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Fellow Servant Rule Held an Inadmissable Defense to an Employee's Action Against His Employer for Injuries Sustained Due to the Negligence of a Coemployee

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both state and federal courts have asserted that the ad damnum clause exists solely to enable courts to assess whether they have jurisdiction over particular matters.[71] Consequently, the legitimacy of the prejudice bar to ad damnum clause amendments clearly is suspect.

Notably, the *Loomis* decision did not address the issue whether, absent a motion by the plaintiff, a court may act *sua sponte* to award more damages than requested in the ad damnum clause. The federal courts consistently have conformed judgments to verdicts in the absence of motions to amend.[72] Moreover, the explicit language of CPLR 3017(a) would seem to compel similar action by the New York courts.[73] Nevertheless, because the *Loomis* Court did not resolve this question, it is suggested that counsel for the plaintiff would be well-advised to move to amend the ad damnum clause to conform to the verdict, and not rely upon a court to act *sua sponte.*

Steven M. Rapp

DEVELOPMENTS IN NEW YORK LAW

Fellow servant rule held an inadmissible defense to an employee's action against his employer for injuries sustained due to the negligence of a coemployee

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[71] One federal court has noted that the ad damnum clause is "totally irrelevant" to the amount of money damages which a plaintiff may be awarded. Zuckerman v. Tatarian, 418 F.2d 878, 880 (1st Cir. 1969), *cert. denied,* 397 U.S. 1069 (1970). Indeed, the significance of the ad damnum clause has been addressed persuasively:

> The purpose of the *ad damnum* is only to establish jurisdiction. It has no bearing on what should be awarded to the plaintiff by the verdict. . . . [I]t is immaterial what the plaintiff thinks he should be awarded. It is immaterial what the defendant thinks should be awarded to the plaintiff.

Mitchell v. American Tobacco Co., 28 F.R.D. 315, 318 (M.D. Pa. 1961) (quoting AMERICAN BAR ASSOCIATION, PROCEEDINGS OF THE SECTION OF INSURANCE, NEGLIGENCE AND COMPENSATION LAW 163, 179-81 (1959)). The singular jurisdictional significance of the ad damnum clause also has been noted by several New York courts. "[T]he *ad damnum* clause has no other relevance or probative weight . . . except to confirm that plaintiff has in fact chosen the proper court, in a jurisdictional sense, to determine his action." Gold v. Huntington Town House, 64 App. Div. 2d 885, 887, 407 N.Y.S.2d 907, 909 (2d Dep't 1978) (Suozzi, J., dissenting).

[72] *E.g.,* Steinmetz v. Bradbury Co., 618 F.2d 21, 24 (8th Cir. 1980); Southwestern Inv. Co. v. Cactus Motor Co., 355 F.2d 674, 678 (10th Cir. 1966); United States *ex rel.* Bachman & Keffer Constr. Co. v. H.G. Cozad Constr. Co., 324 F.2d 617, 620 (10th Cir. 1963); Riggs, Ferris & Geer v. Lillibridge, 316 F.2d 60, 63 (2d Cir. 1963).

[73] *See* CPLR 3017(a) (McKinney Supp. 1980-1981); note 38 *supra.*

Under the doctrine of respondeat superior, an employer generally is liable for injuries caused by the negligent acts of his employees.[74] Significantly, pursuant to the fellow servant rule, an employer need not redress such injuries when the person harmed also is one of his employees.[75] The import of this rule, which has been criticized as unjust by courts and commentators,[76] has been dimin-

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[74] Burger Chef Sys. v. Govro, 407 F.2d 921, 925 (8th Cir. 1969); RESTATEMENT (SECOND) OF AGENCY § 219 (1958); *see* P.S. ATIYAH, ACCIDENTS, COMPENSATION AND THE LAW 254 (3d ed. 1980); J. MUNKMAN, EMPLOYER'S LIABILITY AT COMMON LAW 87 (7th ed. 1971). The vicarious liability of the employer for the torts of his employees is based upon the concept that the employer controls and directs the methods used by the employee in the execution of his duties. The employer, therefore, assumes the risk of loss resulting from injuries caused by the employee's negligence. *See* RESTATEMENT (SECOND) OF AGENCY § 208, Comment a (1958); Conant, *Liability of Principals for Torts of Agents: A Comparative View*, 47 NEB. L. REV. 42, 45 (1968).

[75] *E.g.*, Farwell v. Boston & W.R.R., 45 Mass. (4 Met.) 49, 57 (1842); Murray v. South Carolina R.R., 26 S.C.L. (1 McMul.) 385, 396-97 (1841); Priestly v. Fowler, [1835-1842] All. E.R. 449, 451. The fellow servant rule was created in *Priestly*, wherein Lord Abinger reasoned that the extension of the master's liability to his servants, once admitted, would carry forward to an "alarming" extreme. Priestly v. Fowler, [1835-1842] All. E.R. 449, 451; *see* H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT COVERING THE RELATION, DUTIES AND LIABILITIES OF EMPLOYERS AND EMPLOYEES 795 (1877); NEW YORK STATE COMMISSION ON EMPLOYER'S LIABILITY FIRST REPORT 12 (1910) [hereinafter cited as WAINWRIGHT COMMISSION REPORT]. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 80, at 528-29 (4th ed. 1971); RESTATEMENT (SECOND) OF AGENCY § 474 (1958). One of the justifications historically advanced for the fellow servant rule was that the employee voluntarily and knowingly took on the ordinary risks of employment. *See* Farwell v. Boston & W.R.R., 45 Mass. (4 Met.) 49, 57 (1842). Indeed, the employee was presumed to enjoy complete mobility in a market of unlimited employment opportunities. Therefore, he was expected to assume all the usual risks of his employment and to know the deficiencies of his fellow employees. *See id.* Another justification for the rule was the belief that carelessness in the workplace would be discouraged if no right of action existed in favor of coemployees and against employers. *See id.* Although such principles were applicable to small establishments and shops, they had little validity in large enterprises. 2 LABATT, MASTER AND SERVANT §§ 472, 473 (1904); W. PROSSER, *supra*, § 80, at 526-29.

Relying on Massachusetts and South Carolina authorities, *see* Farwell v. Boston & W.R.R., 45 Mass. (4 Met.) 49, 57 (1842); Murray v. South Carolina R.R., 26 S.C.L. (1 McMul.) 385, 396-97 (1838), the New York courts adopted the fellow servant rule in 1851. Coon v. Syracuse & Utica R.R., 5 N.Y. 492, 496 (1851); *see* Sherman v. Rochester & S.R.R., 17 N.Y. 153, 156 (1858); *cf.* Keegan v. Western R.R., 8 N.Y. 175, 180 (1853) (fellow servant rule inapplicable when injury results directly from employer's negligence). The early New York cases, as did most cases in jurisdictions which adopted the fellow servant rule, involved the liability of railroad companies. *E.g.*, Farwell v. Boston & W.R.R., 45 Mass. (4 Met.) 49, 60-62 (1842); Sherman v. Rochester & S.R.R., 17 N.Y. 153, 156 (1858). One commentator stated that it was "more than a coincidence" that the fellow servant rule developed during the era of great railroad expansion. Steuer, *The Fellow Servant Rule in New York*, 6 FORDHAM L. REV. 361, 361 (1937). For a discussion of the early cases involving railroad company liability, see H.G. WOOD, *supra*, at 795 n.1.

[76] *E.g.*, Crenshaw Bros. Produce Co. v. Harper, 142 Fla. 27, 47, 194 So. 353, 361 (1940) (dictum); Poniatowski v. City of New York, 14 N.Y.2d 76, 81, 198 N.E.2d 237, 238, 248

ished by workers' compensation[77] and employers' liability laws.[78] Nevertheless, the rule may be invoked in the infrequent case when injured employees do not fall within the scope of these statutes.[79]

N.Y.S.2d 849, 851 (1964); C. EASTMAN, WORK ACCIDENTS AND THE LAW 172-82 (1910); WAINWRIGHT COMMISSION REPORT, *supra* note 75, at 73 app. I. In *Crenshaw*, the plaintiff was injured in a collision caused by a coemployee who was the driver of a truck in which the plaintiff was a passenger. Crenshaw Bros. Produce Co. v. Harper, 194 So. at 356. Reasoning that the fellow servant rule was a judicially created defense and thus not binding, the *Crenshaw* court stated that, in future cases, it would not adhere to the doctrine. *Id.* at 363-64. Similarly, in Poniatowski v. City of New York, 14 N.Y.2d 76, 81, 198 N.E.2d 237, 238, 248 N.Y.S.2d 849, 851 (1964), a New York City police officer, who had been injured in a car driven by a fellow officer, sought to recover for his injuries from the city. *Id.* Although the Court of Appeals granted relief pursuant to a provision of the Municipal Law, it also commented upon the injustice of the fellow servant rule. Justice Fuld, in dictum, stated:

> The inherent injustice of a rule which denies a person, free of fault, the right to recover for injuries sustained through the negligence of another over whose conduct he has no control merely because of the fortuitous circumstance that the other is a fellow officer is manifest.

Id. at 81, 198 N.E.2d at 238, 248 N.Y.S.2d at 851. Twelve years after *Poniatowski* was decided, the Supreme Court, Kings County, relying exclusively on the dictum in *Poniatowski*, held that the fellow servant rule no longer was viable, and permitted a police officer who negligently was shot by a fellow officer to recover damages from the city. Jakes v. City of New York, 88 Misc. 2d 355, 358, 388 N.Y.S.2d 507, 509 (Sup. Ct. Kings County 1976); *see* Buckley v. City of New York, N.Y.L.J., Feb. 28, 1980, at 13, col. 3 (Sup. Ct. Bronx County), *aff'd mem.*, 81 App. Div. 2d 1044 (1st Dep't 1981) (allowing officer to recover damages based upon abrogation of fellow servant rule).

[77] *See* W. PROSSER, *supra* note 75, § 80, at 533. In response to the large number of industrial accidents leaving employees and their families destitute, the New York legislature, in 1909, enacted a workers' compensation law. *See* N.Y. LAB. LAW art. 14-a (1910). The law, however, was declared unconstitutional in Ives v. South Buffalo Ry., 201 N.Y. 271, 317, 94 N.E. 431, 448 (1911). Thereafter, the New York State Constitution was amended to provide that it should not be construed as limiting the legislature's power to enact a workers' compensation statute. *See* N.Y. CONST. art. 1, § 18. Finally, in 1913, on the authority of the amendment, the legislature enacted the New York Workers' Compensation Law, ch. 816, § 1 [1913] N.Y. Laws 2277. *See* Project, *New York Workmen's Compensation Law: Problems and Perspectives*, 26 BUFFALO L. REV. 637, 640-41 (1977) [hereinafter cited as Project].

[78] *See* N.Y. EMPL'RS LIAB. LAW § 2 (McKinney 1955 & Supp. 1980-1981). Under Section 2 of the New York Employers' Liability Law, the fellow servant rule is barred as a defense only when a negligent employee had been acting for his employer in a supervisory capacity. *Id.*; *see* WAINWRIGHT COMMISSION REPORT, *supra* note 75, at 14-15.

[79] *See* W. PROSSER, *supra* note 75, § 80, at 532-33. The fellow servant rule "has been said to have 'practically disappeared with [the enactment of] workmen's compensation'" laws. *Id.* at 533. Nevertheless, the rule has been invoked as an effective defense in actions instituted by employees in occupations not covered by workers' compensation. *See id.* at 526; 2C O. WARREN, NEGLIGENCE IN THE NEW YORK COURTS § 2.01[5][e], at 60 (Bender 1978). Employees not covered by workers' compensation have been denied recovery under the fellow servant doctrine. *E.g.*, Fay v. DeCamp, 257 N.Y. 407, 409-10, 178 N.E. 677, 678 (1931); Buchalski v. Kramer, 243 App. Div. 703, 704, 277 N.Y.S. 91, 92-93 (2d Dep't 1935); Glennie v. Falls Equip. Co., 238 App. Div. 7, 9, 263 N.Y.S. 124, 128 (4th Dep't 1933); *cf.* Reboni v. Case Bros., 137 Conn. 501, 505, 78 A.2d 887, 889 (1951) (fellow servant rule is operable except if employer is directly negligent). *But see* Poniatowski v. City of New York,

Recently, in *Lawrence v. City of New York*,[80] the Appellate Division, Second Department, confronted with such a situation, abolished the fellow servant rule, holding that it is not a viable defense to an employee's action against his employer for injuries sustained due to the negligence of a coemployee.[81]

In *Lawrence*, a New York City firefighter, Anthony Lawrence, was injured while fighting a fire in Brooklyn.[82] Lawrence, who was resting in the backyard of a burning building,[83] was struck and rendered unconscious by a couch which had been "thrown or pushed" from an upstairs window of the building.[84] During Lawrence's ensuing personal injury action, which was instituted more than 1 year after the accident, the defendant New York City moved to dismiss the complaint upon the theory that the plaintiff's exclusive remedy was under the New York Workers' Compensation Law,[85] or in the alternative, that the action was barred by the fellow servant rule.[86] The Supreme Court, Kings County, denied the motion, holding that neither the Workers' Compensation Law[87] nor

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14 N.Y.2d 76, 81, 198 N.E.2d 237, 238, 248 N.Y.S.2d 849, 851 (1964), *rev'g* 19 App. Div. 2d 64, 241 N.Y.S.2d 770 (2d Dep't 1963); Buckley v. City of New York, N.Y.L.J., Feb. 28, 1980, at 13, col. 3 (Sup. Ct. Bronx County), *aff'd mem.*, 81 App. Div. 2d 1044 (1st Dep't 1981); Jakes v. City of New York, 88 Misc. 2d 355, 356, 388 N.Y.S.2d 507, 509 (Sup. Ct. Kings County 1976).

[80] 82 App. Div. 2d 485, 447 N.Y.S.2d 506 (2d Dep't 1981), *aff'g* N.Y.L.J., Dec. 13, 1979, at 14, col. 5 (Sup. Ct. Kings County).

[81] *Id.* at 503-04, 447 N.Y.S.2d at 517.

[82] *Id.* at 487, 447 N.Y.S.2d at 508.

[83] *Id.*

[84] *Id.* Evidence was introduced at the trial tending to show that Lawrence and other firefighters had been directed by a superior officer to take a break. Furthermore, there was some evidence that during defenestration of smoldering items that might reignite the building, proper procedure required a lookout downstairs and warnings from the crew upstairs. *Id.* at 486-88, 447 N.Y.S.2d at 507-08.

[85] Lawrence v. City of New York, N.Y.L.J., Dec. 13, 1979, at 14, col. 5 (Sup. Ct. Kings County).

[86] *Id.* at 15, col. 1.

[87] The trial court held that New York City firefighters are not covered under Workers' Compensation because they are not included in the statutory definition of an employee, *see* N.Y. WORK. COMP. LAW §§ 2(3)-(5), 3(1) (McKinney 1965 & Supp. 1980-1981), and because the city had not elected coverage. *See* Lawrence v. City of New York, N.Y.L.J., Dec. 13, 1979, at 14, col. 6 (Sup. Ct. Kings County); N.Y. WORK. COMP. LAW § 3, Group 19; note 107 *infra*. Notably, it has long been the rule in New York that city policemen and firefighters are not covered by the Workers' Compensation Law. *E.g.*, Ryan v. City of New York, 228 N.Y. 16, 20, 126 N.E.2d 350, 351 (1920) (police officers); Krug v. City of New York, 196 App. Div. 226, 229-30, 186 N.Y.S. 727, 729-30 (3d Dep't 1921) (firefighters); 9 OP. N.Y. COMP. 184 (1953) (firefighters). In holding that city firefighters are not employees for purposes of workers' compensation, the *Lawrence* court noted the benefits accorded firefighters and police officers who are injured in the line of duty. Lawrence v. City of New York, N.Y.L.J., Dec. 13,

the fellow servant rule prohibited the action.[88]

On appeal, the Appellate Division, Second Department, affirmed.[89] Writing for a unanimous court, Justice Titone[90] initially noted that, pursuant to an exception to the fellow servant rule created by the New York Employers' Liability Law, a personal injury action probably would have inured to the plaintiff's benefit had it been timely instituted.[91] Because such action was time-barred, however, the court reviewed only the viability of the fellow servant doctrine.[92] In this regard, the court assessed the nondelegable duty[93] and assumption of risk[94] exceptions to the fellow servant

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1979, at 14, col. 6 (Sup. Ct. Kings County); *see* NEW YORK, N.Y., ADMIN. CODE ch. 19, § 487a-7.1, at 416 (1976) (full pay during absence from duty caused by injury); NEW YORK, N.Y., ADMIN. CODE ch. 19, § B19-4.0, at 444 (1976) (pension for permanent disability); NEW YORK, N.Y., ADMIN. CODE ch. 49, § B49-10.0, at 31 (1975) (paid hospital care and treatment). Interestingly, state police officers *are* covered by the mandatory coverage provision of the New York Workers' Compensation Law. N.Y. WORK. COMP. LAW § 3, Group 16 (McKinney 1965 & Supp. 1980-1981); *see* 1935 OP. N.Y. ATT'Y GEN. 189.

[88] Lawrence v. City of New York, N.Y.L.J., Dec. 13, 1979, at 15, col. 1 (Sup. Ct. Kings County). The lower court, citing the Court of Appeals dictum in *Poniatowski*, *see* note 76 *supra*, and its own decision in Jakes v. City of New York, 88 Misc. 2d 355, 358, 388 N.Y.S.2d 507, 509 (Sup. Ct. Kings County 1976), held that the fellow servant rule was not a defense to the plaintiff's action. N.Y.L.J., Dec. 13, 1979, at 15, col. 1.

[89] Lawrence v. City of New York, 82 App. Div. 2d 485, 504, 447 N.Y.S.2d 506, 517 (2d Dep't 1981).

[90] Justices Rabin, Margett, and Weinstein joined Justice Titone.

[91] *Id.* at 490, 447 N.Y.S.2d at 509. The New York Employers' Liability Law "provides that an action under such law must be commenced 'within one year after the occurrence of the accident causing the injury or death.' " *Id.* at 489 n.2., 447 N.Y.S.2d at 509 n.2. (quoting N.Y. EMPL'RS LIAB. LAW § 3 (McKinney 1955 & Supp. 1980-1981)). In *Lawrence*, the accident occurred on February 2, 1971, and the action was filed on February 8, 1972. Lawrence v. City of New York, 82 App. Div. 2d 485, 485-86, 447 N.Y.S.2d 506, 507 (2d Dep't 1981).

[92] 82 App. Div. 2d at 490, 447 N.Y.S.2d at 509.

[93] *Id.* at 490-95, 447 N.Y.S.2d at 509-12; *see* Loughlin v. New York, 105 N.Y. 159, 162, 11 N.E. 371, 372 (1887). An employee has a cause of action against his employer for the negligent performance of a nondelegable duty since it is a duty personal to the master. Hence, the nonperformance or negligent performance of that duty by anyone, including a fellow employee, will give rise to an action that will not be barred by the fellow servant rule. McGuire v. Bell Tel. Co., 167 N.Y. 208, 211-12, 60 N.E. 433, 434 (1901); 2 W.F. BAILEY, PERSONAL INJURIES § 537 (1912). Examples of nondelegable duties include the duty to provide a safe place to work, to provide safe equipment and tools, to give warnings of dangerous conditions of which the employee is unaware, to provide a sufficient number of workers, and to enforce work rules. W. PROSSER, *supra* note 75, § 80, at 526. The court in *Lawrence* held that the nondelegable duty exception would not act to bar the application of the fellow servant rule in the instant case. Lawrence v. City of New York, 82 App. Div. 2d 485, 495, 447 N.Y.S.2d 506, 512 (2d Dep't 1981). The court reasoned that the failure to provide a firefighter to direct traffic on the ground floor of the premises related to a detail of work, not to a duty personal to the master. *Id.* at 491-92, 447 N.Y.S.2d at 510.

[94] The fellow servant rule may not be invoked unless the employee has assumed the risk of injuries "arising from the carelessness and negligence of those who are in the same

rule, but held that neither was applicable in the instant case.[95] Justice Titone thereupon reasoned that because the fellow servant rule was not founded upon "natural justice but on an absurd and disingenuous public policy,"[96] it would be "illogical and self-defeating" to create further exceptions to the rule.[97] Moreover, the court questioned the propriety of barring coemployees, who are more likely to be injured in a workplace accident than are nonemployees, from recovery against an employer.[98] In light of these considerations,[99] the *Lawrence* court held the fellow servant rule to be invalid.[100]

It is submitted that the *Lawrence* court properly abrogated the fellow servant rule.[101] Indeed, it appears that the legislature,

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employment." 1 F.F. DRESSER, THE EMPLOYERS' LIABILITY ACTS AND THE ASSUMPTION OF RISK 259 (1902 & Supp. 1908); *see* Relyea v. Kansas City, Ft. S. & G.R.R., 112 Mo. 86, 93, 20 S.W. 480, 481 (1892) (en banc); Glennie v. Falls Equip. Co., 238 App. Div. 7, 9, 263 N.Y.S. 124, 128 (4th Dep't 1933). The court in *Lawrence* disposed of the assumption of risk issue by noting that although the jury had found that the plaintiff had not assumed the risk of the tortious incident, it did not and could not find, as a matter of law, that the plaintiff did not assume the ordinary risks of employment. The employee, simply by entering into the employment relationship, was said to knowingly assume the perils associated with his trade. Lawrence v. City of New York, 82 App. Div. 2d 485, 497, 447 N.Y.S.2d 506, 513 (2d Dep't 1981). The *Lawrence* court also observed that the plaintiff, a member of an engine company, and the negligent firefighters, members of a ladder company, were contributing to a common cause and would, therefore, be considered fellow servants under the common law. *Id.* at 497-98, 447 N.Y.S.2d at 513-14.

[95] 82 App. Div. 2d at 490-98, 447 N.Y.S.2d at 509-14; *see* notes 93 & 94 and accompanying text *supra*.

[96] 82 App. Div. 2d at 503, 447 N.Y.S.2d at 517. Justice Titone reasoned that the premise of the fellow servant rule, namely, that workplace safety would be encouraged by reducing the opportunity for recovery of damages, was based upon the erroneous assumption that an employee is "endowed with . . . ultra sensory perception . . . [sufficient] to forewarn him of the careless propensities of his working counterparts." *Id.*

[97] *Id.* at 502-03, 447 N.Y.S.2d at 517. Notably, judicial dissatisfaction with the fellow servant rule has prompted modifications and exceptions created on a case-by-case basis. *See* Fitzwater v. Warren, 206 N.Y. 355, 356, 99 N.E. 1042, 1042 (1912). The *Lawrence* court cited the nondelegable duty exception, the vice principal exception, the superior servant exception, the different department exception, and the dangerous agency exception as examples of the erosion of the fellow servant rule. 82 App. Div. 2d at 502, 447 N.Y.S.2d at 516.

[98] 82 App. Div. 2d at 503, 447 N.Y.S.2d at 517.

[99] *Id.* at 498-502, 447 N.Y.S.2d 514-16. The *Lawrence* court also found support for its holding in the Court of Appeals' decision in Poniatowski v. City of New York, 14 N.Y. 76, 81, 198 N.E.2d 237, 238, 248 N.Y.S.2d 849, 851 (1964), wherein the Court questioned the propriety of the fellow servant rule. 82 App. Div. 2d at 498-502, 447 N.Y.S.2d at 514-16.

[100] 82 App. Div. 2d at 503-04, 447 N.Y.S.2d at 517.

[101] New York Cent. R.R. v. White, 243 U.S. 188, 200 (1917); Hawkins v. Bleakley, 220 F. 378, 381-82 (S.D. Iowa 1914), *aff'd*, 243 U.S. 210, 219 (1917); Ives v. South Buffalo Ry., 201 N.Y. 271, 289, 94 N.E. 431, 437-38 (1911); *cf.* Dirken v. Great N. Paper Co., 110 Me. 374, 384-88, 86 A. 320, 325-26 (1913) (it is within a state's power to abrogate fellow servant rule

which also is empowered to abolish the rule, failed to do so merely because of the infrequency of the rule's usage. Nonetheless, it is suggested that the elimination of the fellow servant rule, by whatever means,[102] is essential to alleviate the inequity occasioned by permitting some employees to redress their injuries under employers' liability or workers' compensation laws, while nonsuiting other employees who are subject to the common-law fellow servant rule.

Of course, abolition of the fellow servant rule will impact upon both the Employers' Liability and the Workers' Compensation laws. Notably, section 2(2) of the Employers' Liability Law, which provides an exception to the fellow servant rule when injuries have been caused by a negligent co-employee acting in a supervisory capacity,[103] would be rendered superfluous.[104] Moreover, for those employees who would heretofore have had only the Employers' Li-

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with respect to acts of superintendence). Several states have statutes limiting or totally abrogating the fellow servant defense. *E.g.*, ARK. STAT. ANN. §§ 81-1201, 81-1209 (1947); COLO. REV. STAT. § 8-42-201 (1973) (complete abrogation); IDAHO CODE § 44-1401 (1977); ILL. ANN. STAT. ch. 48, § 172-38 (Smith-Hurd 1969); IND. CODE ANN. § 22-3-9-1 (Burns 1974); MASS. GEN. LAWS ANN. ch. 153, § 1 (West 1958); OHIO REV. CODE ANN. § 4113.03 (Page 1973); 43 PA. CONS. STAT. ANN. § 171 (Purdon 1964). *See also* J. MUNKMAN, EMPLOYERS' LIABILITY AT COMMON LAW 87 (7th ed. 1971) (abrogation of fellow servant rule in England by statute).

[102] Although the appellants in *Lawrence* had argued that only the legislature could abrogate the fellow servant rule, Brief for Appellant at 16, Lawrence v. City of New York, 82 App. Div. 2d 485, 447 N.Y.S.2d 506 (2d Dep't 1981), the court did not address that issue in invalidating the rule. Notably, however, in Beutler v. Grand Trunk Junction Ry., 224 U.S. 85, 88 (1912), Justice Holmes stated that "[t]he doctrine as to fellow servants may be, as it has been called, a bad exception to a bad rule, but it is established, and it is not open to courts to do away with it upon their personal notions of what is expedient." *Id.* at 88. *But see* Millington v. Southeastern Elevator Co., 22 N.Y.2d 498, 508, 239 N.E.2d 897, 903, 293 N.Y.S.2d 305, 313 (1968) (citing Woods v. Lancet, 303 N.Y. 349, 355-56, 102 N.E.2d 691, 694-95 (1951)). The Court in *Millington* held that it was necessary for the courts to remain flexible and to alter court-made rules when a change was required. 22 N.Y.2d at 508, 239 N.E.2d at 903, 293 N.Y.S.2d at 313; *see* Crenshaw Bros. Produce Co. v. Harper, 142 Fla. 27, 47, 194 So. 353, 361 (1940).

[103] N.Y. EMPL'RS LIAB. LAW § 2(2) (McKinney 1955 & Supp. 1980-1981). It has been noted that the cause of action under the Employers' Liability Law does not differ materially from that existing at common law except that, under the Act, the employee could recover for the negligence of a fellow servant who, at the time of the accident, was acting in a supervisory capacity. WAINWRIGHT COMMISSION REPORT, *supra* note 75, at 14; Project, *supra* note 77, at 642 n.26. *See generally* G. ALGER & S. SLATER, NEW YORK EMPLOYERS' LIABILITY ACT 55 (2d ed. 1907).

[104] Of course, the Employers' Liability Law already has been rendered largely obsolete by the Workers' Compensation Law. Indeed, the liability of an employer under the New York Employers' Liability Act is restricted to employment situations not within the coverage of the New York Workers' Compensation Law. N.Y. EMPL'RS LIAB. LAW iii (McKinney 1955).

ability Law exception available to them, a significant restriction to suit is removed—as a prerequisite to the use of such law, notice must be served on an employer within 1 year of an accident.[105] In contrast, of course, personal injury causes of action may be commenced within 3 years of a tortious event.[106]

The impact of the *Lawrence* decision upon the administration of the Workers' Compensation statute also is significant. Since there is now greater potential for an injured employee not covered by Workers' Compensation to recover large judgments in a common-law cause of action, it appears that employers increasingly will elect Workers' Compensation coverage to protect themselves from large and unexpected adverse judgments.[107] Surely, this response, which will increase the number of employees covered by Workers' Compensation, is desirable.

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Notwithstanding court officer's declaration that defendant is "under arrest," absence of probable cause does not require suppression of evidence seized during pat-down search when other indicia of arrest are not present

A warrantless search is considered illegal under the fourth amendment[108] unless it falls within one of the narrow exceptions

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[105] N.Y. EMPL'RS LIAB. LAW § 3 (McKinney 1955 & Supp. 1980-1981); *see* note 91 *supra*.

[106] CPLR 214 (1972 & Supp. 1980-1981).

[107] *See, e.g.*, Lane v. Flack, 73 App. Div. 2d 65, 67, 425 N.Y.S.2d 648, 650 (3d Dep't 1980), *aff'd*, 52 N.Y.2d 856, 857, 418 N.E.2d 671, 671, 437 N.Y.S.2d 78, 78 (1981). In *Lane*, because the defendant county hospital had brought itself within the coverage of the New York Workers' Compensation Law, recovery under such statute was held to be the plaintiff's exclusive remedy. *Id.*; *see* Jamison v. Encarnacion, 281 U.S. 635, 640-41 (1930); N.Y. WORK. COMP. LAW § 11 (McKinney 1955 & Supp. 1980-1981) (recovery under the Workers' Compensation Law is exclusive); COMMISSION OF THE AMERICAN FEDERATION OF LABOR, THE NATIONAL CIVIC FEDERATION, WORKMEN'S COMPENSATION, S. DOC. No. 419, 63d Cong., 2d Sess. 17 (1914); *Workmen's Compensation: Hearings on H.R. 1 Before the Committee on the Judiciary*, 61st Cong., 138 (1910) (brief of H.V. Mercer). Significantly, Section 3, Group 19 of the New York Workers' Compensation Law provides that "[a]ny municipal corporation . . . may bring its employees . . . within the coverage of this chapter . . . notwithstanding the definitions of the terms 'employment', 'employer' or 'employee'" N.Y. WORK. COMP. LAW § 3(1), Group 19 (McKinney 1965 & Supp. 1980-1981); *see* 9 OP. N.Y. COMP. (1953); 1976 INF. OP. N.Y. ATT'Y GEN. 140; *cf.* 9 OP. N.Y. COMP. 297 (1953) (village has implied authority to elect workers' compensation coverage).

[108] The fourth amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects,