AN ANALYSIS OF JUDICIAL INTERPRETATION
AND APPLICATION OF CERTAIN ASPECTS
OF THE FEDERAL EMPLOYERS'
LIABILITY ACT*

John M. Ennis†

The first thing that should be emphasized about the Federal Employers' Liability Act¹ is that it is not in the nature of a workmen's compensation law, but is in fact a special federal negligence law which gives the right to most of the employees of the railroads to bring a negligence action against their employer for personal injuries suffered while on the job. The pertinent portion of Section 1 of the Act (45 U. S. C. §51) reads as follows:

Every common carrier by railroad while engaging in commerce between any of the several states . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. (Italics supplied.)

To put this in a different way, if there are no facts which indicate negligence on the part of the railroad, the employee has no right under the Act which can be successfully prosecuted. There are situations where a man is injured through no apparent fault of his own and yet there cannot be shown any negligence on the part of the carrier. Such an injured railroad employee is indeed unfortunate because he does not have recourse to any state workmen's compensation law and there is no federal compensation law to cover him, so that he is in the position of having no remedy in any form for his injuries and damages, and if he is killed his widow is in a sad situation legally as well as personally.

When counsel is consulted by an injured railroad employee the attorney should remember that "negligence" under FELA is the same in variety and degree as in any other type of personal injury action based on negligence. The attorney who is counsel in an FELA case should, however, be aware of a number of differences

*In this article special attention is given to recent developments in the judicial doctrine of the duty of the employer to furnish a reasonably safe place to work.
†Of Los Angeles, California; member of the California bar.
¹Congress, of course, is the source of the Act. The original Act, passed in 1906 (34 Stat. 232) was held unconstitutional by the Supreme Court. Employers' Liability Cases, 207 U. S. 463 (1908). Congress, on April 22, 1908 passed the present law, and on August 11, 1939 enacted certain amendments. 35 Stat. 65 (1908), as amended by 36 Stat. 291 (1910), and 53 Stat. 1404 (1939), 45 U. S. C. §§51-60 (1946).
between the case of an injured railroad employee and other types of negligence cases such as arise in traffic accidents. I am going to cover the major differences in the order in which they occur most naturally to me, for I do not know of any text which sets forth the differences between the FELA and the ordinary law of negligence.

First of all, let me remind you that Section 1 of the Act states that the railroad is responsible and shall be liable in damages for injuries or death resulting in whole or in part from the negligence of any of its agents or insufficiency in its equipment, etc. The important words here are “in part.” This means that, while the injured man’s employer may be only slightly negligent in a small part of the entire picture of negligence, nevertheless, the carrier is responsible under the Act and can be made responsible in damages. This becomes quite important in many situations. For example, a switch engine may be moving over a public highway or crossing with a switchman on the front footboard, which is a common place for him to be. A truck may come along and, through gross negligence, fail to yield the right of way to the switch engine and strike the engine, causing an injury to the switchman who was on the front footboard of the engine. You might think that there would be no vestige of liability upon the part of the railroad in such a picture. On the contrary, if, for example, the switchman had given a slow-down signal or a stop signal and if the engineer failed to heed these hand signals, you would have a case of liability against the railroad even though it is very obvious that the truck is the principal offender in this situation. In fact, in an ordinary negligence case, I think the attorney would be justified in advising his client that the carelessness of the truck driver was the sole proximate cause of the accident, and that it would be difficult to convince a jury (if one could indeed convince a judge, that he was entitled to get to a jury) that the truck driver was not the real cause of injury and therefore the sole proximate cause.

Under the FELA, however, the courts, including the United States Supreme Court, have rendered a number of decisions on the principle of proximate cause which clearly indicate that the situation just outlined would constitute a case of liability. In this discussion they have referred specifically to the two words, “in part,” appearing in Section 1 of the Act. A leading case on this subject is that of Elsaer v. Scandrett. There the facts were these: The train was stopped at Freeport, Illinois, although its final destination was Milwaukee. The engineer of the train decided to leave the cab and fix the automatic bell ringer, which had failed to work automatically and which had thereafter been operated by hand. The engineer told the fireman that he was going to do this. The fireman offered to go out and do the job. The engineer, however, climbed out of the cab and on to the cat-walk along the right side of the engine. The fireman continued with certain duties in the cab which caused the escape of some steam so that the fireman could not see the engineer or what he was doing. When the fireman received a proceed signal from the brakeman he called to the engineer, and when the engineer did not answer, the fireman went to look for him and found him lying on the ground on the left side of the cab.

151 F. 2d 562, 564-566 (7th Cir. 1945).
In this case there was no evidence available as to what caused the engineer to fall from the cat-walk of the engine and receive the injuries which killed him. The jury decided that the somewhat remote negligence of the defective bell ringer proximately caused the engineer's death. The trial judge in giving his reason for granting the motion of the defendant railroad to set aside the verdict of the jury, said in effect:

... No proof was introduced that Engineer Mackin ever touched any part of the bell ringer mechanism or that he fell while attempting its repair or adjustment. The burden of proof was on the plaintiff to establish affirmative proof that the defective bell ringer was the proximate cause. This the plaintiff has failed to do.

The opinion of the court of appeals was written by Judge Evans. It is a clear statement of the law, showing how far the courts have gone in holding that even a rather remote act of negligence may be in part the cause of injury or death and therefore make the carrier responsible under the FELA. The court of appeals reversed the judgment of the trial court and directed that judgment be entered conforming with the jury's verdict for the plaintiff. In doing so the court of appeals said that the facts showed that: the engineer fell, was injured, and from his injuries died; he was on the ground beneath the bell ringer which he had said he was going out to repair; and the bell ringer was defective and the defendant's negligence with respect to the defectiveness of the bell ringer was established. The court stated that while it was true that the plaintiff-widow had no evidence showing that the defective bell ringer was the cause of death, the court thought, nevertheless, that the defendant's negligence need not be the sole cause of the accident. It appeared that there was a loose rope attached to the bell ringer equipment, and the court said that if the jury selected the theory that the loose rope was a proximate cause which may have caused the engineer to fall from the engine then the jury was not speculating. Therefore the court did not agree with the district court that there was no evidence that the engineer's death resulted in part from the defective bell ringer, and reversed the decision of the lower court.\(^8\)

The courts have not reversed this decision nor have they receded from this doctrine that the railroad's negligence may be only a part of the proximate cause or may be of indirect inference. An attorney consulted by an injured railroad employee therefore should examine the facts for any slight evidence of negligence on the part of the railroad and should not be disturbed if it seems to him that in view of his training in ordinary negligence actions there are one or more proximate causes which are to him much more likely to be the true cause of the employee's injury.

The second major difference between ordinary negligence cases and FELA negligence cases has to do with that legal phrase "contributory negligence." In FELA cases contributory negligence has been banished in favor of its much more humane relation, comparative negligence. The law on this subject is contained in Section 3 (45 U. S. C. §53) of the Act, which reads as follows:

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal

injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. (Italics supplied.)

A few citations on this point are sufficient since it has not been a controversial section of the act. First of all, there is the interesting comment of the California court in Ericksen v. Southern Pacific Co.:

Whether an employee . . . was guilty of contributory negligence is a matter in the first instance for the jury to determine, and then on motion for new trial for the trial court. The jury were fully and fairly instructed on contributory negligence. As we cannot say as a matter of law that plaintiff was guilty of such negligence, we cannot disturb the verdict for lack of diminution, if there was such lack.

Second, in Terminal R. R. Ass'n v. Fitzjohn, the court held concerning contributory negligence: Whether the plaintiff was contributorily negligent in riding on the side ladder of a moving car, knowing there was a pole too close to the track, was a question for the jury, and the jury's determination negating contributory negligence on plaintiff's part could not be disturbed on appeal on the basis of scienter or as a matter of law.

Third, in the case of Ellis v. Union Pacific R. R., an engine foreman (in charge of a switching crew) was injured when he was caught between the side of the railroad car he was riding on, and the side of the building adjacent to the track. The court held that where there is shown any negligence whatever upon the part of the carrier either in whole or in part proximately contributing to the plaintiff's injury, the case must be submitted to the jury, irrespective of plaintiff's contributory negligence if any; and that plaintiff's contributory negligence, if any, is a question for the jury to determine.

The third major difference between ordinary negligence actions and FELA cases is that under the FELA there is no such thing as a defense based upon the theory that an employee assumed the risks of his employment. I will discuss two cases.

*Numerous decisions of the Supreme Court of the United States and of the several states are to be found in the annotations, beginning at page 610, of 45 U. S. C. A. (1943). None of these contravene the intent and meaning of the language in this section, particularly the words which the writer has underscored.


7 165 F. 2d 473, 477-478 (8th Cir. 1948).

8 329 U. S. 649 (1947). The Court reversed the judgment for the plaintiff on other grounds.

At the request of the Chief Editor (the Honorable William J. Palmer, Judge of the Superior Court in Los Angeles, California) of CALIFORNIA APPROVED JURY INSTRUCTIONS (West Publishing Co., 1950), the writer drafted a fairly complete set of jury instructions for FELA cases, which were incorporated in the 1950 Supplement (Part 4) (with certain judicial modifications and with annotations by the editors). Instructions Nos. 301-J and 301-K are on comparative negligence. These instructions are now being given by the judges of the California superior courts and by many of the judges of the United States district courts in California. These comparative negligence instructions do not seem to confuse juries and, in my opinion, would not confuse juries even in general negligence litigation.

9 The law on this subject is contained in Section 4 of the Act (45 U. S. C. 554). This section is annotated beginning at page 695 of 45 U. S. C. A. (1943).
only. Many times an employee receives an injury while violating one or more of the company rules. I have been told by railroad men who have seniority whiskers reaching down to their knees that it is impossible "to railroad right and to keep on time" (sic) without violating a rule or so every day because the rules are so complex and in certain ways contravene accepted practices in railroading. Counsel for the plaintiff need not be disturbed if he finds that an injured employee has violated the rules in some way, provided that he also finds from the facts that the company is negligent either in commission or omission. In the case of Cross v. Spokane P. & S. Ry., the Court held that the violation of a company rule does not constitute assumption of risk, and that at the very most it could constitute contributory negligence, leading to the reduction of the damages awarded.

Assumption of risk was finally and completely wiped out by a statutory amendment of the FELA which became effective August 11, 1939. Until that time there was considerable confusion in the courts about the doctrine of assumption of risk and it became apparent that many of the courts were adhering to the earlier harsh rule of assumption of risk, which tended to frustrate the law enacted by Congress, by decisions which spoke of "non-negligence" on the part of the carrier, and by various other conceptions of the judicial mind. The first case to reach the United States Supreme Court after the 1939 amendment abolishing the assumption of risk was Tiller v. Atlantic Coast Line R. R. The plaintiff's husband, who was a policeman for the railroad, was inspecting seals on the cars at night when he met death by accident. The deceased was aware that no lights were used on the moving cars and that no one would look out for him in making switching movements. There was no evidence as to what he was doing at the time he was run over and killed. The train which killed Tiller was backing up and there was a brakeman with a lantern riding on the rear end on the side opposite to where Tiller was found. The engine bell was ringing at the time of the accident. The federal district court directed a verdict for the defendant railroad on the grounds that (1) the evidence disclosed no actionable negligence, and (2) the cause of death was speculative and conjectural. The court of appeals affirmed, and certiorari was granted because the lower court's decision was based on a holding that the deceased had in effect assumed the risk of his position and therefore there was no duty owed him by the railroad. The Supreme Court in its opinion indicated that it recognized that in decisions previous to the 1939 amendment assumption of risk had sometimes been recognized as a defense to negligence, and sometimes had been held equivalent to non-negligence. The Court then stated:

We hold that every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 Amendment, and that Congress, by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing its name to "non-negligence."

10 283 U. S. 821 (1931).
12 328 U. S. 54 (1945).
13 128 F. 2d 490 (4th Cir. 1942).
14 328 U. S. at 58.
15 The Tiller case was before the Court a second time, with the same result. 323 U. S. 574 (1945).
The next point I want to cover is that under the FELA the employee is entitled to be furnished a reasonably safe place to work. This principle I shall cover in detail for two reasons: First, it includes a large percentage of the legal actions which arise under the FELA, and second, under this doctrine the courts as "the living voice of the law" have steadily extended protection to injured railroad workers, including the spelling out of the recent interesting doctrine of the legal responsibility of the carrier to take "additional precautions" under certain circumstances.

Nowhere in the FELA Is This Doctrine Mentioned, So We Must Look to the Court Decisions for Guidance

A leading case which indicates the all-inclusive interpretation of the United States Supreme Court which is expressly intended to furnish the highest degree of legal redress for injured railroad workers is Bailey v. Central Vermont Ry. Bailey, a section hand, was killed by falling from a bridge while dumping a hopper car of cinders through the ties of the bridge to the road below. He was using a wrench which had been used for this purpose for years without accident. There was no defective equipment and the work was being done in the customary way. Bailey had been warned that the wrench would twist around if he did not let go of it before the hopper started to open. He failed to let go of the wrench soon enough; the wrench did twist around, causing Bailey to lose his balance and fall to his death. The widow sued under the FELA, alleging that the railroad had failed to furnish a safe place to work. The Supreme Court, in an opinion written by Mr. Justice Douglas, sustained the plaintiff's case on the following grounds: The hopper car could have been opened before it was moved onto the bridge, or the cinders could have been dumped on the roadbed and later shoved onto the bridge to fall on the road below. The Court said that the nature of Bailey's work, the absence of a guard rail, the height of the bridge from the ground, the space he had to stand in, the footing which he had, were all facts for the jury to weigh and appraise, and that it was for the jury to decide whether the railroad was negligent.

In the Bailey case the Supreme Court decision emphasized that the jury is the tribunal under our legal system to decide any debatable issue where fair-minded men might reach different conclusions. The Court said that the right to trial by jury is a basic and fundamental feature of our system of jurisprudence and that to withdraw debatable questions from the jury is to usurp its function.

Mr. Justice Douglas also pointed out in the Bailey decision that the duty of the railroad to furnish a reasonably safe place to work is a continuing one "from which the carrier is not relieved by the fact that the employee's work at the place in question in fleeting or infrequent." The last point should be noted by any attorneys who are interested in conducting FELA litigation, as it would come up repeatedly in practice.

16 319 U. S. 350 (1943).
17 Id. at 353.
FAILURE TO FURNISH A REASONABLY SAFE PLACE TO WORK MAY BE BASED UPON THE FACT THAT EQUIPMENT USED BY THE EMPLOYEE IS NOT REASONABLY SAFE

In the case of Carpenter v. Atchison, Topeka & Santa Fe Ry., the court found that it was a question for the jury to decide whether the railroad had furnished a reasonably safe place to work under circumstances which concerned a motor car accident. Plaintiff's husband was killed when the railroad motor car he was operating was struck by a truck at a crossing. The motor car was so insulated that it would not operate crossing wigwags or other signals; it had no bell, whistle, or other warning device. There was evidence that it was going 15-20 m.p.h. instead of the 10 m.p.h. to which company rules limited it at crossings; the rules also required it to yield the right of way to traffic at crossings and to flag over crossings during dense traffic. In this action for wrongful death under the FELA judgment went for defendant in the trial court but the appellate court reversed, pointing out that: (1) In determining the question whether there was any evidence of negligence which should have been submitted to the jury, the federal statutes and decisions controlled. (2) The Act was to be given a liberal construction in order to accomplish its humanitarian purposes. Under it [the FELA] the duty ... upon defendant is to use reasonable care in furnishing its employees with a safe place to work. ... The term negligence, as used in the act, is a violation of that duty. The employer is liable for injuries which can be attributed to conditions under its control when they are not such as a reasonable man ought to maintain in the circumstances. ... (3) Where the evidence is such that fair-minded men might honestly draw different conclusions as to the existence of negligence on the part of the defendant. ... the question is not one of law, but one of fact to be settled by the jury. ... (4) The rules governing the determination of a motion such as here made under Section 630 of the Code of Civil Procedure are the same as those applicable to motions for a judgment of nonsuit and a directed verdict. ... (5) The ... Act imposes a liability on a common carrier by railroad for injuries to or the death of an employee resulting in whole or in part from its negligence. ... (6) We cannot say as a matter of law that the defendant railroad complied with its duties in a reasonably careful manner under the circumstances shown, nor that the conduct which a jury might find to be negligent did not contribute in whole or in part to the injuries received by the decedent. (Italics supplied.)

THE SLIGHTEST SHOWING OF NEGLIGENCE IS SUFFICIENT TO TAKE THE CASE TO THE JURY, AND PRECLUDES A DETERMINATION OF THE ISSUE IN THE CASE THROUGH THE LEGAL PROCESS OF NON-SUIT, DIRECTED VERDICT, OR SIMILAR LEGAL DEVICE

The Tiller case is an example of the conclusiveness of the Supreme Court's decision that the question of negligence in FELA cases must go to the jury. Tiller was killed when he was struck by several cars which were being moved by an engine in backward motion at night. The evidence indicated that there was no

20 Id. at 7, 8. Author's note: Remember that the deceased had been riding on a rail motor car, and various mechanical devices were here involved.
light burning on the rear of the engine at the time of the backup movement. There was other evidence that even if there had been a light burning it would not have been visible to Tiller. The deceased was aware that no lights were used on the moving cars and that no one would look out for him in making switching movements. There was no evidence as to what he was doing at the time he was run over and killed. There was a brakeman with a lighted lantern riding on the rear end of the cut of cars on the side opposite to where Tiller was found. The engine bell was ringing at the time of the accident. This case was tried twice. The second time the jury returned a verdict in favor of the plaintiff but the court of appeals reversed, and certiorari was granted because of the importance of this case as it related to the administration and enforcement of the FELA. The court of appeals had held that the evidence of negligence was insufficient to justify submitting the case to the jury, and that the district court should have directed a verdict in favor of the railroad.

The Supreme Court held that the plaintiff was entitled to recover and that it was for the jury to determine whether or not the failure to provide the required lights on the rear of the locomotive proximately contributed to the deceased’s death. Mr. Justice Black delivered the opinion, and said in part:22

It was for the jury to determine whether the failure to provide this required light on the rear of the locomotive proximately contributed to the deceased’s death. The ruling of the court below that it was not a proximate cause was based on this reasoning: The general railroad practice in yard movements is to push cars attached to the rear of an engine; no express regulation of the Commission prohibits this; in the instant case the cars attached to the engine necessarily would have obscured any light on the rear of that engine; the light so obscured would not have enabled the engineer to see 300 feet backwards so as to avoid injuring the deceased nor would the light have been visible to the deceased standing at or near the track ahead of the backward movement. Therefore, the court concluded, the failure to furnish the light was not proximately related to the death of Tiller.

Assuming, without deciding, the railroad could consistently with Rule 131 obscure the required light on the rear of the engine, it does not follow that, as a matter of law, failure to have the light did not contribute to Tiller’s death. The deceased met his death on a dark night, and the diffused rays of a strong headlight even though directly obscured from the front, might easily have spread themselves so that one standing within three car-lengths of the approaching locomotive would have been given warning of its presence, or at least so the jury might have found. The backward movement of cars on a dark night in an unlit yard was potentially perilous to those compelled to work in the yard. Tennant v. Peoria & P. U. R. Co., 321 U. S. 29, 33. And “The standard of care must be commensurate to the dangers of the business.” Tiller v. Atlantic Coast Line R. Co., supra.

In the Tennant case23 referred to above in the opinion in the Tiller case, there were no eye witnesses to the accident, and the jury had found a verdict for the plaintiff, which was reversed by the court of appeals.24 In finding for the plaintiff and reversing the court of appeals, which found there was not enough evidence to

21 142 F. 2d 718 (4th Cir. 1944).
22 323 U. S. at 578-579.
24 134 F. 2d 860 (7th Cir. 1945).
take the case to the jury, Mr. Justice Murphy stated that there was some evidence of negligence which, together with the presumption that Tennant was exercising due care to preserve his life, was sufficient to submit the case to the jury. The opinion of the Supreme Court in the Tennant case is so positive in indicating that in these cases even the slightest evidence of negligence is a jury question, that I quote from the language of the Supreme Court as the best way of emphasizing this point:

In holding that there was no evidence upon which to base the jury’s inference as to causation, the court below emphasized other inferences which are suggested by the conflicting evidence. Thus it was said to be unreasonable to assume that Tennant was standing on the track north of the engine in the performance of his duties. It seemed more probable to the court that he seated himself on the footboard of the engine and fell asleep. Or he may have walked back unnoticed to a point south of the engine and been killed while trying to climb through the cars to the other side of the track. These and other possibilities suggested by diligent counsel for respondent all suffer from the same lack of direct proof as characterizes the one adopted by the jury.

It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its functions is to select from among conflicting inferences and conclusions that which it considers most reasonable. That conclusion, whether it relates to negligence, causation, or any other factual matter, cannot be ignored. Courts are not free to re-weigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable. (Italics supplied.)

There are many other cases which reiterate and reemphasize that the jury is the proper tribunal to decide the facts in FELA cases.

IV

The Fact That the Work-place Is Away from Railroad-owned or Controlled Property Does Not Relieve the Railroad of Liability on Account of an Unsafe Place to Work

In the case of Ericksen v. Southern Pacific Co., the court held that it was immaterial that the place where plaintiff worked was not under the control of the defendant railroad, since the defendant required the plaintiff to work there. The plaintiff was employed by defendant to select railroad ties for it to purchase. Cheney Lumber Company was a supplier which plaintiff frequently visited for that purpose. He had to stand on a dock, over 10 feet above the tracks, where the ties were loaded. There was so little room for him to stand where the ties were flush with the end of

25 321 U. S. at 34-35.
26 Two other cases which indicate clearly that the question of negligence in an FELA action is one to be determined exclusively by the jury are Wilkerson v. McCarthy, 336 U. S. 53 (1949), and Butz v. Union Pacific R. R., 233 P. 2d 332 (Utah, 1951).
the dock that he had to lean over to inspect the ends. In so doing he fell and was badly injured. He won damages in this FELA suit. On appeal the verdict was affirmed; the court reasoned as follows: (1) The Act applies only to employees of a railroad who are employed in interstate commerce. He was thus employed, since the ties were eventually placed on tracks used in interstate commerce. (2) To recover, the employee must prove that his injuries were proximately caused by his employer’s negligence—here the failure to provide a safe place for plaintiff to perform his duties. The fact that the place was not in defendant’s control is immaterial. It is also immaterial that plaintiff was his own boss at the scene, since he could not require Cheney or its employees to change the method of placing the ties. (3) An award of $18,000, of which about $15,000 was general damages, was not so excessive as to indicate passion or prejudice of the jury. He suffered a crushing fracture of the heel, resulting in a great deal of hospital treatment, disability, and pain during some three years—he was brought to court on a stretcher—and permanent difficulty in walking on uneven ground. (4) Whether plaintiff was contributorily negligent was first for the jury to determine, then for the judge on a motion for new trial. The jury having been fully instructed on the subject, it cannot be said as a matter of law that he was negligent, and the verdict cannot be disturbed for lack of diminution, if there was such lack.

In the case of *Terminal Railroad Association v. Fitzjohn*, the plaintiff, who was acting as engine foreman in charge of a switching crew, was injured when he was knocked off the side of the car by a light standard or upright located too close to the rail. The track involved was on property owned by the United States Government, and the plaintiff actually knew of the existence of the upright. The court held the railroad responsible, stating that it is well established that the railroad has the same duty to furnish its employees with a reasonably safe place in which to work while on the premises of another as it does while the employees are on the premises of the railroad.

V

**Even if the Employee Happens to Use an Unsafe Place When a Safe Place Is Equally Available, the Doctrine and the Duty of the Railroad Still Apply**

In *Wilkerson v. McCarthy*, the Court first announced this principle of law. The plaintiff, a train service employee, was injured while trying to cross an engine pit on a greasy plank, as he headed for the lavatory. There was a clear, safe pathway which he could traverse to reach the lavatory, but this route was slightly longer than the route which he choose to use. The engine pit which the plaintiff tried unsuccessfully to cross was guarded by a chain designed to keep away from that area personnel who were not employed in repairing the engines. The plaintiff squeezed between some cars, ducked under the guard chain, and started across the plank over the engine pit. He slipped on grease on the plank and fell into the pit, sustaining severe injuries. The Utah supreme court agreed with the trial judge that this was not a case in which there was sufficient evidence of negligence on the part of the

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28 165 F. 2d 473 (8th Cir. 1948).
carrier to submit the case to the jury. Certiorari was granted and the Supreme Court reversed, holding that the carrier is under an obligation to keep all of the premises and all of the places of work in a reasonably safe condition. The Court held that evidence had been offered that the greasy plank was not in reasonably safe condition, and that it was a question for a jury to decide whether or not this greasy plank proximately contributed to the plaintiff's injury. The Court further held that although the plaintiff had available to him a safer but longer route of travel, this did not as a matter of law justify taking the case away from the jury.

The principle of law established by this decision has not been repudiated or changed, and in fact my partner recently won a case where the trial judge would have apparently refused to permit the case to go to the jury if counsel had not submitted to him the decision of the court in Wilkerson v. McCarthy, since the facts in our case involved the use of an unsafe way of descending from a railroad platform where there existed a safe ramp which was less conveniently located than the way used by the employee who suffered injury.

VI

THE RAILROAD IS UNDER A DUTY TO WARN AN EMPLOYEE OF ANY CONDITION OR CIRCUMSTANCE WHICH IS HAZARDOUS TO AN EMPLOYEE IN HIS PLACE OF WORK, WHERE SUCH CONDITION OR CIRCUMSTANCE IS OR SHOULD BE KNOWN TO THE RAILROAD

In Terminal Railroad Association v. Howell, the employee was attempting to close the door on a railroad car, working under instructions from his foreman, and while so doing was injured. The defense of the railroad was that the employee should have been able to see that this defective door was a hazard, and that therefore the employee caused his own injury. The court held that the foreman knew or should have known that the defective door presented a hazardous condition, and that since the foreman failed to give any warning to the employee the carrier had failed to furnish the employee with a reasonably safe place to work.

VII

WHETHER THE RAILROAD HAS NOTICE, ACTUAL OR CONSTRUCTIVE, OF AN UNSAFE PLACE TO WORK IS A MATTER TO BE LEFT ENTIRELY TO THE JURY

In Baltimore & O. R. R. v. Flechtner, the plaintiff stepped on a barrel hoop near a track, fell under a car, and lost his foot. While the yard was not fenced in, the public did not usually enter there. The hoop was rusty, and it was the kind of hoop used on kegs which hold railroad spikes. The court held that the rusty condition of the hoop was sufficient to indicate it had been in the switch yard a considerable time, so that the railroad in the exercise of ordinary care should have known that the hoop was there and had it removed, and that therefore the railroad had failed to furnish the employee with a reasonably safe place to work.

In Lowden v. Hanson, the plaintiff while throwing a spring switch was injured when the handle broke because of a structural defect. There was no showing

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\[39\] 112 Utah 300, 387 P. 2d 188 (1947).
\[32\] 300 Fed. 318 (6th Cir. 1924).
\[33\] 135 F. 2d 135 (8th Cir. 1948).
\[34\] 134 F. 2d 348 (5th Cir. 1943).
that the company had either actual or constructive notice of this defect. There was, however, testimony by a railroad man that the defect in the switch could have been discovered by tapping the parts of the switch stand with a hammer. He testified that if a tapping test was made a dull sound would be given off where there was a cracked or defective part inside the switch stand. The court held that the failure of the railroad to inspect the switch as indicated by the witness constituted a lack of ordinary care and imposed liability upon the railroad under the Act.

VIII

WHERE THE UNSAFE PLACE TO WORK GIVES RISE TO AN OCCUPATIONAL DISEASE RATHER THAN A TRAUMATIC INJURY, THE RAILROAD IS NONE THE LESS LIABLE

In *Urie v. Thompson*, the plaintiff, a former fireman on one of defendant's steam locomotives, filed suit in a state court to recover under the FELA for injuries, alleging that after thirty years of service he had been forced to cease work by silicosis caused by continuous inhalation of silica dust which arose from sand materials emitted in excessive amounts by the locomotives' faultily adjusted sanding apparatus. Upon the plaintiff's first appeal from an adverse judgment the state supreme court held that the petition failed to state a cause of action for negligence under the FELA, but stated one under the Boiler Inspection Act, and hence remanded the cause for trial, which resulted in a verdict for the plaintiff in the amount of $30,000, based solely on a violation by the defendant of the Boiler Inspection Act. This judgment was reversed by the state supreme court on the ground that the Boiler Inspection Act did not cover silicosis, that is, disease as distinguished from injury.

Reversing the judgment of the state supreme court, the United States Supreme Court, in an opinion by Mr. Justice Rutledge, unanimously held that the question whether the plaintiff's original petition stated a cause of action for negligence under the FELA was properly reviewable by the Court; that the action, as it was brought within three years from the discovery by the plaintiff of the disease, was not barred by the statute of limitations; and that *silicosis* is within the coverage of the FELA, when it results from the employer's negligence.

IX

THE EMPLOYEE IS NOT REQUIRED TO ANTICIPATE UNSAFE CONDITIONS IN THE WORK PLACE AND TO TAKE PRECAUTIONS TO DISCOVER THEM

In the case of *Harness v. Baltimore and O. R. R.*, the court held that where an employee is without knowledge of risks of employment because of the negligence of the employer, he need not anticipate and take precautions to discover them, but may assume that the employer has provided a reasonably safe place to work.

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34 337 U. S. 163 (1949).
35 352 Mo. 211, 176 S. W. 2d 471 (1945).
36 357 Mo. 738, 210 S. W. 2d 98 (1948).
37 86 W. Va. 284, 103 S. E. 866 (1920).
If extraordinary precautions by the railroad could have anticipated and prevented the development of an unsafe place to work the railroad is liable, and this is true even though the railroad does not have control of the place where the employee is injured.

In Butz v. Union Pacific R. R., the plaintiff was injured while riding on the side of a baggage car being pushed on a baggage track which ran adjacent to the platform of the Denver Union Terminal Company, which was not a part of the Union Pacific Railroad. He was hurt by a baggage truck which was so close to the track that there was not sufficient clearance for his body between the side of the baggage car and the baggage truck. The trial judge granted a non-suit after hearing the plaintiff's evidence. The Utah Supreme Court stated that from the evidence in the record the court assumed that the baggage truck was left afoul of the clearance line by employees of the Terminal Company, and not by employees of the Union Pacific Railroad. The court pointed out: "It is settled beyond question that it is the duty of the employer to exercise reasonable care to furnish his employees a reasonably safe place to work, and this includes situations where the employer sends his employee on the premises of another to perform his duties."

The problem in the case was the argument of the defendant which maintained that there was no basis for either its actual or constructive knowledge of a condition of danger which apparently existed through no fault of employees of the defendant Union Pacific Railroad. The court stated that the plaintiff's attention had to be divided between the security of his position on the side of the car, watching the track ahead, passing any necessary signals to the engineer respecting the movement of the train and its proper stopping place, and watching his clearance with the baggage trucks. Under those circumstances (said the court) could reasonable minds say that the defendant should have taken other precautions in providing plaintiff with a reasonably safe place to perform his duties?

The court quotes the following from Boston & M. R. R. v. Meech:

From the foregoing, it is clear that although some precautions were taken for the decedent's safety, further precautions were possible, and from this it follows, as we read the decisions cited above, that there was an "evidentiary basis" for submitting the issue of the defendant's causal negligence to the jury. (Italics supplied.)

The Utah court goes on to say that to apply literally the rule—"further precautions were possible"—would not be sound because there would be no conceivable injury which hindsight could not have prevented by some precaution. The test, therefore, is whether in the exercise of ordinary prudence and care the railroad

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38 233 P. 2d 332 (Utah, 1951).
39 233 P. 2d at 334.
40 In support of this position the court cites a number of cases, including Terminal Railroad Ass'n v. Fitzjohn, supra note 28, and Ellis v. Union Pacific R. R., 329 U. S. 649 (1947).
41 233 P. 2d at 335.
42 156 F. 2d 109, 111 (1st Cir. 1946), cert. denied, 329 U. S. 763 (1946).
should have reasonably foreseen the likelihood of injury, and whether additional precautions should have been taken by the defendant to provide plaintiff with a safe place to work was therefore a question for the jury. As the court states,\textsuperscript{43}

What the employee wants and needs is a reasonably safe place to perform his duties. He is not concerned with, and indeed cannot know the technicalities of ownership, rental, lease, or reciprocal exchange of facilities of an involved railroad system. . . . The employer exercises exclusive choice both as to the place of work and control over safety factors. It is therefore not unreasonable to charge him with the duty of providing a safe place to work.

The court then points out that in the \textit{Wilkerson} case, Mr. Justice Douglas reviewed the 55 petitions for certiorari from 1943 to 1949 in these cases, 20 of said writs being granted. The Utah supreme court in conclusion makes the following statement,\textsuperscript{44} which should be noted and remembered by every member of the bar who believes in the right to trial by jury:

This history, together with the language of the adjudicated cases, including the \textit{Wilkerson} case itself, point to one inescapable conclusion: The Supreme Court of the United States says with unequivocal certainty that wherever a railroad employee under F.E.L.A. is injured in the course of duty and there is \textit{any} evidentiary basis upon which reasonable minds could believe that \textit{reasonable care might have required additional safety measures which were not taken}, and which contributed in whole or in part to cause the injury, the case should be tried by a jury. Tiller v. Atlantic Coast Line R. R. Co., 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610; Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916; and see the case of Jacob v. City of New York, 315 U. S. 752, 62 S. Ct. 854, 86 L. Ed. 1166, wherein Mr. Justice Murphy speaking for the court stated: "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts."

With this sentiment we are in accord. (Italics supplied.)

From these decisions we can reasonably conclude and the writer does conclude:

(1) To entitle the plaintiff to a recovery under the FELA it must be shown that there is some negligence (however slight) upon the part of the carrier.

(2) If there is \textit{any} evidence from which a jury \textit{could} infer negligence upon the part of the defendant, the court shall \textit{not} interfere with the jury's right to render a verdict nor set aside a verdict once rendered upon any factual question, and any deviation from the latter principle will constitute reversible error.

(3) Plaintiff is not required to prove that the carrier had actual or constructive notice as to an unsafe condition at the place he is injured to entitle him to have a determination by the jury, and the presumption is that the employer has notice since he controls places of work and/or the assignments which the employee must carry out.\textsuperscript{45}

\textsuperscript{43} 333 P. 2d at 336.
\textsuperscript{44} \textit{Id.} at 336-337.
\textsuperscript{45} See Butz v. Union Pacific R. R., \textit{supra} note 38, and cases cited therein.
I think I should comment briefly on the part that the doctrine of res ipsa loquitur plays in relation to FELA cases. Several years ago a judge, who shall go unnamed, asked me toward the end of a very weak liability case if it was not a fact that the doctrine of res ipsa loquitur does not apply to FELA cases. I immediately endeavored to use this theory on the judge, because of course the doctrine does apply, but I lost the case anyway.

A California case, which I think is most useful, is *Leet v. Union Pacific R. R.* Here the California supreme court in effect stated that the plaintiff may produce and offer evidence of specific acts of negligence and shall not be penalized for bringing in all of the specific and definite evidence he has, and that therefore although he does produce specific evidence, he shall be entitled to the benefits of the doctrine of res ipsa loquitur and have an instruction given to the jury to this effect.

The United States Supreme Court case which I feel is the most helpful on this point is *Jesionowski v. Boston & Maine R. R.* In this case a switchman was killed at night. He had thrown a switch, and then apparently signalled the train to back up. His body was not found at a place where he should have been. The lower court held that res ipsa loquitur did not apply for the reason that the switchman evidently participated in the switching movement which led to his death. The lower court said that therefore the defendant railroad was not in complete control of the agency which caused his death and denied the benefit of res ipsa loquitur. The Supreme Court held that the fact that the switchman participated to some extent did not foreclose the right of the widow-plaintiff to have the benefit of res ipsa loquitur. The Court said that the deceased was presumed to have used due care for his safety and that the backing up of the train did kill him. Therefore, said the Court, it was proper that the doctrine of res ipsa loquitur be invoked and it was a question for the jury to decide whether the railroad was responsible for the death of Jesionowski.

I am going to conclude by stating some general and rather positive conclusions. This, I realize, is a dangerous practice—dangerous, that is, to the one who offers the generalizations. Nonetheless, I am going to offer a few rules of thumb which I think cover generally the analysis and trial of FELA cases.

First, does the case come under the Act? The Act says it covers employees of common carriers *by rail* in interstate commerce. So, this rules out bus drivers (even for companies owned by the railroads), employees of the Pullman Company, and those of car companies such as the Pacific Fruit Express.

Second, is the injured employee in interstate commerce? There are many cases

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46 I think that two citations are sufficient for me to give here, although there are dozens of cases from California and other states, and also federal cases, on the point.

47 25 Cal. 2d 605, 155 P. 2d 42 (1944). This is not a unanimous decision, but the dissenting opinion concurs on this point.


49 154 F. 2d 703 (1st Cir. 1946).

50 I will not endeavor to cover the various phases of the law under the Safety Appliance Acts and the Boiler Inspection Act for that would be impossible in the space allotted to me.
on this aspect but it seems to me that a general rule of thumb is: If you took all
the men away from the railroad who were doing the particular job or type of work
the injured man was doing, would this substantially affect the carrying on of inter-
state commerce? If so, the employee is in interstate commerce. This is obviously
not a precise and all-inclusive definition, but it will help counsel who are not familiar
with this type of case.

Third, is there any negligence whatever on the part of the carrier irrespective
of how negligent you may think the injured railroad man might have been? If so,
there is a liability case.

Fourth, did the injured man file an accident report with the company, and if so,
does he have a copy of it for you?

Fifth, in addition to any general negligence of the railroad, is there a violation
of the Boiler Inspection Act or the Safety Appliance Acts? If so, this should be
pleaded in addition to the allegation of general negligence under Section 1. The
allegations need not be divided into separate causes of action.

Sixth, do not plead that an injured railroad man is totally and permanently
disabled on the theory that you are doing him a favor upon the supposition that
subsequent medical studies may tend to show that this is a fact. You do not need
to plead total and permanent disability, and by a proper allegation of disability
which may extend over an indefinite future time, you give him all the protection
that he needs. This point cannot be overemphasized because if you plead and
endeavor to prove permanent and total disability you may by process of law deprive
the injured railroad man of the most valuable thing he has, his seniority rights.
Seniority rights are property rights. They have been lost for railroad men through
their attorneys overpleading the case.

Seventh, prospective jurors should be made to understand that the injured railroad
man has not received any compensation from any source whatever, and that he
does not come under the benefits of any compensation law. I have found superior
court judges very reasonable in allowing questions on voir dire to insure that the
prospective jurors understand this. I have also found that if you will submit in
writing a proper statement and special questions to the federal judges they are very
conscientious about conveying to the prospective jurors the fact that the injured
railroad man does not have any workmen’s compensation coverage whatever. Un-
less this is made known to the prospective jurors, counsel may have a sad experience
in receiving a low verdict and being later informed by the jurors that they thought
the verdict was adequate in addition to the “compensation” that the man had re-
ceived. At this point counsel explains to the jurors that his client did not receive
any “compensation” and the jurors are amazed, but counsel is horrified, because
he explained too little and too late.

Eighth, in trying your case remember that you are entitled to use the company
rule book. This is the “Bible” under which the men work, and if any of the rules
have been violated you may read these rules into evidence and argue them to the jury,
showing that the company or its agents violated the rules, and that this was part of
the cause of the injury to your client.51

Last but not least, counsel for the plaintiff should never forget in an FELA
case that he is representing an employee who has been hurt while on duty and that
the employee has no compensatory relief except to come to the forum of the
courtroom to apply to the jurors for his only compensation for his wage loss on
account of on-duty injuries and for loss of earning power and for his pain and
suffering. It is of the greatest importance that counsel make the jury understand
this basic proposition. If this is done, and the evidence is presented fairly and
properly, any competent attorney will, I am sure, obtain an equitable result in an
FELA case.

51 Incidentally, the company rules may be used in lawsuits where a member of the general public
is the plaintiff. Southern Pacific Co. v. Haight, 126 F. 2d 900 (9th Cir. 1942); Nelson v. Southern
Pacific Co., 8 Cal. 2d 648, 67 P. 2d 682 (1937). Also the provisions of the Safety Appliance Acts have
been held to be for the benefit of the general public as well as for employees. United States v. State
of California, 296 U. S. 554 (1935). The Boiler Inspection Act also is for the protection of passengers
and the general public as well as employees. Urie v. Thompson, 337 U. S. 163 (1949). See the
annotation in 17 A. L. R. 2d 252 (1949).