Chapter 654

Places of Employment; Safety and Health Regulations

Chapter 654

NOTES OF DECISIONS

This chapter is a separate and independent law adopted for the protection of employes and applicable to every employer. Hillman v. No. Wasco County P.U.D., (1958) 213 Or 264, 323 P2d 664.

FURTHER CITATIONS: Hubbard v. Lamford Lbr. Co., Inc., (1956) 209 Or 145, 304 P2d 943; Galer v. Weyerhaeuser Tbr. Co., (1959) 218 Or 152, 344 P2d 544; Davis v. Angell, (1959) 218 Or 443, 345 P2d 405; Blaine v. Ross Lbr. Co., Inc., (1960) 224 Or 227, 355 P2d 461; Richardson v. Harris, (1964) 238 Or 474, 395 P2d 435.

ATTY. GEN. OPINIONS: Administration by Workmen's Compensation Board, 1966-68, p 449, p 611.

654.005 to 654.155

NOTES OF DECISIONS

A vice principal whose injuries result from his inattention to his duty to provide a safe place to work cannot hold his employer liable. Skeeters v Skeeters, (1964) 237 Or 204, 389 P2d 313, 391 P2d 386.

FURTHER CITATIONS: Howard v. Foster & Kleiser Co., (1959) 217 Or 516, 332 P2d 621, 342 P2d 780; Ritter v. Beals, (1961) 225 Or 504, 358 P2d 1080; Renner v. Kinney, (1962) 231 Or 553, 373 P2d 668; Short v. Federated Livestock Corp., (1963) 235 Or 81, 383 P2d 1016.

LAW REVIEW CITATIONS: 41 OLR 224; 1 WLJ 195-200.

654.005

CASE CITATIONS: Arnold v. Gardiner Hill Tbr. Co., (1953) 199 Or 517, 263 P2d 403; M & M Wood Working Co. v. State Ind. Acc. Comm., (1954) 201 Or 603, 271 P2d 1082; Fields v. Fields, (1958) 213 Or 522, 307 P2d 528, 326 P2d 451; Meakins v. Olson, (1966) 244 Or 108, 416 P2d 5.

ATTY. GEN. OPINIONS: Effect of rules and regulations of board, 1952-54, p 71.

LAW REVIEW CITATIONS: 45 OLR 45.

654.010

NOTES OF DECISIONS

This section in general enjoins upon an employer the same duties that were required by the common law. Shelton v. Paris, (1953) 199 Or 365, 261 P2d 856; Ritters v. Beals, (1961) 225 Or 504, 358 P2d 1080; O'Neal v. Meier & Frank Co., (1961) 226 Or 108, 359 P2d 101; Concannon v. Ore. Portland Cement Co., (1968) 252 Or 1, 447 P2d 290.

The effect of this statute is to withdraw the defense of assumption of risk. Ritters v. Beals, (1961) 225 Or 504, 358 P2d 1080; O'Neal v. Meier & Frank Co., (1961) 226 Or 108, 359 P2d 101; Richardson v. Harris, (1964) 238 Or 474, 395 P2d 435.

Domestic help is not within the scope of this section. Ritters v. Beals, (1961) 225 Or 504, 358 P2d 1080.

This Act was not intended to place civil liability on a foreman. Kemp v. Utah Constr. and Min. Co., (1963) 225 F Supp 250.

The Safety Codes are applicable to farm employment. Quick v. Andresen, (1964) 238 Or 433, 395 P2d 154.

A person hiring a laundress one day a week in a private home was not an "employer" within the meaning of this section. Larson v. Papst, (1955) 205 Or 126, 286 P2d 123.

FURTHER CITATIONS: Varley v. Consol. Tbr. Co., (1943) 172 Or 157, 139 P2d 584; Miles v. Spokane, Portland & Seattle Ry., (1945) 176 Or 118, 155 P2d 938; Arnold v. Gardiner Hill Tbr. Co., (1953) 199 Or 517, 263 P2d 403; Renner v. Kinnery, (1962) 231 Or 553, 373 P2d 668; Rich v. Tite-Knot Pine Mill, (1966) 245 Or 185, 421 P2d 370; Kruse v. Coos Head Tbr. Co., (1967) 248 Or 294, 432 P2d 1009; Entler v. Hamilton, (1971) 258 Or 65, 481 P2d 85.

ATTY. GEN. OPINIONS: Authority of the Labor Commissioner to prohibit owner from operating a boiler which is in dangerous condition, 1920-22, p 572.

LAW REVIEW CITATIONS: 46 OLR 221.

654.015

NOTES OF DECISIONS

This Act was not intended to place civil liability on a foreman. Kemp v. Utah Constr. and Min. Co., (1963) 225 F Supp 250.

FURTHER CITATIONS: Arnold v. Gardiner Hill Tbr. Co., (1953) 199 Or 517, 263 P2d 403; Quick v. Andresen, (1964) 238 Or 433, 395 P2d 154; Entler v. Hamilton, (1971) 258 Or 65, 481 P2d 85.

654.020

NOTES OF DECISIONS

The language "no employe shall... fail to do every other thing reasonably necessary to protect life and safety of such employes" is merely a statutory declaration of common law. Kemp v. Utah Constr. and Min. Co., (1963) 225 F Supp 250.

654.025

NOTES OF DECISIONS

The violation of a duly established rule or regulation promulgated by the commission constitutes negligence per se. Arnold v. Gardiner Hill Tbr. Co., (1953) 199 Or 517, 263 P2d 403; Fields v. Fields, (1958) 213 Or 522, 307 P2d 528, 326 P2d 451.

These provisions imply that the commission has the right and duty to inspect. M & M Wood Working Co. v. State Ind. Acc. Comm., (1954) 201 Or 603, 271 P2d 1082.

Domestic help is outside of the Safety Act. Ritter v. Beals, (1961) 225 Or 504, 358 P2d 1080.

The safety codes promulgated under this section are not applicable to persons other than employes. Rich v. Tite-Knot Pine Mill, (1966) 245 Or 185, 421 P2d 370.

The Basic Safety Code is not intended to change the basis of the liability of an employer from negligence to absolute liability. Entler v. Hamilton, (1971) 258 Or 65, 481 P2d 85.

Safety code not applicable to laundress employed one day a week in private home. Larson v. Papst, (1955) 205 Or 126, 286 P2d 123.

ATTY. GEN. OPINIONS: Authority to issue monthly bulletin of rules and regulations, 1920-22, p 375.

654.030

CASE CITATIONS: Arnold v. Gardiner Hill Tbr. Co., (1953) 199 Or 517, 263 P2d 403.

654.035

NOTES OF DECISIONS

The violation of a duly established rule or regulation promulgated by the commission constitutes negligence per se. Arnold v. Gardiner Hill Tbr. Co., (1953) 199 Or 517, 263 P2d 403; Snyder v. Prairie Logging Co., (1956) 207 Or 572, 298 P2d 180; Blaine v. Ross Lbr. Co., (1960) 224 Or 227, 355 P2d 461; Downey v. Traveler's Inn, (1966) 243 Or 206, 412 P2d 359.

The commission is not authorized by this section to make an employer an insurer. Shelton v. Paris, (1953) 199 Or 365, 261 P2d 856.

These provisions imply the right and duty to inspect. M & M Wood Working Co. v. State Ind. Acc. Comm., (1954) 201 Or 603, 271 P2d 1082.

Violation by employer of a rule cannot be taken advantage of by a plaintiff who was not within the class of persons sought to be protected by the rule and where the accident which occurred was not of the type sought to be prevented. Snyder v. Prairie Logging Co., (1956) 207 Or 572, 298 P2d 180.

This Act was not intended to place civil liability on a foreman. Kemp v. Utah Constr. and Min. Co., (1963) 225 F Supp 250.

Safety code not applicable to laundress employed one day a week in private home. Larson v. Papst, (1955) 205 Or 126, 286 P2d 123.

The causal relationship between violation of the basic safety code and the injury was a jury question. Richardson v. Harris, (1964) 238 Or 474, 395 P2d 435.

FURTHER CITATIONS: Baldassarre v. W. Ore. Lbr. Co., (1952) 193 Or 556, 239 P2d 839; Wilson v. Hanley, (1960) 224 Or 570, 356 P2d 556; Davis v. Weyerhaeuser Co., (1962) 231 Or 596, 373 P2d 985; Kinney v. So. Pac. Co., (1962) 232 Or 322, 375 P2d 418; Quick v. Andresen, (1964) 238 Or 433, 395 P2d 154; Mock v. Georgia-Pac. Corp., (1968) 252 Or 116, 446 P2d 125; Robbins v. Steve Wilson Co., (1970) 255 Or 4, 463 P2d 585.

654.040

NOTES OF DECISIONS

These provisions imply the right and duty to inspect. M & M Wood Working Co. v. State Ind. Acc. Comm., (1954) 201 Or 603, 271 P2d 1082.

ATTY. GEN. OPINIONS: Need of hearing on revision of sawmill and woodworking code, 1938-40, p 517.

654.045

NOTES OF DECISIONS

These provisions imply the right and duty to inspect. M & M Wood Working Co. v. State Ind. Acc. Comm., (1954) 201 Or 603, 271 P2d 1082.

654.047

ATTY. GEN. OPINIONS: Statute as applicable to school district shop, 1924-26, p 604; board as replacing State Industrial Accident Commission in areas of general administration and policy, 1966-68, p 610.

LAW REVIEW CITATIONS: 45 OLR 49.

654.050

NOTES OF DECISIONS

These provisions imply the right and duty to inspect. M & M Wood Working Co. v. State Ind. Acc. Comm., (1954) 201 Or 603, 271 P2d 1082.

This Act was not intended to place civil liability on a foreman. Kemp v. Utah Constr. and Min. Co., (1963) 225 F Supp 250.

ATTY. GEN. OPINIONS: Penalties as taxes, 1964-66, p 141.

654.060

NOTES OF DECISIONS

This Act was not intended to place civil liability on a foreman. Kemp v. Utah Constr. and Min. Co., (1963) 225 F Supp 250.

Safety code not applicable to laundress employed one day a week in private home. Larson v. Papst, (1955) 205 Or 126, 286 P2d 123.

654.065

CASE CITATIONS: White v. State Ind. Acc. Comm., (1940) 163 Or 476, 96 P2d 772, 98 P2d 955.

654.085

NOTES OF DECISIONS

The legislature intended safety codes to be standards of care. Lovins v. Jackson, (1963) 233 Or 369, 378 P2d 727.

FURTHER CITATIONS: Varley v. Consol. Tbr. Co., (1943) 172 Or 157, 139 P2d 584; Shelton v. Paris, (1953) 199 Or 365, 261 P2d 856.

654.090

ATTY. GEN. OPINIONS: Board as replacing State Industrial Accident Commission in areas of general administration and policy, 1966-68, p 610.

654.093

LAW REVIEW CITATIONS: 45 OLR 49.

654.095

CASE CITATIONS: M & M Wood Working Co. v. State Ind. Acc. Comm., (1954) 201 Or 603, 271 P2d 1082.

ATTY. GEN. OPINIONS: Penalties as taxes, 1964-66, p 141; validity of transfer of funds, 1964-66, p 205.

LAW REVIEW CITATIONS: 45 OLR 44.

654.155

CASE CITATIONS: M & M Wood Working Co. v. State Ind. Acc. Comm., (1954) 201 Or 603, 271 P2d 1082.

654.305

NOTES OF DECISIONS

The Employers' Liability Act (ORS 654.305 to 654.335 and 654.990(5)) As a Whole

ORS 654.305 In Particular

See also cases under ORS 654.310 to 654.335 and 654.990 (3).

THE EMPLOYERS' LIABILITY ACT AS A WHOLE

1. In general

The acceptance of partial compensation from the Industrial Accident Commission was not an election of remedy so as to preclude a subsequent action against the one causing the injuries. Hicks v. Peninsula Lbr. Co., (1923) 109 Or 305, 220 P 133; Coomer v. Supple Inv. Co., (1929) 128 Or 224, 274 P 302.

The intent of the Act, is to give the injured employe a remedy against his employer. Lawton v. Morgan, Fliedner & Boyce, (1913) 66 Or 292, 131 P 314, 134 P 1037.

This Act is a modified form of the common-law remedy, whereby an employe is permitted to recover from an employer damages for a personal injury caused by the latter's negligence. Olds v. Olds, (1918) 88 Or 209, 171 P 1046.

This Act is both remedial and preventive. (see diagram in this case) Camezind v. Freeland Furniture Co., (1918) 89 Or 158, 174 P 139.

In order to recover under this Act, it is necessary to show that the defendant was engaged in the kind of work embraced within the terms of the statute, that the plaintiff was defendant's employe acting within the scope of his employment, that the terms of his employment contemplated performance by the plaintiff of work involving risk and danger, and that the proximate cause of the plaintiff's injury was one included within the terms of the statute. Fitzgerald v. Ore.-Wash. R. & Nav. Co., (1932) 141 Or 1, 16 P2d 27.

ORS 654.330 does not extend the scope of ORS 654.305 and 654.310 but merely defines the conditions under which the common-law defenses shall not be available. Williams v. Clement's Forest Prod., Inc., (1950) 188 Or 572, 216 P2d 241, 217 P2d 252.

No new liability, over and above the liability imposed on a master at common law, is created by this law although it does increase the employer's burden. Shelton v. Paris, (1953) 199 Or 365, 261 P2d 856.

Action by longshoreman's widow under this Act was not removable to Oregon federal district court under federal removal statute. Eriksen v. Moore Mill and Lbr. Co., (1958) 157 F Supp 888.

2. Construction and effect of Act generally

A liberal construction is to be given this Act. Blair v. W. Cedar Co., (1915) 75 Or 276, 280, 146 P 480; Dickerson v. E. & W. Lbr. Co., (1916) 79 Or 281, 155 P 175; Smith v. Shevlin-Hixon Co., (1946) 157 F2d 51.

While not strictly construed, this statute is not to be extended by implication. McClaugherty v. Rogue River Elec. Co., (1914) 73 Or 135, 140 P 64, 144 P 569.

The common-law doctrines of assumption of risk, negligence of fellow servants, and contributory negligence do not apply in actions for injuries to a servant within this law. Union Oil Co. v. Hunt, (1940) 111 F2d 269.

3. Application of Act generally

This Act applies only to employments which involve a risk or danger, and are inherently dangerous. It comprehends hazardous occupations in general, specifically enumerated or otherwise. Union Oil Co. v. Hunt, (1940) 111 F2d 269.

This Act extends its protection only to (1) employments which are attended with inherent risks and dangers, and (2) employments which are rendered hazardous through the use of machinery, scaffolding, dangerous substances, electrical devices or other equipment and substances expressly enumerated in the Act. Duties and employments attended only with ordinary risks and dangers are unaffected by the Act. Barker v. Portland Traction Co., (1946) 180 Or 586, 173 P2d 288, 178 P2d 706.

This Act does not apply to an action by an employe against his employer for an assault and battery by a fellow employe. Kelley v. Ore. Shipbuilding Corp., (1948) 183 Or 1, 189 P2d 105.

This law is not applicable to workmen on navigable

waters within the territorial limits of Oregon. Sanderson v. Sause Bros. Ocean Towing Co., (1953) 114 F Supp 849.

Before a person other than the employer can be liable under this law it is necessary that such person have direct and primary control over the instrumentalities causing the injuries or death. Myers v. Staub, (1954) 201 Or 663, 272 P2d 203.

Subsection (2) of ORS 656.804 exempted rejecting employers from the Act if the action arose out of occupational disease. Concannon v. Ore. Portland Cement Co., (1968) 252 Or 1, 447 P2d 290.

This Act applies to the Federal Government when the negligence of employes of the United States cause deaths. Binney v. United States, (1971) 329 F Supp 351.

A practical nurse-housekeeper was not covered. Ritter v. Beals, (1961) 225 Or 504, 358 P2d 1080.

4. Other statutes

The labor commissioner's certificate of conformity to the Factory Inspection Act was prima facie evidence in an action under ORS 654.305 and 654.310, of performance of the master's duties to the extent required by that Act. Kuntz v. Emerson Hardwood Co., (1919) 93 Or 565, 184 P 253.

Provisions of Workmen's Compensation Act classifying foundries, blast furnaces, and smelters as hazardous occupations are procedural rules to guide the State Industrial Accident Commission [now Workmen's Compensation Board] and not amendments of ORS 654.305 and 654.310 permitting withholding from the jury the question of whether the loading of an electric furnace involved risk or injury. Hale v. Elec. Steel Foundry Co., (1948) 183 Or 275, 191 P2d 257.

Violation of a mandatory rule and regulation of the Safety Code constitutes negligence per se in action brought under this Act. Arnold v. Gardiner Hill Tbr. Co., (1953) 199 Or 517, 263 P2d 403.

5. Employers and employes within Act

(1) Maritime. A tort though committed on shipboard within the navigable waters of the state may be remedied under this statute in the state court, or in the federal courts where there is a diversity of citizenship, and a remedy might also be had in a court of admiralty. Keithley v. North Pac. S. S. Co., (1916) 232 Fed 255.

Right of action for wrongful death created by Employer's Liability Law may be invoked to recover for a maritime death occurring on the state's territorial waters without constitutional inhibition. Hess v. United States, (1959) 361 US 314, 80 S Ct 341, 4 L Ed 2d 305, rev'g 259 F2d 285.

Where a stevedore was injured by the vessel's hoisting appliances, this Act applies to an action against the vessel. The Bee, (1914) 216 Fed 709.

An injury occurring on a dock was not within the admiralty jurisdiction, but rather under this statute, especially as the plaintiff was not suing on his maritime contract but on the ground of the negligence of the defendant. Swayne & Hoyt v. Barsch, (1915) 226 Fed 581, 141 CCA 337.

(2) Interstate commerce. An injury sustained by one while engaged in interstate commerce cannot be the basis of recovery under this Act. Donaghy v. Ore.-Wash. R. & Nav. Co., (1930) 133 Or 663, 288 P 1003, 291 P 1017.

Where tracks used for interstate and intrastate commerce were maintained by a crane, which crane while being repaired by a machinist's helper during a period of 42 days, caused his injury, he was not injured in interstate commerce so as to preclude the application of this Act. Id.

(3) Counties and municipal corporations as subject to Act by ORS 30.320. A county employe cannot bring an action under this statute for personal injuries sustained while an employe of the county, as the action is one of tort. Rapp v. Multnomah County, (1915) 77 Or 607, 152 P 243; Clark v. Coos County, (1916) 82 Or 402, 404, 161 P 702.

A municipal corporation is subject to the provisions of this Act. Mackay v. Comm. of Port of Toledo, (1915) 77 Or 611, 152 P 250; Asher v. Portland, (1930) 133 Or 41, 284 P 586.

A quasi corporation, such as a school district, when performing a purely ministerial act, is under certain conditions liable under this Act for injuries to a laborer while painting its structure. Lupke v. Sch. Dist. 1, (1929) 130 Or 409, 275 P 686.

An officer of a city is not within the purview of this Act. Asher v. Portland, (1930) 133 Or 41, 284 P 586.

The name by which a person is called does not determine if he is an employe or an officer within this Act; his status is determined by the duties he is required to perform. Id.

That an oath must be taken by a lineman employed by a city fire department does not make him an officer of the city, instead of an employe within this Act. Id.

The immunity of a municipal corporation from liability for negligence of officers and employes in performing governmental functions was not abolished by this Act. Wold v. Portland, (1941) 166 Or 455, 112 P2d 469.

A lineman attached to a city fire department, while engaged with others under direction of a foreman in removing telephone poles with fire alarm service wires attached, constituting an obstruction to a bridge approach in which the city was interested, was an employe and not an officer within this Act. Asher v. Portland, (1930) 133 Or 41, 284 P 586.

6. Relations of parties as affecting duties and liability

(1) Generally. The assumption by an employe of the responsibility under this Act does not absolve the employer. Moen v. Aitken, (1928) 127 Or 246, 271 P 730; Hollopeter v. Palm, (1930) 134 Or 546, 291 P 380, 294 P 1056.

The employer alone is liable under this statute; no suit is authorized against a negligent employe. Gray v. Hammond Lbr. Co., (1925) 113 Or 570, 232 P 637, 233 P 561, 234 P 261.

Although the protection of this Act is not confined only to employes of the defendant, the injured person must be an employe of someone engaged in the enterprise out of which the injury arose. Johnson Lbr. Corp. v. Hutchens, (1952) 194 F2d 574.

Although the protection of this Act is not confined only to employes of the defendant, the injured person must be an employe of someone engaged in the enterprise out of which the injury arose. Pehrson v. Lauch Const. Co., (1956) 237 F2d 269, 273.

Manufacturer was not liable to employe of the machine's owner. Richey v. Sumoge, (1967) 273 F Supp 904.

Failure of a tree faller to perform his duty of rendering the operation safe barred his estate from recovery for death resulting from such failure. Robbins v. Irwin, (1947) 180 Or 667, 178 P2d 935.

(2) Employer to his employe. Every detail of an employe's work is not required to be supervised by the employer under this Act. Van Norden v. Chas. R. McCormick Lbr. Co., (1927) 17 F2d 568.

That plaintiff is defendant's employe acting within the scope of his employment must be shown to recover under this Act. Fitzgerald v. Ore.-Wash. R. & Nav. Co., (1932) 141 Or 1, 16 P2d 27.

The word "employe" must be considered in its ordinary meaning as one rendering service for wages or salary. Jylha v. Chamberlain, (1942) 168 Or 171, 121 P2d 928.

Where, while going away from a logging camp closed for the season, a logger froze his feet, the injury was not within this Act as he was no longer an employe. Brady v. Ore. Lbr. Co., (1926) 117 Or 188, 243 P 96, 45 ALR 812.

Deceased was not an employe where he was merely doing a good turn without expectation of reward when he was crushed between defendant's car and another while untying

a tow rope. Jylha v. Chamberlain, (1942) 168 Or 171, 121 P2d 928.

(3) Employer to another's employe. Where the duties of an employe of another employer brings him within reach of dangers, he must be protected by the employer having charge of the danger. Cauldwell v. Bingham & Shelley Co., (1917) 84 Or 257, 155 P 190, 163 P 827; Rorvik v. No. Pac. Lbr. Co., (1921) 99 Or 58, 190 P 331, 195 P 163; McKay v. Pac. Bldg. Materials Co., (1937) 156 Or 578, 68 P2d 127; Pacific States Lbr. Co. v. Bargar, (1926) 10 F2d 335.

"Having charge of or responsibility for any work involving risk or danger" involves more than an economic interest in the completion of a project. Browning v. Terminal Ice Co., (1961) 227 Or 36, 360 P2d 630.

The liability of defendant to the employes of another rests on the duty to safeguard and use structures and equipment under their control so as not to create or maintain a hazardous situation which may be the proximate cause of an injury. Id.

A captain injured, while standing on a wharf where his duties required him to be, through the negligence of employes of a lumber company, was within the protection of this Act. Rorvik v. No. Pac. Lbr. Co., (1921) 99 Or 58, 190 P 331, 195 P 163.

Where a laborer, under the control of the captain, was injured while loading lumber on a ship after it had been piled on a dock by a lumber company, the provisions of this Act did not apply to the lumber company. McCauley v. Steamship "Willamette," (1923) 109 Or 131, 215 P 892.

A lumber company was required to exercise care required by this Act toward employe of stevedoring company. Pacific States Lbr. Co. v. Bargar, (1926) 10 F2d 335.

An employe of a customer of the defendant injured while lawfully using defendant's appliances was protected by this Act. Coomer v. Supple Investment Co., (1929) 128 Or 224, 274 P 302.

A company furnishing and delivering concrete to a construction contractor was required to take the statutory precautions necessary for the protection of the contractor's employes. McKay v. Pac. Bldg. Materials Co., (1937) 156 Or 578, 68 P2d 127.

Control by defendants of the premises upon which plaintiff was injured was sufficient control over the work plaintiff was performing to bring defendants within the purview of the Act. Metcalf v. Roessel, (1970) 255 Or 186, 465 P2d 699.

(4) Owner to employe of independent contractor. The test of whether a person is a servant or a contractor is not the manner of their receiving compensation. Cauldwell v. Bingham & Shelley Co., (1917) 84 Or. 257, 155 P 190, 163 P 827.

Where the contractor controls the details of the work, he alone is responsible for an injury to an employe, under this Act. Warner v. Synnes, (1925) 114 Or 451, 230 P 362, 235 P 305, 44 ALR 904.

An owner's right to inspect the contractor's work as it progresses does not create the relation of master and servant between the owner and the contractor's employes. Id.

One employed to remove garbage from premises and using his own garbage truck in performance of task, was an "independent contractor" and not protected by this Act. Helzer v. Wax, (1928) 127 Or 427, 272 P 556.

There was neither the retention nor the exercise of control by the owner sufficient to impress upon defendant-owner the duties imposed by the Act. Wilson v. Portland Gen. Elec. Co., (1968) 252 Or 385, 448 P2d 562.

(5) General contractor to employe of independent contractor. A general contractor is not liable to a servant of an independent contractor for injuries caused by the negligence of such independent contractor. Lawton v. Morgan, Fliedner & Boyce, (1913) 66 Or 292, 131 P 314, 134 P 1037; Tamm v. Sauset, (1913) 67 Or 292, 135 P 868, LRA 1917D, 988.

(6) Person in charge. Failure to perform the duty assigned to him to repair a machine or render an operation safe bars any action by such foreman or other employe against his employer when he is injured through a defect resulting from such failure. Schmidt v. Multnomah Operating Co., (1936) 155 Or 53, 61 P2d 95; Marks v. Bauers, (1925) 3 F2d 516.

The fact that an employe obeys a foreman's negligent order, does not preclude him from recovery under this Act. Peluck v. Pac. Machine & Blacksmith Co., (1930) 134 Or 171, 293 P 417.

A foreman of a railroad switching crew cannot recover for injuries sustained because of a defective clearance made by such crew. Straub v. Ore. Elect. Ry. Co., (1939) 163 Or 93, 94 P2d 681.

It is necessary to an affirmative defense under ORS 654.315 to show plaintiff was charged with obedience to the Basic Safety Code, and that his violation was the proximate cause of his injury. Skeeters v. Skeeters, (1964) 237 Or 204, 389 P2d 313, 391 P2d 386.

(7) Member of public. Where the decedent is shown to be an employe of no employer at the time of his death by coming into contact with an electric wire, no action will lie under this statute. Saylor v. Enterprise Elec. Co., (1923) 106 Or 421, 212 P 477.

7. Scope of employment

The scope of a servant's duties is defined by what he was employed to perform, and actually did perform with knowledge and approval of employer. Walters v. Dock Comm., (1928) 126 Or 487, 245 P 1117, 266 P 634, 270 P 778.

Active engagement in his work by an employe is not required in order to be within the protection of this statute. Fitzgerald v. Ore.-Wash. R. & Nav. Co., (1932) 141 Or 1, 16 P2d 27.

Recovery is dependent upon allegation and proof that the employe, when injured, was acting within the scope of his employment. Union Oil Co. v. Hunt, (1940) 111 F2d 269.

A servant living and working in his master's barn was justified in using the facilities at hand, and if his injury was chargeable in part to the master's violation of ORS 654.305 and 654.310, the master is liable. Malloy v. Marshall-Wells Hdw. Co., (1918) 90 Or 303, 173 P 267, 175 P 659, 176 P 589.

Although injured after the hour when his duties usually ended, an action of a janitor was maintainable where he was acting in furtherance of his master's employment at the time of the injury. Poole v. Tilford, (1921) 99 Or 585, 195 P 1114.

8. Duties and care required of employer

(1) Generally. A higher degree than ordinary care is required of an employer under this Act. Stanfield v. Fletcher, (1925) 114 Or 531, 236 P 258; Coomer v. Supple Inv. Co., (1929) 128 Or 224, 274 P 302; Fromme v. Lang & Co., (1929) 131 Or 501, 281 P 120; Hoffman v. Broadway Hazelwood, (1932) 139 Or 519, 10 P2d 349, 11 P2d 814, 83 ALR 1008.

The character of proof necessary to establish negligence on the part of the employer is changed by this statute from that required under the common law. Schulte v. Pac. Paper Co., (1913) 67 Or 334, 135 P 527, 136 P 5.

The standard of care used by others will not satisfy the statute. Poole v. Tilford, (1921) 99 Or 585, 195 P 1114.

Directing or permitting work beyond the physical capacity of an employe, when it was the only work available, did not render an employer liable. Ferretti v. So. Pac. Co., (1936) 154 Or 97, 57 P2d 1280.

The care required of the employer is commensurate with the degree of danger in the nature of the employment. Union Oil Co. v. Hunt, (1940) 111 F2d 269.

The test of practicality laid down by this statute is specific enough to satisfy the requirement of due process.

Mallatt v. Ostrander Ry. & Tbr. Co., (1942) 46 F Supp 250.

In an action for wrongful death in state territorial waters the conduct said to give rise to liability is to be measured not under admiralty's standards of duty, but under the substantive standards of the state law. Hess v. United States, (1959) 361 US 314, 80 S Ct 341, 4 L Ed 2d 305.

This Act does not contemplate merely that machinery shall conform to standards of safety if used in a particular way, but that it shall be safe for all uses to which it is customarily put. Blaine v. Ross Lbr. Co., (1960) 224 Or 227, 355 P2d 461.

The statute does not impose upon an employer the role of an insurer of the safety of his workmen in the absence of some showing of negligence. Norman v. Cunningham Sheep Co., (1963) 233 Or 385, 377 P2d 916.

(2) Safe place to work. Maintenance of a safe plant, as well as the inauguration thereof, is a duty of an employer. Dickerson v. E. & W. Lbr. Co., (1916) 79 Or 281, 155 P 175.

Although a master is a merchant, in so far as he operates machinery he comes within ORS 654.305 and 654.310, notwithstanding the fact that dangerous places are used only 10 or 12 times during a year. Malloy v. Marshall-Wells Hdw. Co., (1918) 90 Or 303, 173 P 267, 175 P 659, 176 P 589.

Where a woman was employed to cook in a tent near blasting operations, it was the duty of the employer to see that she had a safe place to work. Crown Willamette Paper Co. v. Newport, (1919) 171 CCA 146, 260 Fed 110.

Where a key on a fly-wheel caught clothing of the plaintiff employe when he was making an adjustment, the evidence warranted a finding of negligence of the employer under this Act. Hornig v. Canby, (1920) 95 Or 612, 188 P 700.

A sawmill operator did not violate this law. Arnold v. Gardiner Hill Tbr. Co., (1953) 199 Or 517, 263 P2d 403.

(3) Selecting and inspecting materials, etc. The master is bound to select and inspect his appliances, and the servant is relieved of the burden of showing that the master had notice of the defects. Askatin v. McInnis & Reed Co., (1913) 67 Or 320, 135 P 322.

Where an animal is used in work, the employer is required to furnish a safe animal, the same as any other instrumentality for performing the labor. Marks v. Columbia County Lbr. Co., (1915) 77 Or 22, 149 P 1041, Ann Cas 1917A, 306.

Where the ropes used by his servant were not inspected by the master, he was guilty of negligence, as a matter of law. Askatin v. McInnis & Reed Co., (1913) 67 Or 320, 135 P 322.

Where a contractor's employe selected a rope without the owner's consent, and was injured in using it, the owner was not liable, under this Act, although he had agreed to furnish the contractor with materials. Warner v. Synnes, (1925) 114 Or 451, 230 P 362, 235 P 305, 44 ALR 904.

(4) Scaffolding and other temporary structure. That a contract with a city does not require that the contractor provide a safety rail does not relieve the contractor if such a rail is required by this statute. Wolsiffer v. Bechill, (1915) 76 Or 516, 146 P 513, 149 P 533.

If injured longshoremen working on a dock come within the protection of this Act, they must do it under the "and generally" clause, not that relating to a structure more than 20 feet from the ground. McCauley v. Steamship "Willamette," (1923) 109 Or 131, 215 P 892.

A spur track on a trestle more than 20 feet from the ground, which, though built as a railroad, had been used only as a means of erecting a power house, was pro hac vice a scaffolding within ORS 654.305 and 654.310. Evans v. Portland Ry., Light & Power Co., (1913) 66 Or 603, 135 P 206.

(5) Machinery. This Act is applicable to "machinery." A **slab haul** (consisting of a staging, incorporated with which was a system of dead rolls for conveying slabs in a sawmill), Dunn v. Orchard Land Co., (1913) 68 Or 97, 136 P 872; a **block and tackle** (used to hoist things through a hatchway), Malloy v. Marshall-Wells Hdw. Co., (1918) 90 Or 303, 173 P 267, 175 P 659, 176 P 589; **an elevator,** Thompson v. Union Fishermen's Co-op. Packing Co., (1926) 118 Or 436, 235 P 694, 246 P 733; Chatfield v. Zeller, (1944) 174 Or 59, 147 P2d 222; **a swinging cargo hook,** Grammer v. Wiggins-Meyer S.S. Co., (1928) 126 Or 694, 270 P 759; **a spray rig,** Fields v. Fields, (1958) 213 Or 522, 307 P2d 528, 326 P2d 451.

Everything which can be called machinery is not as a matter of law "dangerous." Williams v. Clemen's Forest Prod., Inc., (1950) 188 Or 572, 216 P2d 241, 217 P2d 252.

Where a head sawyer failed to observe a signal from the plaintiff and allowed a log to roll against the plaintiff's hand, an action for the resulting injuries fell within this Act. Browning v. Smiley-Lampert Lbr. Co., (1914) 68 Or 502, 137 P 777.

Where plaintiff, a stevedore, was hurt in doing work which involved the use of machinery, his cause of action came within this Act. Kveset v. W. R. Grace & Co., (1915) 77 Or 83, 150 P 281.

(6) Guards. Not only must the employer provide a guard, but he must see to it that it is used. Camenzind v. Freeland Furniture Co., (1918) 89 Or 158, 174 P 139.

That there are no guards on the market does not of itself relieve an employer from guarding a dangerous machine. Id.

The rule requiring guards is to provide protection from all dangers reasonably foreseeable. Skeeters v. Skeeters, (1964) 237 Or 204, 389 P2d 313, 391 P2d 386.

It was a question of fact whether a protective device which would have prevented plaintiff's injury could have been installed without impairing the machine's efficiency. Ludwig v. Zidell, (1941) 167 Or 488, 118 P2d 1073.

(7) Openings. "Shafts," as used in the statute, contemplates openings in the ground or in structures, and not revolving shafts in machinery. Franklin v. Webber, (1919) 93 Or 151, 182 P 819.

Regardless of how a brick came to fall, the contractor was liable where he failed to provide a temporary floor to protect persons working below. Morgan v. Bross, (1913) 64 Or 63, 129 P 118.

That one party engaged in construction did not desire to have a permanent floor constructed until later did not give the other a license to neglect to fulfill the requirements of the statute. Cauldwell v. Bingham & Shelley Co., (1917) 84 Or 257, 155 P 190, 163 P 827.

That a staging was an inclosure within the meaning of this statute, could not be stated as a matter of law. Id.

(8) Electricity. Where control of a switch can be exercised by an electric company although it does not own the switch, it is liable under this Act if the switch was defective. Clayton v. Enterprise Elec. Co., (1916) 82 Or 149, 161 P 411.

The furnishing of switches at some distance from a point where work is required to be done, by which the current may be turned off entirely, did not exculpate an electrical company from negligence in failing to comply with the specific requirements of ORS 654.305 and 654.310. McClaugherty v. Rogue River Elec. Co., (1914) 73 Or 135, 140 P 64, 144 P 569.

Where, while repairing electric wires, an injury occurred, the case was clearly within this statute. Hoag v. Wash.-Ore. Corp., (1915) 75 Or 588, 144 P 574, 147 P 756.

Insulation on a wire, properly attached to poles, at a point 30 feet from a pole was not required by ORS 654.305 and 654.310. Turnidge v. Thompson, (1918) 89 Or 637, 175 P 281.

(9) Devices and precautions. Substitutes for safety appliances not within the substantial specification of this Act do not take the place of devices specifically named; nor will devices required by a city ordinance serve as a substitute. Harvey v. Corbett, (1915) 77 Or 51, 55, 56, 150 P 263.

Customary usage in the trade is not necessarily a conclusive test of the performance of the duty of using every device and precaution which is practicable. Camenzind v. Freeland Furniture Co., (1918) 89 Or 158, 174 P 139.

Every care and precaution practicable to use for the safety of life and limb of employes and the public must be exercised by the employer. Coomer v. Supple Inv. Co., (1929) 128 Or 224, 274 P 302.

The work of driving a team without rope or chains with which to lock the wheels did not involve risk or danger as a matter of law. Williams v. Clemen's Forest Prod., (1950) 188 Or 572, 216 P2d 241, 217 P2d 252. Overruling Olds v. Olds, (1918) 88 Or 209, 171 P 1046.

Before an employer can be charged with negligence in failing to supply safe tools there must be some evidence upon which a jury could find (a) a failure to provide, and (b) that the tools furnished were less safe than some other tools that might have been furnished. Norman v. Cunningham Sheep Co., (1963) 233 Or 385, 377 P2d 916.

Employer's duty to furnish sufficient manpower to perform a task safely is violated when a workman is required to overtax himself in order to perform the task, or otherwise required to risk injury which could have been prevented by additional help. Id.

Evidence of customary practice is admissible to show whether the employer acted as a reasonably prudent person. Robbins v. Steve Wilson Co., (1970) 255 Or 4, 463 P2d 585.

Where no appliance was provided to remove a belt from a moving pulley, an employe injured by removing the belt by hand may bring an action under this Act. Wasiljeff v. Hawley Paper Co., (1914) 68 Or 487, 137 P 755.

The fact that there was not sufficient room for belt shifters did not justify their absence, it being the employer's duty to make sufficient room. Id.

Where plaintiff was required by her foreman and by the location of her place of work to jump down three feet to reach said place of work, there was sufficient evidence for the jury to find that defendant failed to use every device practicable and every care and caution for the employes' safety. Shevlin-Hixon Co. v. Smith, (1947) 165 F2d 170.

The instruction that it is not necessary for plaintiff to prove that any of the devices which he claimed were not used, were in general use, was proper. Baldassarre v. W. Ore. Lbr. Co., (1952) 193 Or 556, 239 P2d 839.

9. Breach of duty by employer

The duties imposed on the master are nondelegable, absolute and continuing. Camenzind v. Freeland Furniture Co., (1918) 89 Or 158, 174 P 139; Malloy v. Marshall-Wells Hdw. Co., (1918) 90 Or 303, 173 P 267, 175 P 659, 176 P 589; Warner v. Synnes, (1925) 114 Or 451, 230 P 362, 235 P 305, 44 ALR 904; Hollopeter v. Palm, (1930) 134 Or 546, 291 P 380, 294 P 1056.

Transgression of this Act by the employer is negligence per se and is actionable. Camenzind v. Freeland Furniture Co., (1918) 89 Or 158, 174 P 139; Skeeters v. Skeeters, (1964) 237 Or 204, 389 P2d 313, 391 P2d 386.

The servant must show the negligence specified in ORS 654.305 and 654.310 and prove facts in addition to the accident inconsistent with the exercise of due care. Gynther v. Brown & McCabe, (1913) 67 Or 310, 134 P 1186.

Acts of omission which constitute "negligence" under the Act are set out in ORS 654.305 and 654.310. Lang v. Camden Iron Works, (1915) 77 Or 137, 146 P 964.

A breach of duty on the part of the employer must be shown by the plaintiff. Ferretti v. So. Pac. Co., (1936) 154 Or 97, 57 P2d 1280.

Violation of commissioner's orders constitutes negligence per se and may be pleaded in an action under this Act. Blaine v. Ross Lbr. Co., (1960) 224 Or 227, 355 P2d 461.

It is not any random violation of the statutory duty which will make the employer liable, but violation by inadequate performance of a duty which, if properly performed, would have prevented the injury. Skeeters v. Skeeters, (1964) 237 Or 204, 389 P2d 313, 391 P2d 386.

10. Proximate cause

The rule of proximate cause of an injury is not changed by this statute. Vanderflute v. Portland Ry., Light & Power Co., (1922) 103 Or 398, 205 P 551.

The proximate cause of the plaintiff's injury must be one included within the terms of the statute. Fitzgerald v. Ore.-Wash. R. & Nav. Co., (1932) 141 Or 1, 16 P2d 27.

Proximate cause does not mean the last act or nearest act to the injury, but such act or omission failing to comply with the statute as actually aided in producing the injury as a direct and existing cause. Ludwig v. Zidell, (1941) 167 Or 488, 118 P2d 1073.

Whether failure to have a guard over the machinery proximately caused plaintiff's injury was a question for the jury. Id.

11. Assumption of risk by employe

An absolute duty is imposed upon the employer; the doctrine of assumption of risk by an employe does not apply to actions for injuries under this Act. Sonniksen v. Hood River Gas & Elec. Co., (1915) 76 Or 25, 146 P 980; Ramaswamy v. Hammond Lbr. Co., (1915) 78 Or 407, 152 P 223; Poole v. Tilford, (1921) 99 Or 585, 195 P 1114; Peluck v. Pac. Machine & Blacksmith Co., (1930) 134 Or 171, 293 P 417.

12. Actions

(1) Generally. No other notice that the action is brought under this Act is required than to allege facts that bring the case within it. Schulte v. Pac. Paper Co., (1913) 67 Or 334, 135 P 527, 136 P 5.

Joinder in a suit in equity against a vessel of an action under this Act by an injured employe is not permitted. McCauley v. Steamship "Willamette," (1923) 109 Or 131, 215 P 892.

(2) Pleading. It is not necessary to allege that an action is brought under this statute to justify its application where the complaint states facts to which the rule of law embodied by the statue is applicable. Schulte v. Pac. Paper Co., (1913) 67 Or 334, 135 P 527, 136 P 5; Dickerson v. E. & W. Lbr. Co., (1916) 79 Or 281, 155 P 175.

Injury within the scope of employment must be alleged and proved under this Act. Brady v. Ore. Lbr. Co., (1926) 118 Or 15, 245 P 732, 45 ALR 821; Walters v. Dock Comm., (1928) 126 Or 487, 245 P 1117, 266 P 634, 270 P 778.

A theory of recovery based on common-law negligence is not inconsistent with one based on this Act. Rich v. Tite-Knot Pine Mill, (1966) 245 Or 185, 421 P2d 370.

An allegation that the defendant was negligent in not using devices and care, implies that it was practicable to do so. Bottig v. Polsky (concurring opinion), (1921) 101 Or 530, 201 P 188.

The allegation of a specific act of negligence in an action against an employer does not affect the statutory duty to protect the machinery to the fullest extent that its proper operation permits. Rorvik v. Astoria Box & Paper Co., (1931) 136 Or 381, 299 P 333.

Failure to allege that work of decedent involved risk was not fatal after verdict. Rorvik v. No. Pac. Lbr. Co., (1921) 99 Or 58, 190 P 331, 195 P 163.

The complaint was faulty. Skeeters v. Skeeters, (1964) 237 Or 204, 391 P2d 386.

(3) Evidence. An application for the permit to construct a building in which the defendant designated himself as builder is admissible as evidence of his relationship to the owner. Cauldwell v. Bingham & Shelley Co., (1917) 84 Or 257, 155 P 190, 163 P 827.

An injured servant has the burden of proving that it would have been practicable to have guarded the machine

in question. Camenzind v. Freeland Furniture Co., (1918) 89 Or 158, 174 P 139.

The subsequent installation of a guard on a machine after the injury complained of may be shown to demonstrate the practicability of guarding it. Franklin v. Webber, (1919) 93 Or 151, 182 P 819.

Under ORS 654.305, proof which shows that subsequent to injury (1) the employer began the use of the instrumentality which the plaintiff alleges would have rendered the work more safe; (2) experience has shown that the change was practical as a safety measure; and (3) use of the instrumentality has not hampered efficiency, is admissible evidence of antecedent negligence. Williams v. Portland Gen. Elec. Co., (1952) 195 Or 597, 247 P2d 494.

Plaintiff is required to show that work in which he was engaged involved risk or danger to the employe or the public. Skeeters v. Skeeters, (1964) 237 Or 204, 389 P2d 313, 391 P2d 386.

Because of ORS 654.305, the rule that common-law negligence may not be proven by the introduction of evidence of improvements made subsequent to the injury is not applicable to a claim under this Act. Rich v. Tite-Knot Pine Mill, (1966) 245 Or 185, 421 P2d 370.

Evidence of customary practice is admissible to show whether the employer acted as a reasonably prudent person. Robbins v. Steve Wilson Co., (1970) 255 Or 4, 463 P2d 585.

The fact that a certain guard was used in Switzerland was admissible to show that it was practicable to guard the machine, but not to show that the particular guard used in Switzerland should be used. Camenzind v. Freeland Furniture Co. (1918) 89 Or 158, 174 P 139.

The testimony of a veteran logging employe was competent on the question of practicability of safety device on trucks used in logging. Garvin v. W. Cooperage Co., (1919) 94 Or 487, 184 P 555.

Evidence as to negligence resulting in injury to a stevedore hauling ship was insufficient to go to the jury. Van Norden v. Chas. R. McCormick Lbr. Co., (1927) 17 F2d 568.

In the absence of evidence as to the cause of the breaking of a wheel of a machine resulting in an injury to an employe, the employer was not liable and there could be no imputation of negligence to him. Erickson v. Pac. States Lbr. Co., (1927) 18 F2d 513.

Evidence that the device was not in general use is not admissible in an action based upon this Act. Fromme v. Lang & Co., (1929) 131 Or 501, 281 P 120.

Where an action was submitted on common-law principles, evidence tending to show that this Act applied was held harmless. Hovedsgaard v. Grand Rapids Store Equip. Corp., (1931) 138 Or 39, 5 P2d 86.

Any prejudice from evidence to show that employes were engaged in work within this Act was removed by a subsequent withdrawal accompanied by an admonitory instruction. Hamilton v. Redeman, (1939) 163 Or 324, 97 P2d 194.

The employe's belief as to danger was immaterial except in so far as it was some evidence as to whether a reasonable man would have done no more than the employer did. Lynch v. Ore. Lbr. Co., (1939) 108 F2d 283.

Where plaintiff alleged employer should have installed a safeguard, burden was on plaintiff to indicate what safeguard, show that it would have prevented the accident, and also prove the practicality of the device. Cox v. Sanitarium Co., (1947) 181 Or 572, 184 P2d 386.

Installation of guard after the accident was admissible to show the practicability of such installation. Fields v. Fields, (1958) 213 Or 522, 307 P2d 528, 326 P2d 451.

(4) Questions for court and jury. Whether this Act or common-law principles govern an action is a question for the court, and submission to the jury of such question is error. Schulte v. Pac. Paper Co., (1913) 67 Or 334, 135 P 527, 136 P 5; Hoag v. Wash.-Ore. Corp., (1915) 75 Or 588, 144 P 574, 147 P 756.

The following were questions for the jury. **Practicability of a safety rail around a pit,** Wolsiffer v. Bechill, (1915) 76 Or 516, 146 P 513, 149 P 533; **sufficiency of a scaffold,** Moen v. Aitken, (1928) 127 Or 246, 271 P 730; **whether additional care could have been taken without materially destroying the usefulness of the appliances in use,** Coomer v. Supple Inv. Co., (1929) 128 Or 224, 274 P 302; **negligence in improperly suspending rolls of a gangedger,** Ore.-Amer. Lbr. Co. v. Simpson, (1925) 8 F2d 946; **employment status of deceased,** Johnson Lbr. Corp. v. Hutchens, (1952) 194 F2d 574; **if the employer's orders to violate the safety code had a causal bearing on plaintiff's injury,** Wilson v. Hanley, (1960) 224 Or 570, 356 P2d 556; **if an employe was in charge of a particular machine,** Skeeters v. Skeeters, (1964) 237 Or 204, 389 P2d 313, 391 P2d 386; **whether the activity in which employe was engaged involved risk or danger,** Skeeters v. Skeeters, (1964) 237 Or 204, 389 P2d 313, 391 P2d 386; Quick v. Andresen, (1964) 238 Or 433, 395 P2d 154.

There was no error in submitting the case to the jury on the theory that the Employers' Liability Law might apply. Richardson v. Harris, (1964) 238 Or 474, 395 P2d 435.

(5) Instructions. Where both common-law grounds and grounds under this Act are included in one action, the instructions should distinguish between the grounds. Schulte v. Pac. Paper Co., (1913) 67 Or 334, 135 P 527, 136 P 5.

The exact language of ORS 654.305 may be used in instructing the jury in an action under this Act. Hoag v. Wash.-Ore. Corp., (1915) 75 Or 588, 144 P 574, 147 P 756.

The nature, extent and limits of rights accorded by the statute may properly be declared to the jury by the court, in the absence of special circumstances. Nordlund v. Lewis & Clark R. Co., (1932) 141 Or 83, 15 P2d 980.

Whenever instructions encompass within the word "negligence" an alleged violation of ORS 654.305, proof showing that after an injury the employer made a change in the tortious instrumentality and that subsequent experience has shown that the change (1) is a practical safety measure and (2) does not detract from efficiency, is evidence of negligence. Williams v. Portland Gen. Elec. Co., (1952) 195 Or 197, 247 P2d 494.

The jury should be instructed that defendant could be held liable only if it were proved he was an employer within the meaning of this Act. Thomas v. Foglio, (1961) 225 Or 540, 358 P2d 1066.

An instruction that the employer was under a nondelegable duty to furnish the employe a "reasonably safe" place to work was not error, that being more favorable to the employer than the law required. Nordin v. Lovegren Lbr. Co., (1916) 80 Or 140, 156 P 587.

An instruction that, if the defendant had provided a "reasonably and ordinarily safe" place for the plaintiff to work, considering the character of the work, defendant could not be found negligent, was properly refused. Nelson v. Brown & McCabe, (1916) 81 Or 472, 159 P 1163.

An instruction on the duty to use an elevator safety device was proper. Poole v. Tilford, (1921) 99 Or 585, 195 P 1114.

An assumption by the court that plaintiff's work involved risk or danger was reversible error. McCauley v. Steamship "Willamette," (1923) 109 Or 131, 215 P 892.

Where the court in effect withdrew the common-law cause of action from the consideration of the jury, it was not error to refuse to instruct the jury upon defenses pertaining exclusively thereto. Montgomery Ward & Co. v. Hammer, (1930) 38 F2d 636.

An instruction that the defense of assumption of risk is not available in an action under this Act, was proper where the issue was developed by the evidence although not alleged as a defense. Nordlund v. Lewis & Clark R. Co., (1932) 141 Or 83, 15 P2d 980.

The failure to instruct as to the specific duty of the

employer seasonably to test materials so as to detect defects was not error in the absence of a request therefor. Id.

No prejudice resulted from a judge's statement of his interpretation of the Act where it appeared the jury declined to apply that law to the case. Hamilton v. Redeman, (1939) 163 Or 324, 97 P2d 194.

The court's statement to the effect that the employe, who had not considered himself in danger, could not charge the employer with negligence for not knowing that the place was dangerous was improper. Lynch v. Ore. Lbr. Co., (1939) 108 F2d 283.

ORS 654.305 IN PARTICULAR

13. In general

The method of operation as well as the safe condition of machinery is governed by the statutory words "care and precaution." Lang v. Camden Iron Works, (1915) 77 Or 137, 146 P 964.

A two-year limitation is imposed on actions arising under this section. Shelton v. Paris, (1953) 199 Or 365, 261 P2d 856.

In order for there to be a commingling of function or duty, a shoulder-to-shoulder performance of work is not necessary. Hess v. United States, (1960) 282 F2d 633.

The Act is cast in terms of the nature and degree of defendant's control over the work out of which the injury arises. Bassick v. Portland Gen. Elec. Co., (1967) 246 Or 498, 426 P2d 450.

Plaintiff may recover under this Act against one who does not directly employ him. Id.

In an action for the death of city employe, killed while trying to rescue an employe of defendant, proof that city had been in complete control at time of accident precluded recovery. Byers v. Hardy, (1959) 216 Or 42, 337 P2d 806, cert. denied, 361 US 321, 80 S Ct 347, 4 L Ed 2d 347.

14. Member of public

The word "public" relates only to criminal liability under the Act; a member of the public has no right of action unless he is an employe, or is engaged in a hazardous employment. Turnidge v. Thompson, (1918) 89 Or 637, 175 P 281; Saylor v. Enterprise Elec. Co., (1923) 106 Or 421, 212 P 477; Drefs v. Holman Transfer Co., (1929) 130 Or 452, 280 P 505; Pacific States Lbr. Co. v. Bargar, (1926) 10 F2d 335.

No recovery as a member of the public was allowed a garbage collector who was an independent contractor at the time of injury. Helzer v. Wax, (1928) 127 Or 427, 272 P 556.

15. Person in charge

The word "and" means "or" in the sentence "all owners .... and other persons having charge of any work," thereby creating a several and not a joint liability. Lawton v. Morgan, Fliedner & Boyce, (1913) 66 Or 292, 131 P 314, 134 P 1037.

The requirements of the law are extended, by this section, to all persons having charge of or responsibility for any work involving risk or danger to employes. Dunn v. Orchard Land Co., (1913) 68 Or 97, 136 P 872; Mackay v. Comm. of Port of Toledo, (1915) 77 Or 611, 152 P 250.

One who merely leases equipment used in the activity out of which plaintiff's injury occurred is not an employer within the meaning of this Act unless he was participating in the activity out of which the injury arose. Thomas v. Foglio, (1961) 225 Or 540, 358 P2d 1066.

Decedent was under the direction and control of defendant. Tallmon v. Toko Kaium K.K. Kobe, (1967) 278 F Supp 452.

An elevator company, employing a constructor's helper upon the premises of a realty company was bound to use care and devices under this Act. Gunnell v. Van Emon Elevator Co., (1916) 81 Or 408, 159 P 971.

Plaintiff, in charge of the work of himself and another in posting signs on defendant's billboards, could not recover since the breach of his duty to inspect the ladder from which he fell when a rung broke was the cause of the injury. Howard v. Foster & Kleiser Co., (1958) 217 Or 516, 332 P2d 621, 342 P2d 780.

Plaintiff, a foreman, could not recover for injury from fall since injury was caused by breach of foreman's duty to inspect. Galer v. Weyerhaeuser Tbr. Co., (1959) 218 Or 152, 344 P2d 544.

Evidence was conclusive that plaintiff was not a vice principal with a duty to repair or inspect the machinery. Blaine v. Ross Lbr. Co., (1960) 224 Or 227, 355 P2d 461.

16. Work involving risk or danger

(1) Generally. Only employments beset with danger come under the application of this Act. O'Neill v. Odd Fellows Home, (1918) 89 Or 382, 174 P 148; Bottig v. Polsky, (1921) 101 Or 530, 201 P 188.

An occupation must be commonly regarded as dangerous before the employe is protected by this section and ORS 654.310. Wells v. Nibler, (1950) 189 Or 593, 221 P2d 582; Short v. Federated Livestock Corp., (1963) 235 Or 81, 383 P2d 1016.

Hazardous occupations in general are included in this section. Yovovich v. Falls City Lbr. Co., (1915) 76 Or 585, 149 P 941.

Where any risk or hazard would seem naturally incident to the employment, this Act is broad enough to include any injury resulting to an employe. Lang v. Camden Iron Works, (1915) 77 Or 137, 146 P 964.

"Any work involving a risk or danger" applies only to employments which are inherently dangerous. Barker v. Portland Traction Co., (1947) 180 Or 586, 173 P2d 288, 178 P2d 706.

Work involving risk or danger is work which is inherently dangerous or employment which presents dangers which are uncommon. Richardson v. Harris, (1964) 238 Or 474, 395 P2d 435.

In the absence of demurrer or motion to strike, complaint alleging plaintiff was injured by falling into defendant's elevator shaft was sufficient, although there was no allegation the work involved risk or danger. Bandy v. Norris, Beggs and Simpson, (1959) 222 Or 1, 342 P2d 839.

(2) Determining if risk or danger involved. The place in which the work was to be done must be considered as a factor in determining whether the work involved a risk of danger within this Act. Vanderflute v. Portland Ry., Light & Power Co., (1922) 103 Or 398, 205 P 551; Jodoin v. Luckenbach S.S. Co., (1928) 125 Or 634, 268 P 51.

It is the specific work engaged in when injured that controls the question of risk and danger, rather than the general name or character of the original employment. Bartley v. Doherty, (1960) 225 Or 15, 351 P2d 71, 351 P2d 521; Memmot v. State Ind. Acc. Comm., (1963) 235 Or 360, 385 P2d 188; Quick v. Andresen, (1964) 238 Or 433, 395 P2d 154.

Whether or not the particular work in which plaintiff was engaged at the time of his injury involved risk or danger ordinarily is a jury question. Parks v. Edward Hines Lbr. Co., (1962) 231 Or 334, 372 P2d 978; Entler v. Hamilton, (1971) 258 Or 65, 481 P2d 85.

The general characteristics of an employment need not be hazardous, but recovery may be had where the duty the employe was performing was within the purview of the Act and the injury was due to a violation of the requirements of the Act. Barker v. Portland Traction Co., (1947) 180 Or 586, 173 P2d 288, 178 P2d 706.

Although the duties of an employe have general characteristics of inherent risk and danger (alleged but not decid-

ed), the employe is not thereby entitled to recover for an injury occurring from a nonhazardous activity. Id.

Whether a case comes under the provisions of this Act depends upon whether the employe, at the time he was injured, engaged in work involving risk or danger. Williams v. Clemen's Forest Prod., (1950) 188 Or 572, 216 P2d 241, 217 P2d 252. Overruling Fitzgerald v. Ore.-Wash. R. & Nav. Co., (1932) 141 Or 1, 16 P2d 27.

It was a jury question whether the arrangement of the load of logs on the truck was dangerous, and the absence of machinery did not preclude the operation of the Employers' Liability Act. Hon v. Moore Tbr. Prod., Inc., (1959) 215 Or 628, 337 P2d 321.

(3) Particular employments

(a) Rule. Ordinarily, whether the work involved risk or danger to the employes or the public, is a question for the jury. Yovovich v. Falls City Lbr. Co., (1915) 76 Or 585, 149 P 941; Wheeler v. Nehalem Tbr. Co., (1916) 79 Or 506, 155 P 1188; Poullos v. Grove, (1917) 84 Or 106, 164 P 562; Rorvick v. No. Pac. Lbr. Co., (1921) 99 Or 58, 190 P 331, 195 P 163; Bottig v. Polsky, (1921) 101 Or 530, 201 P 188; Jodoin v. Luckenbach S.S. Co., (1928) 125 Or 634, 268 P 51; Coomer v. Supple Inv. Co., (1929) 128 Or 224, 274 P 302; Freeman v. Wentworth & Irwin, (1932) 139 Or 1, 7 P2d 796; Ferretti v. So. Pac. Co., (1936) 154 Or 97, 57 P2d 1280; Williams v. Clemen's Forest Prod., (1950) 188 Or 572, 216 P2d 241, 217 P2d 252; Snyder v. Prairie Logging Co., (1956) 207 Or 572, 298 P2d 180; Bartley v. Doherty, (1960) 225 Or 15, 351 P2d 71, 351 P2d 521.

"Risk and danger" is not established as a matter of law whenever a workman is injured while working in a sawmill operation. Williams v. Clemen's Forest Prod., (1950) 188 Or 572, 216 P2d 241, 217 P2d 252.

Where the scaling of logs is required to be done concurrently with logging operations and in the vicinity and as a part thereof, the jury could find that such scaling involves risk and danger. Snyder v. Prairie Logging Co., (1956) 207 Or 572, 298 P2d 180.

Where plaintiff was required by her foreman and by the location of her place of work to jump down three feet to reach said place of work, there was sufficient evidence for the jury to find her work to be inherently dangerous and therefore involving risk or danger within ORS 654.305. Shevlin-Hixon Co. v. Smith, (1947) 165 F2d 170.

In a case involving an employe injured while loading an electric furnace, the evidence was such that error was committed in withholding from the jury the question of whether the work performed by the employe involved risk or danger. Hale v. Elec. Steel Foundry Co., (1948) 183 Or 275, 191 P2d 257.

(b) Employments involving risk or danger. Certain employments involve risk or danger. **Hauling slabs along a slab haul 50 feet high on dead rolls in a sawmill,** Dunn v. Orchard Land Co., (1913) 68 Or 97, 136 P 872; **moving a ginpole,** Lang v. Camden Iron Works, (1915) 77 Or 137, 146 P 964; **tree cutting,** Niemi v. Stanley Smith Lbr. Co., (1915) 77 Or 221, 147 P 532, 149 P 1033; **mining activities,** Raiha v. Coos Bay Coal & Fuel Co., (1915) 77 Or 275, 143 P 892, 149 P 940, 151 P 471; **stringing electric wires,** Hartman v. Ore. Elec. R. Co., (1915) 77 Or 310, 149 P 893, 151 P 472; **certain farm labor,** Poullos v. Grove, (1917) 84 Or 106, 164 P 562; **logging camp,** Brady v. Ore. Lbr. Co., (1926) 117 Or 188, 243 P 96, 45 ALR 812; **milling company employe,** Walters v. Dock Comm., (1928) 126 Or 487, 245 P 1117, 266 P 634, 270 P 778.

Where bales of paper fell, the refusal of an instruction based on the theory that the plaintiff's work did not involve risk or danger within this Act, was warranted by the evidence. Quinn v. Hawley Pulp and Paper Co., (1917) 85 Or 630, 167 P 571.

(c) Employments not involving risk or danger as a matter of law. Certain employments do not involve risk or danger. **Removing an iron spool, weighing 250 to 300 pounds, from a truck upon a railroad track,** Isaacson v. Beaver Logging Co., (1914) 73 Or 28, 143 P 938; **a laundress using a step ladder two or three feet high, not equipped with a hand rail, in hanging up washing,** O'Neill v. Odd Fellows Home, (1918) 89 Or 382, 174 P 148; **restaurant and confectionery business,** Hoffman v. Broadway Hazelwood, (1932) 139 Or 519, 10 P2d 349, 11 P2d 814, 83 ALR 1008; **work of a streetcar operator in removing snow from a clogged switch,** Barker v. Portland Traction Co., (1947) 180 Or 586, 173 P2d 288, 178 P2d 706; **cutting a limb from a tree,** Wells v. Nibler, (1950) 189 Or 593, 221 P2d 582; **one employed as "lacer" during hop harvest,** McLean v. Golden Gate Hop Ranch, (1952) 195 Or 26, 244 P2d 611; **operating a gasoline filling station,** Union Oil Co. v. Hunt, (1940) 111 F2d 269; **home laundering,** Larson v. Papst, (1955) 205 Or 126, 286 P2d 123; **hog feeding,** Short v. Federated Livestock Corp., (1963) 235 Or 81, 383 P2d 1016.

FURTHER CITATIONS: I-L Logging Co. v. Manufacturers & Wholesalers Indem. Exch., (1954) 202 Or 277, 313, 273 P2d 212, 275 P2d 226; Montgomery Ward & Co. v. No. Pac. Terminal Co., (1954) 17 FRD 52; Landgraver v. Emanuel Lutheran Charity Bd., Inc., (1955) 203 Or 489, 520, 280 P2d 301; Schweigert v. Beneficial Standard Life Ins. Co., (1955) 204 Or 294, 282 P2d 621; Hall v. Copco Pac., Ltd., (1955) 224 F2d 884; Pease v. Roseburg Lbr. Co., (1956) 206 Or 658, 294 P2d 346; Lang v. Coastwise Line, (1956) 206 Or 667, 294 P2d 341; Ellis v. Fallert, (1957) 209 Or 406, 307 P2d 283; Oviatt v. Camarra, (1957) 210 Or 445, 311 P2d 746; O'Toole v. United States, (1957) 242 F2d 308; Hahn v. Ross Island Sand & Gravel Co., (1958) 214 Or 1, 320 P2d 668; Long v. Springfield Lbr. Mills, Inc., (1958) 214 Or 231, 327 P2d 421; Hess v. United States, (1958) 259 F2d 285; Nadeau v. Power Plant Engineering Co., (1959) 216 Or 12, 337 P2d 313; Davis v. Angell, (1959) 218 Or 443, 345 P2d 405; Fisher v. Kirk, (1959) 219 Or 402, 347 P2d 851; Continental Cas. Co. v. Gen. Acc. Fire & Life Assur. Corp., (1959) 175 F Supp 713; Olson v. River View Cemetery Assn., (1960) 220 Or 220, 349 P2d 279; Mildenberger v. Cargill, Inc., (1960) 220 Or 629, 350 P2d 413; Warner v. Mitchell Bros. Truck Lines, (1960) 221 Or 544, 352 P2d 156; Nelson v. Bartley, (1960) 222 Or 361, 352 P2d 1083; Fisher v. Rudie Wilhelm, (1960) 224 Or 26, 355 P2d 242; Cimarron Ins. Co., Inc. v. Travelers Ins. Co., (1960) 224 Or 57, 355 P2d 742; Pruett v. Lininger, (1960) 224 Or 614, 356 P2d 547; O'Neal v. Meier & Frank Co., (1961) 226 Or 108, 359 P2d 101; Beers v. Chapman, (1962) 230 Or 553, 370 P2d 941; Renner v. Kinney, (1962) 231 Or 553, 373 P2d 668; Dewey v. A. F. Kilaveness & Co., (1963) 233 Or 515, 379 P2d 560; Snook v. St. Paul Fire & Marine Ins. Co., (1963) 220 F Supp 314; Kemp v. Utah Const. and Min. Co., (1963) 225 F Supp 250; Cox v. Al Pierce Lbr. Co., (1965) 239 Or 546, 398 P2d 746; Crow v. Junior Bootshops, (1965) 241 Or 135, 404 P2d 789; Klerk v. Tektronix, Inc., (1966) 244 Or 10, 415 P2d 510; Godell v. Johnson, (1966) 244 Or 587, 418 P2d 505; Penrose v. Mitchell Bros. Crane Div., Inc., (1967) 246 Or 507, 426 P2d 861; Pooschke v. Union Pac. R. R., (1967) 246 Or 633, 426 P2d 866; Kruse v. Coos Head Tbr. Co., (1967) 248 Or 294, 432 P2d 1009; Wells v. Evans Prod. Co., (1968) 252 Or 17, 446 P2d 108; Johnson v. Field, (1969) 253 Or 654, 456 P2d 483; Bass v. Dunthorpe Motor Trans. Co., (1971) 258 Or 409, 484 P2d 319; McGrath v. White Motor Corp., (1971) 258 Or 583, 484 P2d 838; Leech v. Georgia-Pac. Corp., (1971) 259 Or 161, 485 P2d 1195.

ATTY. GEN. OPINIONS: Necessity of fault for liability, 1954-56, p 79.

LAW REVIEW CITATIONS: 35 OLR 6; 39 OLR 75; 39 OLR 80, 81; 40 OLR 291, 293; 41 OLR 30, 226; 45 OLR 40; 45 OLR 43; 46 OLR 333; 1 WLJ 1-16, 28-31, 42, 43, 45, 63, 72, 74, 95-104, 141, 620-622.

654.310

NOTES OF DECISIONS

See also cases under ORS 654.305 and 654.315 to 654.335.

The use of the word "or" in the first sentence of this section indicates that for the recovery of damages a several, and not a joint, liability was contemplated. Lawton v. Morgan, Fliedner & Boyce, (1913) 66 Or 292, 131 P 314, 134 P 1037.

Insuring that a scaffolding will bear four times the maximum weight it is to sustain is a duty of a foreman or other person in charge. Moen v. Aitken, (1928) 127 Or 246, 271 P 730.

The highest degree of care is not contemplated in the furnishing of the materials described in subsection (1). Mildenberger v. Cargill, Inc., (1960) 220 Or 629, 350 P2d 413.

Manufacturer was not liable to employe of the machine's owner. Richey v. Sumoge, (1967) 273 F Supp 904.

Plaintiff, in charge of the work of himself and another in posting signs on defendant's billboards, could not recover since the breach of his duty to inspect the ladder from which he fell when a rung broke was the cause of the injury. Howard v. Foster & Kleiser Co., (1958) 217 Or 516, 332 P2d 621, 342 P2d 780.

FURTHER CITATIONS: Myers v. Staub, (1954) 201 Or 663, 272 P2d 203; Hubbard v. Lamford Lbr. Co., (1956) 209 Or 145, 304 P2d 943; Bandy v. Norris, Beggs and Simpson, (1959) 222 Or 1, 342 P2d 839.

LAW REVIEW CITATIONS: 40 OLR 293; 1 WLJ 107, 108.

654.315

NOTES OF DECISIONS

See also cases under ORS 654.305, 654.310 and 654.320 to 654.335.

Nondelegable, absolute and continuing duties are imposed on masters. Camenzind v. Freeland Furniture Co., (1918) 89 Or 158, 174 P 139; Moen v. Aitken, (1928) 127 Or 246, 271 P 730.

A rope selected by the plaintiff while engaged in working for himself need not be tested by the master's foreman. Malloy v. Marshall-Wells Hdw. Co., (1918) 90 Or 303, 173 P 267, 175 P 659, 176 P 589.

Precisely the same duty to the same extent is placed upon each of the persons specifically mentioned in this section, and none can delegate it. Marks v. Bauers, (1925) 3 F2d 516.

Neither the owners nor the superintendent is made any more responsible for the construction or operation of a particular structure than the foreman. Id.

A civil suit against a negligent employe is not authorized under this Act. Gray v. Hammond Lbr. Co., (1925) 113 Or 570, 232 P 637, 233 P 561, 234 P 261.

To see that a scaffold will bear four times the maximum weight to be sustained by it is a duty of a foreman supervising its construction. Moen v. Aitken, (1928) 127 Or 246, 271 P 730.

Nondelegable, absolute and continuing duties are imposed on masters. Fields v. Fields, (1958) 213 Or 522, 307 P2d 528, 326 P2d 451.

The burden of proving the foreman's defense rule is with the defendant. Bartley v. Doherty, (1960) 225 Or 15, 351 P2d 71, 351 P2d 521.

It is necessary to an affirmative defense under this section to show plaintiff was charged with obedience to the Basic Safety Code and that his violation was the proximate cause of his injury. Skeeters v. Skeeters, (1964) 237 Or 204, 389 P2d 313, 391 P2d 386.

Whether plaintiff had authority to hire and fire employes is relevant to determining whether he was a vice principal. Id.

A foreman injured through a lack of safety appliances it was his duty to provide, was not entitled to recover therefor. Marks v. Bauers, (1925) 3 F2d 516.

The chief engineer of a hotel had a statutory duty to see to it that an ice crushing machine was not operated without proper guard. If he violated this duty, a cause of action in his favor for injuries sustained by contact with the machine did not arise. Schmidt v. Multnomah Operating Co., (1936) 155 Or 53, 61 P2d 95.

Employe's familiarity with machine resulting from prior use did not transfer to him duty imposed by statute on employer to make machine as safe as practicable. Fields v. Fields, (1958) 213 Or 522, 307 P2d 528, 326 P2d 451.

Plaintiff, in charge of the work of himself and another in posting signs on defendant's billboards, could not recover since the breach of his duty to inspect the ladder from which he fell when a rung broke was the cause of the injury. Howard v. Foster & Kleiser Co., (1958) 217 Or 516, 332 P2d 621, 342 P2d 780.

FURTHER CITATIONS: Richey v. Sumoge, (1967) 273 F Supp 904.

LAW REVIEW CITATIONS: 1 WLJ 140-144.

654.320

NOTES OF DECISIONS

See also cases under ORS 654.305 to 654.315 and 654.325 to 654.335.

1. In general

This section changes the rule that the character of the act in the performance of which the injury arises, and not the rank or class of the negligent employe, is the test whether a negligent employe is a vice-principal or a fellow servant. Schulte v. Pac. Paper Co., (1913) 67 Or 334, 135 P 527, 136 P 5.

2. Liability

No recovery against a superintendent or manager is provided for by this section; the injured employe may only recover against the employer for the negligence of the superintendent or manager. Hoag v. Wash.-Ore. Corp., (1915) 75 Or 588, 144 P 574, 147 P 756; Gray v. Hammond Lbr. Co., (1925) 113 Or 570, 232 P 637, 233 P 561, 234 P 261.

Whether the negligence of the owner or of a fellow-workman causes an injury, the owner is liable by reason of this and other sections. Reed v. Western Union Tel. Co., (1914) 70 Or 273, 141 P 161.

Delegation of statutory duties to a foreman will not exonerate employer. Howard v. Foster & Kleiser Co., (1959) 217 Or 516, 332 P2d 621, 342 P2d 780.

A foreman was not entitled to recover for injuries resulting from his failure to comply with the statute as to safety devices. Marks v. Bauers, (1925) 3 F2d 516.

3. Person in charge

A head sawyer is a vice-principal and not a fellow servant. Browning v. Smiley-Lampert Lbr. Co., (1914) 68 Or 502, 137 P 777.

A subcontractor has charge of the work and this section casts upon him an agency in behalf of the original contractor who is liable for injuries to an employe hired by the subcontractor. Wolsiffer v. Bechill, (1915) 76 Or 516, 146 P 513, 149 P 533.

A foreman in charge of lumbering operations is the agent of the lumber company by reason of this section. Yovovich v. Falls City Lbr. Co., (1915) 76 Or 585, 149 P 941.

Architects, provided by a construction contract to oversee

the work, are not independent contractors. Harvey v. Corbett, (1915) 77 Or 51, 150 P 263.

A carpenter is, as a matter of law, not one in charge or control of the work under this section. Moen v. Aitken, (1928) 127 Or 246, 271 P 730.

A lineman was regarded as a vice-principal under this section where he permitted an inexperienced boy of 18 to ascend poles and tie high-voltage wires. Betts v. Bisher, (1914) 130 CCA 161, 213 Fed 581.

4. Evidence

Evidence, to the effect that the defendant's foreman told the injured employe that if he did not like the job he could leave, was admissible as tending to show where the plaintiff was required to work at the time of the injury. Ramaswamy v. Hammond Lbr. Co., (1915) 78 Or 407, 152 P 223.

5. Instructions

Instruction that a tree faller killed by a flying limb was as a matter of law not in charge or control of the work was properly refused. Robbins v. Irwin, (1947) 180 Or 667, 178 P2d 935.

The trial court's use of the exact language of the section in place of paraphrase in plaintiff's requested instruction was not error. Id.

LAW REVIEW CITATIONS: 1 WLJ 119, 121.

654.325

NOTES OF DECISIONS

See also cases under ORS 654.305 to 654.320, 654.330 and 654.335.

1. In general

Contributory negligence of the deceased merely reduces the recovery for his death. Kuntz v. Emerson Hardwood Co., (1919) 93 Or 565, 184 P 253.

An assignment of a right of action under this Act is not permitted. Rorvik v. No. Pac. Lbr. Co., (1921) 99 Or 58, 190 P 331, 195 P 163.

No right of action against a negligent employe is authorized by this section. Gray v. Hammond Lbr. Co., (1925) 113 Or 570, 232 P 637, 233 P 561, 234 P 261.

If a decedent's cause of action is barred at the time of his death, an action under this section cannot be maintained; this is true notwithstanding an action brought by the decedent tardily, which action was terminated without trial by reason of the death of the plaintiff. Piukkula v. Pillsbury Astoria Flouring Mills Co., (1935) 150 Or 304, 42 P2d 921, 44 P2d 162, 99 ALR 244.

The word "children" as used in the statute includes both adults and minors. Melton v. Southeast Portland Lbr. Co., (1939) 160 Or 500, 85 P2d 1038.

2. Construction and effect

A new right of action is created by this section, but it is dependent upon the possession by the deceased of a cause of action at the time of his death. Piukkula v. Pillsbury Astoria Flouring Mills Co., (1935) 150 Or 304, 42 P2d 921, 44 P2d 162, 99 ALR 244; Hansen v. Hayes, (1944) 175 Or 358, 154 P2d 202.

This is not a survival statute. Id.

3. Relationship to ORS 30.020 (the Wrongful Death Act)

(1) In general. ORS 30.020 is not repealed by this Act. Statts v. Twohy Bros. Co., (1912) 61 Or 602, 123 P 909; McFarland v. Ore. Elec. R. Co., (1914) 70 Or 27, 138 P 458, Ann Cas 1916B, 527; Niemi v. Stanley Smith Lbr. Co., (1915) 77 Or 221, 227, 147 P 532, 149 P 1033; Hawkins v. Anderson & Crowe, (1917) 84 Or 94, 164 P 556.

This section is exclusive of ORS 30.020 while the named persons survive. Niemi v. Stanley Smith Lbr. Co., (1915) 77 Or 221, 227, 147 P 532, 149 P 1033; Hawkins v. Anderson & Crowe, (1917) 84 Or 94, 100, 164 P 556.

Construction of this section with ORS 30.020 is required, and so far as possible effect is to be given to the provisions of each. Niemi v. Stanley Smith Lbr. Co., (1915) 77 Or 221, 147 P 532, 149 P 1033.

An election to sue under ORS 30.020 instead of this Act does not violate any principle of public policy. Thompson v. Union Fishermen's Co-op. Packing Co., (1926) 118 Or 436, 235 P 694, 246 P 733.

An action under ORS 30.020 differs from one by a beneficiary under this Act in that the former is for the benefit of the estate, and the latter for the exclusive benefit of the beneficiary named in the Act. Fox v. Ungar, (1940) 164 Or 226, 98 P2d 717.

(2) Effect on parties plaintiff. If any named beneficiary is living, no other person can recover as otherwise employer would be subject to more than one action for same wrong. Thompson v. Union Fishermen's Co-op. Packing Co., (1926) 118 Or 436, 235 P 694, 246 P 733; Thompson v. Union Fishermen's Co-op. Packing Co., (1929) 128 Or 172, 273 P 953.

Where none of the beneficiaries named survive, a personal representative may recover damages under ORS 30.020 for the estate of the deceased or, if the deceased was a child, and his parents did not survive, his guardian may sue. Id.

The personal representative of a deceased employe covered by this Act may bring an action in that capacity under ORS 30.020, or in his capacity as a relative, if such is the case, under this Act. Thompson v. Union Fishermen's Coop. Packing Co., (1926) 118 Or 436, 235 P 694, 246 P 733; Thompson v. Union Fishermen's Co-op. Packing Co., (1929) 128 Or 172, 273 P 953. **Contra,** Hawkins v. Barber Asphalt Paving Co., (1913) 202 Fed 340.

An action under ORS 30.020 could not be brought by a widow and children who may bring an action under this section. Nordlund v. Lewis & Clark R. Co., (1932) 141 Or 83, 15 P2d 980.

If anyone of the beneficiaries named in this statute is living and in a position to bring the action, no action brought by the personal representative under ORS 30.020 will lie. Fox v. Ungar, (1940) 164 Or 226, 98 P2d 717.

(3) Effective date of action. An amended complaint filed by a beneficiary under this Act in a suit originally brought by the administrator to recover damages for the death of his intestate did not relate back to the commencement of the original action. Fox v. Ungar, (1940) 164 Or 226, 98 P2d 717.

4. Employer under Workmen's Compensation Act

An employer who is subject to the Workmen's Compensation Act and has fully complied therewith is not personally liable to a workman who is injured in the course of his employment or, in case of his death, to the beneficiaries mentioned in this Act, or to anyone else. Bigby v. Pelican Bay Lbr. Co., (1944) 173 Or 682, 147 P2d 199.

5. Relation of employer and employe

Employes only are protected by this Act, and only their

substitutes may prosecute an action for death resulting from a violation of the Act. Saylor v. Enterprise Elec. Co., (1923) 106 Or 421, 212 P 477.

Where the evidence showed that deceased was not an employe of any employer at the time of his death, an action cannot be maintained. Id.

Where the evidence showed that deceased was not an employe of any employer at the time of his death, an action tion with the employer company, the mother of the decedent cannot maintain an action under this Act. Drefs v. Holman Transfer Co., (1929) 130 Or 452, 280 P 505.

6. Who may maintain action

If the mother of the decedent was surviving, the father could not maintain an action. McFarland v. Ore. Elec. R. Co., (1914) 70 Or 27, 138 P 458, Ann Cas 1916B, 527.

Before the 1919 amendment, the administrator could not sue under this section. Franciscovich v. Walton, (1915) 77 Or 36, 150 P 261.

Before the 1919 amendment, although a women left children by a former marriage, her husband had a right of action for her death under this section. Crown Willamette Paper Co. v. Newport, (1919) 260 Fed 110, 171 CCA 146.

A nonresident alien may maintain an action under this section. Garvin v. Western Cooperage Co., (1919) 94 Or 487, 184 P 555.

Intermediaries are not permitted to sue under this section; the action is to be maintained directly by whatever beneficiary is entitled to sue. Wilcox v. Warren Const. Co., (1920) 95 Or 125, 186 P 13, 13 ALR 211.

Before the 1919 amendment, the widow had the exclusive right to sue for death of her husband in her own name; and where she did not prosecute, her cause of action died with her, and the husband's lineal heirs, children by a former wife, could not maintain the action. Id.

The Workmen's Compensation Act precludes, if not expressly, at least by implication, the mother of a deceased workman who was not dependent upon his earnings in whole or in part from maintaining an action for damages for his death under this Act. Bigby v. Pelican Bay Lbr. Co., (1944) 173 Or 682, 147 P2d 199.

A widow and dependent minor children were properly made parties plaintiff. Williams v. Clemen's Forest Prod., (1950) 188 Or 572, 216 P2d 241, 217 P2d 252. Overruling Melton v. Southeast Portland Lbr. Co., (1939) 160 Or 500, 85 P2d 1038.

7. Pleading

The failure of a mother to allege the nonexistence of a widow or children of her deceased son was cured by a finding that the son was unmarried. Gray v. Hammond Lbr. Co., (1925) 113 Or 571, 232 P 637, 233 P 561, 234 P 261.

Where there was no contention that there were actually preferred beneficiaries, an objection for failure to allege that there were none was purely technical. Id.

8. Damages

Contributions of support money by the deceased employe is a proper item of damages in an action by the widow and children and recovery is not limited to the net amount that the decedent would have saved from his earnings. Nordlund v. Lewis & Clark R. Co., (1932) 141 Or 83, 15 P2d 980.

The amount of recovery under this section is to be measured by the pecuniary loss suffered by the person entitled to maintain the action. Scott v. Brogan, (1937) 157 Or 549, 73 P2d 688.

If the surviving spouse sues, the right of action includes the damages suffered by the heirs. Melton v. Southeast Portland Lbr. Co., (1939) 160 Or 500, 85 P2d 1038.

Damages under this Act are not measured by the "benefit of the estate" rule. Hansen v. Hayes, (1944) 175 Or 358, 154 P2d 202. Overruling McClaugherty v. Rogue River Elec. Co., (1914) 73 Or 135, 140 P 64, 144 P 569; Yovovich v. Falls City Lbr. Co., (1915) 76 Or 585, 149 P 941; Kuntz v. Emerson Hardwood Co., (1919) 93 Or 565, 184 P 253; Garvin v. Western Cooperage Co., (1919) 94 Or 487, 184 P 555; Rorvik v. No. Pac. Lbr. Co., (1921) 99 Or 58, 190 P 331, 195 P 163.

FURTHER CITATIONS: Hess v. United States, (1959) 361 US 314, 80 S Ct 341, 4 L Ed 2d 305.

LAW REVIEW CITATIONS: 1 WLJ 35, 128-133.

654.330

NOTES OF DECISIONS

See also cases under ORS 654.305 to 654.325 and 654.335.

1. In general

No suit against a negligent employe is authorized by reason of this section. Lawton v. Morgan, Fliedner & Boyce, (1917) 66 Or 292, 131 P 314, 134 P 1037; Gray v. Hammond Lbr. Co., (1925) 113 Or 570, 232 P 637, 233 P 561, 234 P 261.

This section is remedial. Camenzind v. Freeland Furniture Co., (1918) 89 Or 158, 174 P 139.

Assumption of risk is no defense where the plaintiff performs work in conformity to the orders of the defendant's foreman who has charge of the work. Bottig v. Polsky, (1921) 101 Or 530, 201 P 188.

Employers are held to more stringent safety measures than those of the common law rule of due care. Howard v. Foster & Kleiser Co., (1959) 217 Or 516, 332 P2d 621, 342 P2d 780.

The merchant marine Act abolishing the fellow servant rule could not be applied by a stevedore electing to try an action under this Act. Van Norden v. Chas. R. McCormick Lbr. Co., (1927) 17 F2d 568.

A directed verdict for employer was properly denied where the defense was a fellow servant's negligence in the use of a bolt cutter furnished by the employer. Johnson v. Ore.-Wash. R. R. & Nav. Co., (1928) 126 Or 85, 268 P 985.

2. Construction

The word "works" as used in the statute, means an entire plant; all the real estate, buildings and machinery used in the particular business. Fitzgerald v. Ore.-Wash. R. & Nav. Co., (1932) 141 Or 1, 16 P2d 27.

This section does not extend the scope of ORS 654.305. Williams v. Clemen's Forest Products, Inc., (1950) 188 Or 572, 216 P2d 241, 217 P2d 252.

A motor car was held "machinery" within this section by a jury where injury was caused or contributed to by neglect of any person in control of machinery. Jodoin v. Luckenbach S.S. Co., (1928) 125 Or 634, 268 P 51.

3. When section applies

Where the action for injuries comes within the employers' liability law, the common-law doctrine of negligence of fellow servants does not apply. Wasiljeff v. Hawley Paper Co., (1914) 68 Or 487, 137 P 755; Wheeler v. Nehalem Timber Co., (1916) 79 Or 506, 155 P 1188; Moen v. Aitken, (1928) 127 Or 246, 271 P 730; Peluck v. Pac. Machine & Blacksmith Co., (1930) 134 Or 171, 293 P 417; Hollopeter v. Palm, (1930) 134 Or 546, 291 P 380, 294 P 1056; Skeeters v. Skeeters, (1964) 237 Or 204, 389 P2d 313, 391 P2d 386.

The words "or other person" do not exclude the defense of fellow servant in every case of negligence of an employe

in charge of any machine used in the employer's work. Van Norden v. Chas. R. McCormick Lbr. Co., (1927) 17 F2d 568.

Only where the injury is caused by one in authority is the fellow servant defense inapplicable. Id.

Whether a business is connected with interstate commerce or not, this section applies. Swayne & Hoyt v. Barsch, (1915) 226 Fed 581, 141 CCA 337.

A plaintiff employed as a dock laborer, in his common-law action for injuries sustained, was entitled to the protection of this section. Id.

4. Negligence of foreman

Even though the foreman's order is negligent, the plaintiff conforming therewith is not on that account precluded from recovering. Yovovich v. Falls City Lbr. Co., (1915) 76 Or 585, 149 P 941; Peluck v. Pac. Machine & Blacksmith Co., (1930) 134 Or 171, 293 P 417.

Irrespective of any negligence on the part of the superior servant, the employer is liable for any injury resulting to an employe injured in cutting through a tree in conformity with the directions of his superior, as was his duty. Yovovich v. Falls City Lbr. Co., (1915) 76 Or 585, 149 P 941.

5. Determination of employe's status

The court may determine whether an offending employe is a temporary vice-principal or a fellow servant where there is no dispute as to the facts, or where only one inference can legitimately be drawn. Isaacson v. Beaver Logging Co., (1914) 73 Or 28, 143 P 938.

Where it was contradicted that the plaintiff performed work under the direct, positive command of a superior servant, to give an instruction that the servant giving the order was not a fellow servant with the plaintiff is error. Id.

A head sawyer, who did not heed employe's signal, was within the definition of those whose neglect or incompetence shall not be a defense by reason of this section. Browning v. Smiley-Lampert Lbr. Co., (1914) 68 Or 502, 137 P 777.

That the mate of a vessel superintending its discharge, with power to discharge the dock laborers, was a fellow servant of a dock laborer, could not be said, as a matter of law. Swayne & Hoyt v. Barsch, (1915) 226 Fed 581, 141 CCA 337.

6. Questions for jury

Whether a fellow servant's negligence caused the injury was a question for the jury where fellow servant may not have obeyed employer. Reed v. W. Union Tel. Co., (1914) 70 Or 273, 141 P 161.

Evidence was insufficient to go to the jury upon the specification of negligence of the engineer who was in charge leaving the power room just prior to an accident. Erickson v. Pac. States Lbr. Co., (1927) 18 F2d 513.

Whether a foreman ordered the act causing an employe's injury, was a question for the jury under conflicting evidence. Peluck v. Pac. Machine & Blacksmith Co., (1930) 134 Or 171, 293 P 417.

No error was committed by refusal of instruction that fatal injury to tree faller was not his fault when he acted under order of superior, where questions as to his negligence and as to whether he acted under superior were properly submitted to jury. Robbins v. Irwin, (1947) 180 Or 667, 178 P2d 935.

LAW REVIEW CITATIONS: 33 OLR 90; 1 WLJ 22, 120-126.

654.335

NOTES OF DECISIONS

See also cases under ORS 654.305 to 654.330.

1. In general

Only actions specified in ORS 654.305 and 654.310 come within the exception to the common-law rule as to contributory negligence as expressed by this section. Schaedler v. Columbia Contract Co., (1913) 67 Or 412, 135 P 536.

The doctrine of comparative negligence by which the person injured is entitled to recovery only when his negligence is slight and that of the defendant gross in comparison is not applicable to actions under this Act. Filkins v. Portland Lbr. Co., (1914) 71 Or 249, 142 P 578.

This section is remedial. Camenzind v. Freeland Furniture Co., (1918) 89 Or 158, 174 P 139.

Employers are held to more stringent safety measures than those of the common law rule of due care. Howard v. Foster & Kleiser Co., (1959) 217 Or 516, 332 P2d 621, 342 P2d 780.

2. Abolition of defense of contributory negligence

In cases within this Act the defense of contributory negligence is eliminated, but must be taken into account in fixing the amount of damages. Wasiljeff v. Hawley Paper Co., (1914) 68 Or 487, 137 P 755; Cameron v. Pac. Lime & Gypsum Co., (1914) 73 Or 510, 144 P 446, Ann Cas 1916E, 769; Blair v. W. Cedar Co., (1915) 75 Or 276, 146 P 480; Wheeler v. Nehalem Tbr. Co., (1916) 79 Or 506, 155 P 1188; Gunnell v. Van Emon Elevator Co., (1916) 81 Or 408, 159 P 971; Poullos v. Grove, (1917) 84 Or 106, 164 P 562; Peluck v. Pac. Machine & Blacksmith Co., (1930) 134 Or 171, 293 P 417; Hovedsgaard v. Grand Rapids Store Equip. Corp., (1931) 138 Or 39, 5 P2d 86; Fitzgerald v. Ore.-Wash. R. & Nav. Co., (1932) 141 Or 1, 16 P2d 27; Skeeters v. Skeeters, (1964) 237 Or 204, 389 P2d 313, 391 P2d 386.

In all cases where there has been any negligence on the part of an employer, the issue of contributory negligence must be submitted to the jury for comparison. Hartman v. Ore. Elec. R. Co., (1915) 77 Or 310, 149 P 893, 151 P 472.

In cases within this Act the defense of contributory negligence is eliminated, but must be taken into account in fixing the amount of damages. Mazurek v. Rajnas, (1969) 253 Or 555, 456 P2d 83.

Where a plaintiff stevedore was hurt in doing work involving the use of machinery, his own contributory negligence would not completely bar recovery. Kveset v. W.R. Grace & Co., (1915) 77 Or 83, 150 P 281.

In an action by a servant injured by a runaway team while hauling lumber, the servant's alleged negligence could be considered only in mitigation of damages. Olds v. Olds, (1918) 88 Or 209, 171 P 1046.

Negligence of an elevator operator in occupying a dangerous position in the elevator was no defense; the employer was obligated to construct the elevator so that there would be no dangerous position thereon. Suey v. Benson Hotel Co., (1919) 91 Or 395, 179 P 239.

For an employe to change his place in a room was at most contributory negligence, merely reducing recovery. Kuntz v. Emerson Hardwood Co., (1919) 93 Or 565, 184 P 253.

A carpenter's negligence, unless willful, was properly stated to be no defense in a personal injury action against an employer. Hollopeter v. Palm, (1930) 134 Or 546, 291 P 380, 294 P 1056.

3. Fixing the amount of damages

Where the party injured was not exercising ordinary care, a part of the loss must be borne by him, and the remainder is recoverable from the defendant, on the basis of the fault

of each. Filkins v. Portland Lbr. Co., (1914) 71 Or 249, 142 P 578.

The jury should first discover what sum of money would afford indemnity for the injury, irrespective of the cause of the hurt, and then if both employer and employe are guilty of negligence, they must compare the negligence of each, and from such relative estimate assess the damages. Sonniksen v. Hood River Gas & Elec. Co., (1915) 76 Or 25, 146 P 980.

The apportioning of damages according to the respective want of care of the parties is proper under this section. Raiha v. Coos Bay Coal & Fuel Co., (1915) 77 Or 275, 143 P 892, 149 P 940, 151 P 471.

The word "may" in this section means "must"; and it is the duty of jury to consider contributory negligence. Donaghy v. Ore.-Wash. R. & Nav. Co., (1930) 133 Or 663, 288 P 1003, 291 P 1017.

4. Pleading and proof

Pleading and proof of contributory negligence for the consideration of the jury in determining the amount of recovery, but not as a defense, was proper. Schulte v. Pac. Paper Co., (1913) 67 Or 334, 135 P 527, 136 P 5.

An answer pleading that the injury was caused solely by the negligence of the plaintiff, although not admitting a dereliction upon the part of the employer, was sufficient to justify instructions by the court on contributory negligence. Tabor v. Coin Mach. Mfg. Co., (1917) 85 Or 194, 166 P 529.

Disregard of a warning by an injured employe was proper evidence of contributory negligence by him so as to reduce damages. Kuntz v. Emerson Hardwood Co., (1919) 93 Or 565, 184 P 253.

The trial court did not commit error in withdrawing the charge of contributory negligence where defendant failed to support it by substantial evidence. Manasco v. Barclay and Dahl, (1950) 189 Or 109, 218 P2d 469.

5. Instructions

Instructions to this section without explaining to the jury that the word "may" therein should be construed as "must" constitutes error. Donaghy v. Ore.-Wash. R. & Nav. Co., (1930) 133 Or 663, 288 P 1003, 291 P 1017.

An instruction that no recovery could be had by an employe guilty of contributory negligence was erroneous and was properly refused. Raiha v. Coos Bay Coal & Fuel Co., (1915) 77 Or 275, 143 P 892, 149 P 940, 151 P 471; Nelson v. Brown & McCabe, (1916) 81 Or 472, 159 P 1163; Olds v. Olds, (1918) 88 Or 209, 171 P 1046; Hollopeter v. Palm, (1930) 134 Or 546, 291 P 380, 294 P 1056.

Instructions taken together, correctly stated the law that the contributory negligence of the employe, if any, must be compared with that of the employer, and considered in mitigation in assessing damages. Sonniksen v. Hood R. Gas & Elec. Co., (1915) 76 Or 25, 146 P 980; Donaghy v. Ore.-Wash. R. & Nav. Co., (1930) 133 Or 663, 288 P 1003, 291 P 1017.

That this Act abrogated the legal principles of contributory negligence was not an erroneous instruction. Evans v. Portland Ry., Light and Power Co., (1913) 66 Or 603, 135 P 206.

Where the jury rendered a verdict for the plaintiff, an error in instructing the jury as to contributory negligence was not prejudicial to him. Coleman v. LaGrande, (1914) 73 Or 521, 144 P 468.

An instruction that if the accident was solely the plaintiff's fault and not his contributory fault he could not recover was proper. Ramaswamy v. Hammond Lbr. Co., (1915) 78 Or 407, 152 P 223.

An instruction as to reasonable care of employe could properly be refused where the court had charged in accordance with this section. Dickerson v. E. & W. Lbr. Co., (1916) 79 Or 281, 155 P 175.

That the jury should not consider contributory negligence at all was an erroneous instruction. Tabor v. Coin Mach. Mfg. Co., (1917) 85 Or 194, 166 P 529.

A refusal to give instructions as to the plaintiff's sole negligence was not error where a part of the charge given covered the same ground. Suey v. Benson Hotel Co., (1919) 91 Or 395, 179 P 239.

Where there was no plea, evidence or circumstances of contributory negligence, the refusal of plaintiff's requested instruction on contributory negligence was not error. Stanfield v. Fletcher, (1925) 114 Or 531, 236 P 258.

FURTHER CITATIONS: Hess v. United States, (1959) 361 US 314, 80 S Ct 341, 4 L Ed 2d 305; Ritters v. Beals, (1961) 225 Or 504, 358 P2d 1080; Norman v. Cunningham Sheep Co., (1963) 233 Or 385, 377 P2d 916; Godell v. Johnson, (1966) 244 Or 587, 418 P2d 505; Peterson v. Culp, (1970) 255 Or 269, 465 P2d 876.

LAW REVIEW CITATIONS: 39 OLR 76; 1 WLJ 22, 23.

654.410

NOTES OF DECISIONS

A violation of this section constitutes negligence without regard to the applicability or nonapplicability of the penal clause of this statute. Fitzgerald v. Ore.-Wash. R. & Nav. Co., (1932) 141 Or 1, 16 P2d 27.

The height of an electric bulb above the head of the stairway, in view of the shortness of the chain, may be a defect of which the employer could have had knowledge by the exercise of ordinary care. Id.

FURTHER CITATIONS: Barker v. Portland Traction Co., (1947) 180 Or 586, 173 P2d 288, 178 P2d 706.

654.415

ATTY. GEN. OPINIONS: Statute as applicable to school district shop, 1924-26, p 604.

654.990

NOTES OF DECISIONS

1. Subsection (5)

The word "public" in ORS 654.305 relates only to criminal liability under the Employers' Liability Act. Turnidge v. Thompson, (1918) 89 Or 637, 175 P 281; Saylor v. Enterprise Elec. Co., (1923) 106 Or 421, 212 P 477; Drefs v. Holman Transfer Co., (1929) 130 Or 452, 280 P 505; Pacific States Lbr. Co. v. Bargar, (1926) 10 F2d 335.

FURTHER CITATIONS: Shelton v. Paris, (1953) 199 Or 365, 261 P2d 856; M & M Wood Working Co. v. State Ind. Acc. Comm., (1954) 201 Or 603, 271 P2d 1082; Howard v. Foster & Kleiser Co., (1959) 217 Or 516, 332 P2d 621, 342 P2d 780; Ritter v. Beals, (1961) 225 Or 504, 358 P2d 1080; Renner v. Kinney, (1962) 231 Or 553, 373 P2d 668.

LAW REVIEW CITATIONS: 40 OLR 291.