1908), 45 U.S.C. 54.

[30] 53 STAT. 1404, c. 685, sec. 1 (1939), 45 U.S.C. 54. Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 58 (1942).

[31] *Infra,* CONTRIBUTORY NEGLIGENCE.

[32] Seaboard Air Line R. v. Horton, 233 U.S. 492 (1914). New York Central R. Co. v. Winfield, 244 U.S. 147, 150 (1916). Wilkerson v. McCarthy, 336 U.S. 53, 61 (1949).

But see opinions by Justice Frankfurter advocating the insurance principle of workmen's compensation laws to replace negligence as the basis of compensation for injuries to railroad employees. Concurring in Wilkerson v. McCarthy, 336 U.S. 53, 65 (1949). Carter v. Atlanta & St. A. B. R. Co., 338 U.S. 430, 437 (1949). Dissenting in Stone v. New York, C. & St. L. Ry. Co., 344 U.S. 407, 410 (1953).

establish liability; violation of the Act itself creates liability[33] and bars all defenses, even including contributory negligence.[34]

Considerable confusion has always existed with reference to assumption of risk. Not only has the term been used in conjunction with the fellow-servant rule and contributory negligence, but frequently loosely and interchangeably with both. Perhaps even more confusing was the argument that the railroad was not negligent because the plaintiff had assumed the risk.[35] Whether or not assumption of risk was considered an affirmative defense, in the nature of confession and avoidance, it would have been more accurate to say that the railroad was not *liable* because the plaintiff had assumed the risk, and had thus absolved the railroad of a legal duty toward him. Nevertheless, the effect was the same. In a number of cases the court placed the responsibility on the employee, but found that the railroad was not negligent, and consequently not liable. It was so held in instances where the track curved so sharply that cars would not couple properly,[36] where a station platform was in disrepair and a station agent who was injured thereby presumably had knowledge of the danger,[37] where no bell or whistle was sounded to notify the employee of an approaching train even though there was insufficient distance between tracks,[38] and where a yard employee alighted in the dark from an engine and fell into a ditch along the track in the railroad yard.[39]

After the 1939 Amendment, eliminating entirely assumption of risk as a defense, it became important for the railroad to argue and emphasize the non-negligence concept of assumed risk. This was so because the plaintiff's claim could no longer be defeated by saying that the acts that caused his injury were hazards or risks that he assumed as part of his employment, even though the defendant had been negligent. Consequently, it was urged that failure to protect the employee against the ordinary hazards of his occupation did not amount to negligence on the part of the railroad.

This approach was used with temporary success in *Tiller v. Atlantic*

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[33] O'Donnell v. Elgin, J. & E. R. Co., 338 U.S. 384 (1949). Carter v. Atlantic & St. A. B. R. Co., 338 U.S. 430 (1949) Affolder v. New York, C. & St. L. R. Co., 339 U.S. 96 (1950)

[34] 35 STAT. 66, c. 149, sec. 3 (1908), 45 U.S.C. 53.

[35] ". . . there may be assumption of rick by an employee without negligence either on his part or on the part of his employer. . ." Tiller v. Atlantic Coast Line R. Co., C.C.A. 4th, 128 F. 2d 420, 423 (1942); reversed, 318 U.S. 54 (1943).

[36] Tuttle v. Detroit, Grand Haven & Milwaukee Ry., 122 U.S. 189 (1887).

[37] Missouri Pacific R. Co. v. Aeby, 275 U.S. 426, 430 (1928).

[38] Toledo, St. Louis & Western R. Co. v. Allen, 276 U.S. 165 (1928). See also Aerkfetz v. Humphreys, 145 U.S. 418 (1891), where failure to sound bell or whistle was held not negligence; and further, if plaintiff was injured it must have been by his contributory negligence. His knowledge of the dangers of train operations was not called an assumed risk.

[39] Delaware, Lackawanna and Western R. Co. v. Koske, 279 U.S. 7 (1929).

Coast Line R. Co.,[40] where a railroad policeman inspecting the seals of a train moving slowly on one track was hit and killed by the unlighted rear car of a train backing in the opposite direction on the next track. A directed verdict for the defendant was affirmed, and the court pointed out that prior to the 1939 Amendment the decisions of the courts in similar cases showed that liability on the part of the carrier was denied because "it was guilty of no neglect in failing to safeguard the injured employee from the ordinary risks of the business;"[41] therefore, the court concluded, the defense of assumed risk remained where the men were exposed to the ordinary risks of the business.[42]

Upon appeal the Supreme Court reversed[43] and made it clear that assumption of risk, however stated, was no longer a defense under the F.E.L.A. Justice Black, speaking for the Court, said:

> We hold that every vestige of the doctrine of assumption of risk was obliterated by the 1939 amendment, and that Congress, by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing its name to "non-negligence." As this Court said in facing the hazy margin between negligence and assumption of risk as involved in the Safety Appliance Act of 1893, "Unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of risk under another name;" and no such result can be permitted here.[44]

Contributory Negligence

Earliest of the defenses in negligence cases under the common law is contributory negligence, which was expounded by Lord Ellenborough in *Butterfield v. Forrester*.[45] To support an action the plaintiff had to show that he was in the exercise of ordinary care.[46] Thus, contributory

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[40] 128 F. 2d 420, C.C.A. 4th (1942).

[41] *Id.* at page 423.

[42] *Id.* at page 424:

"The conclusion is inescapable that Congress did not intend to enlarge the obligation of carriers to look out for the safety of their men when exposed to the ordinary risks of the business, and that in circumstances other than those provided for in the amended section of the statute, the doctrine of assumption of risk must be given its accustomed weight. It is beyond the power of this court to deny the defense in this case. It presents no material difference of fact from situations considered by the courts in numerous decisions and held to be free from negligence on the part of the carriers, and we have no authority to prescribe new standards of conduct in the important field of railroad operations."

[43] Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54 (1942).

[44] *Id.* at page 58.

[45] 11 East 60 (1809).

[46] "A party is not cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right. In cases of persons riding upon what is considered to be the wrong side of the road, that would not authorize another purposely to ride up against them. One person being in fault will not dispense with

negligence barred the plaintiff from any recovery; it was a complete defense.

When the fellow-servant doctrine, assumption of risk and contributory negligence were all complete defenses to an action against the employer, the ultimate result of the case was the same whether one or all three of the defenses were established. Consequently, if there was some misuse of terms or inaccurate application of definitions, the distinctions had more theoretical than practical effect. It was not until one or more of the defenses had been limited or abolished that it became vitally important to determine precisely which defense was involved. This, in turn, required careful analysis to distinguish between superficially similar defenses.

Throughout the history of the law of master and servant, and particularly under the F.E.L.A. and the Safety Appliance Acts, the greatest difficulty has been encountered in defining and distinguishing assumption of risk and contributory negligence, and in classifying a set of facts as one or the other.

Though the accuracy of the statement may be challenged,[47] it has been held that assumption of risk arises out of contract, and contributory negligence from tort.[48] The distinction between the two has been expressed in terms of chronological sequence in that assumption of risk occurs before the negligent act of the employer, whereas the employee's action thereafter, if improper, constitutes contributory negligence.[49] Somewhat differently stated, knowledge of the risk is the watchword of the defense of assumption of risk, and want of due care in view thereof is that of contributory negligence;[50] acquiescence with knowledge of the

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another's using ordinary care for himself. Two things must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff." *Ibid.*

[47] Rese v. Minneapolis, St. P. & S.S.M. Ry. Co., 107 Minn. 260, 120 N.W. 360 (1909).

"The view that assumption of risk is a matter of contract and contributory negligence one of tort is fallacious. Both are equally peculiar to the law of torts and implied from conduct. Assumption of risk is passive submission to the risk of injury inherent in a known defect. Contributory negligence arises when the servant's act adds new dangers to those incidental to conditions."

[48] Whisenhunt v. Atlantic Coast Line R. Co., 195 S.C. 213, 10 S.E. 2d 305 (1940). McAdoo v. Angellotte, C.C.A. 2, 271 Fed. 268 (1921). Gray v. Garrison, 49 Ga. App. 472, 176 S.E. 412 (1934). Cobia v. Atlantic Coast Line R. Co., 188 N.C. 487, 125 S.E. 18 (1924). Chicago, R.I.&P. Ry. Co. v. King, 165 Okla. 169, 25 P. 2d 304 (1932).

[49] Johnson v. Mammoth Vein Coal Co., 88 Ark. 243, 114 S.W. 722 (1908). "The preliminary conduct of getting into the dangerous employment is said to be accompanied by assumption of risk. The act more immediately leading to a specific accident is called negligent."

[50] Cincinnati, N.O. & T.P. Ry. Co. v. Thompson, C.C.A. 6, 236 Fed. 1 (1916). Chesapeake & Ohio Ry. Co. v. Richardson, C.A.A. 6, 116 F. 2d 860 (1941), *cert. den.* 313 U.S. 574 (1941).

risks involved is not contributory negligence because one can be fully aware of the defects and yet use the utmost care to avert the dangers which they threaten.[51]

At times the distinctions are so slight that they are difficult to follow on logic alone. For example, it has been held that if there are two ways in which an act can be done, one safe and the other dangerous, the employee's selection of the latter is contributory negligence and not assumption of risk.[52] On the other hand, assumption of risk and not contributory negligence applies in the case of an injury due to an obvious defect in a "simple tool".[53]

It must be remembered that over the many years during which the courts have had to decide whether the conduct of the railroad employee in a particular case amounted to assumption of risk or contributory negligence, the determination of that fact has had a widely variable effect upon the action, depending upon the year in which the case arose. Before 1893, both assumption of risk and contributory negligence were complete defenses.

By enactment of the F.E.L.A. in 1908, contributory negligence was no longer a bar to recovery, but could be asserted in diminution of damages.[54] Thus, before 1908 contributory negligence was a complete defense, and after that date it was a partial defense to liability under the F.E.L.A. Assumption of risk was a complete defense that was not affected by the F.E.L.A. until the amendment in 1939,[55] which entirely eliminated that defense from the F.E.L.A.

The overlapping of dates is further complicated by the relation of these two defenses to the Safety Appliance Act. Enacted in 1893,[56] it was the first legislation by Congress to establish liability of an interstate carrier to its employees for injuries resulting from inadequacy or failure of

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[51] Hesse v. Railroad Co., 58 Ohio S. 167, 169, 50 N.E. 354, 355 (1898). Cetola v. Lehigh Valley R. Co., 89 N.J.L. 691, 99 Atl. 310 (1916). St. Louis & S.F. Ry. Co. v. Sears, 173 Okla. 483, 49 P 2d 489 (1935).

[52] Louisville & N.R. Co. v. Morrill, 211 Ala. 39, 99 So. 297 (1924). Illinois Central R. Co. v. Skinner's Adms., 177 Ky. 62, 197 S.W. 552 (1917). Fort Street Union Depot Co. v. Hillen, C.C.A. 6, 119 F. 2d 307 (1941) cert. den. 314 U.S. 642 (1941). Chesapeake & Ohio Ry. Co. v. Fultz, 191 Ind. App. 639, 161 N.E. 835 (1928) *cert, den.* 282 U.S. 855 (1930).

[53] Pryor v. Williams, 254 U.S. 43 (1920), reversing 272 Mo. 613, (1917) in which the Missouri Supreme Court said:

"If the defects were so glaring, and the clawbar so patently defective that an ordinary prudent servant would not have used it, then its use under such circumstances was negligence on the part of the servant. . . ."

See also, Donahue v. Louisville, H. & St. L. Ry. Co., 183 Ky. 608, 210 S.W. 491 (1919); St. Louis & S.F. Ry. Co. v. Sears, 173 Okla. 483, 49 P. 2d 489 (1935).

[54] 45 U.S.C. 53.

[55] 53 STAT. 1404, c. 685, §1, 45 U.S.C. 54.

[56] 45 U.S.C. §§ 1-7.

equipment, such as brakes,[57] couplers,[58] grab irons[59] or drawbars.[60] Section 7 of the Safety Appliance Act[61] eliminated assumption of risk as a defense. However, contributory negligence was not mentioned in that Act, and it therefore remained as a common law defense until enactment of the F.E.L.A. in 1908. By Section 3 of the F.E.L.A.[62] contributory negligence has not only been modified as to liability under the F.E.L.A. but entirely eliminated as a defense to an action brought under the Safety Appliance Act.

In reading the many cases that decided close or borderline factual situations as to whether the conduct was labeled assumption of risk or contributory negligence, one cannot escape the thought, or even the conclusion, that frequently the case was first decided, and then the proper designation was made to achieve the result. All too frequently it seemed that the decisions non-suited railroad employees by applying the name assumption of risk to that which might have been called contributory negligence, and vice versa. However, in some cases the employee benefited. One such case[63] was an action under the Safety Appliance Act before enactment of the F.E.L.A., so that contributory negligence was still a defense but assumption of risk was not. There the decedent was a brakeman who had been ordered to make a coupling, and to do so he had to go between the cars. In failing to hit the slot, while attempting to guide the drawbar, he sustained fatal injuries. Justice Holmes found difficulty in drawing a sharp distinction between assumption of risk and contributory negligence, and observed that the difference between the two is one of degree rather than kind.[64]

Some other comparable situations have fallen on one side or the other of the close and wavering line between assumption of risk and contributory negligence. Where plaintiff's violation of a company rule was one of two or more causative factors that produced the accident,

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[57] 27 STAT. 531, c. 196, §1, 45 U.S.C. 1.
[58] 27 STAT. 531, c. 196, §2, 45 U.S.C. 2.
[59] 27 STAT. 531, c. 196, §4, 45 U.S.C. 4.
[60] 27 STAT. 531, c. 196, §5, 45 U.S.C. 5.
[61] 27 STAT. 532, c. 196, §7, 45 U.S.C. 7.
[62] 35 STAT. 66, c. 149, §3, 45 U.S.C. 53.
[63] Schlemmer v. Buffalo, Rochester, etc. Ry., 205 U.S. 1 (1907).
[64] *Id.* at page 12:

". . . Apart from the notion of contract, rather shadowy as applied to this broad form of the latter conception, proximity to the particular harm. The preliminary conduct of getting into the dangerous employment or relation is said to be accompanied by assumption of risk. The act more immediately leading to a specific accident is called negligence. But the difference between the two is one of degree rather than of kind; and when a statute exonerates a servant from the former, if at the same time it leaves the defense of contributory negligence still open to the master, a matter upon which we express no opinion, then, unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of risk under another name. . . ."

his action was ordinarily styled contributory negligence.[65] However, where one who had a "primary" duty failed in respect thereto, such conduct barred him completely, although the negligence of other employees concurred. This became known as the "primary duty" rule. In one case a freight train had stopped because a drawbar had pulled out of one of its cars. The brakeman remained in the caboose instead of dropping back to warn a following passenger train. He was killed when the freight train was struck by the passenger train.[66] The Supreme Court did not attempt to analyze or classify the conduct of the decedent, but merely decided against the plaintiff by saying that "there is no justification for a comparison of negligences or the apportioning of their effect."[67] The "primary duty" rule was developed further in a series of cases in which Justice Holmes felt that it would be a "perversion of the statute" to allow any recovery to the superior whose negligence was combined with that of his subordinate.[68] Subsequently, he used the proximate cause approach by concluding that "A failure to stop a man from doing what he knows he ought not to do, hardly can be called a cause of his act."[69] The need for deft use of language on this subject was obviated by the 1939 amendment, and since that time it has been uniformly held that the primary duty rule had been thereby abolished.[70]

As assumption of risk can no longer be used to defeat recovery, and contributory negligence can only reduce plaintiff's verdict but not preclude it, it is appropriate to consider the theories now relied upon to deny liability. Whether the term used is sole negligence (of the plaintiff), non-negligence, or proximate cause, they all amount to exactly the same thing.

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[65] Rocco v. Lehigh Valley R. Co., 288 U.S. 275 (1933). Terminal R. Assn. v. Farris, C.C.A. 8, 69 F. 2d 779 (1934). Southern Ry Co. v. Glenn, 228 Ala. 563, 154 So. 792 (1934). Brock v. Mobile & O. R. Co., 330 Mo. 918, 51 S.W. 2d 100 (1932).

[66] Great Northern Ry. Co. v. Wiles, 240 U.S. 444 (1916).

[67] *Id.* at p. 448.

[68] Frese v. Chicago, B. & Q. R. Co., 263 U.S. 1, 3 (1923).

"Whatever may have been the practice, he could not escape his duty, and it would be a perversion of the Employers' Liability Act to hold that he could recover for an injury primarily due to his failure to act as required, on the ground that possibly the injury might have been prevented if his subordinate had done more."

Davis v. Kennedy, 266 U.S. 147, 148 (1924).

"It seems to us a perversion of the statute to allow his representative to recover for an injury directly due to his failure to act as required on the ground that possibly it might have been prevented if those in secondary relation to the movement had done more."

[69] Unadilla Valley R. Co. v. Caldine, 278 U.S. 138, 142 (1928). Southern Ry. Co. v. Youngblood, 286 U.S. 313 (1931).

[70] Keith v. Wheeling & L.E. R. Co., C.C.A. 6, 160 F. 2d 654 (1947). Atlantic Coast Line R. Co. v. Mangum, 250 Ala. 431, 34 So. 2d 848 (1948). Atlantic Coast Line R. Co. v. Anderson, 200 Ga. 801, 38 S.E. 2d 610 (1946). Missouri-Kansas-Texas R. Co. v. Webb, Texas, 229 S.W. 2d 204 (1950).

Sole negligence refers to the claim that only the plaintiff was negligent, or at least only the plaintiff's own negligence contributed to cause his injury. The logical, and therefore necessary, conclusion must be that the defendant was not negligent because only one of the parties was negligent, solely the plaintiff.

Non-negligence presumably refers to the absence of negligence on the part of the defendant. In such cases the defense of contributory negligence does not even arise, because the term itself presupposes that there is negligence other than the plaintiff's.[71] Therefore, if the defendant railroad is not negligent, the plaintiff has not proved his case because under the F.E.L.A. the railroad is not an insurer but is liable only on the basis of negligence.[72]

Proximate cause has been another argument used effectively after assumption of risk was no longer a defense under the F.E.L.A. to avoid the assessment of event partial damages. The reasoning went along the line that assuming that the employee and railroad were both careless, only the negligence of the employee, and not that of the railroad, was a proximate cause of the accident. In this fashion the plaintiff had to clear two hurdles, first, to establish negligence of the defendant, and then to establish the proximate relation of the defendant's negligence and also to disassociate his own conduct from the proximate cause. This contention, however, does not take into account the very broad language used to define liability under the F.E.L.A. for injury or death "resulting in whole or in part from the negligence . . ." of the carrier.[73] The words "in part" have been held to relax the older concept of proximate cause which confined its limits to a "direct" or "efficient" cause, and to enlarge the scope of negligence for which the carrier is liable.[74]

Since the 1939 amendment, not only has assumption of risk been removed as a defense in all its forms, but, even more important, there has been a clear and definite trend in the decisions toward effectuating the purposes of the Act. Courts have become more jury conscious on the question of contributory negligence. Comparisons of fault are for the jury only to judge.[75] Contributory negligence cannot be decided by the court.[76] It has even been said that for practical purposes there is only left the question of whether the carrier was negligent and whether that negligence was a proximate cause of the injury.[77]

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[71] 9 Words and Phrases 382.

[72] See note 32, *supra.*

[73] 45 U.S.C. 51.

[74] Eglsaer v. Scandrett, C.C.A. 7, 151 F. 2d 562 (1945).

[75] Wilkerson v. McCarthy, 336 U. S. 53 (1949). *Cf.* Concurring opinion of Justice Frankfurter at p. 65. Urie v. Thompson, 337 U. S. 196 (1949). Terminal R. Assn. of St. Louis v. Scharb, C.C.A. 8, 151 F. 2d 361 (1945).

[76] Keith v. Wheeling & L. E. R. Co., C.C.A. 6, 160 F. 2d 654 (1947).

[77] Stewart v. Baltimore & O. R. Co., C.C.A. 2, 137 F. 2d 527 (1943). Francis v. Terminal R. Assn. 354 Mo. 1232, 193 S.W. 2d 909 (1946).

The effect of contributory negligence under the F.E.L.A. is somewhat different from its application under the common law and other statutes. Under the common law contributory negligence was a complete defense, and there was no recovery by an employee who was guilty of contributory negligence.[78] This rule likewise applied in many states. The more equitable and humanitarian rule of apportioning damages, or comparative negligence, was written into the F.E.L.A. at the time of its enactment, and has remained without change. Comparative negligence has been applied in several ways.

In Wisconsin,[79] if the plaintiff's negligence is not as great as the defendant's, he will not be barred, but the rule of comparative negligence is then applied to diminish a total recovery. Carried to an extreme, a plaintiff guilty of 49% of the combined negligence may recover 51% of his damages, whereas he recovers nothing if the parties were equally at fault. In Nebraska[80] and South Dakota[81] contributory negligence is not a bar to recovery when it is slight and defendant's negligence gross by comparison. The terms "slight" and "gross" are indefinite, comparative and variable; there is a wide latitude for interpretation, both by the jury and by the courts.

Under section 3 of the F.E.L.A.,[82] where the plaintiff has been guilty of contributory negligence, "damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." This provides for a diminution of damages because of contributory negligence,[83] and in the proportion that the plaintiff's negligence bears to the combined negligence of both parties.

Conclusion

The evolution of the law of master and servant, as applied in railroad cases, began in an era when Congress and the courts were sympathetic and responsive to the needs of a new and growing business. The worker had not yet effectively impressed the justice of his position upon judicial thinking. Hence, all three of the common law defenses, the fellow-servant doctrine, assumption of risk and contributory negligence,

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[78] Cleveland, C. C. & St. L. Ry. Co. v. Baker, C.C.A. 7, 91 Fed. 224 (1899). Hodges v. Kimball, C.C.A 4, 104 Fed. 745 (1900). Denver & R.G.R.Co. v. Arright, C.C.A. 8, 129 Fed. 347 (1904). Toledo, St. L. & W. R. Co. v. Gordon, C.C.A. 7, 177 Fed. 152 (1909). Borhmer v. Pennsylvania R. Co., C.C.A. 2, 252 Fed. 553 (1918), aff. 252 U.S. 496 (1920).

[79] Wisc. Stat. Sec. 331.045, adopted 1931.

[80] Neb. Revised Statutes (1943) §25-1151, adopted 1913.

[81] S. Dakota Code, §47,0304-1, adopted 1941.

[82] 35 Stat. 66, 45 U.S.C. 53.

[83] Norfolk & Western R. Co. v. Earnest, 229 U.S. 114 (1913). Seaboard Air Line R. Co. v. Tilghman, 237 U.S. 499 (1915). Illinois Central R. Co. v. Skaggs, 240 U.S. 66 (1916). Pennsylvania R. Co. v. Cole, C.C.A. 6, 214 Fed. 948 (1914). New York C. & St. L. R. Co. v. Niebel, C.C.A. 6, 214 Fed. 952 (1914). New York, C. & St. L. R. Co. v. Aigler, 10 Ohio App. 195 (1917). Hutchins v. Akron, Canton & Youngstown R. Co., C.C.A. 6, 162 F. 2d 189 (1947).

were available to absolve a railroad of liability by reason of injuries negligently inflicted upon employees. As the employee acquired greater stature, both politically and economically, the balance shifted until it has been recognized by judicial expression of the Supreme Court that the F.E.L.A. was designed to put on the railroad industry some of the cost of the legs, eyes, arms and lives which it consumed in its operations.[84]

Without reviewing the year by year change, suffice it to say that in this field of law the fellow-servant rule and assumption of risk have been laid to rest. Contributory negligence has been discarded as a defense under the Safety Appliance Act, and has been retained as part of the F.E.L.A. only as comparative negligence in diminution of damages.

Thus, there has been a definite trend away from the old philosophy of creating a liability for the consequences of negligence and then effecting a nullification by the imposition of conclusive defenses. Congress has reflected the changed thinking on the subject by enacting appropriate legislation. Under the present state of the law, and the realistic approach that currently marks judicial interpretation of it, defenses to the F.E.L.A. are indeed limited.

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[84] Concurring opinion of Justice Douglas in Wilkerson v. McCarthy, 336 U.S. 53, 68 (1949).

"The Federal Employers' Liability Act was designed to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consmed in its operations. Not all these costs were imposed, for the Act did not make the employer an insurer. The liability which it imposed was the liability for negligence. But judges had created numerous defenses—fellow-servant rule, assumption of risk, contributory negligence—so that the employer was often effectively insulated from liability even though it was responsible for maintenance of unsafe conditions of work. The purpose of the Act was to change that strict rule of liability, to lift from employees the 'prodigious burden' of personal injuries which that system had placed upon them, and to relieve men 'who by the exigencies and necessities of life are bound to labor' from the risks and hazards that could be avoided or lessened 'by the exercise of proper care on the part of the employer in providing safe and proper machinery and equipment with which the employee does his work'"