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Fellow-Servant Rule in Florida

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FELLOW-SERVANT RULE IN FLORIDA

Under an established common law rule, commonly referred to as the respondeat superior doctrine,[1] a master is liable to third persons for injuries caused by the negligence or misconduct of an employee when acting within the scope of his employment.[2] The theory usually advanced is that, since the master controls his servant's acts and receives the attendant benefits, he should be liable for any wrongful acts performed in his behalf.[3] The fellow-servant rule is one of three common law defenses[4] available to the master to defeat recovery under the respondeat superior doctrine; the others, assumption of risk[5] and contributory negligence,[6] are not within the scope of this Note.

ORIGIN

The fellow-servant rule originated in the English case of *Priestley v. Fowler*,[7] in which Lord Abinger held that a fellow-servant's negligence is one of the risks assumed when a servant accepts employment. Essentially the rule is but a part of the assumption of risk doctrine;[8] its extensive use, however, has caused it to be considered as a separate defense by the courts.

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[1]See, *e.g.*, Mechem, *Employer's Liability*, 4 ILL. L. REV. 243, 249 (1909).

[2]*E.g.*, Coon v. Syracuse & Utica R. R., 5 N.Y. 492 (1851); *cf.* Winn & Lovett Groc. Co. v. Archer, 126 Fla. 308, 171 So. 214 (1936); Stinson v. Prevatt, 84 Fla. 416, 94 So. 656 (1922).

[3]*E.g.*, Flike v. Boston & Albany R.R., 53 N.Y. 550 (1873). Mr. Justice Holmes severely criticized the respondeat superior doctrine on the ground that it forces one man to pay for another's wrongs. He suggested that the real reason for the doctrine is the employer's deep pocket, Holmes, *Agency*, 5 HARV. L. REV. 1 (1891). The doctrine, however, is not without support. See, *e.g.*, Morris, *The Torts of an Independent Contractor*, 29 ILL. L. REV. 339, 340 (1934).

[4]See 1 MECHEM, LAW OF AGENCY §§1643-1678 (2d ed. 1914).

[5]See Wilson & Toomer Fertilizer Co. v. Lee, 90 Fla. 632, 106 So. 462 (1925).

[6]See Atlas Dredging Co. v. Mitchell, 74 Fla. 307, 77 So. 542 (1917).

[7]3 M. & W. 1, 150 Eng. Rep. 1030 (Ex. 1837). Plaintiff, a butcher boy's helper, was injured as a result of the overloading of a van by the butcher boy. Neither the plaintiff nor the defendant, his master, knew of the overloading. In a civil suit for damages the court held that the master was not liable, since a servant is not bound to risk his safety in an employer's service and may avoid risks by refusing to accept employment in which he apprehends injury.

[8]Indeed, the *Priestley* case is also cited as the origin of the defense of assumption of risk, 3 LABATT, MASTER AND SERVANT 3102 (2d ed. 1913).

Briefly stated, the fellow-servant rule provides that a master is not liable to a servant injured as the result of a co-servant's negligence, even though he would be liable under similar circumstances to a third person not his servant. South Carolina[9] and Massachusetts,[10] the first American jurisdictions to adopt this defense, were but the forerunners; today Florida[11] and most other jurisdictions in the United States[12] recognize the rule as a limitation to the respondeat superior doctrine.

Judge-Made Exceptions

In order to minimize the hardships resulting from close adherence to the fellow-servant rule, several courts,[13] following Ohio's lead,[14] adopted the vice-principal exception. In the leading Ohio case[15] an engineer was allowed to recover from a railroad for injuries caused by the negligence of the conductor. The court advanced the idea that, since the conductor was a supervisor carrying out the acts of the master, he was not a fellow-servant of the engineer. Other persons in charge of carrying out the master's work, as well as train conductors, have been called vice-principals, with the result that the injured servant was allowed to recover from his master.[16]

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[9]Murray v. South Carolina R.R., 11 S.C. 166 (1841).

[10]Farwell v. Boston & Worcester R.R. Corp., 4 Metc. 49, 38 Am. Dec. 339 (Mass. 1842).

[11]Parrish v. Pensacola & Atl. R.R., 28 Fla. 251, 9 So. 696 (1891).

[12]*E.g.*, Nolan v. New York, N.H. & H. R.R., 70 Conn. 159, 39 Atl. 115 (1898); Kerr v. Crown Cotton Mills, 105 Ga. 510, 31 S.E. 166 (1898); Zienke v. Northern Pac. Ry., 8 Idaho 54, 66 Pac. 828 (1901); Stewart v. International Paper Co., 96 Me. 30, 51 Atl. 237 (1901); Hunn v. Michigan Cent. R.R., 78 Mich. 513, 44 N.W. 502 (1889); Hawk v. McLeod Lumber Co., 166 Mo. 121, 65 S.W. 1022 (1901); Mollhoff v. Chicago, R.I. & P. R.R., 15 Okla. 540, 82 Pac. 733 (1905); Duncan v. A. & P. Roberts Co., 194 Pa. St. 563, 45 Atl. 330 (1900).

[13]Collier v. Tennessee Coal Co., 155 Ala. 375, 46 So. 487 (1908); Allen v. Standard Box & Lumber Co., 53 Ore. 10, 96 Pac. 1109 (1908); Reese v. Jones & Laughlin Steel Co., 243 Pa. St. 336, 90 Atl. 63 (1914).

[14]Little Miami R.R. v. Stevens, 20 Ohio 415 (1851).

[15]*Ibid.*

[16]*E.g.*, Day v. Chicago, M. & St. R.R., 284 Ill. 534, 120 N.E. 480 (1918) (person temporarily acting as foreman considered a vice-principal as to one of his crew of carpenters); Wagner v. Gibsonite Constr. Co., 220 S.W. 890 (Mo. 1920) (carpenter operating mechanical saw considered vice-principal as to a carpenter's helper); Petroleum Iron Works Co. v. Burlington, 80 Okla. 43, 193 Pac. 980 (1920) (department head vice-principal as to a mere laborer); Allen v. Chamberlain, 134 Tenn. 438, 183 S.W. 1034 (1916) (railroad section foreman considered vice-principal as to section hand).

In an early Florida case[17] the Court defined a fellow servant as a person who has the same common enterprise and who is attempting to accomplish the same general purpose as the injured servant. Under this broad definition the Court found that an engineer was a fellow servant of a fireman,[18] a switchman,[19] and even a common laborer.[20] In *Atlantic Coast Line Railroad Co. v. Beazley*,[21] however, the Court allowed a flagman injured as a result of the acts of the conductor to recover from the railroad on the basis of the vice-principal exception. And in the comparatively recent case of *Crenshaw Bros. Produce Co. v. Harper*,[22] a truck driver was considered a vice-principal in so far as a student helper was concerned, and the latter was allowed to recover. Mr. Justice Brown severely criticized the rationale of the fellow-servant rule and urged that it be abolished altogether.[23]

Legislative Change

The Florida Legislature, recognizing that injustices were being caused by the use of this defense, in 1887 enacted a statute[24] that abrogated the fellow-servant rule in cases involving railroads. The Florida Court in construing this statute has tended to restrict its meaning despite the general criticism of the co-servant rule.[25] In *Luster v. Geneva Mill Co.*,[26] for example, the Court held that a person injured while operating a tramway in conjunction with a lumber business was not operating a railroad as contemplated by the statute. The fellow-servant rule was allowed as a defense, and the plaintiff-employee was denied recovery from the lumber company.

In 1913 the Legislature again limited the scope of the fellow-

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[17]Stearns & Culver Lumber Co. v. Fowler, 58 Fla. 362, 50 So. 680 (1909).

[18]South Florida R.R. v. Price, 32 Fla. 46, 13 So. 638 (1893).

[19]Prairie Pebble Phosphate Co. v. Taylor, 64 Fla. 403, 60 So. 114 (1912).

[20]Ingram-Dekle Lumber Co. v. Geiger, 71 Fla. 390, 71 So. 552 (1916).

[21]54 Fla. 311, 45 So. 761 (1907).

[22]142 Fla. 27, 194 So. 353 (1940).

[23]*Id.* at 47, 194 So. at 361.

[24]Fla. Stat. §768.07 (1949). This statute was patterned upon the Georgia statute and is typical of legislation passed in other states with regard to railroads, 1 Mechem, Law of Agency §1679 (2d ed. 1914).

[25]See, *e.g.*, Steuer, *The Fellow Servant Rule in New York*, 6 Ford. L. Rev. 361 (1937); 1 Baylor L. Rev. 489 (1949). Professor Mechem notes that the rule ". . . is difficult to account for except upon considerations of expediency rather than natural justice," 1 Mechem, Law of Agency §1643 (2d ed. 1914).

[26]102 Fla. 350, 135 So. 854 (1931).

servant defense by providing in effect that it should not be available if the injury occurred in certain types of employment.[27] The statute sets out certain hazardous occupations[28] and expressly provides that as to these occupations the assumption of risk doctrine is abrogated.[29] The Florida Court in *Atlantic Coast Line Railroad Co. v. Shouse*[30] stated that the purpose of the statute is to restrict the scope of the fellow-servant doctrine, and held that one employed in the enumerated hazardous occupations did not assume the risk of a co-employee's negligence.

Workmen's compensation statutes have also drastically restricted the orbit of the fellow-servant rule. Legislation of this type was first enacted in England,[31] where the fellow-servant defense was likewise first advanced. The protection that the English act gave to employees was rendered almost nugatory, however, when the English courts found that an employee could contract away rights given to him under the statute.[32] In America today, under similar statutes the employee is denied the right to contract away such benefits, either by the terms of the statute[33] or by decisions that hold such contracts void as against public policy.[34]

The Florida Workmen's Compensation Law,[35] passed in 1935, applies to employers having more than three employees, and expressly excepts farm laborers, domestic servants, casual employees, and many others from coverage.[36] It provides for an election by the employee:

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[27]FLA. STAT. c. 769 (1949).

[28]FLA. STAT. §769.01 (1949) reads as follows: "This chapter shall apply to persons engaged in the following hazardous occupations in this state; namely, railroading, operating street railways, generating and selling electricity, telegraph and telephone business, express business, blasting and dynamiting, operating automobiles for public use, boating, when boat is propelled by steam, gas or electricity."

[29]FLA. STAT. §769.04 (1949).

[30]83 Fla. 156, 91 So. 90 (1922).

[31]43 & 44 VICT. c. 42 (1880).

[32]Griffiths v. Earl of Dudley, 9 Q.B.D. 357 (1882).

[33]*E.g.*, ARIZ. CODE ANN. §56-806 (1939); ARK. STAT. ANN. tit. 81, §1320(a) (1947); OKLA. STAT. ANN. tit. 85, §47 (1936).

[34]Devise v. Delano, 272 Ill. 166, 111 N.E. 742 (1916); Pittsburg C.C. & St. L. Ry. v. Ross, 169 Ind. 3, 80 N.E. 845 (1907); Cannaday v. Atlantic C.L. R.R., 143 N.C. 439, 55 S.E. 836 (1906).

[35]FLA. STAT. c. 440 (1949).

[36]FLA. STAT. §440.02(1) (1949): ". . . officers elected at the polls . . . professional athletes such as professional boxers and wrestlers, and baseball, football, basketball, hockey, pole, tennis, jai alai and similar players excluding also all

He can either accept certain fixed compensation under the act or sue under the common law.[37] When he brings his action at law, however, the common law defenses, including the fellow-servant rule, are available to the employer.

CONCLUSION

Lord Abinger, in announcing the fellow-servant rule in *Priestley v. Fowler*, admitted that he lacked judicial precedent; he nevertheless sought to justify the rule enunciated by a process of inductive reasoning:[38]

> "If the owner of the carriage is therefore responsible for the sufficiency of his carriage to his servant, he is responsible for the negligence of his coach-maker, or his harness-maker, or his coachman. The footman . . . may have an action against his master for a defect in the carriage owing to the negligence of the coach-maker, or for a defect in the harness, arising from the negligence of the harness-maker, or for drunkenness, neglect, or want of skill in the coachman . . . . The master, for example, would be liable to the servant for the negligence of the chambermaid, for putting him into a damp bed; for that of the upholsterer, for sending in a crazy bedstead whereby he was made to fall down while asleep and injure himself; for the negligence of the cook, in not properly cleaning the copper vessels used in the kitchen: of the butcher, in supplying the family with meat of a quality injurious to the health; of the builder, for a defect in the foundation of the house, whereby it fell, and injured both the master and the servant by the ruins."

The supposed absurdity of the consequences led Lord Abinger to decide against the servant. His logic, however, has been concisely and effectively criticized:[39]

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referees, judges, umpires, trainers, masseurs and similar performers or attendants incident to professional exhibitions and performance of athletic games, sports and contests, turpentine labor, labor in processing gum-spirits of turpentine, crude gum, oleorosin and gum rosin."

[37]FLA. STAT. §440.07 (1949).

[38]Priestley v. Fowler, 3 M. & W. 1, 150 Eng. Rep. 1030, 1032 (Ex. 1837).

[39]DOWNEY, HISTORY OF WORK ACCIDENT INDEMNITY IN IOWA 239 (1912). See note 25 *supra* for general criticisms of the fellow-servant doctrine.

"Had the learned and antiquated Lord drawn his analogies from the factories or steam railways then flourishing all about him, his arguments might have seemed less conclusive even to himself."

Despite the fallacy of his reasoning Lord Abinger should not be dealt with too severely. At the time he handed down the *Priestley* decision the laissez faire doctrine was at its zenith as a result of the writings of Adam Smith and Jean Baptiste Say, the great French teacher and exponent of Smith's theories.[40]

In all probability the only reason that fragments of the rule remain is that they seem of such little consequence. The fellow-servant defense in Florida, for example, can only be used against those who are not covered by the Workmen's Compensation Law or who, although covered, choose to bring a common law action rather than accept the compensation allowed under the Act.[41] The public policy of today as manifested by workmen's compensation laws – that injuries caused by industry be charged as a cost of production[42] – requires the complete abolition of the rule. The fact that the defense is available in only a few instances is not an adequate reason to retain a rule that, according to most authorities,[43] is without any justification other than mere expediency. But, since the Florida Legislature has taken it upon itself to limit the application of the rule without eliminating it altogether, it is not for the judiciary to declare its dissolution. Until such time as the members of the Legislature see fit to abolish the rule, the courts of Florida can only apply the common law doctrine without regard to possible injustices.

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[40]*Cf.* CLARK, LAW OF THE EMPLOYMENT OF LABOR c. 7 (1911);MCCONNELL, BASIC TEACHINGS OF THE GREAT ECONOMISTS 356, 357 (1943); USHER, INTRODUCTION TO THE INDUSTRIAL HISTORY OF ENGLAND 425 (1920).

[41]See note 37 *supra.*

[42]*See* General Properties Co. v. Greening, 154 Fla. 814, 820, 18 So.2d 908, 911 (1944); Protectu Awning Shutter Co. v. Cline, 154 Fla. 30, 36, 16 So.2d 342, 343 (1944).

[43]See note 25 *supra.*