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LABOR LAW AND ASSUMPTION OF RISK

HENRY WEISS†

I

BYOND the scope of the Workmen's Compensation Law, a field of employer-employee litigation has continued to grow in somewhat spasmodic fashion. An increasing awareness of the remedies available under the Labor Laws and Rules of the Industrial Board has stimulated this peripheral phase of tort liability. In recent years some of the industrial diseases have expanded into this fringe area. Particularly, the silicosis action accounted for much of the litigation. It is not a matter of certainty that various amendments to the Compensation Law, presumably encompassing the dust diseases will in fact accomplish that result.¹ Nor can it as yet be said that all diseases acquired as a result of work done are compensatable.²

Where the cause of action is based upon the employer's violation of the Labor Law or Rules of the Industrial Board, is it a valid defense to assert that the employee assumed the risk of such violation?

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1. N. Y. WORKMEN'S COMPENSATION LAW § 3, subd. 2, par. 28 was enacted in 1935 and then, in effect, was superseded as to dust diseases by N. Y. WORKMEN'S COMPENSATION LAW, Art. 4a, § 67. (N. Y. Laws 1936, c. 887, effective June 6, 1936) which provides compensation for injurious exposure subsequent to Sept. 1, 1935. *Mutolo v. Utica General Jobbing Foundry*, 161 Misc. 327, 292 N. Y. Supp. 14 (1936). It provides *only* for total temporary or permanent disability. Although this article is made an exclusive remedy for all dust ailments, it has been held that complete absence of remedy of any kind for partial disability does not render the article unconstitutional. *del Busto v. E. I. Dupont de Nemours & Co., Inc.*, 167 Misc. 920, 5 N. Y. S. (2d) 174 (1938). *But see*, *Powers v. Porcelain Insulator Corp.*, 285 N. Y. 54, 32 N. E. (2d) 790 (1941), and *Scherini v. Titanium Alloy Co.*, 286 N. Y. 531, 37 N. E. (2d) 237 (1941). This article was amended by N. Y. Laws 1940, c. 548 (N. Y. WORKMEN'S COMPENSATION LAW, § 66). Dealing as it does with a difficult subject, the draftsman seems to have mounted his horse and galloped off in all directions. The compensation benefits are ultimately increased. As to actions where exposure occurred *both before and after* Sept. 1, 1935 a short statute of 90 days from April 16, 1940 *seems* to have been enacted.

2. N. Y. WORKMEN'S COMPENSATION LAW, § 3, subd. 2, par. 28, apparently enacted as a reservoir for industrial diseases, does in reality take care of the greatest number of unspecified *occupational diseases*. But that very last term has been the subject of conflicting judicial construction. Compare *Bishop v. Comer and Pollock Inc.*, 251 App. Div. 492, 297 N. Y. Supp. 946 (3d Dep't 1937) with *Goldberg v. 954 Marcy Corporation*, 276 N. Y. 313, 12 N. E. (2d) 311 (1938) and *Lerner v. Rump Brothers*, 241 N. Y. 153, 149 N. E. 334 (1925). Both the *Goldberg* case and *Lurye v. Stern Bros. Department Store*, 275 N. Y. 182, 9 N. E. (2d) 828 (1937) are cited in *Nayor v. Harwick Trucking Corporation*, 283 N. Y. 62, 27 N. E. (2d) 434 (1940) and the matter is left in doubt. *But see*, *Daniels v. Udell Sons & Co.*, 261 App. Div. 855, 24 N. Y. S. (2d) 747 (3d Dep't 1941), *appeal dis-*

Litigated for over fifty years, this question has been in the last few years variously decided by our Courts. The Appellate Division of the Fourth Department in *Fiore et al. v. General Railway Signal Company*³ affirmed an order denying a motion to strike out the defense of assumption of risk pleaded to a cause of action based upon violation of the Labor Law. This was decided with the brief notation, ". . . as to assumption of risk, see *Gombert v. McKay*, 201 N. Y. 27 and *Fitzwater v. Warren*, 206 N. Y. 355." Shortly after the *Fiore* case, the identical question arose in the Third Department. Justice Schenck, at Special Term, granted a motion to strike out this defense in *Gribsch v. B. T. Babbitt, Inc.*,⁴ saying:

"The plaintiff contends that, as the second cause of action is based on violation of the Labor Law, this defense is untenable as a matter of law because the Labor Law imposes absolute duties upon employers from which they cannot escape merely by showing that the employee submitted to these risks and voluntarily assumed them. This court is fully in accord with this contention. The purposes and spirit of labor legislation is to protect the employee. If the employer were allowed to shift the responsibility to the employee, this purpose would be defeated. The entire trend of precedent upon this point clearly indicates that it is the law of this State that an employee does not assume any risks by working in a place and under conditions which he knows to be unsafe and in violation of the Labor Laws. The duty on the employer is *absolute*."⁵

The resolution of this conflict takes us back over the stream of judicial meandering for a period of many years. A very interesting course it is, full of ox-bows but not without clear deep running water. Two views were developed by the courts up to the advent of *Fitzwater v. Warren*⁶ and *Welch v. Waterbury*,⁷ both decided by the Court of Appeals in the order named, in 1912. The first of these represented, up to 1912, the majority and prevailing view. The second was a minority position, which, however, forecast the rule in labor decisions subsequently to be adopted.

Basic to the earlier prevailing position were two premises. The first was

missed mem., 286 N. Y. 17 (1941); *Moore v. Colonial Sand & Stone Co.*, 261 App. Div. 857, 24 N. Y. S. (2d) 751 (3d Dep't 1941); *Bak v. Kotok Fish Distributor*, 261 App. Div. 862, 24 N. Y. S. (2d) 752 (3d Dep't 1941).

3. 249 App. Div. 708, 292 N. Y. Supp. 704, *leave to appeal denied*, 249 App. Div. 797, 293 N. Y. Supp. 495 (4th Dep't 1936). The same Court followed this case in *Laviera v. The Pfaudler Company*, 249 App. Div. 924, 293 N. Y. Supp. 503 (4th Dep't 1937).

4. 164 Misc. 7, 298 N. Y. Supp. 848 (1937).

5. *Id.* at 9, 298 N. Y. Supp. at 850, *aff'd*, 254 App. Div. 601, 2 N. Y. S. (2d) 848, *leave to appeal denied*, 254 App. Div. 785, 4 N. Y. S. (2d) 1018 (3d Dep't 1938).

6. 206 N. Y. 355, 99 N. E. 1042 (1912).

7. 206 N. Y. 522, 100 N. E. 426 (1912).

that no distinction obtained as to the character of a master's obligations and their enforcement at common law and under labor statutes. In one of the earliest cases asserting this premise, *Freeman v. Glens Falls Paper Mill Co.*,⁸ plaintiff's intestate was killed as a result of defendant's failure to provide automatic elevator doors as required by the labor statute. The intestate, working as defendant's employee, knew of this condition. The trial court charged that the statute requiring automatic doors had no bearing on the case because the intestate indisputably had knowledge of the violation and thus accepted the situation. On appeal from a judgment for the defendant, the Appellate Division of the Third Department in affirming stated in part:

"The duty prescribed by this statute is not more or greater than the common-law duty of an employer to his employees to provide a safe place in which, and proper machinery with which, to work. And the defendant's liability to the person injured by reason of the statute not being complied with, is not an absolute one, but is subject to the same limitations and restrictions as is the common-law liability for not furnishing a safe place and proper machinery."⁹

The courts held that the employee waived performance by the employer of his statutory obligations and voluntarily assumed the risks of such non-performance; therefore the benefits under the statute were not available to the plaintiff employee.

The second premise, which is an obvious corollary to the first, was that violation of a labor statute did not give rise to a new and independent cause of action. This was propounded when shortly thereafter, in 1896, the same question was presented to the Court of Appeals in *Knisley v. Pratt*.¹⁰ Though in the *Freeman* case the action was not brought solely upon statutory violation, non-compliance with the labor statute was an integral part of the complaint. The complaint in the *Knisley* case contained no allegation of violation of the statute; common law breach of the master's duty to the servant was relied upon. Nevertheless, the case was decided in the Court of Appeals (by reason of its later injection into the record) as involving violation of provisions of the Factory Act regulating the employment of women and the guarding of machinery. The defendant asserted assumption of risk. The Court preceded its holding

8. 70 Hun 530, 24 N. Y. Supp. 403 (3d Dep't 1893), *aff'd mem.* 142 N. Y. 639, 37 N. E. 567 (1894).

9. *Id.* at 534, 24 N. Y. Supp. at 405-406.

10. 148 N. Y. 372, 42 N. E. 986 (1896). On the nature of the "duty" following the rule of the *Freeman* and *Knisley* cases, see *Rabe v. Consolidated Ice Co.*, 113 Fed. 905 (C. C. A. 2d 1902).

by certain propositions which it considered primary, that the Factory Act did not create a new cause of action, but that an action thereunder was simply one at common law based upon negligence. The Court held that although protection of a particular class was contemplated by the Act, statutory safeguards of this kind did not deprive employees "of their free agency and the right to manage their own affairs". Measured against such apparent "freedom to deal" the judgment was reversed for the ultimate reason that nothing contained in the Factory Act prevented an employee's "contractual" assumption of the risk of the breach of that labor statute.

A great many cases within the following few years were decided in accord with the rule of the *Freeman* and *Knisley* cases.¹¹ After the decision of *Butler v. Townsend et al.*¹² asserting non-liability of an employer for injuries to his servant owing to the collapse of a scaffold, the legislature took note. By the laws of 1897, c. 415, § 18, a provision of the Labor Law was added which in effect *affirmatively enjoined* an employer from providing an unsafe scaffold. The courts countered with a compromise. Under this section, following the *Knisley* case, *McLaughlin v. Eidlitz*¹³ held that knowledge on the part of the employee of Labor Law violations with respect to a scaffold presented *a question of fact for a jury's determination as to whether the employee assumed the risk of such violation*. It would seem that even with aid of the mandatory language of the legislative act¹⁴ this change was too much for the judicial digestion. And so, evading a forthright position, the meaty part of the act was disgorged for a jury's more lusty appetite. Notwithstanding the evasiveness of the rule thus formulated it represented a very concrete gain for the employee. Though the knowledge of the employee was in

11. *Shields v. Robins*, 3 App. Div. 582, 38 N. Y. Supp. 214 (1st Dep't 1896) involving violation of a statute as to covering elevators; plaintiff, knowing thereof, was held to have assumed the risk on the basis of the *Knisley* and *Freeman* cases. This is typical of the many cases to be found in the reports. In *Hayes v. Fay*, 22 Misc. 320, 49 N. Y. Supp. 112 (1898) it was held that the plaintiff might assume the risk and that *such question was for the jury* where suit was based on violation of labor statute as to guarding an excavation, applying the principle of the *Knisley* case.

12. 126 N. Y. 105, 26 N. E. 1017 (1891).

13. 50 App. Div. 518, 64 N. Y. Supp. 193 (2d Dep't 1900).

14. The relevant language of (N. Y. Laws) 1897, c. 415, § 18 is: "A person employing or directing another to perform labor of any kind in the erection, repairing, altering or painting of a house, building or structure *shall not furnish or erect, or cause to be furnished or erected* for the performance of such labor, *scaffolding*, hoists, stays, ladders, or other mechanical contrivances *which are unsafe, unsuitable or improper* and which are not so constructed, placed and operated as to give proper protection to the life and limb of a person so employed or engaged." (writer's italics).

most cases easily proved by the defendant employer, the compromise rule afforded an opportunity to enlist the jury's sympathy in arriving at a result in disregard of the facts.

However, if the *McLaughlin* case attempted to compromise by the aid of the jury between an old rule by precedent and a new one by legislative act, the Court of Appeals in *Gombert v. McKay*¹⁵ would have neither the new rule nor the compromise. It is to be noted that this case was one of the two relied upon by the Court in the comparatively recent *Fiore* case, *supra*. Plaintiff's intestate was employed by the defendant to build the exterior of a structure, and participated in the erection of a scaffold used for that work. Collapse of this scaffold resulted in the death of the employee. Plaintiff relied upon section 18 of the Labor Law previously referred to in the *McLaughlin* case. On appeal from a judgment for the defendant, *entered on a directed verdict*, the Court of Appeals affirmed, relying specifically upon the *ratio decidendi* of the *Freeman and Knisley* cases. Certainly at this point the settled rule was established beyond question. Strong statutory language had failed to upset or temper it.¹⁶

II

Little was left of an employee's civil remedy under the labor statutes in light of the unanimous action of the Court of Appeals in *Gombert v. McKay*.¹⁷ Nevertheless, even as the rule was being firmly entrenched there arose a contemporaneous current of legal thought which, though representing in most cases a dissident position, very soon effectively undermined the holding in the *Gombert* case. This undercurrent of contrary opinion, remaining obscurely in the background, flowed from factual and legal premises quite different from those epitomized in the *Gombert* case. It had been by this time well established that a release or exonerating agreement given by an employee to his employer in advance of accident and injury to cover the employer's violations of common law obligations was invalid as against the public policy of the state.¹⁸ This

15. 201 N. Y. 27, 94 N. E. 186 (1911).

16. Characteristic of judicial process is the foreshadowed "disintegration" of the rule; this is variously manifested in its application. In the *McLaughlin* case the question is sent to the jury for determination as one of fact. In the *Gombert* case the determination was reserved for the Trial Judge as one of law. Thus while both make nominal adherence to the same basic principle, the actual variance in application is crucial.

17. 201 N. Y. 27, 94 N. E. 186 (1911).

18. In *Purdy v. R. W. & O. R. R. Co.*, 125 N. Y. 209, 26 N. E. 255 (1891), the exonerating agreement given after the inception of employment was held inoperative for lack of consideration, with indication that even with consideration present its validity was

holding was shortly to be applied with considerable force to the instant problem. Specifically as to statutory duties of the master, an entirely different position on the problem of assumption of risk had been taken as early as 1894 by the General Term in *Simpson v. New York Rubber Co.*¹⁹ Here, on appeal from a judgment for the servant in an action based on a statute requiring guarding of machinery, wherein the Trial Court denied a request to charge that if plaintiff was found to have known of the failure to guard he assumed the obvious risks incident to such failure to guard, the judgment was affirmed.²⁰

Reaction from the majority view that the risk of violation might be assumed is strongly championed in the dissent in *Bushtis v. Catshill Cement Co.*,²¹ where an appeal was taken from dismissal of the plaintiff's complaint in an action for injuries while in the defendant's employ. The action was based in part on violation of the Factory Act, so-called. On the authority of the *Knisley* case, it was held that the plaintiff assumed the risk. Judge Kellogg, in his thorough and illuminating dissent, urges

subject to question. In *Johnston v. Fargo*, 184 N. Y. 379, 77 N. E. 388 (1906) the agreement was executed as a condition of employment at its inception; nevertheless the agreement was held invalid because its effect was to vitiate those rules of common law and statute designed to protect the employee and thereby destroy the employer's incentive to observe them.

19. 80 Hun 415, 30 N. Y. Supp. 339 (2d Dep't 1894), decided by three justices who concurred in result only. One of the justices arrived at a similar result but declined at that time to follow the reasoning of the first opinion as to a waiver by an employee of statutory protection.

20. Cullen, J., writing well in advance of current legal thought, realistically remarked, *id.* at 417, 30 N. Y. Supp. at 340: "Experience has shown that in some matters persons must be protected from their own imprudence. If there were to be considered only the interest of the individual in his personal security the statute would be unnecessary. The end sought to be accomplished could equally well be secured by contract between the employer and the employee. The matter has always been a subject of contract, that is, no law has ever forbidden employee's making the guarding of machinery a condition of their service. Yet such contracts are unknown. If, therefore, assent can dispense with the statutory protection, the subject, for practical purposes, is left in the same condition as it was before the enactment of the statute."

It is notable that in his well considered opinion, Judge Cullen distinguished *Freeman v. Glens Falls Paper Mill Co.*, 70 Hun 530, 24 N. Y. Supp. 403 (3d Dep't 1893), on the ground that in the latter case the action sounded in negligence and so the question here presented was "not necessarily involved". It is, however, difficult to follow Judge Cullen when he cites *White v. Lithographic Co.*, 131 N. Y. 631, 30 N. E. 236 (1892) as an expression by the Court of Appeals in support of his position. The opinion of Cullen, J., places reliance upon the inferences which flow from *Purdy v. Railroad Co.*, 125 N. Y. 209, 26 N. E. 255 (1891), *supra*, note 18.

21. 128 App. Div. 780, 113 N. Y. Supp. 294 (3d Dep't 1908), *aff'd mem.*, 198 N. Y. 548 (1910).

a reconsideration of the rule of the majority, particularly in the light of the changing attitude of the Legislature with respect to the protection of labor.²² Although the dissent in the *Bushtis* case was not adopted by the Court of Appeals, almost at the same time it was recognized by the Appellate Division of the Fourth Department in *Graves v. Gustave Stickley Co.*²³ that a change in policy was desirable, with the result that the Court regarded as *open* the question of the availability of the defense of assumption of risk. The appellate court took the position that since the *Knisley* case, and those cases decided on that authority, "the statutory law of our state for protecting the lives and health of employees engaged in hazardous employments, including workers in factories, has undergone a marked change for better safeguarding them from harm."²⁴

By this time the rule of the *Knisley* case and later *Gombert* case was made the subject of searching attack in a collateral fashion in the Federal courts and by some of the law commentators. In 1899 Taft, J., writing for the Circuit Court of Appeals of the Sixth Circuit in *Narramore v. Cleveland, C., C. & St. L. Ry. Co.* considered the *Knisley* case and held to the contrary.²⁵ The plaintiff had caught his foot in a switch block. An Ohio statute required the defendant to use switches which would have

22. The dissenting opinion of Judge Kellogg is of value in following the course of litigation as well as for its analysis of the beneficial effects intended under the labor statutes as they were at the close of the last century. It is notable also for its judicial recognition of a public policy implicit, at least, in such statutes, recognition curiously absent in much of the judicial reasoning on this subject.

23. 125 App. Div. 132, 109 N. Y. Supp. 256 (4th Dep't 1908), *aff'd mem.*, 195 N. Y. 584, 89 N. E. 1101 (1909).

24. *Id.* at 136, 109 N. Y. Supp. at 259, 260. There were in fact many such statutory changes. In some instances the language and provisions were considerably strengthened. For example compare as to scaffolding N. Y. Laws 1885 c. 314 with N. Y. Laws 1891 c. 214. And with these, compare N. Y. Laws 1897 c. 415 and N. Y. Laws 1899 c. 192. In most instances, however, the changes were extensions merely of degree. There were relatively few changes of such tenor as could satisfactorily reconcile the *Knisley* case with the *Simpson* case. The Court in the *Graves* case simply recognized the existence of a legislative policy which the vast body of cases contemporaneously decided completely overlooked or deliberately disregarded.

25. 96 Fed. 298 (C. C. A. 6th 1899). The concept of statutory protection of a "specific class" rather than a general statute, it will be seen, comes to be regarded as basic to the existence of a cause of action founded solely upon such statute. Terminal recognition of such evolution of the "statutory cause of action" is well demonstrated in *Schmidt v. Merchants Despatch Transportation Co.*, 270 N. Y. 287, 200 N. E. 824 (1936), note 58, *infra*.

In accord with the *Narramore* case is *Welsh v. Barber Asphalt Paving Co.*, 167 Fed. 465 (C. C. A. 9th 1909), arising upon a similar Oregon statute. *But see contra*, *Denver & R. G. R. Co. v. Norgate*, 141 Fed. 247 (C. C. A. 8th 1905); *St. Louis Cordage Co. v. Miller*, 126 Fed. 495, 509 (C. C. A. 8th 1903) on comparable statutes.

prevented such an occurrence. The Court recognized that while under common law the plaintiff would have assumed the risk since he knew of the condition, the question was presented whether the statute changed the rule of liability so as to relieve the plaintiff of the effect of assumption of risk. In holding that the effect of the statute was to eliminate this defense, it was pointed out that the authorities followed by the Court of Appeals in the *Knisley* case did not involve a statute "enjoining a specific duty of a master for the protection of servants",²⁶ and confused the doctrine of assumption of risk with the rule of contributory negligence. Francis Bohlen writing some seven years later²⁷ upheld Taft's criticism of the *Knisley* case. There is pointed out the distinction of the application of the assumption of risk and contributory negligence defenses in the fact of statutory violations. At or about the same time similar conclusions were reached upon review of the rule by W. E. Freerks,²⁸ G. W. Payne,²⁹ and in part by R. D. Thurber.³⁰ Something of a stalemate in reasoning was reached, however, because of too great an emphasis on the distinction obtaining between assumption of risk and contributory negligence. The former was regarded exclusively as a contractual matter, the latter a rule of conduct.³¹ Passing the correctness of the legalistics of the argument, the consequent rule of non-availability of assumption of risk is a *non-sequitur*. It was in any event unnecessary to the position which rested upon a much more certain foundation of common sense and legislative policy. Payne did point out one of the absurdities of a contrary rule: ". . . the more dangerous the place and the more obvious the danger, the more certain will the master be that he will escape liability."³²

26. *Id.* at 303.

27. Bohlen, *Voluntary Assumption of Risk* (1906) 20 HARV. L. REV. 14, 91. Bohlen remarks at page 113: ". . . as Taft, J., points out, a servant may be debarred from recovering for injury received from the breach of a statutory duty on his master's part by his own contributory negligence. A servant who continues to work, knowing that a statutory protection has been omitted, while he does not waive the liability for the violation of the statute, is bound to use care commensurate with the added risk to avoid the injurious consequences of such a breach of the statute."

28. Freerks, *Doctrine of Assumed Risk* (1905) 61 CENT. L. J. 446.

29. Payne, *Effect of Legislation Requiring the Master to Guard Dangerous Machinery* (1908) 66 CENT. L. J. 157; Payne, *Servants Assumption of Risk of Masters' Breach of Statutory Duty* (1910) 71 CENT. L. J. 131.

30. Thurber, *The Labor Law as a Basis for Suit* (1909) 16 BENCH & BAR 56, 93.

31. Freerks, *op. cit. supra*, note 28, relies particularly on this.

32. Payne, *loc. cit. supra*, note 29, 71 CENT. L. J. at 133.

III

The *Gombert* case,³³ a firm declaration of an extreme position, was decided in February, 1911. The restiveness of some lower courts, a few Federal tribunals and several writers was, we have seen, definitely manifest even before this latest affirmation of an established rule. However, the Court of Appeals was itself in a surprisingly short interval apparently convinced that the *Gombert* rule was untenable. The following year, the Court without any change in membership reversed its position, not, however, without dissent, in *Fitzwater v. Warren*.³⁴

In the *Fitzwater* case, in answer to a conceded violation of the labor statute requiring the guarding of machinery, the defendant pleaded the plaintiff's assumption of risk. On appeal from dismissal of the complaint, the Appellate Division reversed the judgment. The matter came to the Court of Appeals, therefore, on stipulation by the defendant for judgment absolute. That Court stated, first, that public policy precluded an employee from assuming a risk created by a violation of statute, citing the *Simpson*³⁵ case for this principle. The Court found the *Knisley* case was "largely qualified, if not virtually overruled, by the subsequent decision of this Court in *Johnston v. Fargo* (184 N. Y. 379)."³⁶ What could not be done by express agreement, it was reasoned, to relieve the master of obligation to his employee might not be accomplished by implication in defiance of the employer's statutory duties. In any event, said the Court, a dismissal of the complaint was improper because a fair question had been presented for the jury as to assumption of risk. Contradictory to and weakening the prior part of the decision, this latter comment is of particular significance. The Court rendered judgment for the plaintiff by virtue of the stipulation for judgment absolute. Two of the judges dissented on the theory that assumption of risk had been established as a matter of law. In light of what had so recently before been said, the *Fitzwater* case was surprisingly unequivocal. If the *Gombert* case was not technically in contradiction, it was indubitably repudiated in principle. Whatever uncertainty existed as to the meaning of the *Fitzwater* case was soon dissipated by interpretation and application. The conflict in decisions was readily recognized in *Grady v. National Conduit & Cable Co.*³⁷ The plaintiff therein relied upon Section 18 of

33. *Gombert v. McKay*, 201 N. Y. 27, 94 N. E. 186 (1911).

34. 206 N. Y. 355, 99 N. E. 1042 (1912).

35. *Simpson v. N. Y. Rubber Co.*, 80 Hun 415, 30 N. Y. Supp. 339 (2d Dep't 1894).

36. *Fitzwater v. Warren*, 206 N. Y. 355, 358, 99 N. E. 1042 (1912).

37. 153 App. Div. 401, 138 N. Y. Supp. 549 (2d Dep't 1912).

the Labor Law which related to unsafe scaffolding. The court charged that the plaintiff assumed the risk, the danger being open and obvious. Considering the conflict between the *Knisley*, *Gombert* and *Fitzwater* cases, the Appellate Division elected to follow the last named case and held that even in face of the employee's knowledge of statutory violations, the employer might not assert the defense of assumption of risk. The Court of Appeals, in the same year which gave rise to the *Fitzwater* case and the *Grady* case in the lower Court, made even clearer its newly taken position in *Welch v. Waterbury*.³⁸ This much litigated case made its first reported appearance in the Appellate Division³⁹ prior to the *Gombert* case and the *Fitzwater* case. It involved the failure to guard machinery in accordance with the Labor Law, and had resulted in a judgment for the plaintiff which was reversed by the Appellate Court and a new trial granted by reason of the fact that the case was tried entirely on a common law theory, that is, as an action based on the master's negligence. On such theory the Court held there was a question of plaintiff's assumption of risk which should have been presented to the jury. The case appeared again the following year in the same Court⁴⁰ on appeal from a dismissal of the complaint on the several grounds that there was insufficiency of notice to bring the case under the Employer's Liability Act and that, regarded as a common law action, the plaintiff must fail because of assumption of risk. The Appellate Division affirmed the dismissal. The Court of Appeals in 1912, the year of the *Fitzwater* case, reversed the judgment and granted a new trial; in so doing the Court stated: "The risks occasioned by the failure of the employer to supply statutory safeguards were not, as a matter of law, assumed by the employee, though he had full knowledge of such failure."⁴¹ As though this were not enough, in the concurring opinion it is added that regarded as an action under common law the Court was nevertheless controlled by the *Fitzwater* case. To what extent this latter position might be relied upon is doubtful so far as the abrogation of the defense to a common law action "involving" violation of a labor statute is concerned but apparently the statute was thought to cut off this defense as a matter of law upon motion to dismiss an action in negligence. It is curious that no mention is made of the exactly opposite holding in the *Gombert* case, decided just a year before.

The application of this newly interpreted rule is shortly found in fur-

38. 206 N. Y. 522, 100 N. E. 426 (1912).

39. *Welch v. Waterbury & Co.*, 136 App. Div. 315, 120 N. Y. Supp. 1059 (2d Dep't 1910).

40. 144 App. Div. 213, 128 N. Y. Supp. 974 (2d Dep't 1911).

41. 206 N. Y. 522, 100 N. E. 426 (1912).

ther litigation of the *Welch* case. In 1913 appeal was taken to the Appellate Division from a judgment for the plaintiff.⁴² The defendant had requested the Court to charge that, if the plaintiff knew that the cog wheels were unguarded, the jury "might find that the plaintiff had voluntarily 'assumed the risk' ". This charge was refused on the authority of the *Fitzwater* and *Grady* cases.⁴³ The change in the rule now seemingly well established was, however, not accepted without question. In *New York, N. H. & H. R. Co. v. Vizvari*,⁴⁴ the Second Circuit Court of Appeals, referring to a distinction between the duty of a master under common law and by statute, regarded such concept as "fanciful and contrary to common sense"; nor did it find support for such position in the New York cases. Nevertheless the transitional state of the rule was recognized in various decisions of the 1912-1914 period.⁴⁵ The more extreme viewpoint (following the concurring opinion in the *Welch* case) is found in several cases which purport to eliminate the defense of assumption of risk even though the action is not founded upon violation of the Labor Law.⁴⁶ This projection of the *Fitzwater-Welch* rule to the common law cause of action is clearly a position without justification in reason or precedent. The cases which so project the *Fitzwater-Welch* rule seem to rely largely upon the holding of *Johnston v. Fargo*.⁴⁷ The *Johnston* case related to an agreement which, while touching upon the common law duties, nevertheless was executed in advance of the actual

42. 159 App. Div. 509, 144 N. Y. Supp. 688 (2d Dep't 1913).

43. *Id.*, at 510. It was not in dispute that the plaintiff had been employed in the defendant's factory for a considerable period of time and certainly knew of the failure to comply with the statutory requirements. Two judges of the Appellate Division dissented, significantly enough, insofar as the majority opinion held that assumption of risk is wiped out by public policy in a common law action. The majority view was subsequently affirmed in the Court of Appeals without opinion in *Welch v. Waterbury Co.*, 217 N. Y. 604, 111 N. E. 1096 (1916). Compare with this the concurring opinion in the Court of Appeals decision in *Welch v. Waterbury*, 206 N. Y. 522, 524, 100 N. E. 426 (1912).

44. 210 Fed. 118 (C. C. A. 2d, 1913); this case arose under the Federal Employer's Liability Act.

45. *Bakewell v. Orford Copper Co.*, 160 App. Div. 671, 145 N. Y. Supp. 1070 (2d Dep't 1914) is of particular interest, bearing in mind that the *Welch* case was in constant litigation until 1916; after consideration of the *Fitzwater* and *Welch* cases there is noted "the transitional state through which New York Law is passing." See also, *Leddy v. Carley*, 78 Misc. 546, 139 N. Y. Supp. 227 (1912).

46. *Felcin v. Society of The New York Hospital*, 155 App. Div. 545, 140 N. Y. Supp. 772 (1st Dep't 1913); *Rosasco v. Ideal Opening Die Co.*, 79 Misc. 507, 141 N. Y. Supp. 23 (1913). Both apparently propose a rule of legal insufficiency of the defense both at common law and under the statute. See also *Wasilewski v. Warner Sugar Refining Co.*, 87 Misc. 156, 149 N. Y. Supp. 1035 (1914).

47. 184 N. Y. 379, 77 N. E. 388 (1906).

assumption of risk or the possibility thereof and included risks of all kinds whether eventually known or unknown to the employee. Public policy, it was held, invalidated such a blanket agreement. Such public policy was applied in holding that the labor statutes affording special protection eliminated the defense of assumption of risk. Apart therefrom the basic rights and obligations between employer and employee as existent under common law are not otherwise altered. Extension of the rule to situations coming solely under the provisions of the common law must be regarded as gratuitous and as contrary to the well accepted concepts governing the relationship between master and servant where not affected by special labor statutes. At any rate the rule which in such a short period came into being to upset a large body of precedent was clearly restated and affirmed in *Christiensen v. Morse Drydock and Repair Company*.⁴⁸ There, in a suit upon violation of the Labor Law relating to scaffolds, the defendant requested the Trial Court to charge that breach of an express provision of the Labor Law does not take away the defense of assumption of risk. The request was denied. The Appellate Court regarded as conceded, on the authority of the *Fitzwater* case, that assumption of risk was not a defense to an action based on the employer's violation of a statute imposing a "specific duty in express terms".

While the rather casual manner of the recent *Fiore* case⁴⁹ fails to recognize the change from the early rule, now well established, the issue seemed to have been definitely determined in New York State.⁵⁰ In *Michalek v. U. S. Gypsum Co.*,⁵¹ Judge Rippey (now a member of the New York Court of Appeals) held the defense of assumption of risk to be insufficient, thus recognizing the doctrine of the *Fitzwater* case as the substantive rule of this State. It is nevertheless true that the issue has been passed upon in various other states with diverse results.⁵²

48. 179 App. Div. 825, 167 N. Y. Supp. 57 (2d Dep't 1917).

49. *Fiore et al. v. General Railway Signal Company*, 249 App. Div. 708, 292 N. Y. Supp. 704 (4th Dep't 1936).

50. The Court of Appeals on various occasions recognized the new holding, *Dougherty v. Pratt Institute*, 244 N. Y. 111, 155 N. E. 67 (1926); *Encarnacion v. Jamison et al.*, 251 N. Y. 218, 167 N. E. 422 (1929).

51. 16 Fed. Supp. 708 (D. C. N. Y. 1936); *Pieczonka v. Pullman Co.*, 89 F. (2d) 353, is to be distinguished as not involving a labor law cause of action.

52. The conflict in decisions of the various states had been early recognized by LABATT, *MASTER AND SERVANT* (2nd ed. 1913). In Vol. 5, at p. 5060, discussing the relative merits of the rules, he stated: "The more rational view would seem to be that to permit a servant to assume such a risk would have the practical result of nullifying the beneficial effect of the statute, for it would be possible for the master merely to notify the servant of his failure to perform the statutory duty in order to avoid any liability to the servant for such

There have been some untoward and extreme results. One has been the extension, referred to above, of the rule to cases not in reality founded upon Labor Law violations. Another has been the holding that contributory negligence is not available as a defense to a Labor Law cause of action. The Appellate Division of the First Department so held in *Stern v. Great Island Corporation*.⁵³ The logic of the holding is only technically sound. The Court said, in striking the defense of contributory negligence from the answer:

"Since the plaintiff's cause of action rests on negligence, contributory negligence does not constitute a defense. Indeed, the very purpose of the statute was to protect plaintiff's intestate and others in like position from the consequences of their own negligence. It would be strange, therefore, if the same negligence could defeat the operation of the statute."⁵⁴

The Labor Law cause of action, it is quite true, does not depend on negligence. So with relation to its violation one could not in a strict sense be contributorily negligent. However, such public policy as manifestly is repugnant to an employee's assumption of risk certainly has no application to the instance of an employee who by his own act increases the existent risk. Whether such act of the employee is in a fine sense contributory "negligence", seems of little consequence. Only the intent to inflict a penalty or a complete reliance upon a rigid concept would explain, but not justify, the failure to preserve as a defense the contributory act of the employee which unduly increases the risk. So to hold is in any event to disregard the basic and practical distinction between assumption of risk and contributory negligence,⁵⁵ clear beyond question at least since *Thomas v. Quartermaine*.⁵⁶

With the increased advantage thus to be gained by a suit upon a Labor Law cause of action naturally the precise nature of such an action has been brought into sharper focus. The most troublesome question which

failure."

In a suit upon a statute almost identical with New York's, the Pennsylvania Court, in *Plazak v. Allegheny Steel Co.*, 324 Pa. 422, 188 Atl. 130 (1936), wherein the plaintiff had contracted silicosis, held that "by continuing in the employment, plaintiff did not assume the risk."

53. 250 App. Div. 115, 293 N. Y. Supp. 608 (1st Dep't 1937). In *Friedman v. Beck*, 250 App. Div. 87, 293 N. Y. Supp. 649 (1st Dep't 1937), *appeal dismissed*, 274 N. Y. 566, 10 N. E. (2d) 554, the elusiveness of the problem is again demonstrated in connection with another type of statute.

54. *Id.* at 116.

55. See note 27, *supra*, as to Bohlen's comments on this distinction as applied.

56. 18 Q. B. 685 (1887).

has arisen lies in the significance to be given to the rules of the Industrial Board of the Department of Labor. The formulation of such rules to supplement the Labor Law is expressly provided for by that Act.⁵⁷ It has been held that these rules, made pursuant to statute, under a strict construction of the constitutionality of the delegation of powers, form no part of a Labor Law cause of action. That view is subject to much doubt and the question cannot be regarded as settled.⁵⁸

To speculate upon the motivation of the courts in arriving at any particular decision or in reversing themselves is perhaps no less idle than to seek the intent of the Legislature in connection with a statute. Nevertheless, it is notable that the Court which decided the *Gombert* case in February, 1911, rendered the decision in *Ives v. South Buffalo Ry. Co.*⁵⁹ the following month holding unconstitutional the first Workmen's Compensation Act. The Court composed of the identical members the following year rendered the decision in the *Fitzwater* case. We know that at the time the *Fitzwater* case was decided, there was pending the constitutional amendment designed to render valid a Workmen's Compensation Act replacing the act of 1910 held unconstitutional. Whether this back-

57. N. Y. LABOR LAW, §§ 27, 27-a, 299 and others. The power to make such rules has been successively shifted from the Industrial Commission to the Industrial Board, and now for the most part would seem to rest with the Board of Standards and Appeals.

58. In *Schumer v. Caplin*, 241 N. Y. 346, 150 N. E. 139 (1925) judgment for the plaintiff was reversed upon the basis of error in the charge that violation of a rule of the Industrial Commission constituted negligence *per se*. This view was undisturbed until the *dictum* of Judge Lehman writing for the Court of Appeals in *Schmidt v. Merchants Despatch Transportation Co.*, 270 N. Y. 287, 200 N. E. 824 (1936), wherein after analysis of a Labor Law cause of action it was additionally stated at page 306, 200 N. E. at 830: "It imposes an absolute duty upon employers to provide adequate and proper safeguards. In the performance of that duty there may be some room for discretion as to what safeguards may be proper and adequate. *There are perhaps some gaps to be filled in by administrative regulations.*" (Italics added). Some intimation to the contrary may possibly be inferred from the language in *Teller v. Prospect Heights Hospital*, 280 N. Y. 456, 21 N. E. (2d) 504 (1939). The Appellate Division of the Fourth Department in *Moccia v. Pfaudler*, 251 App. Div. 796, 296 N. Y. Supp. 711 (1937) has taken the position in this connection that on the authority of *Schumer v. Caplin*, *supra*, "a breach of a rule is but evidence of negligence which has no place in the action for breach of the statutory obligation." Upon the problem of the availability of assumption of risk, it is very questionable that such a rule could prevail in light of the intensive integration of the statute and rules.

59. 201 N. Y. 271, 94 N. E. 431 (1911). One of the issues which the Court considered was that of the effect of the proposed compensation act upon the defense of assumption of risk. In that connection the principal opinion, rendered a month after the *Gombert* case, observed that, contrary to the rule at common law, under the Labor Law and Employers' Liability Act the employee is presumed to have assented only to those risks of employment present *after* exercise by the employer of due care and *after* compliance by the employer with the applicable labor statute.

ground influenced the Court to decide the *Fitzwater* case without so much as mentioning the previous *Gombert* case is of course problematical but also probable.

At the time the Appellate Division of the Fourth Department rendered the decision in the *Fiore* case, there were pending literally hundreds of cases or claims in the western area of the State founded upon alleged Labor Law violations in connection with industrial operation. These claims seemed to threaten in a rather serious way certain phases of manufacturing operations in such industrial centers as Syracuse, Rochester, Buffalo, and Niagara Falls.

Whatever explanation may be offered for the seeming reaction in rule demonstrated in the *Fiore* case, there can be no doubt of the soundness of the opposing rule more recently declared by the Third Department in the *Griebsch* case.⁶⁰ The protective and beneficent intent behind the labor statutes is supported by a public policy too forceful and well established to be whittled away at this late time.

60. *Griebsch v. B. T. Babbitt, Inc.*, 254 App. Div. 601, 2 N. Y. S. (2d) 848 (3d Dep't 1938), *aff'g* 164 Misc. 7, 298 N. Y. Supp. 848 (1937).

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