

24.04(B) [2026 Revision] Affirmative Defense – Contributory Negligence

(Approved April 1, 2025; Effective January 1, 2026)

In your verdict, you must assess a percentage of fault to plaintiff [whether or not defendant was partly at fault]¹ if you believe:

First, plaintiff (*characterize the act of negligence, such as "failed to keep a lookout for oncoming trains"*), and

Second, plaintiff was thereby negligent,² and³

Third, such negligence² of plaintiff resulted in whole or in part in [injury to plaintiff] [the death of (*decedent's name*)].⁴

Notes on Use (2026 Revision)

(Approved April 1, 2025; Effective January 1, 2026)

1. The bracketed phrase may be used at defendant's option.
2. The terms "negligent" and "negligence" must be defined. See definitions in Chapter 11.00.
3. If more than one specification of negligence is submitted, modify Paragraph First to submit such specifications in the disjunctive and modify Paragraph Second to read:

"Second, plaintiff, in any one or more of the respects submitted in Paragraph First, was thereby negligent, and"

4. Select the appropriate phrase.

If contributory negligence is submitted, see MAI 24.06 and 24.07 for appropriate modification of the damage instruction in an FELA case. Use Verdict Form 37.07.

Committee Comment (2026 Revision)

(Approved April 1, 2025; Effective January 1, 2026)

A. This instruction is revised to comply with *Norfolk Southern Railway Co. v. Sorrell*, 549 U.S. 158, 127 S.Ct. 799 (2007).

B. Unlike "contributory negligence" as it was applied in non-FELA cases prior to the adoption of comparative fault principles, contributory negligence under the FELA did not bar plaintiff's recovery, but required a pro rata reduction. *See* 45 U.S.C. § 53, which provides: "the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee . . . "

C. Section 53 goes on to state: "Provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." The Boiler Inspection Act (now the Locomotive Inspection Act) and the Federal Safety Appliance Acts have been held to be such enactments; thus, the defense is not available in cases arising thereunder.

D. There was a publication error in the 2021 Revision of MAI 24.04(B), which resulted in an erroneous standard appearing in the pocket part publication of Paragraph Third of MAI 24.04(B). This has been corrected in the 2026 Revision to incorporate the causation standard mandated by *Norfolk Southern Railway Co. v. Sorrell*, 549 U.S. 158, 127 S.Ct. 799 (2007).