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# Jury Instruction On Assumption Of Risk Under Fela

quired is usually sufficiently strong so as to indicate guilt independent of the information. If past experience has proved the informer to be reliable, the amount of corroboration necessary is less than that required if the informer is unreliable. How much less depends upon the facts of each case.

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## JURY INSTRUCTION ON ASSUMPTION OF RISK UNDER FELA

The question arises in actions under the Federal Employers' Liability Act as to whether the trial judge should instruct the jury on the issue of assumption of risk, despite the fact that assumption of risk is not a defense under the Act.[1]

This question was presented in *Koshorek v. Pennsylvania R.R.*[2] The plaintiff, who had worked for eighteen years for the Pennsylvania Railroad in a car repair shop, had to stop work on account of a lung condition, diagnosed as pulmonary emphysema and fibrosis. Koshorek brought an action against the Railroad, contending that operations in the repair shop created a silica hazard by raising dust and dirt in the air, and that his lung condition was caused by exposure to this hazard.

There was a conflict in the evidence as to whether a silica hazard actually existed, the plaintiff admitting that he was aware of the dust in the shop. The trial judge instructed the jury as to the Railroad's affirmative duties and on the issue of comparative negligence.[3] The plaintiff also requested an instruction on assumption of risk under the FELA to the effect that the plaintiff did not assume any risk as a result of the Railroad's failure to supply a reasonably safe place to work.[4] The court refused the instruction on the ground that the point was already covered adequately and properly by the instruction on the Railroad's affirmative duties. The jury returned a verdict for the defendant Railroad. The plaintiff's motion for a new trial was denied and he appealed to the United States Court of Appeals for the Third Circuit on the ground that the District Court erred in its refusal to grant the requested instruction.

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[1]For compilation of cases raising this question under the FELA see 45 U.S.C.A. § 54, notes 220-23 (1954).

[2]318 F.2d 364 (3d Cir. 1963).

[3]Id. at 366 n.7.

[4]Id. at 366 n.8.

The Court of Appeals, in a 2-1 decision, reversed the judgment of the District Court, remanding for a new trial. The court stated that the "retention of the doctrine of comparative negligence and the abrogation of the defense of assumption of risk necessitates that a careful distinction between the two concepts be made in a case such as that at bar arising under the Act,"[5] and further, "[H]ad an adequate distinction between conduct constituting contributory negligence and that which would have constituted assumption of risk been pointed out to the jurors in the charge, the jury might well have reached a different verdict."[6]

The Federal Employers' Liability Act[7] adopts the doctrine of comparative negligence,[8] under which contributory negligence by the employee does not bar but only diminishes the amount of recovery. However, where a violation by the employer of a safety statute contributed to the injury or death, the Act completely abolishes contributory negligence as a defense.[9] Under the 1939 Amendment,[10] the Act also

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[5]Id at 367.

[6]Id. at 369-70.

[7]The first Federal Employers' Liability Act, 34 Stat. 232, was passed in 1906, but was held unconstitutional because it included employees engaged in intrastate commerce. Employers' Liability Cases, 207 U.S. 463 (1908). The second Federal Employers' Liability Act, 35 Stat. 65 (1908), 45 U.S.C. §§ 51-60 (1958), passed in 1908, covers liability of railroads engaged in interstate commerce to their employees. It was held constitutional. Second Employer's Liability Cases, 223 U.S. 1 (1912). Unlike most Workmen's Compensation Acts, liability under the FELA is based upon the employer's negligence.

[8]"Comparative negligence by the plaintiff is that negligence which joins with the negligence of the defendant in proximately causing the injuries of the plaintiff and goes in reduction of the amount of recovery in proportion that the negligence of the plaintiff compares with that of defendant. . . ." Whatley v. Henry, 90 Ga. 486, 16 S.E.2d 214, 220 (1941).

[9]45 U.S.C. § 53 (1958) provides: "In all actions hereafter brought against any such common carrier by railroad under or by virture of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided,* That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

[10]Under the Act as passed in 1908 the defense of assumption of risk is available to the employer, except where the employer's violation of a safety statute contributed to the injury or death of the employee. Ch. 149, § 4, 35 Stat. 65. This section, as amended by the Act of August 11, 1939, states: "In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in

provides that the employee does not assume any risk of employment where the negligence of the employer[11] was a contributing cause of the injury or death.[12]

In the absence of an instruction on assumption of risk there are two possible errors that the jury may make. The possibility of such errors provides a reason why the trial judge should instruct the jury on assumption of risk even though it is not a defense under the Act.

The first possible error is that the jury will consider actions of the plaintiff constituting assumption of risk as establishing that the employer was not negligent. Under the literal language of the 1939 amendment, the defense of assumption of risk is eliminated only when there has been negligence by the employer.[13] It would seem, therefore, that it would not make any difference whether the jury based its decision for the defendant on assumption of risk by the plaintiff or non-negligence of the defendant. However, the United States Supreme Court in *Tiller v. Atlantic Coast Line R.R.*[14] held that "every vestige of the doctrine of assumption of risk was obliterated from the law 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.' "[15] Thus, the Supreme Court has abolished assumption of risk, in both its meanings,[16] as a defense. It is pointed out by Harper

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any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." Ch. 865, § 4, 53 Stat. 1404 (1939), 45 U.S.C. § 54 (1958).

[11]The amendment, by including "officers, agents, and employees" of the railroad, has abolished the common law "fellow servant doctrine." Under the Act, the negligence of a fellow employee is treated as negligence of the employer, and cannot defeat recovery. See Joice v. Missouri-Kan.-Tex. R.R., 354 Mo. 439, 189 S.W.2d 568, 572-73 (1945).

[12]For the United States Supreme Court interpretation of the amendment see Tiller v. Atlantic Coast Line R.R., 318 U.S. 54 (1943).

[13]"[E]mployee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part *from the negligence* of any of the officers, agents, or employees of such carrier . . . ." (Emphasis added.) 53 Stat. 1404 (1939), 45 U.S.C. § 54 (1954).

[14]318 U.S. 54 (1943).

[15]Id. at 58.

[16]"[A]ssumption of risk had come to have a dual aspect in master and servant cases, namely, (1) assumption of the ordinary risks of employment which the master was not bound to protect the servant against, but the servant had to protect himself against, and (2) assumption of risks created by the negligence of the master (but known to and appreciated by the servant)." Mr. Justice Frankfurter, in his concurring opinion in the Tiller case, supra note 14 at 68, contended the amendment abolished only the second aspect. However, a majority of the court did not agree. 2 Harper & James, Torts § 21.4 n.9 at 1177, 1178 (1956).

and James[17] that this decision did not eliminate negligence as a basis of liability under the Act, but it removed the burden of self-protection from the employee and requires the employer to protect the employee against foreseeable sources of injury. It follows that a situation may arise where the jury may return an erroneous judgment by considering the plaintiff's assumption of the risk of the working conditions under the guise of non-negligence of the employer. Such a situation arose in *Atlantic Coast Line R.R. v. Burkett*[18] where the plaintiff sustained injuries from falling backwards over a pile of debris while carrying a rail. The plaintiff contended that, although he knew the debris was there, the defendant was liable because he did not use reasonable care to furnish the plaintiff a safe place to work. The defendant contended that it was not negligent, that it was the plaintiff's duty to keep the yard free of debris, and that the employee's negligence in walking backwards caused the accident. The trial judge felt that there may be some confusion by the jury as to whether the employee had assumed the risk of the defendant's failure to use due care which would not constitute a defense to the employer, or whether the defendant had not been negligent, a full defense. Therefore, he instructed the jury, over the defendant's objection,[19] on the issue of assumption of risk to distinguish it from non-negligence of the employer. The jury found for the plaintiff and the defendant appealed on the ground that the trial court erred in instructing on assumption of risk. The Court of Appeals held that the instruction was proper, stating, "We think that the trial judge was justified in thinking that in the absence of a charge on assumption of risk, the jury might have considered that defense under the guise of nonnegligence."[20]

A second danger of error, in the absence of an instruction, is that the jury will consider as contributory negligence, actions of the employee that actually constitute assumption of risk. If the jury were to make this error, the amount of damages due the plaintiff would be erroneously reduced under the doctrine of comparative negligence,

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[17]2 Harper & James, supra note 16.

[18]192 F.2d 941 (5th Cir. 1951).

[19]The defendant objected on the ground that "there was no issue made by the pleadings or evidence with respect to any assumption of risk and the injection of this issue would tend to lead the jury to believe that the plaintiff might not be required under the law to exercise ordinary care that would be placed upon him by all the circumstances of the case, and such charge was calculated to confuse the jury to the prejudice of the defendant." Atlantic Coast Line R.R. v. Burkett, supra note 18 at 943.

[20]Id. at 943.

when actually the plaintiff is entitled to full recovery.[21] *Nickell v. Baltimore & O. R.R.*[22] involved a situation in which the possibility of such an error arose where the employee was struck by one of the Railroad's express trains while crossing the tracks to go to work. A tunnel had been provided for passing under the tracks, but the path across the tracks was often used by employees. The Railroad had a rule that employees were not to cross the tracks except in the performance of their duties. The question presented was whether the plaintiff was contributorily negligent in carelessly crossing the tracks, or whether he assumed the risk by crossing the tracks against the regulations of the employer. The trial judge, to distinguish the terms for the jury, over the Railroad's objection, gave instructions on contributory negligence and assumption of risk. The jury returned a judgment for the plaintiff and the defendant appealed. The Court of Appeals affirmed, holding that the instructions were proper.

Often the opposition to an instruction distinguishing assumption of risk and contributory negligence[23] is based upon the argument that the instruction would confuse the jury since the distinction is difficult[24] for even the judge to draw and comprehend.[25] However, this argument is answered by the better reasoning that even if it is difficult for a judge to make the distinction, it is better that he should do it than to leave the difficult task to laymen less trained in the law.[26]

The better reasoning supports the view that the trial judge should instruct the jury on assumption of risk and its distinction from contributory negligence. The distinction must be stated in a manner applicable to the particular fact situation.

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[21]This error can, of course, operate both ways. If the jury were to erroneously consider conduct by the plaintiff constituting contributory negligence as assumption of risk, the plaintiff would obtain a full recovery when it should be reduced under the doctrine of comparative negligence.

[22]347 Ill. App. 202, 106 N.E.2d 738 (1952).

[23]Although the general view is that the defense of assumption of risk and contributory negligence are separate and distinct, some courts and writers hold that they are identical in their legal effect. Porter v. Cornett, 306 Ky. 25, 206 S.W.2d 83 (1947). See also 35 Am. Jur. Master and Servant § 296 (1941).

[24]The difficulty in making this distinction is well recognized by writers and the courts. See Schlemmer v. Buffalo, R. & P. Ry., 205 U.S. 1, 12-13 (1906); Prosser, Torts § 55 (1955).

[25]Supra note 2 at 374, 375 (Dissenting opinion of Justice Ganey). See also Mr. Justice Frankfurter's concurring opinion in the Tiller case, supra note 14 at 72, where he stated, "Because of its ambiguity the phase 'assumption of risk' is a hazardous legal tool. As a means of instructing a jury, it is bound to create confusion. It should therefore be discarded."

[26]See Koshorek v. Pennsylvania R.R., supra note 2 at 369.

The distinction may be drawn as to whether the essence of the plaintiff's conduct was carelessness, implying contributory negligence, or venturesomeness, implying assumption of risk.[27]

A more useful distinction may concern causation; namely that contributory negligence is a proximate cause of the injury but assumption of risk plays no part in causing the accident except exposure to the danger.[28] This distinction, stated in another way, is that contributory negligence is a matter of an act more immediately leading to the accident, while assumption of risk is preliminary conduct in getting into a dangerous situation.[29]

A further distinction is that contributory negligence is a breach of a duty imposed by law, while assumption of risk is not a breach of a duty but a voluntary undertaking.[30] Prosser makes this distinction by stating, "Assumption of risk is a matter of knowledge of the danger and intelligent acquiescence in it, while contributory negligence is a matter of some fault or departure from the standard of reasonable conduct, however, unwilling or protesting the plaintiff may be."[31]

An additional distinction which may be helpful concerns the reasonableness of the plaintiff's conduct. Contributory negligence never involves entirely reasonable conduct by the plaintiff, while assumption of risk may involve such reasonable conduct.[32]

Applying these distinctions to the fact situation in the *Koshorek* case, it appears that the plaintiff's actions constituted assumption of risk. Koshorek's conduct was preliminary conduct in getting into the dangerous situation rather than an act immediately causing the disease. It further appears that his actions were reasonable and not careless. Since the jury returned a verdict for the defendant, it is quite possible the jury considered the plaintiff's conduct under the guise of contributory negligence or non-negligence of the employer. In fact, the only way the jury could have found for the defendant was to have

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[27]Sufelberger v. Worden, 189 Kan. 379, 369 P.2d 382 (1962); Taylor v. Hostetler, 186 Kan. 788, 352 P.2d 1042 (1960); Spurlin v. Nardo, 145 W. Va. 408, 114 S.E.2d 913 (1960); Hunn v. Windsor Hotel Co., 119 W. Va. 215, 193 S.E. 57 (1937).

[28]Saeter v. Harley Davidson Motor Co., 186 Cal. App. 2d 248, 8 Cal. Rptr. 747 (Dist. Ct. App. 1960).

[29]Schlemmer v. Buffalo, R. & P.R.R., 205 U.S. 1 (1907); Johnson v .Mammoth Vein Coal Co., 88 Ark. 243, 114 S.W. 722 (1908) (quoting Schlemmer case); Bouchard v. Sicard, 113 Vt. 429, 35 A.2d 439 (1944).

[30]Hay v. Nance, 119 F. Supp. 763 (D. Alaska 1954); Dempsey v. Sawyer, 95 Me. 295, 49 Atl. 1035 (1901); Cathey v. DeWeese, 289 S.E.2d 51 (Mo. 1956); El Paso & S.W.R.R. v. Foth, 101 Tex. 135, 100 S.W. 171 (Civ. App. 1907).

[31]Prosser, Torts § 55 (1955).

[32]Potter v. Brittan, 286 F.2d 521 (3d Cir. 1961), quoting Harper & James, Torts § 22.2 (1956).